Editor's Note: A Corrigendum was issued by the Court on June 2, 2008; the corrections have been made to the text and the Corrigendum is appended to this judgment.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tsilhqot'in Nation v. British Columbia***, 2007 BCSC 1700

Date: 20071120
Docket: 90-0913
Registry: Victoria

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

Plaintiff

And:

Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region and The Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Vickers

Reasons for Judgment

Counsel for the Plaintiff	J. Woodward, D. Rosenberg, P. Hutchings, P. Rosenberg, M. Browne, D. M. Robbins, G. S. Campo, H. Mahony, M. Couling, S. Nixon, M. Haddock, J. Nelson, G. Reed and D. Mildon
Counsel for British Columbia (Forestry)	P. G. Foy, Q.C., T. Leadem, Q.C., G. J. Underwood, K. J. Tyler, K. E. Gillese, J. G. Penner, E. Christie, S. Lysyk and J. Z. Murray
Counsel for The Attorney General of Canada	G. Donegan, Q.C., B. McLaughlin, M. P. Doherty, J. Chow, C. Cameron, J. Blackhawk and I. Jackson

Date and Place of Trial/Hearing: 339 Days between November 18, 2002 and April 11, 2007
Victoria and Tl'ebayi, Xeni (Nemiah Valley), B.C.

EXECUTIVE SUMMARY

The Xeni Gwet'in First Nations Government is one of six Tsilhqot'in bands. This action is brought by Chief Roger William in his representative capacity as Xeni Gwet'in Chief on behalf of all Xeni Gwet'in and all Tsilhqot'in people.

The plaintiff seeks declarations of Tsilhqot'in Aboriginal title in a part of the Cariboo-Chilcotin region of British Columbia defined as Tachelach'ed (Brittany Triangle) and the Trapline Territory.

In addition, the plaintiff seeks declarations of Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area and a declaration of a Tsilhqot'in Aboriginal right to trade in animal skins and pelts.

The "Nemiah Trapline Action" was commenced in the Supreme Court of British Columbia on April 18, 1990. The plaintiff commenced the "Brittany Triangle Action" on December 18, 1998. Both actions were provoked by proposed forestry activities in Tachelach'ed and the Trapline Territory.

The trial commenced in Victoria on November 18, 2002. There were a total of 339 trial days. In the late fall and early winter of 2003, the Court sat for five weeks in the language resource room of the Naghataneqed Elementary School at Tl'ebayi in Xeni (Nemiah Valley). The balance of the trial took place in Victoria. In the course of this lengthy trial, the court heard oral history and oral tradition evidence and considered a vast number of historical documents. Evidence was tendered in the

fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry and forest ecology.

The Tsilhqot'in people are a distinct Aboriginal group who have occupied the Claim Area for over 200 years.

The Court is not able, in the context of these proceedings, to make a declaration of Tsilhqot'in Aboriginal Title. The Court offers the opinion that Tsilhqot'in Aboriginal title does exist inside and outside the Claim Area. On the evidence in this case, title lands includes:

- 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 and Xeni Dwelh combine to provide the northern boundary, while Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.

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

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

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

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

Aboriginal title land is not "Crown land" as defined by provincial forestry legislation. The provincial ***Forest Act*** does not apply to Aboriginal title land. The jurisdiction to legislate with respect to Aboriginal title land lies with the Federal government pursuant to s. 91(24) of the ***Constitution Act, 1967***.

The Province has no jurisdiction to extinguish Aboriginal title and such title has not been extinguished by a conveyance of fee simple title.

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.

Tsilhqot'in people have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

These rights have been continuous since pre-contact time which the Court determines was 1793.

Land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal title and Tsilhqot'in Aboriginal rights.

The plaintiff's claim for damages is dismissed without prejudice to a renewal of such claims as they may pertain to Tsilhqot'in Aboriginal title land.

TABLE OF CONTENTS

EXECUTIVE SUMMARY ..... **iii**

TABLE OF CONTENTS ..... **vii**

1. PREFACE **13**

2. INTRODUCTION **19**

a. Tislagh Season *19*

b. Nature of the Litigation *21*

c. The Region and People *21*

d. Tsilhqot'in Population *21*

e. The Parties *22*

f. Description of the Claim Area *24*

i. Tachelach'ed and the Trapline Territory 24

(1) Landscape 24

(2) Climate 26

ii. Forest Cover 28

iii. Public Lands / Crown Lands 29

(1) Provincial Parks 29

(2) Fishing Station 29

g. Xeni Gwet'in Declaration *29*

3. DETAILS OF THE LITIGATION **31**

a. Chronology of the Litigation and Related Events *31*

b. Issues to be Decided *38*

4. PRELIMINARY ISSUE **39**

5. EVIDENTIARY ISSUES **49**

a. Oral History / Oral Tradition Evidence *49*

b. Historical Documents *75*

6. HISTORICAL NARRATIVE 76

a. Pre-Historic Period *77*

i. Dene/Athapaskan Migrations *77*

b. Proto-Historic Period *80*

i. Early European Exploration to 1808 80

c. Historic Period *83*

7. ETHNOGRAPHIC NARRATIVE 117

a. Ethnography *117*

b. Language and Culture *121*

c. Time Periods *124*

d. Socio-Political Structure *125*

e. Tsilhqot'in Dwellings *128*

f. Semi-Nomadic Lifestyle *133*

g. Tools and Implements *139*

i. Fishing 139

ii. Hunting and Trapping 140

iii. Other implements 141

iv. Baskets and Cooking 141

v. ?Etaslaz ts'i (Bark Boats) 142

vi. Bedding 143

vii. Clothing and Footwear 143

h. Spirituality *144*

i. Deyen 144

ii. Burial Practices 145

i. Tsilhqot'in Laws *146*

j. Legends and Stories *148*

k. Summary *149*

8. ABORIGINAL GROUP 150

a. The Proper Rights Holder 150

9. ABORIGINAL TITLE 161

a. Nature of Aboriginal Title 161

b. Test for Aboriginal Title 183

i. Pre-sovereignty Occupation 183

ii. Exclusivity 184

iii. Continuity 184

c. R. v. Marshall; R. v. Bernard 186

10. DATE OF SOVEREIGNTY ASSERTION 199

11. TSILHQOT'IN ABORIGINAL TITLE 208

a. Introduction 208

b. Tsilhqot'in Traditional Territory and the Claim Area 212

c. Tsilhqot'in Migration, South and East 215

d. Boundaries of the Claim Area 222

12. SUMMARY OF EVIDENCE - OCCUPATION 225

a. Introduction 225

b. Oral Traditions: Legends and Landmarks 226

c. Time Depth 233

d. Trails, Hunting, Fishing and Trapping 235

e. Regular Use of Definite Tracts of Land 237

13. CLAIM AREA SITES 239

a. Tsilhqox (Chilko River) and the Historical "Long Lake" 239

b. The Tsilhqox (Chilko River) Corridor 245

i. Gwetsilh (Siwash Bridge) 247

ii. ?Elhixidlin (Whitewater) 249
iii. Tl'egwated 249
iv. Tachi 252
v. Tsilangh 252
vi. Tsi Lhizbed 253
vii. Nusay Bighinlin 253
viii. Ts'eman Ts'ezchi or Ts'esman Ts'ez 255
ix. Tsi T'is Gulin and Henry's Crossing 256
x. Ts'u Nintil 258
xi. Biny Gwetsel 259
xii. Gwedeld'en T'ay 260
xiii. Biny Gwechugh (Canoe Crossing) 260
xiv. Sul Gunlin 263

c. Xeni (Nemiah Valley) *263*
i. Various Sites 265
ii. Summary 268

d. Tachelach'ed (Brittany Triangle) *268*
i. Gweq'ez Dzelh and Xeni Dzelh 273
ii. ?Esqi Nintanisdzah (Child Got Lost) 274
iii. Nu Natase?ex (Mountain House) 274
iv. Natasewed Biny (Brittany Lake) 275
v. Captain George Town 276
vi. Far Meadow 276
vii. Delgi Ch'osh or Lhuy Tu Xadats'ebe?elhtalh (Big Lake) 278
viii. Ts'uni?ad Biny (Tsuniah Lake) 278
ix. ?Elhghatish (Between the Lakes) 280
x. Tsanlgen Biny (Chaunigan Lake) 281

e. Western Trapline Territory *281*
i. Lhuy Nachasgwengulin (Little Eagle Lake) 281
ii. Gwedzin Biny (Quitzee or Cochin Lake) 282
iii. Ch'ezqud 283
iv. ?Edibiny 284
v. Naghatalhchoz Biny (Chelquoit Lake or Big Eagle Lake) 285
vi. Tsi gheh ne?eten 287
vii. Sa Nagwedijan 288

viii. Tsi Ch'ed Diz?an 289
ix. Tsilhqox Biny (Chilko Lake) Area 289
x. Tsilhqox Biny Area - Gwedats'ish 290
xi. Tsilhqox Biny Area - Ch'a Biny 291
xii. Ts'il?os (Mount Tatlow) 292
xiii. Dzelh Ch'ed (Snow Mountains) - Coast or Cascade Mountains 292
xiv. Tl'ech'id Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts'i Talh?ad (Rainbow Creek), Tsi Tese?an (Tchaikazan Valley) and Tsilhqox Tu Tl'az (Edmond Creek) watersheds 292
xv. Talhiqox Biny (Tatlayoko Lake) 293
xvi. Tsimol Ch'ed (Potato Mountain) 297
xvii. Area West and South of Tsilhqox Biny 298
xviii. West Side of Tsilhqox Biny 299

f. Eastern Trapline Territory *299*
i. Dasiqox Biny (Taseko Lake) and Eastward 300
ii. Teztan Biny (Fish Lake) 301
iii. Nabas Dzelh (Anvil Mountain) 302
iv. Gwetex Natel?as (Red Mountain) 303

14. EXCLUSIVITY 305

15. CONTINUITY 315

16. CONCLUSIONS ON TSILHQOT'IN ABORIGINAL TITLE TO THE CLAIM AREA 315

17. STATUTORY AUTHORITY TO ISSUE FOREST TENURES AND AUTHORIZATIONS 322

18. PRIVATE LANDS ISSUE 329

19. CONSTITUTIONAL ISSUES – DIVISION OF POWERS 335

a. Interjurisdictional Immunity *335*
b. Submerged Lands *352*

20. INFRINGEMENT OF ABORIGINAL TITLE 353

a. General Principles *354*

b. ***Application*** *361*

21. JUSTIFICATION OF INFRINGEMENT OF ABORIGINAL TITLE 364

a. ***General Principles*** *364*

b. ***Compelling and Substantial Legislative Objective*** *365*

c. ***Honour of the Crown*** *372*

d. ***Duty to Consult*** *375*

e. ***Application*** *379*

22. ABORIGINAL RIGHTS (Excluding Title) 386

a. ***Introduction*** *386*

b. ***Test for Aboriginal Rights*** *386*

c. ***Characterizing the Right*** *392*

d. ***Establishing the Ancestors of the Claimant Aboriginal Group Engaged in a Particular Practice, Custom or Tradition Prior to European Contact – Continuity Element*** *396*

e. ***Integral to the Distinctive Culture*** *397*

f. ***Continuity Between Claimed Rights and Pre-Contact Practices*** *401*

g. ***Date of Contact*** *402*

23. TSILHQOT'IN ABORIGINAL RIGHTS (Excluding Title) 411

a. ***The Position of the Parties*** *411*

b. ***Proper Rights Holder*** *413*

c. ***Tsilhqot'in Right to Hunt and Trap*** *414*

d. ***Tsilhqot'in Right to Trade*** *420*

e. ***Continuity*** *426*

24. INFRINGEMENTS OF ABORIGINAL RIGHTS 427

a. ***Introduction*** *427*

b. ***General Principles*** *428*

c. ***Application*** *429*

25. JUSTIFICATION OF INFRINGEMENTS OF ABORIGINAL RIGHTS 433

26. FORESTRY REGIME – SUSTAINABILITY 435

27. FIDUCIARY DUTY / HONOUR OF THE CROWN 439

28. LIMITATIONS, LACHES AND CROWN IMMUNITY 442

a. ***Limitations*** *443*

b. ***Laches*** *450*

c. ***Crown Immunity*** *451*

29. DAMAGES 451

30. RECONCILIATION 453

APPENDIX A – MAPS 471

Map 1 472

Map 2 473

Map 3 474

APPENDIX B - GLOSSARY OF TERMS 475

1. PREFACE

[1] Canada's multi-cultural society did not begin when various European nations colonized North America. Rather, multiculturalism on this continent had it genesis thousands of years ago with the receding of the last great ice age. Waves of

Aboriginal people swept across North America, establishing themselves in diverse communities across the entire continent. While the lives of Aboriginal people were not without conflict, there are many examples of different Aboriginal cultures living side by side in peace and harmony. Today's modern, multi-cultural communities seldom, if ever, look back at the Aboriginal roots of Canadian diversity. The evidence in this case has provided me with the opportunity to acknowledge the multi-cultural roots of our Canadian culture; roots to be honoured and respected.

[2] Every Canadian should have the good fortune I have experienced over the past several years. These proceedings provided me with a unique opportunity to learn about one of Canada's vibrant Aboriginal communities. I also had the opportunity to learn more of the history of this province and to appreciate the role of Aboriginal people in that history.

[3] About two hundred years ago, Tsilhqot'in people were presented with life altering challenges. The arrival of fur traders encouraged trade in items that, up to that point in time, had provided Tsilhqot'in people with subsistence and survival. In return, Tsilhqot'in people received European goods that would forever change their lives. Their new trading partners also encouraged them to abandon their usual trading habits with neighbouring Aboriginal groups.

[4] With the arrival of the Christian missionaries, Tsilhqot'in people faced another challenge. They were invited to accept a new spirituality in place of that which had served them for generations.

[5] Smallpox and other diseases were introduced by European colonizers, leaving Tsilhqot'in people decimated in their numbers. Shortly thereafter, Tsilhqot'in people were directed by the federal and provincial governments to stop their migratory movements, to stay in one place and to become farmers and ranchers. The Tsilhqot'in language and culture were placed under severe stress as children were taken from their homes and required to live in residential schools.

[6] All of these life altering changes came without the benefits of a modern social support system to assist Tsilhqot'in people through the transition that was demanded of them.

[7] The present Canadian community is now faced with the challenge of acknowledging past wrongs and of building a consensual and lasting reconciliation with Aboriginal people. Trials in a courtroom have the inevitable downside of producing winners and losers. My hope is that this judgment will shine new light on the path of reconciliation that lies ahead.

[8] I want to express my gratitude to those who provided assistance to me throughout this long trial. I am greatly indebted to counsel for their assistance. Each of the many lawyers who played a role in this case made an important contribution and I thank them for all of their efforts. A trial judge relies heavily on the assistance of counsel in the course of every trial. Aboriginal law is a field that has grown and developed rapidly in the past 25 years. Counsel were of great assistance to me in my understanding of the legal principles and issues that arose throughout the trial.

[9] Of equal importance to a trial judge is the cooperation demonstrated by counsel throughout the trial. There were many differences of opinion but counsel never failed to respect each other and to reach accommodations whenever possible, lightening the burden on me as the trial judge. Each one of them brings great credit to the legal profession.

[10] I was assisted throughout the trial by several Interpreters and Word Spellers. In that regard, I want to express my appreciation to Ms. Susie Lulua, Word Speller for the deposition evidence of Martin Quilt; Ms. Bella Alphonse, Word Speller; Mr. William Myers, Word Speller and Interpreter; Ms. Beverly M. Quilt, Interpreter; Ms. Agnes Haller, Interpreter; Mr. Orrie Charleyboy, Interpreter and Ms. Margaret Lulua, Word Speller.

[11] In the late fall and early winter of 2003, the court convened at the Naghtaneged School at Tl'ebayi in Xeni (Nemiah Valley). I want to express my appreciation to all who made this sitting possible. I reserve a special thank you for the children of the school who allowed us the use of their language resource classroom for this historic sitting of the Court.

[12] I also had the benefit of an excellent court staff. The first clerk assigned to the case was Ms. Lisa Wickens. With her departure to another court, Ms. Jean Lystar became our court clerk and registrar. These two women provided exceptional assistance as court clerks, registrars and keepers of the many exhibits. I am grateful to all court staff who provided assistance throughout this trial but I do reserve special thanks for the work of Ms. Wickens and Ms. Lystar.

[13] Each year, throughout the course of this trial, I was assisted by law clerks and Judicial Administration staff. These people are the unsung heroes, working tirelessly behind the scenes. They provided support and assistance to me whenever it was needed. I thank each of them for their contributions and for their many hours of dedicated service.

[14] The trial was recorded each day by a court reporter. I believe all counsel would join me when I express our collective gratitude to Ms. Christie L. Pratt who was "our court reporter". She provided an outstanding service to the Court and now has the foundation of a Tsilhqot'in language dictionary buried in the software of her computer. I would be remiss if I did not acknowledge the work of Ms. Pauline S. Cziraky who joined us on those few days that Ms. Pratt was unavailable. Her role as a substitute for Ms. Pratt was not easy as much of the evidence in this case was unfamiliar and complex.

[15] Ms. Kathleen Lush was our Court Cartographer and I want to express my appreciation to her for her excellent cartographic assistance.

[16] This was a trial that took advantage of the latest technology available. I want to express my appreciation to all those people who made it possible to view the documents in electronic form. Various disks containing place names referred to by witnesses were provided from time to time and this too was of great assistance.

[17] From September 2004 to the end of term in 2005, Ms. Becky Black provided assistance as my law clerk. In September 2006, after her call to the Bar, she returned as a Law Officer of the Court, assigned to assist me in the work that was to

lie ahead. I want to express my gratitude to Ms. Black for all the assistance she has provided to me throughout the past year. Ms. Black's outstanding work has made the task of writing this judgment much less daunting than I first imagined.

[18] It is not usual in the writing of judgments to provide a preface. This is not a usual judgment but, rather, part of a larger process of reconciliation between Tsilhqot'in people and the broader Canadian society. A reader will find the usual recitation of facts, the legal principles and the conclusions I have drawn. In the writing of a judgment, a court does not normally decide an issue if that decision is only to become unnecessary *obiter dicta* of the court. Because the Court is engaged in the broader process of reconciliation, I have departed from the usual practice and expressed my views on some issues that might not have been addressed but for the nature of these proceedings.

[19] I have also considered it helpful to include a rather lengthy historical section with relevant and interesting extracts from historical documents.

[20] More importantly, this judgment features Tsilhqot'in people as they strive to assert their place as First Peoples within the fabric of Canada's multi-cultural society. The richness of their language, the story of their long history on this continent, the wisdom of their oral traditions and the strength and depth of their characters are a significant contribution to our society. Tsilhqot'in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.

[21] Important work lies ahead for the provincial and federal governments and Tsilhqot'in people. In that regard, there will have to be compromises on all sides if a just and lasting reconciliation is to be achieved.

2. INTRODUCTION

a. Tislagh Season

[22] It was the season for tislagh (steelhead salmon). According to their oral history and traditions, Tsilhqot'in people have gathered at this time of year in the custom of the ?Esggidam (ancestors) since the time of sadanx (legendary period of time long ago). Tislagh returned to the Tsilhqox (Chilko River) and, as they had for generations, Tsilhqot'in people returned to the river crossing at Biny Gwetsel and to Tsi T'is Gunlin, just south of Henry's Crossing, to gaff tislagh. They left Xeni (Nemiah Valley) and other parts of Tsilhqot'in territory and travelled the ancient trails set by the ?Esggidam, passing Tsuniah Biny (Tsuniah Lake), onto the crossing of the Tsilhqox at Biny Gwetsel, making their way further down river past Tsi T'is Gunlin and onto Henry's Crossing.

[23] In May of 1992, during the season for tislagh, approximately 100 Tsilhqot'in people returned, not to gaff tislagh at Tsi T'is Gunlin and Biny Gwetsel but to establish a blockade at Henry's Crossing. Their purpose was clear. There would be no improvements to the bridge at this important crossing over the Tsilhqox that would allow clear cut logging to occur in Tachelach'ed (Brittany Triangle).

[24] Xeni Gwet'in people (people of the Nemiah Valley) are charged with the sacred duty to protect the nen (land) of Tachelach'ed and the surrounding nen on behalf of all Tsilhqot'in people. They were determined that any logging in Tachelach'ed would be on their terms. The nen and their Aboriginal rights were threatened. The seasonal harvest could be interrupted in order to discharge their duty to protect the nen.

[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.

[26] The forecasted clear cut logging was expected to interfere with their Aboriginal right to hunt and trap. Insufficient consideration had been given to sustaining their communities in the model for sustainability employed by British Columbia.

[27] These were the central issues that interrupted the 1992 season for tislagh. The events that year on the bridge at Henry's Crossing, just downriver from Tis T'si Gunlin and Biny Gwetsel, subsequently spiralled into these long and costly proceedings.

b. Nature of the Litigation

[28] This is an action for declarations of Tsilhqot'in Aboriginal title and certain defined Tsilhqot'in Aboriginal rights relating to land in the central region of British Columbia.

c. The Region and People

[29] The Chilcotin Region is located in the central interior of British Columbia. The region spreads west from the Fraser River, across the Chilcotin Plateau to the Coast Mountain Range. It rises into the Chilcotin Mountain Range in the south. The Blackwater River cuts across its northern edge. The landscape of the high elevation plateau and surrounding mountain ranges is both the backdrop and the heartland of the present action.

[30] The Chilcotin Region is named after the Tsilhqot'in people. The Tsilhqot'in people are an Athapaskan speaking Aboriginal people. The Tsilhqot'in First Nation is comprised of the Xeni Gwet'in, the Tl'esqox (Toosey), the Tsi Del Del (Redstone), the Tletinqox-t'in (Anahim), the ?Esdilagh (Alexandria) and the Yunesit'in (Stone).

d. Tsilhqot'in Population

[31] At the present time, there are approximately 3,000 Tsilhqot'in people. They are spread across communities from Fort Alexandria to Anahim Lake. It is not clear how many Tsilhqot'in people live off reserve. Those who make their homes on the reserves are a relatively small community of people, spread over great distances.

The Xeni Gwet'in community of Tsilhqot'in people is the most remote and is clearly situated on historical Tsilhqot'in territory.

[32] Historical data reveals a population in the Tsilhqox corridor of approximately 150 - 200 people at the time of sovereignty assertion. Given the semi-nomadic nature of Tsilhqot'in people over 160 years ago, collecting an accurate census would have been impossible. Those who were recorded were seen or reported to be along the river corridor. Undoubtedly others, outside this river corridor, were not counted. The numbers of Tsilhqot'in people were greatly reduced in the 1860's due to an epidemic of smallpox, a fate that was met by many Aboriginal people.

[33] Today, the Xeni Gwet'in number about 390 - 400 people. Of these, approximately 200 persons live on the Xeni Gwet'in reserves in Xeni and about 15 live off reserve in the Claim Area. The balance live off reserve, outside of the Claim Area.

e. The Parties

[34] Chief Roger William is a member of the Tsilhqot'in First Nation and is the Chief of the Xeni Gwet'in. This action is brought by Chief William in his representative capacity.

[35] The Xeni Gwet'in First Nations Government, also known as the Nemiah Valley Indian Band, is a body of Aboriginal persons. They constitute a "band" within the meaning of the ***Indian Act***, R.S.C. 1985, c. I-5. Common Crown lands have been set apart for their use and benefit.

[36] In 1996, the Tsilhqot'in National Government (TNG) was incorporated under the ***Canada Corporations Act***, R.S.C. 1970, c. C-32 on February 28, 1996. Only five Tsilhqot'in bands are members of the TNG. The Tl'esqox Band is not a member. It maintains a membership in the Carrier/Tsilhqot'in Tribal Council.

[37] The defendant, Her Majesty the Queen in Right of the Province of British Columbia, is that aspect of the Monarch in which the lands at issue in these proceedings are said to vest pursuant to s. 109 of the ***Constitution Act, 1867***. The Regional Manager of the Cariboo Forest District is that person exercising powers and authority over forestry related matters pursuant to the ***Forest Act,*** R.S.B.C. 1996, c. 157 (and under the predecessor legislation: the ***Forest Act***, R.S.B.C. 1979, c. 140). The Office of the Regional Manager was created on January 1, 1979 and continued until March 31, 2003. At that time, the duties were assumed by the Regional Manager of the Southern Interior Forest Region. At all material times, the Regional Manager was authorized to make decisions relating to the granting of forest tenures on the lands in the Claim Area pursuant to the ***Forest Act***, the ***Ministry of Forests and Range Act*****,** R.S.B.C. 1996, c. 300 and the ***Forest Practices Code of British Columbia Act*** , R.S.B.C. 1996, c. 159.

[38] The defendant, the Attorney General of Canada, is named in these proceedings pursuant to ***Crown Liability and Proceedings Act,*** R.S.C. 1985, c. C-50, s. 23(1).

[39] These actions were initiated to prevent the harvesting of timber in the Claim Area. Forest companies with rights and plans to harvest timber were parties to the

action in its early stages. When these companies abandoned plans to log in the Claim Area, the proceedings against them were discontinued.

f. Description of the Claim Area

i. Tachelach'ed and the Trapline Territory

(1) Landscape

[40] The plaintiff makes claims with respect to lands known as the Brittany Triangle and the Trapline Territory. The Brittany Triangle is known to Tsilhqot'in people as Tachelach'ed. It refers to the land enclosed by the Tsilhqox and Dasiqox (Taseko River) with a southern boundary running through Xeni.

[41] Tachelach'ed encompasses plateau, mountain and transition zones (between mountains and plateau). It falls within the Cariboo Forest Region of British Columbia. The Chilcotin Plateau, located in the central and northern portion of the Claim Area, consists of level to gently rolling terrain. The southern and western halves of the Claim Area are made up of the Chilcotin and Pacific Ranges. The transition zone between these two areas is relatively narrow. Elevations on the plateau range from 1,000 to 1,500 m. Deeply incised valleys have been cut into the plateau by the major river systems. The Chilcotin and Pacific Ranges are rugged glacial mountains that rise to approximately 2,800 m elevation.

[42] The boundaries of Tachelach'ed are described as follows: the point of commencement is marked by the confluence of the Tsilhqox and Dasiqox. The eastern boundary follows the Dasiqox to the Davidson Bridge. The southern

boundary follows the Nemiah Valley Road in a westerly direction until it reaches Xeni Biny (Konni Lake), then follows the southern shore of Xeni Biny to its confluence with Xeni Yeqox (Nemiah Creek). It then follows Xeni Yeqox to the eastern shore of Tsilhqox Biny (Chilko Lake). The western boundary follows the eastern shore of Tsilhqox Biny in a northerly direction to the Tsilhqox. It then continues along the Tsilhqox until the point of commencement, the confluence of the Tsilhqox and Dasiqox.

[43] The area of Tachelach'ed, including the geographic area which overlaps the Trapline Territory, totals 141,769 hectares. The area of Tachelach'ed, excluding the geographic area which overlaps the Trapline Territory, totals 100,395 hectares.

[44] For the purposes of this action, Tachelach'ed does not include the lands within the following Indian Reserves: Chilco Lake 1; Chilco Lake 1A; Garden 2; Garden 2A; Lezbye No. 6; Lohbiee 3; Tanakut 4 and Tsunnia Lake.

[45] The Trapline Territory is the land within the boundary of Trapline Licence #0504T003 issued by British Columbia and does not include lands within the Indian Reserves noted in the preceding paragraph.

[46] To orient the reader of this judgment, I have attached as Appendix A, three maps. Map 1 situates the Claim Area in the Province of British Columbia. The large body of water within the Claim Area is Tsilhqox Biny. Map 2 is a portion of the locater base map marked as exhibit 10 in these proceedings. Tachelach'ed is outlined with a solid yellow line; the Trapline Territory, east and west is outlined with a broken yellow line. Map 3 locates Tsilhqot'in sites inside and outside the Claim

Area and is intended to assist in an understanding of my later review of Tsilhqot'in occupation of the Claim Area.

(2) Climate

[47] Five distinct biogeoclimatic zones are found within the Claim Area. I rely on the evidence of Brian T. Guy, Ph.D., a hydrologist, in describing the climate of the Claim Area.

[48] Tachelach'ed is located primarily in the Sub-Boreal Pine Spruce zone. The lowest elevations within the major valleys are within the Interior Douglas Fir zone. The Montane Spruce, Englemann Spruce Subalpin Fir, and Alpine Tundra zones dominate the Trapline areas to the west and south of Tachelach'ed (within the Chilcotin Ranges) at the highest elevation.

[49] The climate in the Claim Area is largely controlled by location and physiography. The exposed Chilcotin Plateau portion of the Claim Area has a moderate continental climate with cold winters, warm summers and relatively low levels of precipitation. The movement of continental arctic air in the fall and winter and continental tropical air in the summer result in large seasonal variability in air temperature across the Claim Area. Moisture availability to the plateau is limited primarily by the Coast Mountains, which dewater moist maritime air coming from the Pacific.

[50] The Pacific and Chilcotin Ranges act as a partial barrier between the interior continental systems and coastal systems. Air temperatures are significantly colder

in the high mountains and milder in the low elevation valleys. Precipitation values in the mountains are highest in the winter months (September to February) due to a continuous succession of frontal systems moving eastward from the Pacific. Glaciers in the Chilcotin and Pacific Ranges reflect the higher winter precipitation values. In the summer months, dry weather is more common.

[51] Precipitation on the plateau is highest from June through August. During these three months, the plateau receives nearly half of its annual precipitation (which averages 337.6 mm). Extreme daily precipitation events of greater than 25 mm can occur throughout the year. In summer, daytime high temperatures are between 18° and 22° centigrade.

[52] Talhiqox Biny (Tatlayoko Lake), located on the western boundary of the Trapline Territory, is situated in the valley bottom between the Chilcotin and Pacific Ranges. Here the climate exhibits characteristics of both the plateau and the mountain regions of the Claim Area. Day time temperatures during the summer are generally between 18° and 23° centigrade at Talhiqox Biny. Winter night time minimum temperatures typically range from -6° to -12° centigrade.

[53] In the valley bottom, the wettest months occur between October and January. Nearly half of the annual precipitation, which averages 434.2 mm, falls during these four months.

[54] The Tsilhqox and Dasiqox both flow through large valley bottom lakes, Tsilhqox Biny and Dasiqox Biny, at the northern limit of the mountains before they begin their journey across the plateau. These two rivers mark the boundaries of

Tachelach'ed and join together at its northern tip. There they continue on to the Chezqox (Chilcotin) River which drains into the Fraser River. These river systems have historically provided a variety of salmon runs, an important source of food for First Nations people and in particular, the Tsilhqot'in people. Other significant valley bottom lakes near the mountain-plateau transition include Talhiqox Biny, Ts'uni?ad Biny (Tsuniah Lake), Xeni Biny, ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake). Streams originating on the plateau tend to be smaller and tend to have a more meandering habit characterized by frequent lakes and wetlands. There are some significant shallow plateau lakes in the Claim Area including Tsanigan Biny (Chaunigan Lake), Mainguy Lake, Natasewed Biny (Brittany Lake), Naghatalhchoz or Chelquoit Biny (Big Eagle Lake), Gwedzin Biny (Cochin Lake), Lhuy Nachasgwengulin (Little Eagle Lake) and many small lakes.

ii. Forest Cover

[55] The Claim Area is situated in the Williams Lake Timber Supply Area. Within that larger area, forestry is responsible for more jobs than any other component of the economy. Other major areas of the economy include mining, tourism, farming and ranching.

[56] The nature of the forest cover is dependant on climate and terrain. The dominant species are pine, spruce and Douglas fir. A major infestation of Mountain Pine Beetle has had a profound impact on the pine forests in the Claim Area.

iii. Public Lands / Crown Lands

(1) Provincial Parks

[57] Ts'yl?os Provincial Park totals approximately 233,000 hectares. It is located in both Tachelach'ed and the Trapline Territories. Nuntsi Provincial Park is situated in the central eastern portion of Tachelach'ed and totals 20,570 hectares.

(2) Fishing Station

[58] A Federal Department of Fisheries station is located at the outlet of Tsilhqox Biny. This is an important location for the management of the Tsilhqox salmon run which itself is a component of the larger Fraser River salmon runs.

g. Xeni Gwet'in Declaration

[59] On August 23, 1989, the Xeni Gwet'in people made a declaration concerning the Nemiah Aboriginal Wilderness Preserve which included Tachelach'ed and the Trapline Territory. The Xeni Gwet'in people declared that within the Nemiah Aboriginal Wilderness Preserve, the following rules were to apply:

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.

3. DETAILS OF THE LITIGATION

a. Chronology of the Litigation and Related Events

[60] In 1983, Carrier Lumber Ltd. (Carrier) was granted a forest licence authorizing logging activities in the Trapline Territory.

[61] In 1989, Carrier submitted a Forest Development Plan (FDP). This FDP proposed logging in the Trapline Territory and was approved during that year. Carrier was granted a cutting permit for blocks in the Trapline Territory in 1990.

[62] On August 23, 1989, as a consequence of this and other forestry activities in the surrounding areas, the Xeni Gwet'in people issued the Xeni Gwet'in (Nemiah) Declaration.

[63] On December 14, 1989, the plaintiff commenced Action No. 89/2573 against British Columbia (the "Original Action"). The plaintiff claimed essentially the same relief as claimed in this action, No. 90/0913 (the "Nemiah Trapline Action" or the "Trapline Action"). The Original Action was discontinued when the Trapline Action was commenced.

[64] The Nemiah Trapline Action was commenced in the Supreme Court of British Columbia on April 18, 1990 against the Regional Manager of the Cariboo Forest Region, British Columbia, Carrier and other forest companies. At that time, the

plaintiff sought injunctions restraining the defendants from clear-cut logging within the Trapline Territory.

[65] On December 17, 1990, Millward J. made a consent order accepting Carrier's undertaking not to apply to British Columbia for timber cutting permits in the Nemiah Trapline without notice.

[66] The proceedings against the other forest companies were eventually discontinued.

[67] On October 11, 1991, this Court issued an injunction by consent, enjoining Carrier from logging (or any other preparatory work for logging) within the Trapline Territory until the trial of this matter. Carrier was specifically enjoined from logging certain named cut blocks located within the Trapline Territory.

[68] In 1998, the Trapline Action was amended to advance claims for Tsilhqot'in Aboriginal title, damages for infringement of Aboriginal rights and title, compensation for breach of fiduciary duty, declaratory orders concerning the issuance and use of certain forest licences and injunctions restraining the issuance of cutting permits.

[69] Following the injunction restraining logging in the Trapline Territory, forest companies indicated interest in logging within Tachelach'ed (Brittany Triangle). Logging in this part of the Claim Area required an upgrade of the bridge at Henry's Crossing, a bridge spanning the Tsilhqox (Chilko River) and providing access to Tachelach'ed.

[70] On May 7, 1992, Tsilhqot'in members mounted a blockade to prevent work on the bridge at Henry's Crossing. This activity attracted the attention of the provincial government and on May 13, 1992, Premier Michael Harcourt promised the Xeni Gwet'in people that there would be no further logging in their traditional territory without their consent.

[71] In 1992, the Xeni Gwet'in people commissioned a sustainable forestry plan for Tachelach'ed lands. This plan was rejected by the Ministry of Forests. Ministry officials proposed various logging plans and sought the views of Xeni Gwet'in people. Between 1994 and 1997, Xeni Gwet'in people voted against logging plans for Tachelach'ed in a series of community referenda.

[72] The dispute between Ministry of Forests officials and the Xeni Gwet'in people centred on the control of logging in Tachelach'ed. Tsilhqot'in people sought a right of first refusal with respect to any logging activities. They argued that such a right was essential to the maintenance of their traditional way of life. Ministry officials declined to grant such a right, arguing that there was no legislative authority that enabled them to grant such a concession to Tsilhqot'in people.

[73] On January 12, 1994, Ts'il?os Provincial Park was established as a Class A park under the ***Park Act***, R.S.B.C. 1979, c. 309 by Order-in-Council No. 64.12. At the centre of this wilderness park is Ts'il?os (Mount Tatlow). Ts'il?os Park comprises 39% of the Claim Area. In its amended statement of defence, British Columbia admits that Xeni Gwet'in people hold Aboriginal hunting and trapping rights for subsistence and ceremonial use throughout Ts'il?os Park.

[74] On February 16, 1994, Tsilhqot'in Chiefs met with members of the British Columbia Cabinet to discuss, amongst other things, forestry issues.

[75] On January 1, 1997, British Columbia issued Forest Licence A54417 to Timberwest Forest Limited. This forest licence permitted logging within the Trapline Territory and Tachelach'ed. On January 8, 1997, the Xeni Gwet'in filed a notice of intention to proceed with the Nemiah Trapline Action. Harvesting rights under this licence were transferred to Riverside Forest Products (Soda Creek) Limited on June 23, 1997.

[76] On March 1, 1997, British Columbia granted Forest Licences A55901 to Lignum Limited; A55902 to West Fraser Mills Limited; A55904 to RFP Timber Ltd.; and A55905 to Jackpine Forest Products Ltd., which permitted additional logging of the Trapline Territory and Tachelach'ed.

[77] In the fall of 1998, with the assistance of the David Suzuki Foundation, the Xeni Gwet'in began eco-system based planning for forestry and cultural tourism in the Trapline Territory and Tachelach'ed.

[78] On November 1, 1998, British Columbia re-issued Forest Licences A20016 to RFP Timber Ltd. and A20019 to Riverside Forest Products Limited which would have permitted further logging of the Trapline Territory and Tachelach'ed. Both of these renewed licences replaced licences of the same number dated November 1, 1993.

[79] The plaintiff commenced Action No. 98/4847 (the "Brittany Triangle Action") on December 18, 1998 against British Columbia, Riverside Forest Products Ltd. and others, seeking declarations similar to those in the Nemiah Trapline Action with respect to the lands known as Tachelach'ed.

[80] On February 19, 2001, the plaintiff filed a fresh statement of claim in the Brittany Triangle Action. On March 9, 2001, British Columbia filed a fresh statement of defence in the Brittany Triangle Action setting out British Columbia's reserve creation defence.

[81] On November 2, 1999, I dismissed an application brought by British Columbia to strike the representative claim for Aboriginal title in both actions: ***Nemaiah Valley Indian Band v. Riverside Forest Products*** (1999), C.P.C. (4th) 101, 1999 Carswell BC 2438 (S.C.).

[82] The parties consented to the consolidation of the Trapline Action and the Brittany Triangle Action. On February 21, 2000, a notice of trial was issued setting the trial date in both actions for September 10, 2001.

[83] On October 5, 2000, upon application by the plaintiff, I made an order that Canada be added as a defendant in the Brittany Triangle Action.

[84] On November 2, 2000, Canada was added as a defendant in the Nemiah Trapline Action, by consent.

[85] On February 2001, a fresh statement of claim was filed and, in March 2001, fresh statements of defence were filed by British Columbia and by Canada. In its

statement of defence, Canada did not support British Columbia's reserve creation defence.

[86] Upon application by Canada on March 19, 2001 the trial of the action was adjourned to a date to be fixed.

[87] On April 18, 2001, a Ministry of Forests official confirmed that logging and road building in the Claim Area were inevitable, as the decision to permit harvesting in the disputed area was made at the time the licences were issued early in 1997.

[88] On April 4, 2002, an order was made consolidating the Nemiah Trapline Action and the Brittany Triangle Action.

[89] On August 14, 2002, I dismissed an application by the defendant, British Columbia, for an order compelling the plaintiff to provide notice of the plaintiff's claims to all land or resource use tenure holders, or applicants for tenure, whose interests may be affected by the litigation: ***William v. Riverside Forest Products Limited***, 2002 BCSC 1199.

[90] On September 13, 2002, the plaintiff filed a consolidated fresh statement of claim. On October 22, 2002, British Columbia filed a consolidated fresh statement of defence. This new pleading did not contain the reserve creation defence.

[91] The trial of the consolidated action began on November 18, 2002. On November 20, 2002, I dismissed an application by Canada to be removed as a party: ***William v. British Columbia***, 2002 BCSC 1904.

[92] On January 8, 2003, I struck out the claim against Riverside Forest Products Ltd.: ***William v. British Columbia***, 2003 BCSC 2036.

[93] On February 14, 2003, I allowed the plaintiff to amend the statement of claim and dismissed an application by British Columbia for an order striking out the statement of claim on the basis that it disclosed no reasonable claim, or was otherwise an abuse of process: ***William v. British Columbia***, 2003 BCSC 249.

[94] On June 16, 2003, the plaintiff filed an amended statement of claim. On June 19, 2003, Canada filed an amended statement of defence. On June 26, 2003, British Columbia filed a statement of defence. On June 27, 2003, the plaintiff filed a reply to British Columbia's statement of defence.

[95] On February 6, 2004, I made a ruling on the admission of oral history evidence. In that ruling I established a procedure for the preliminary examination of lay witnesses who intended to offer oral history evidence. The purpose of that procedure was to assist the court in assessing the necessity and reliability of oral history evidence and ultimately, its admissibility: ***William v. British Columbia***, 2004 BCSC 148.

[96] On May 6, 2004, I directed counsel to frame an issue of law or fact, or partly of law and partly of fact, pursuant to Rule 33. Counsel were unable to frame such a issue by consent. On July 16, 2004, following submissions by counsel, I concluded that this case or specific issues arising in this case ought not to proceed as a stated case pursuant to Rule 33: ***William v. British Columbia***, 2004 BCSC 964.

[97] The trial of this action has consumed 339 trial days. It has had a long history and in its initial stages, a faltering start. The foregoing summary does not include a description of the various motions in this court on the issue of costs, two of which were appealed to the Court of Appeal. One of these decisions was also considered on appeal in the Supreme Court of Canada.

[98] The triggering events for these proceedings were proposals to harvest timber in the Claim Area. There is a fundamental dispute between the Province and Tsilhqot'in people on the issue of land use. The result of this litigation has been to bring logging in the Claim Area to a halt.

[99] In the late fall and early winter of 2003, the court convened at the Naghataneqed School at Tl'ebayi in Xeni (Nemiah Valley). As our time at Xeni spanned several weeks during winter months, travel throughout the Claim Area was not possible. Thus, I was only able to see a small portion of Xeni and Tachelach'ed by traveling the short distance from the Davidson Bridge over the Dasiqox (Taseko River) to the eastern shore of Tsilhqox Biny (Chilko Lake).

[100] The parties filed written argument and, by agreement and with my consent, there were no oral arguments.

b. Issues to be Decided

[101] The issues raised by these proceedings include the following:

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?

4. PRELIMINARY ISSUE

[102] One of the issues to be decided in this case is whether the plaintiff has existing Aboriginal title to Tachelach'ed (Brittany Triangle) and the Trapline Territory. To meet the test for Aboriginal title, the plaintiff must establish a sufficient degree of

physical occupation of the Claim Area by Tsilhqot'in people at the time of sovereignty assertion. Physical occupation may be established by evidence of "regular use of definite tracts of land": ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 at para. 149.

[103] In his main argument, the plaintiff refers to evidence which, in his submission, portrays a regular and highly organized schedule of Tsilhqot'in land use and occupancy throughout the Claim Area. The plaintiff organizes this evidence by season according to Tsilhqot'in subsistence patterns. The evidence provides details about the character of the lands. It includes evidence about the bioclimatic zones, animal habitats, and seasonal variations in animal and plant abundance allowing Tsilhqot'in people to sustain themselves from these resources.

[104] The plaintiff seeks to demonstrate regular use of all of the various geographical areas that comprise the Claim Area pursuant to an organized pattern of occupation. This pattern consists of systematic, oscillating, regular use of the plateau lands, its lakes, rivers and streams and the mountainous regions of the Claim Area.

[105] The plaintiff argues that this evidence is presented through the lens proposed by the Supreme Court of Canada in ***Delgamuukw*** and ***R. v. Marshall; R. v. Bernard***, [2005] 2 S.C.R. 220, 2005 SCC 43. This evidence is grounded in the perspective of Tsilhqot'in people and focuses on the cultural, economic and legendary significance of their land use patterns.

[106] British Columbia argues that the plaintiff has advanced an "all or nothing" claim and, accordingly, the Court may only find Aboriginal title to the Claim Area in either Tachelach'ed or the Trapline Territory, or reject the claim outright. British Columbia characterizes the plaintiff's original review of the evidence as:

> … a vast amount of loosely organized information concerning a number of uses to which a variety of geographic areas – some relatively localized, some not, some inside the Claim Area, some not – have in different times and by different sets of people been put. Rarely does the Plaintiff include details that would allow the Court to understand what the evidence shows concerning the frequency, intensity or general time frame for the alleged traditional use in question.
>
> Because the Plaintiff has chosen to organize his review of the evidence of use of land in Appendix 3 by season, as opposed to by use for traditional purposes or by specific geographic location (as in [British Columbia's] Appendix 2), it is very difficult to analyse the evidence in a way that might be helpful to the Court.

[107] In his reply, the plaintiff takes issue with British Columbia's characterization of his argument and his review of the evidence. The plaintiff argues that the Court has jurisdiction to make a declaration of title with respect to all or a portion of the Claim Area. In particular, he argues the Court has jurisdiction to find that portions of the component parts of the Claim Area, Tachelach'ed and the Trapline Territory, may also be found to be definite tracts of land that qualify for a declaration of Aboriginal title.

[108] To demonstrate this point, the plaintiff took the same body of occupation evidence that is presented in the main argument according to season and by geographical location. This presentation of the occupation evidence is set out in the plaintiff's reply, Appendix 1A and Appendix 1B. This allows the Court to consider the

evidence associated with each of the various tracts of land that comprise the Claim Area. Thus the Court had the benefit of considering the occupation evidence from the perspective of traditional, seasonal use (as conveyed for the most part in Appendix 3 of the main argument) or from the perspective of geographical location (as set out the reply Appendices 1A and 1B).

[109] Both defendants object to the submissions set out in Appendices 1A and 1B. They say that the Trapline Territory and Tachelach'ed are the only two definite tracts of land pleaded in the statement of claim. Together they are defined as the Claim Area. The defendants say that the disputed appendices set out alternate definite tracts of land within the larger Claim Area. No motion has been filed to amend the statement of claim to allow the Court to consider each of these tracts of land individually.

[110] The defendants say they are prejudiced by the plaintiff's late stage attempts to convert the pleaded definite tracts of land – Tachelach'ed and the Trapline Territory - into smaller definite tracts of land. In their submission, the plaintiff is bound by his pleadings and cannot succeed simply by saying the smaller definite tracts of land are all included in the greater Claim Area.

[111] By way of example, counsel for both defendants point out that the southern boundary of Tachelach'ed was described differently by three Aboriginal witnesses. At the time the evidence was heard, they did not consider the southern boundary of Tachelach'ed to be an issue in the case. If it were an issue, they say it would have prompted a different cross examination of the witnesses. In their submission there is

a resulting prejudice. If smaller definite tracts of land are to be considered, notice of such tracts should have been set out in the pleadings. The defendants say this would have triggered a different approach to the evidence in the course of the trial.

[112] In ***Delgamuukw v. British Columbia*** (1991), 79 D.L.R.R (4th) 185 (B.C.S.C.) the plaintiffs claimed ownership and later Aboriginal title to 133 individual tracts of land on behalf of 51 "Houses". The sum of the individual tracts equaled the total landmass of the overall territory claimed. The claims were rejected by the trial judge for various reasons. One reason was that the internal boundaries of the individually claimed portions of the territory had not been established. On appeal in ***Delgamuukw v. British Columbia*** (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), Macfarlane J.A., for the majority, said the following at p. 499:

> The plaintiffs did not establish to the satisfaction of the trial judge they had the requisite exclusive possession of land to make out their claim for ownership except in locations already within reserves. As well, there was significant difficulty with the delineation of specific boundaries for the claim. It is clear that no one can own an undefined non-specific parcel of land. In my view the trial judge applied the relevant law in dismissing the plaintiffs' claim.
>
> In addition to the claims of "ownership" and "jurisdiction", the plaintiffs also asked "the court to grant them whatever other rights they may be entitled to": ***Delgamuukw*** (B.C.S.C.) at p. 237. Although the plaintiffs did not amend their pleadings to claim other Aboriginal rights, McEachern C.J. concluded that "a claim for Aboriginal rights other than ownership and jurisdiction was also open to the plaintiffs": ***Delgamuukw*** (B.C.S.C.) at p. 283.

[113] On appeal the plaintiffs sought to amalgamate the individual House claims into two claims, one brought by the Gitksan Nation and the second by the Wet'suwet'en Nation. The plaintiffs argued that there was no prejudice because the

greater territorial claim was merely the sum of the individual claims. The Supreme Court of Canada rejected this argument. In the judgment of Lamer C.J.C. at para. 76, he said:

> However, no such amendment was made with respect to the amalgamation of the individual claims brought by the 51 Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents suffered some prejudice. 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.

[114] It is clear from the foregoing passage that the Supreme Court was of the view that the collective claims were not in issue at trial. Thus, the Court was not prepared to allow the appellants to frame their case in a different manner on appeal because of the resulting prejudice to the respondents.

[115] British Columbia argues that the plaintiff is attempting to reframe his case in the same manner as the plaintiffs on appeal in ***Delgamuukw***.

[116] The plaintiff relies upon the provisions of s. 10 of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253. That provision sets out a direction to the Court to grant "all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter…". I

interpret those words to mean that appropriate remedies are to be granted for those matters that have been pleaded and proven to the satisfaction of the court at trial.

[117] The plaintiff's amended statement of claim states at para. 10:

> As part of the lands exclusively occupied by the Tsilhqot'in, at and before the time the British Crown assumed sovereignty, the Tsilhqot'in exclusively occupied lands known as the Brittany Triangle (the "Brittany"). The Tsilhqot'in continue to exclusively occupy the Brittany today.

[118] Paragraph 11 of the amended statement of claim provides a geographical description of the boundaries of Tachelach'ed. Paragraph 12 states:

> As part of the lands exclusively occupied by the Tsilhqot'in at the time of British sovereignty, the Tsilhqot'in exclusively occupied the whole of the lands within the boundary of Trapline Licence #0504T03 issued by British Columbia (the "Trapline Territory"). The Tsilhqot'in continues to have exclusive occupation of the Trapline Territory today …

[119] The plaintiff seeks the following declarations in his amended statement of claim:

> a) A declaration that the Tsilhqot'in have existing Aboriginal title to the Brittany;
>
> b) A declaration that the Tsilhqot'in have existing Aboriginal title to the Trapline Territory.

[120] The plaintiff does not explicitly claim Aboriginal rights or title to portions of the Tachelach'ed or Trapline Territories. Indeed, in para. 11, the plaintiff alleges Tsilhqot'in people occupied "the whole of the lands within the boundaries of Trapline Licence #0504T003". In the prayer for relief the plaintiff does not seek a declaration

that Tsilhqot'in people have existing Aboriginal title to the Claim Area *or any portions thereof*. A plain reading of the pleadings shows the plaintiff has claimed Aboriginal title over all of the lands, which may be said to be an "all or nothing" claim. The plaintiff is now attempting to reframe his claim to include Aboriginal title over smaller included portions of Tachelach'ed and the Trapline Territory.

[121] It appears that British Columbia was aware of the potential for this alternative claim to title over portions of these defined areas. In its amended statement of defence, British Columbia does not admit that the Tsilhqot'in Nation exclusively occupied Tachelach'ed or the Trapline Territory: para. 12(a), but says in the alternative at para. 12(c):

> … that if the Aboriginal activities that may have been practiced by the Ancestral Tsilhqot'in Groups constituted occupation establishing Aboriginal title to any portions of the Brittany or 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;

[122] Although British Columbia may have been aware of an alternate claim to portions of the Claim Area, any mention of this in the statement of defence is not a *de facto* amendment of the plaintiff's pleadings. More importantly, such a plea does not define the smaller tracts of land said to be contained within the two component parts of the Claim Area.

[123] In ***Delgamuukw*** (S.C.C.) at para. 76, Lamer C.J.C. declined to allow the plaintiff's to "frame the case in a different manner on appeal" because it "would retroactively deny the respondents the opportunity to know the appellants' case".

The Supreme Court of Canada ruled that the plaintiffs could not amend their claim to make a collective claim for Aboriginal rights and title because it was simply not the case the plaintiffs had originally pleaded. Similarly the plaintiff here did not claim *portions* of Tachelach'ed or the Trapline Territory in his statement of claim.

[124] "Volume 36.1: Pleading", in *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1999) states at para. 51: "[a]n omission to seek an appropriately precise declaration may disqualify the party seeking it to such relief", citing ***Biss v. Smallburgh Rural District Council***, [1964] 2 All E.R. 543 (C.A.).

[125] The plaintiffs in ***Biss*** were the owners of 105 acres of land known as Warren Farm. Shortly after purchasing the property, the plaintiffs cleared nine acres and advertised the lands as a site suitable for caravans and campers. The plaintiffs' application to the district planning authority for a license to use some of the lands as a caravan site was denied.

[126] The plaintiffs asked the court for a declaration that either 72 acres or alternatively 35 acres of Warren Farm was eligible for a licence. The trial judge declared that the plaintiffs were entitled to a site licence for the 9 cleared acres. On appeal, the court found that the 9 acres of declared lands were the trial judge's own invention and there was no attempt to lead evidence to prove anything smaller than the portions actually claimed in the statement of claim.

[127] Harman L.J. of the English Court of Appeal described the plaintiffs' cross appeal as follows at pp. 553-554:

> … 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 … of the stationing of caravans (a) on the area immediately to the south of the farm-house, (b) between it and the sea, and (c) round about the first pylon carrying the electric power line to the house. 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 seventy-two acres or the thirty-five acres as a whole, and I do not think that the remedy by declaration can be properly 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.

[128] The Court of Appeal's reasoning in ***Biss*** echoes the concerns raised by the defendants here. In my view, the plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks.

[129] I am bound by the conclusions reached by the Supreme Court of Canada in ***Delgamuukw***. I conclude that the reply argument Appendices 1A and 1B are a reframing of the plaintiff's case. The case is framed as an "all or nothing" claim. To allow the plaintiff to now seek declarations over portions of the Claim Area would be prejudicial to the defendants.

[130] I should acknowledge, however, that I have rejected British Columbia's request that I not consider the material in reply Appendices 1A and 1B. I have found the material to be helpful from two perspectives. The first is in an overall assessment of the entire body of evidence on the issue of Tsilhqot'in Aboriginal title. The second relates to the opinions I express on potential Tsilhqot'in Aboriginal title inside and outside the Claim Area. These opinions are not binding on the parties,

but emerge from a consideration of the entire evidentiary record. For these assessments, I have found the plaintiff's method of organizing the evidence in reply Appendices 1A and 1B to be helpful.

5. EVIDENTIARY ISSUES

a. Oral History / Oral Tradition Evidence

[131] Tsilhqot'in was not a written language until the last half of the twentieth century. The history of the Tsilhqot'in people is an oral history, accessed by listening to the stories and legends told by Tsilhqot'in people. The listener is taught how the land was formed; the need to respect the land and all it has to offer; the bond between plants, animals and people; the rules that must be followed and the consequences of failing to follow those rules; places and events that shape the lives of Tsilhqot'in people; and all those matters of importance that provide substance and meaning to the life of a Tsilhqot'in person.

[132] The absence of a Tsilhqot'in written record raises a number of evidentiary challenges. The plaintiff must lead evidence about a pre-contact Aboriginal society "across a gulf of centuries and without the aid of written records": ***Mitchell v. M.N.R.***, [2001] S.C.R. 911, 2001 SCC 33 at para. 27. Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition

evidence presented in these cases, courts must undergo their own process of de-colonization.

[133] This process requires a court to not only "peer beyond recorded history" but also to set aside some closely held beliefs about the reliability of oral history evidence. The Supreme Court of Canada provided some general direction on the use of oral history and oral tradition evidence in ***R. v. Van der Peet***, [1996] 2 S.C.R. 507 at para. 68:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[134] In ***Delgamuukw*** (S.C.C.), at para. 80, Lamer C.J.C. repeated those words and emphasized that the evidence must not be undervalued merely because it does not conform precisely to existing or traditional evidentiary standards. He continued at paras. 81-82 as follows:

> The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by "their bridging of aboriginal and non-aboriginal cultures" (at para. 42). Accordingly, "a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law"

> such that "[t]rue reconciliation will, equally, place weight on each" (at paras. 49 and 50).
>
> In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" (at para. 49). Both the principles laid down in *Van der Peet* – first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit – must be understood against this background.

[135] The description of Aboriginal oral history found in the *Report of the Royal Commission on Aboriginal Peoples* (1996), Vol. 1 (*Looking Forward, Looking Back*), at p. 33, and quoted by Lamer C.J.C. in ***Delgamuukw*** at para. 85, bears repeating here:

> The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one – and not necessarily the most important – element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.
>
> In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. . . .
>
> Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are "facts enmeshed in the stories of a lifetime". They are also

> likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

[136] In a fact-driven process, such as the determination of Aboriginal rights and title, one must sift through the layers of oral history and oral tradition evidence with an awareness of context and an appreciation of the role of that tradition within Aboriginal society. Lamer C.J.C. addresses this process at paras. 86-87, as follows:

> Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only "as a repository of historical knowledge for a culture" but also as an expression of "the values and mores of [that] culture": Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations." The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial -- the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.
>
> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui*, *supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on

> aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis…

[137] Many of the oral histories and oral traditions I was privileged to hear in this case were woven with history, legend, politics and moral obligations. This form of evidence is a marked departure from the court's usual fare and poses a challenge to the evaluation of the entire body of evidence. Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the "truth" which lies at the heart of the oral history and oral tradition evidence can be much more elusive.

[138] In ***Mitchell***, McLachlin C.J.C., at para. 33, said the following:

> The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonable reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

[139] The foregoing observations by McLachlin C.J.C. provided the foundation for my decision in ***William v. British Columbia*** 2004 BCSC 148. I concluded that a central question on the admissibility of hearsay evidence was the issue of reliability. To provide the defendants with the opportunity to test the reliability of oral evidence proffered by the plaintiff, I established a procedure that was followed by counsel whenever a witness was expected to give oral history or oral tradition evidence.

Now that this evidence has been heard, the more difficult issue of evidentiary weight must be addressed.

[140] Jan Vansina is an anthropologist and a leading authority on oral history and oral tradition evidence and the role it can play in historical reproduction. Vansina was accepted as an authority by both John Dewhirst for the plaintiff and Dr. Alexander von Gernet for Canada, the two experts who provided opinions on oral history and oral tradition evidence at trial.

[141] In his seminal work, *Oral Tradition As History* (Madison: The University of Wisconsin Press, 1985), Vansina makes a distinction between oral history and oral tradition. There is a very helpful explanation at pp. 12-13:

> The sources of oral historians are reminiscences, hearsay, or eyewitness accounts about events and situations which are contemporary, that is, which occurred during the lifetime of the informants. This differs from oral traditions in that oral traditions are no longer contemporary. They have passed from mouth to mouth, for a period beyond the lifetime of the informants . . .
>
> . . .
>
> As messages are transmitted beyond the generation that gave rise to them they become oral traditions . . .

[142] At pp. 27-28, Vansina defines oral traditions as follows:

> We are now ready to define oral traditions as verbal messages which are reported statements from the past beyond the present generation. The definition specifies that the message must be oral statements spoken, sung, or called out on musical instruments only. This distinguishes such sources not only from written messages, but also from all other sources except oral history. The definition also makes clear that all oral sources are not oral traditions. There must be transmission by word of mouth over at least a generation. Sources for oral history are therefore not included. On the other hand the definition

> does not claim that oral traditions must be "about the past" nor that they are just narratives . . .

[143] Appellate Courts, including the Supreme Court of Canada, have used the terms oral history and oral tradition interchangeably. In situations involving claims for declarations of Aboriginal title and rights, it would appear that the evidence tendered includes both oral tradition and oral history evidence. However, it is the oral tradition evidence in Aboriginal rights and title cases which may be the only available evidence relating to an event or situation which occurred prior to sovereignty assertion or first contact.

[144] Oral traditions about a pre-sovereignty event (for example) pass through a chain of transmission to the present day. Vansina discusses this chain and its implications at p. 29 of his text:

> The first and simplest model supposes that an observer reported his experience orally, casting it in an initial message. A second party heard it and passed it on. From party to party it was passed on until the last performer, acting as informant, told it to the recorder. A chain of transmission exists in which each of the parties is a link. From the definition . . . it is evident that to a historian the truly distinctive characteristic of oral tradition is its transmission by word of mouth over a period longer than the contemporary generation. This means that a tradition should be seen as a series of successive historical documents all lost except for the last one and usually interpreted by every link in the chain of transmission. It is therefore evidence at second, third or nth remove, but it is still evidence unless it be shown that a message does not finally rest on a first statement made by an observer. It cannot then be evidence for the event or situation in question, even though it still will be evidence for later events, those that gave rise to the "false" message.

[145] Vansina also points out that the transmission is not a communication from "one link in one generation to a link in the next one". Rather, "the transmission really

is communal and continuous": Vasina, p. 30. Oral traditions and their communication are a vital part of Tsilhqot'in society. They are told and retold while hunting or fishing, at camp, at gatherings or at home. As Chief William testified: "that's the only way that we were Tsilhqot'in".

[146] Applying Vansina's definition, the evidence tendered by the plaintiff can be characterized as both oral tradition and oral history evidence. The oral tradition evidence consists of verbal messages from the past beyond the present generation. Examples of this type of evidence include: descriptions of how and where the ?Esggidam (ancestors) participated in seasonal rounds; evidence of the locations of cultural depressions (the visible remains of Tsilhqot'in dwellings) that are understood to be created by the ?Esggidam; evidence about the formation of particular landmarks; and legends such as Lhin Desch'osh. These reported transmissions are communal and continuous. Other evidence can be characterized as oral history evidence. Examples of oral history include evidence of when a witness participated in seasonal rounds and how he or she learned from parents or grandparents about how to construct and live in traditional shelters.

[147] Although oral traditions are continuous, unlike written documents they may change through their transmission. Vansina discusses this key distinction between oral and written accounts at pp. 195-6:

> Oral and written sources differ with regard to the subjectivity of the encoder of the message. Oral sources are intangible, written sources are tangible. Tangible sources survive unaltered through time and are defined by their properties as objects. If they can be dated, they testify directly to the time of their manufacture. In this, a written source participates in the advantage of an archaeological source or an ancient

> monument. Nothing has altered the source since it was made, and because written sources are the only ones which are both messages and artifacts, the subjectivity of the encoder of the message is clear and unaltered since the time of writing. Copyists can add or subtract from the original message and add yet another interpretation to the message, but even there the sum of interpretations ends at the date of writing. Hence the concern of scholars with originals and contemporary, "first hand" written data. Here subjectivity is reduced to a minimum: an interpretation encoding the message at the time of the event and an interpretation of the decoder, the historian.
>
> When sources are intangible, such as oral tradition, . . . they must be reproduced from the time of their first appearance until they are recorded. . . . That means that they accumulate interpretations as they are being transmitted. There is no longer an original encoding interpretation and a decoding one, but there are many encoding and decoding interpretations . . .
>
> Nevertheless, one should keep in mind that the first encoded message limits the decoder's interpretation. Hence, and however much various successive encoders have altered original messages through selection or interpretation, they were also restrained by the previous interpretations. Such interpretations are therefore cumulative. The one a researcher is confronted with is to a degree a collective interpretation. It is the product of a continuing reflection about the past, the goal of which was not to find out "what really happened," but to establish what in the past, believed to be real, was relevant to the present.

[148] Tsilhqot'in oral traditions come to life within that community. They are told and retold to members of that group within the context of a specific geographical location – Tsilhqot'in territory. How the community interprets those traditions is an unfolding process, based on their environment and culture. The oral traditions demonstrate how Tsilhqot'in people "establish what in the past, believed to be real, was relevant to the present".

[149] Some Tsilhqot'in oral traditions have become written documents after they were recorded by visiting anthropologists. Reading the collection of legends

collected by Livingston Farrand, *Traditions of the Chilcotin Indians* (New York: 1900) and listening to the oral version of particular legends provided by Tsilhqot'in elders at trial, I was able to observe that stories have changed with the passage of time.

[150] Changes in an oral tradition pose a challenge where one seeks to use the evidence provided by that oral tradition to reconstruct the past. Vansina advocates a particular methodology when using oral history or oral tradition evidence for historical reproductions. He states at p. 196:

> It follows that oral traditions are not just a source about the past, but a historiology (one dare not write histriography!) of the past, an account of how people have interpreted it. As such oral tradition is not only a raw source. It is a hypothesis, similar to the historian's own interpretation of the past. Therefore oral traditions should be treated as hypotheses, and as the first hypothesis the modern scholar must test before he or she considers others. To consider them first means not to accept them literally, uncritically. It means to give them the attention they deserve, to take pains to prove or disprove them systematically for each case on its own merits.

[151] Dr. Alexander von Gernet was called as a witness by Canada. He is an anthropologist and ethnohistorian. He was qualified to express opinions in the fields of oral history and oral traditions. His evidence on these subjects has been accepted and relied upon by other courts: see, for example, ***Benoit v. Canada,*** 2003 FCA 236, 228 D.L.R. (4th) 1. Dr. von Gernet wrote two reports for Canada to assist the Court in this case. The first report is entitled *Oral History and Oral Tradition Evidence in the Forensic Reconstruction of Aboriginal History and Practices* (May 2006). This report advocates assessments on a case by case basis. Dr. von Gernet's evidence was that oral history and oral tradition evidence must be assessed by making three distinct inquiries into:

l) The context of the performance in which the oral history is related;

2) The internal coherence of the oral history; and,

3) An external comparison of the oral history with outside sources.

[152] The third branch of this approach calls for some independent corroboration of the oral tradition evidence. Rejecting oral tradition evidence because of an absence of corroboration from outside sources would offend the directions of the Supreme Court of Canada. Trial judges are not to impose impossible burdens on Aboriginal claimants. The goal of reconciliation can only be achieved if oral tradition evidence is placed on an equal footing with historical documents. Oral tradition evidence "would be consistently and systemically undervalued" if it were never given any independent weight but only used and relied upon where there was confirmatory evidence: see ***Delgamuukw*** (S.C.C.) at para. 98.

[153] Canada says it is not their position, nor the position of Dr. von Gernet, that oral tradition evidence can only be given weight when it is corroborated by documentary or archaeological evidence. Corroboration will, of course, increase the ability of the court to assess historical factual accuracy. However, when oral history cannot be corroborated, it may still bear independent weight and the court must do its best to evaluate its strengths and weaknesses. Canada submits that, even where oral tradition is contradicted by documentary evidence, oral tradition evidence may still prevail and assessments must be made to gauge which, on a balance of probabilities, is more plausible. Such an approach is in keeping with the directions set out by the Supreme Court of Canada.

[154] Despite what Canada has argued, I was left with the impression that Dr. von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. This approach is not legally sound. Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Dr. von Gernet, it would fall into legal error on the strength of the current jurisprudence.

[155] Dr. von Gernet also presented a second report entitled *Analysing Tsilhqot'in Oral Traditions.* In this report, Dr. von Gernet assessed the oral tradition evidence submitted in this case. At p. 4, he explains his role in this regard was "to assist the Court in assessing whether, or to what extent, oral tradition evidence is useful and reliable in the forensic reconstruction of an actual past, without in any way usurping the Court's function of assessing the credibility of the witnesses through whom such evidence has been tendered." Dr. Von Gernet arrived at two conclusions at pp. 91-92:

> Many, but by no means all, of the Tsilhqot'in personal narratives or oral traditions are rich in detail and internally consistent with each other. Here, as in many other cases, some elements of the traditions may be used either independently or in concert with other evidence to reconstruct the lifeways of people in the past, at least in the short term.

> The problem is that, while they may be reliable in some respects (such as a record of certain traditional fishing or hunting practices), in this instance, they are not a reasonably reliable historical record of the actual use of particular locations at or prior to 1846.
>
> …
>
> In general, the traditions relating to the "Chilcotin War" are not unlike other Aboriginal traditions about specific nineteenth-century events, in that they likely contain at least some independent information about what actually happened, together with modern inferences about why things happened. Once again the problem is the use to which they are now being put. Having examined the Tsilhqot'in oral traditions about this war, it is my opinion that this corpus does not strongly support a theory that the Tsilhqot'in people of 1864 intended to maintain exclusive use and occupancy of the Claim Area, particularly since the story-tellers (including the Plaintiff himself) cite alternate motivations.

[156] While Dr. von Gernet's second opinion concludes with a touch of argument, it is an opinion that has been expressed by others in the course of this trial. While I accept much of what Dr. von Gernet has said, I conclude he would not give oral tradition evidence any weight without some corroboration from an outside source. As I have noted, this approach is not supported by the jurisprudence. When I consider the oral tradition evidence about the Tsilhqot'in War, I believe it does give some support to a theory that the Tsilhqot'in people of 1864 intended to maintain some control over the use and occupation of Tsilhqot'in territory by others. I am called upon to weigh that evidence along with all the other evidence I heard concerning the causes of that historic conflict.

[157] The plaintiff relies upon the evidence of John Dewhirst, a cultural anthropologist. In my preliminary ruling on the issue of oral tradition evidence, I relied on an opinion of Dewhirst that had been filed in affidavit form.

[158] In his affidavit, Dewhirst expressed the view that Tsilhqot'in oral history is maintained primarily by repetition and that Tsilhqot'in people are generally reluctant to relate oral history unless they are confident they are able to accurately recount an event or piece of knowledge. He also said that Tsilhqot'in people have a "subtle and intricate system of cultural checks related to the transmission of oral history". This system includes: (1) repetition between family members providing opportunities to check consistency; (2) caution in relating oral history only if they are confident and certain; (3) deference to those who are more knowledgeable and/or raised in a "traditional way"; (4) recognition by elders of their role to relate oral history to the young; and (5) relating oral histories when engaged in traditional activities at particular places.

[159] Dewhirst acknowledged his work has been influenced by Vansina's approach to the assessment of oral tradition evidence. Dewhirst was much less critical of oral tradition evidence and, contrary to the Vansina approach, less concerned with providing or disproving such evidence "systematically for each case on its merits". He was, however, prepared to give it independent weight and, to that extent, he was following the directions of the Supreme Court of Canada.

[160] Dewhirst was able to check his oral history and oral tradition sources in his geneology work. His efforts to identify the ancestors of the modern Xeni Gwet'in community was of great assistance to the court.

[161] Tsilhqot'in oral history and oral tradition practices are somewhat less formal than those reported in ***Delgamuukw*** (B.C.S.C.). In that case the trial judge was

presented with the *adaawk* and *kungax* of the claimant First Nations, which Lamer C.J.C. described, at para. 93, as follows:

> The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge, at p. 164, as a "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House". The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the adaawk and kungax is underlined by the fact that they are "repeated, performed and authenticated at important feasts" (at p. 164). At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax.

[162] The trial judge in ***Delgamuukw*** was also called upon to consider oral history evidence, which he characterized as "recollections of aboriginal life." He also considered the "territorial affidavits", affidavits sworn by claimant group chiefs attesting to the territorial holdings of each Gitksan or Wet'suwet'en House.

[163] Tsilhqot'in oral history and oral tradition evidence can loosely be grouped into three categories. The first category, constituting the majority of the oral history evidence, can be generally characterized as "recollections of aboriginal life" as that heading was described in ***Delgamuukw***. Evidence in this category consists of a witness's account of what he or she learned from deceased individuals within the community concerning genealogy or traditional activities and practices, including land use.

[164] The second category consists primarily of a witness's version of legends and stories about events from the more distant past – oral traditions said to be shared by the larger community.

[165] The third category relates to specific historical events. I include in this category: the Tsilhqot'in War, an encounter with the "Qaju" or Homalco people on the slopes of Potato Mountain and the forced removal of Edmund Elkins from Lhiz Bay Biny to the Elkin Creek area.

[166] Oral traditions differ from Aboriginal nation to Aboriginal nation. Even within an Aboriginal group, the oral traditions of the community may be handed down across generations in a variety of ways. Some of these mechanisms of transmission may be highly formalized and structured, others entirely without form or structure.

[167] The Tsilhqot'in method of oral transmission is an expression of their non-hierarchical society and culture. While elders (and in some instances, particular elders) are recognized as having more expertise in the relating of oral history and traditions, there are no formally recognized experts within Tsilhqot'in society. Nor does an individual require community permission or authority to relay oral traditions. Some elders said that story tellers would be corrected if the story were told incorrectly. Others did not accept that proposition. Some elders said that certain oral traditions (myths and legends) could only be told after sunset, others disagreed. Those witnesses who would not tell stories until after the sun had set were accommodated by the Court holding special evening sittings. Other witnesses were comfortable telling the stories during the normal daylight sitting hours. Formalities about story telling varied with the witnesses. These differences of opinion on the formalities of story telling do not detract from the weight to be given to the oral histories and traditions.

[168] I agree with the view expressed by Dr. von Gernet that many of the Tsilhqot'in personal narratives or oral traditions are rich in detail and internally consistent with each other. As Dr. von Gernet concludes, some elements of these oral histories and traditions "may be used either independently or in concert with other evidence to reconstruct the lifeways of people in the past, at least in the short term". They are reliable as a record of certain traditional fishing or hunting practices. Contrary to the view he expressed, I find that some oral tradition evidence of Tsilhqot'in people does assist in the construction of a reasonably reliable historical record of the actual use of some portions of the Claim Area at or prior to 1846.

[169] The myths and legends of Tsilhqot'in people connect them to their land. Can these myths or legends assist in any measure to provide historical evidence for the periods that are relevant in this case?

[170] Lhin Desch'osh is a central Tsilhqot'in myth. According to Tsilhqot'in witnesses, it is an account of both their origins as a distinctive Tsilhqot'in people, and of their shared homeland. The version of Lhin Desch'osh (Lendix'tcux) recorded by Farrand in 1897 mentions "Chilcotin country" and provides a rough sketch of some of its most distinctive features, including the Tsilhqox (Chilco River), Tsilhqox Biny (Chilko Lake) and the Dasiqox (Taseko River). The plaintiff invites the court to infer that Tsilhqot'in people were using and occupying these locations for a long time prior to 1897 because the locations were recorded by Farrand in this important and elaborate myth.

[171] In his report Dr. von Gernet expressed the opinion that "a raconteur's identification of his or her source (e.g. grandparent or respected elder), a faithful reproduction, frequent repetition and an assurance that the story is very old, are insufficient to show that we are dealing with a myth related from remote times by a particular culture": von Gernet Report, p. 49. Furthermore, he says at p. 50 that "most of the Tsilhqot'in myths published by Farrand are, *for whatever reason*, essentially the same as those told by other peoples, are fragments of longer myths told elsewhere, or are local adaptations of a standard repertoire".

[172] The evidence I heard leads to the conclusion that a variation of this story is part of the repertoire of many North American Aboriginal groups. The references to local geography are adapted to suit local conditions. One witness told the court that the Toosey people have different and fewer "stone dogs" – referred to in Lhin Desch'osh - than the Xeni people. Dr. von Gernet noted that the Secwepemc (Shuswap) version of the Lhin Desch'osh myth (told to Farrand eight years before he visited Tsilhqot'in people) contains references to specific locations within Secwepemc territory.

[173] The commonality between the oral traditions of North American Aboriginal groups is not surprising. The Tsilhqot'in people share a common ancestry with other Athapaskan people. There was also an active trade system between neighbouring Aboriginal groups which provided an opportunity to communicate stories and legends. As groups of people migrated and shifted their geographical locations, the details of the stories and legends also shifted to match the groups' current subjective experience. This gradual shift makes it difficult, if not impossible, to place an

accurate time depth on a peoples' arrival in any particular area based on the details contained in myth or legend.

[174] The legend of Ts'il?os and ?Eniyud tells of the origin of Ts'il?os (Mount Tatlow), of ?Eniyud Dzelh rising to the west of Talhiqox Biny (Tatlayoko Lake) and of the planting of wild potatoes throughout Tsimol Ch'ed (Potato Mountain) and Xeni (Nemiah Valley). Tsilhqot'in people rely upon this legend to assert that they have occupied these spaces since the origins of the land itself. I do not challenge the sincerity of these beliefs. However, neither this legend nor the legend of Lhin Desch'osh can be taken as evidence that Tsilhqot'in people used or occupied those locations from the beginning of time.

[175] However, given the ages of some witnesses who recounted the legend of Lhin Desch'osh for the court, and understanding that Farrand heard the legend from Tsilhqot'in people in the late nineteenth century, I am satisfied that the legend was developed before first contact with Europeans and well before fur traders of the HBC visited the Claim Area in the second quarter of the nineteenth century. Farrand does not report hearing the legend of Ts'il?os and ?Eniyud. However, I am satisfied that legend shows territorial familiarity of Tsilhqot'in people stretching back several generations into the eighteenth century.

[176] The most detailed version of the story of Lhin Desch'osh was presented as a written exhibit, as recorded in Livingston Farrand's 1900 publication, *Traditions of the Chilcotin Indians*. I heard many elders relate portions of the legend of Lhin Desch'osh, a legend that is said to be a Tsilhqot'in creation story. The story, as told

to me in court, was consistent in theme and lesson but lacked consistency in detail. Herein lays an excellent object lesson.

[177] There is a natural tendency to view Farrand's account and conclude that much has been lost in the ensuing century. But I do not know how Farrand collected and constructed his version of the legend. I do not know how many Tsilhqot'in people he interviewed. I do not have evidence as to whether he accurately recorded or indeed, if he took any literary licence. If all the oral versions of Lhin Desch'osh available today could be recorded and compiled as a single version, how would that document compare with Farrand's account?

[178] This points to the conclusion that it is not details that need close examination. If the legend is to establish "what in the past, believed to be real [is] relevant to the present", I must be sensitive to the fact that I am listening to "a communal and continuous communication" and it is the underlying theme or lesson that provides consistency to the legend. Thus, as a listener, I must gather up the fragments of this collective story and seek to determine what, if anything, it tells me about the presence and activities of Tsilhqot'in people in the Claim Area pre-contact and at the time of sovereignty assertion.

[179] Anthropologist Robert Lane spent approximately 12 months living with and studying Tsilhqot'in people between 1948 and 1951. His recordings of Tsilhqot'in oral histories during those years are a valuable record against which to consider the oral histories adduced at trial.

[180] A review of Lane's work indicates there may be some loss of Tsilhqot'in oral traditions concerning the presence of other Aboriginal people in the Claim Area. In his article entitled "Chilcotin", included in Volume 6 of the *Handbook of North American Indians*, (Washington: Smithsonian Institution, 1981), Lane recounted the following oral tradition from his Tsilhqot'in informants at p. 402:

> Many older Chilcotins believed that other peoples once lived in parts of what is now Chilcotin territory and that the Chilcotin at that time occupied the drainage system of the Chilcotin River above where it joins the Chilko River and perhaps the upper Nazko River. They believed that the Bella Coola once controlled most of the habitable lands along the east front of the Coast Range south of Anahim Lake. Salish people lived around the headwaters of the Homalco River. The main valley of the Chilcotin River was the home of a semi-mythical people, the ?enaycel 'little Salishan(s)' who lived in pit houses and subsisted on salmon. The Chilcotin entered the valley, scared the ?enaycel away, and took over the salmon fishery.

[181] During the course of this trial, some witnesses provided oral tradition evidence about the ?Enaycel (Little Salishans or little Shuswap). However, many of the Tsilhqot'in witnesses did not relate stories regarding the ?Enaycel when asked about past residents of the Claim Area and some denied that others had ever occupied the Claim Area. I did not hear any oral tradition evidence regarding the Nuxalk (Bella Coola) controlling much of the habitable lands along the east front of the Coast Range south of Anahim Lake. I am not able to say if this area referred to by Lane would be inclusive of the Claim Area.

[182] In his 1953 thesis entitled *Cultural Relations of the Chilcotin Indians of West Central British Collumbia* (Ph.D. Thesis, University of Washignton, 1953) [unpublished], Robert Lane also recounted Tsilhqot'in oral tradition. Lane described

"Bute Inlet people" coming up to Tsilhqox Biny and building 'salt water' houses and canoes and attempting raids, at p. 91. According to Lane's informants, the Bute Inlet people stayed on the lake for several years and the Tsilhqot'in "simply avoided the lake at this time": thesis, p. 91. I did not hear any oral tradition evidence concerning these "salt water houses". There is nothing in Lane's work that would date the presence of these structures. By the time Alfred Waddington began the construction of his failed overland route to the gold fields, the historical record leads to but one conclusion: the Homalco people living at Bute Inlet feared the Tsilhqot'in and were reluctant to venture into Tsilhqot'in territory. I did hear oral tradition evidence recounting the killing of Tsilhqot'in young women on Tsimol Ch'ed by the Qaju (Homalco) and the subsequent reprisal attack and running off of these invaders by Tsilhqot'in warriors. However, there is certainly no historical evidence before me supporting the presence of Homalco people on Tsilhqox Biny.

[183] Another set of Tsilhqot'in oral histories, described by Lane, that I did not hear at trial are accounts of non-Tsilhqot'in pit houses in and around the Claim Area. In his 1953 thesis, Lane distinguished between two types of pit house sites: "relatively large sites with numerous closely spaced pits . . . located along the Chilcotin River or at the lower ends of large lakes in the western part of the country"; and small, widely scattered pit house sites with only a few pits in each site and located far away from the Chezqox (Chilcotin River): at p. 275. He concluded that the large sites were not Tsilhqot'in, based in part on Tsilhqot'in oral history:

> The Chilcotin deny that they are Chilcotin sites or that the Chilcotin had ever wintered along the river. At least one of the important large sites is in territory which informants claim was never occupied by Chilcotin

> . . . Furthermore, informants who deny Chilcotin occupation of the large river sites specifically identify them as Little Shuswap.
>
> On the other hand, the Chilcotin do claim as their own the isolated lake pit house sites. The size of these sites is consistent both with knowledge of Chilcotin patterns of living and with the assumption that pit houses were only recently adopted by the Chilcotin. A few of these sites or pits can be associated with specific families.

[184] Lane mapped the pit house sites that he was told about by Tsilhqot'in informants on Map 2 of his thesis at p. 36. He also indicates whether the pit house sites were said by Tsilhqot'in people to be Tsilhqot'in or non-Tsilhqot'in. In doing so, Lane noted that he visited few of the sites and made no methodical survey of them. It follows that he relied almost entirely on Tsilhqot'in oral history and oral traditions in this regard. Many of the sites identified as non-Tsilhqot'in by Lane (based on Tsilhqot'in oral tradition) are in and around the Claim Area and, more specifically, at the north end of Tsilhqox Biny and along the Tsilhqox.

[185] The Tsilhqot'in oral history and oral tradition evidence attributes pit house sites in the Claim Area to the ?Esiggidam. Many witnesses specifically refuted the notion that other Aboriginal groups may have lived in the area and built or lived in any of the pit houses in and around the Claim Area. For example, Theophile Ubill Lulua stated that he had only heard of Tsilhqot'in people living in pit houses "around here" and that he had never heard that any other people were in "these territories".

[186] Martin Quilt testified that he was told stories about "Little Shuswap" living near Tl'egwated (Kigli Holes) and building big pit houses. However, he still attributed all the pit house sites that he knew about to Tsilhqot'in people.

[187] I acknowledge the archeological record is clear that some of the pit houses in the area are of a non-Tsilhqot'in origin. When I weigh the entirety of the evidence including: Lane's work, the oral traditions I heard at trial, the archeological and anthropological evidence, and the historical evidence; it does not reveal to me the presence of any other Aboriginal group in the Claim Area in the late eighteenth or early nineteenth century. I am not able to conclude that relevant oral traditions were kept from me during the course of this trial. I heard what was available to be heard.

[188] Finally, I heard no oral tradition evidence concerning the migration of Tsilhqot'in people to the Claim Area. The evidence at trial was Tsilhqot'in people had lived in the region and in particular the Claim Area from the beginning of time. Doris Lulua said they had been there "ever since the earth began". Martin Quilt testified the Tsilhqot'in people came from in and around the Claim Area and had not moved there from some other location.

[189] In his 1981 article, Robert Lane wrote, at p. 402, that "Their own recollections carry no hint of such a move. They have no traditions of migration or of the origin of themselves as a people". Similarly, the early ethnographer James Teit was unable to obtain any tradition of a migration of Tsilhqot'in people to the southeast.

[190] In contrast, external sources consistently state that Tsilhqot'in people moved into the area in the not so distant past. Again, in his 1981 article at p. 402, Robert Lane wrote that "[t]he Chilcotin probably moved from a more northerly region onto the Chilcotin plateau in the not too distant past". He was inclined to place their move to their present location to a "very late date" and quite possibly linked to the

movements of various Aboriginal groups taking place across Western Canada in the mid-eighteenth and early nineteenth centuries: Lane Thesis, p. 279.

[191] Both James Teit and Livingston Farrand document the centre of the Tsilhqot'in community shifting from the Anahim Lake area down to the Chilcotin River Valley in the 1860's. Tsilhqot'in oral traditions do not record a migration into the Claim Area. As a result, I must look to other evidence to reconstruct this piece of the past.

[192] I have also considered the reliability of Tsilhqot'in oral history evidence in the context of the story told about the death of Chief Sil Canem. This Tsilhqot'in oral history is contradicted by external sources. Chief Roger William testified about a persistent oral history among members of the Xeni Gwet'in that Chief Sil Canem was murdered in 1932 in order to prevent his securing Xeni as an Indian reserve. According to the oral history, Sil Canem had a paper by which the Federal Government set all of Xeni as a reserve but, before he could accomplish this goal, he was murdered by Andy George who had been hired by one of the Purjue brothers.

[193] This oral history account concerning Chief Sil Canem is not confirmed by any external source and, in fact, is contradicted by the results of a coroner's inquest that described Chief Sil Canem as dying by falling in a fire, without mention of Andy George or any other act of murder.

[194] One must always bear in mind that the reports to the Coroner might not be accurate. They are only as reliable as the evidence the Coroner received.

Disrespect for Aboriginal people is a consistent theme in the historical documents. At this point in time, there is no way to reinvestigate this death to determine what actually happened. It is noteworthy, in passing, that a "conspiracy theory" about particular important events appears commonplace even within modern nation states.

[195] I also did not hear any oral tradition evidence concerning the arrival of HBC people and the construction of Fort Chilcotin. HBC records lead one to conclude that the HBC was deliberately established in Tsilhqot'in territory to facilitate trade with Tsilhqot'in people. Nothing concerning its arrival or departure was considered significant enough from the Tsilhqot'in perspective to report these events from one generation to another. There are oral traditions concerning the visits of priests but they lacked any detail beyond the fact of the visits. There are also oral traditions that related to the events of the Tsilhqot'in War of which I will have more to say later.

[196] I am satisfied that all of the witnesses who related oral tradition and oral history evidence at trial did so to the best of their abilities. The central theme and lessons of the legends remained consistent. I propose to take this entire body of evidence into account and to the extent that I am able, consider it from the Aboriginal perspective. If the oral history or oral tradition evidence is sufficient standing on its own to reach a conclusion of fact, I will not hesitate to make that finding. If it cannot be made in that manner, I will seek corroboration from the anthropological, archeological and historical records. I understand my task is to be fair and to try to avoid an ethnocentric view of the evidence.

b. Historical Documents

[197] A comprehensive record of historical documents has been tendered in these proceedings. The records span the period from the eighteenth to the twenty-first centuries. It is surprisingly comprehensive, providing rich and informative details and insight on particular events.

[198] The historical record includes the journals of early explorers of what was to become the Province of British Columbia. For example, there are extracts from the journals of Captain George Vancouver, Alexander Mackenzie and Simon Fraser.

[199] Western Canada is the repository of the most complete records of first contact between Europeans and Aboriginal peoples anywhere in the world. This record is contained in the detailed journals kept by the Officers and Gentlemen of the HBC. Copies of the relevant journals, where available, form a valuable part of the record of this trial.

[200] The fur traders were followed by Christian missionaries. Once again, where relevant and available, copies of the journals of missionary priests are part of the trial record. The arrival of missionaries had a profound and lasting impact on Tsilhqot’in people, many of whom embraced a new form of spirituality. The records of these early Christian missionaries make an important contribution to our understanding of this time in the history of British Columbia.

[201] Some years later, railroad surveyors met and interacted with Tsilhqot'in people. The surveyors recorded their observations and opinions in journals that also form part of this trial's extensive record.

[202] There are also copies of reports, correspondence and newspaper articles spanning a 250 year period. The written work of scholars who studied and reported on this record has also been of great assistance.

[203] There is always a Eurocentric tendency to look for and rely on the written word. Try as one might, it is difficult to read these words and not see in them events as they really were. To follow this path in a trial of this nature would relegate oral history and oral tradition evidence to some lesser level of importance, contrary to the directions of the Supreme Court of Canada. Important as the historical documents are, I have attempted at all times to give equal weight to the oral history and oral tradition evidence.

6. HISTORICAL NARRATIVE

[204] What follows is not a comprehensive history of the Chilcotin Region of British Colombia. It is a sketch of the important events that have occurred in this area. It is intended to place the events of this trial and this judgment in an historical context.

[205] As one might expect, the historical and pre-historic record of this part of British Columbia was not written by the Tsilhqot'in, but by Europeans and, subsequently, Euro-Canadians. Accordingly, it is important to consider Tsilhqot'in oral history to balance and complete the picture.

a. Pre-Historic Period

i. *Dene/Athapaskan Migrations*

[206] There is some disagreement over the exact pathway and timing of early migrations into North America. Many archaeologists agree that the Nadene people arrived in North America approximately 10,600 radiocarbon years Before Present (BP). During the thousands of years following this migration the Nadene people diversified into many different cultures. Their subsequent migrations into different parts of North America led to the development of technologies and lifestyles suited to particular geographic locations.

[207] Members of the Athapaskan language group are descendents of the Nadene people. Between 500 and 800 years ago, Tsilhqot'in people began to diverge (linguistically) from other Northern Athapaskan people.

[208] Prior to the arrival of Athapaskan speaking people, the Chilcotin Region was populated by members of the Plateau Pithouse Tradition (PPT). Archaeologist Dr. Richard Matson was called as a witness for the plaintiff. He was qualified to express opinions concerning the length of time Tsilhqot'in people have been in the Claim Area. Dr Matson conducted field research on several different locations in the Chilcotin Region. One of those locations was within Tachelach'ed (Brittany Triangle). The other two locations were within the Trapline Territory. He determined that the PPT people commenced living on the Chilcotin Plateau approximately 2,000 years Before Present. The PPT people ceased occupation in that area sometime after 1400 AD but before 1500 AD.

[209] The PPT is characterized in part by the pit house winter dwelling. The pit house is an elaborate structure. Most of the dwelling is below ground. A roof is built over the structure and is then covered with earth. These dwellings were usually assembled together in large groups close to a water source such as a river or lake.

[210] The PPT people who lived in the Chilcotin Region may have spoken a variation of the Salish language.

[211] What caused the PPT people to leave the Chilcotin Region is a mystery. Dr. Matson was unable to say where the PPT people went, or if people in neighbouring areas are descendents of these PPT people.

[212] Pit house remains are located by the Chezqox (Chilcotin River) on the Chilcotin Plateau in Tachelach'ed and elsewhere in the Claim Area. Tsilhqot'in people associate some of these sites with a people known as the ?Ena Tsel (Little Shuswap).

[213] As previously noted, Robert Lane, in his unpublished 1953 Ph.D. dissertation, noted that Tsilhqot'in elders recognized that a number of the areas more recently occupied by Tsilhqot'in people were previously inhabited by other groups.

[214] The chasing of the ?Ena Tsel from the Tsilhqox (Chilko River) corridor, particularly in the area of Tl'egwated (Kigli Holes), was raised by more than one Tsilhqot'in witness in the course of the trial.

[215] Tsilhqot'in oral traditions describe the ?Ena Tsel as a group of people with a short stature (3 or 4 feet tall), who spoke a language Tsilhqot'in people did not

understand. According to these traditions the ?Ena Tsel lived in pit houses along the Tsilhqox. Some of the oral tradition evidence suggests that Tsilhqot'in people killed the ?Ena Tsel. Other oral tradition evidence suggests Tsilhqot'in people drove them away. The oral traditions do not explain where the ?Ena Tsel went and deny that the Stl'atl'imx (Lillooet), Nuxalk (Bella Coola), Secwepemc (Shuswap) are descendants of the ?Ena Tsel.

[216] At around the disappearance of the PPT people, Athapaskan speaking people migrated into the region. Dr. Matson was unable to say with certainty whether these Athapaskan speaking people were Tsilhqot'in people or whether they were another Athapaskan people such as the Dakelh (Carrier). However, Dr. Matson assumed these people were Tsilhqot'in people based on Tsilhqot'in present occupation.

[217] Athapaskan people traditionally built rectangular winter lodges consisting of a single ridgepole and combined roofs and walls to form an "A" shaped cross section. Athapaskan people also traditionally used a distinctive boat shaped hearth. They are also known to have built isolated pit house dwellings, smaller than those built by people of the PPT.

[218] Athapaskan speaking people have populated the Chilcotin Region for hundreds of years. Dr. Matson concluded that Tsilhqot'in people have been in the region since at least 1645 - 1660 AD.

b. Proto-Historic Period

i. Early European Exploration to 1808

[219] Over 500 years ago and before the migration of Tsilhqot'in people to the Claim Area, colonization of North America began with the migration of Europeans to this continent. In the sixteenth century Spanish people explored the continent's western shores. Shrouded in secrecy, Sir Francis Drake departed from Plymouth, England on December 13, 1577. His voyage consumed almost three years and is said to have reached to the shores of what is now British Columbia which he named New Albion: Samuel R. Bawlf, *The Secret Voyage of Sir Francis Drake* (Vancouver: Douglas and McIntyre, 2004).

[220] In 1606 The First Charter of Virginia was signed. In ***R. v. White and Bob*** (1964), 52 W.W.R. 193, 50 D.L.R. (2d) 613 (B.C.C.A.), Norris J.A. said at p. 641:

> In 1763 the full extent of the continent was not known, but the territories comprising it had been claimed by the British at least from the time of the Charter of Virginia in 1606 (C. M. Andrews, *Colonial Period of American History*, 1943, pp. 82-8).

[221] In approximately 1745 a Tsilhqot'in war party destroyed the Dakelh village of Chinlac located at the confluence of the Stuart and Nechako Rivers, north of the Claim Area. The massacre was in retaliation for the death of a Tsilhqot'in leader. Three years later, in approximately 1748, a large number of Tsilhqot'in people were killed by Dakelh warriors in revenge for the Chinlac massacre.

[222] In the eighteenth century, exploration of the coastal regions of the Province had begun, led by the Spanish traders Juan Perez and Juan Bodega y Quadra in 1774 and 1775 respectively. They were followed by British Captain James Cook in 1778. The East India Company sent two trade expeditions to the West Coast in search of furs: the first in 1785, the "Sea Otter" under the command of Captain James Hanna; and the second in 1786, the "Experiment" under the command of Captain James Strange.

[223] In that same year, Captain John Meares made his first of several voyages to the West Coast to trade with coastal Aboriginal people for sea otter pelts. At the same time, he formally annexed the Strait of Juan de Fuca in the name of the King of Britain, not unlike other navigators who had preceded him in this area.

[224] In 1785 an expedition was sent by the King George's Sound Company to develop trade with the inhabitants of the American northwest coast. The leaders of the voyage, Captains Nathaniel Portlock and George Dixon commanding the “King George” and the “Queen Charlotte”, had previously accompanied James Cook between 1776 and 1780. They left England in 1785 and explored and traded along the Pacific coast of Canada between Cook's River and Nootka Sound in 1786. After selling their furs in China in 1787, they arrived back in England in 1788.

[225] On June 4, 1792 Captain George Vancouver stepped ashore and claimed all of the land of what was later to become British Columbia on behalf of the British Crown.

[226] In 1793 Sir Alexander Mackenzie recorded the fact that he had reached the Pacific by inscribing his achievement on a rock face near Bella Coola. That same year Captain George Vancouver sailed by that rock face on his historic voyage. He demonstrated that Vancouver Island was separated from the mainland, and provided future generations of mariners with accurate maps of the northwest coast.

[227] These Spanish and English explorers made contact with coastal Aboriginal people during their voyages. The interior of what is now British Columbia was known as New Caledonia to the European fur traders. Trade between Aboriginal people on the West Coast and their neighbours to the east resulted in European goods arriving into this interior region before the first European visitor.

[228] The British reconnaissance of part of New Caledonia was led by Sir Alexander Mackenzie. On July 15, 1793 Mackenzie met with a small party of Aborignal people in North Bentinck Arm, northwest of the Claim Area. These people were taking hides to the coast for trade. There is divided opinion on whether any of the Aboriginal persons at that meeting were Tsilhqot'in people. When describing the people he met, Mackenzie sometimes made use of designations that have not continued in the historical record beyond his account, and it is possible that one of these groups could have included Tsilhqot'in people.

[229] In that same year, the Treaty of Paris was signed. Under the terms of that document, France ceded of its North American possessions to Great Britain.

[230] Writing in 1900, James Teit noted that "about a hundred years ago a war-party supposed to be Chilcotin penetrated into the territory of the Shuswap, and

went as far south as the north side of the Thompson River near Spences Bridge". He says that in their retreat, they were "almost exterminated": *The Jesup North Pacific Expedition*, Part IV, ed. by Franz Boas (New York: G. E. Stechert, 1909), at p. 269.

[231] On June 1, 1808 Simon Fraser met "a tribe of Carriers who inhabit the banks of a large river which flows to the right; they call themselves Chilk-hodins". Fraser described the Tsilhqot'in people as being on horseback. On his return trip the following month, Simon Fraser wrote:

> … we found the Old Chief with a large assembly of Atnahs and Chilkoetins [Chikotins]. The latter are from the westward and came on purpose to have a sight of us, having never seen white people before. They had the information of our return from the lower parts of the river by messages across the Country. The Chilkoetins … are from the head of a river [the Chilkotin] … they speak of their Country as plentifully stocked with all kind of animals … (*The Letters and Journals of Simon Fraser*, ed. by W. Kaye Lamb (Toronto Pioneer Books), pp. 124-125).

c. Historic Period

[232] The North West Company opened Fort Alexandria in 1814. The fort was named after Sir Alexander Mackenzie. Fort Alexandria was located in Dakelh country and was a central trading post in the region. Originally, the fort was located on the Fraser River about 30 km north of Soda Creek. After the merger of the North West Company with the Hudson's Bay Company in 1821, the fort was moved north, up the river to a Dakelh fishing site. Records and correspondence show the fort was moved across to the west side of the river in the hopes of attracting Tsilhqot'in people to trade.

[233] In a letter dated November 28, 1821 John Stuart, the new Chief Factor of the amalgamated Hudson's Bay Company wrote to HBC clerk George McDougall who was stationed at Fort Alexandria suggesting a trading excursion to the “Chilkoutins”.

[234] In January of 1822 McDougall travelled into Tsilhqot’in territory to trade and to explore opportunities for further trade. In a letter to Stuart dated January 18, 1822 McDougall described his trip “to the Chilkotins”. He reported meetings with various “Chilkotin” Indians and his efforts to trade with them. McDougall wrote that they crossed the river and “got to a Lodge where we saw 3 Indians & their Families”. He wanted to trade with them but “they had no Beaver, having worked it all into 3 or 4 New Beaver Robes we seen on their backs”. The next day he traveled “8 or 9 more miles, which brought us to two ground Lodges containing 9 or 10 Families who had a few Furs” but were unwilling to trade because they had made them into “7 or 8 fine New Robes, that must have been made within a month”. McDougall described the “Chilkotins” and their country in the following terms:

> … a fine, brave looking set of Indians, whose lands are far from being poor either, as to beaver or Large Animals, if we can judge from what was told us & that part of their lands which fell under our immediate Eye corroborated a part, which their Dress was still a farther proof of what they told us, the Men being generally well and warmly clad, with good Chevreux, Elk, as well as some Carriboux Skins as Blankets, with good Leggings of excellent Leather, their women … as well the Children are in general covered with good Beaver Robes … from those we seen & who appeared to have some authority among them, we got much information respecting their Country in general … the West side of the River abounds with Lakes & Small Rivers where there is a quantity of Beaver & of almost all kinds of Fish … the East Side … is their favourite hunting grounds for Large Animals, we who saw some moose skins … but it appears that the Carriboux are the most numerous at certain seasons … a Large Lake which they say is about a half a mile broad & takes them two days En Canot [by canoe] to go from the entrance to its extremity …

[235] In his letter, McDougall reported he asked the “Chilkotins” for an estimate of their population and was told that “there are 6 Large Ground Lodges, about the Lake, containing 53 Families … in all along the River 29 Lodges containing 131 Families …”. He concluded that they have “one great Chief & 4 others somewhat respected …”. McDougall also took note that one of the Chilkotins he met:

> … had a Gun, it was one of Barnetts 1808, he says he and several others have had Guns from Indians who came from the Sea, at the extremity of this Lake of theirs, they cross over a Mountain, which portage takes them from 5 to 6 days light, where they fall upon a River running in a Southerly direction & said to empty itself into the Sea.

[236] In 1823 the HBC resolved that a “new establishment ensuing summer be made among the Chilcotin Tribes”: Minutes of Council Northern Development of Pupert Land, 1821-31, ed. by R.H. Fleming (Toronto: Champlain Society, 1940), 5 July 1823, p. 45. For various reasons, several years pass before this establishment was made.

[237] In December of 1825 the new HBC Chief Factor for New Caledonia, William Connolly, wrote in his “Journal of Occurrences New Caledonia District 1825/26” that he made an expedition into Tsilhqot’in territory to determine the feasibility of the proposed Chilcotin Post.

[238] In the winter of 1826 four Talkotin hunters made an excursion into Tsilhqot'in territory and three of the Talkotin were killed by Tsilhqot’in people. This killing was followed by what has been described as a war between the Tsilhqot'in and Talkotin. The Talkotin sent a raiding party from Alexandria on April 19, 1827. They returned with twelve Tsilhqot'in scalps. In response, the Tsilhqot'in sent two groups of

warriors to kill the Talkotin. The first group of 27 Tsilhqot'in warriors arrived near Fort Alexandria in June of 1827. They killed at least one Talkotin traveling from the Fort. A second group of 80 Tsilhqot'in warriors arrived at Fort Alexandria on September 24th. They launched a bloody battle against the Talkotins who were lodged in a fortified house near the fort. In the "Fort Alexandria District Report, 1827", the following was written:

> … the bloody contest would have lasted much longer and probably to the annihilation of the Talkotins had we not given them [the Talkotins] assistance in Arms and Ammunition – which intelligence being conveyed by a Woman – they [the Tsilhqot'in warriors] immediately retreated – some crossing in Canoes (which they had the foresight of seizing) whilst others pursued the route a foot – previous to their departure, they did not refrain from expressing their opinion of our proceedings – breathing vengeance – and threatening to cut off any Whites that might hereafter fall in their way. *Part of Dispatch from George Simpson, Esq. … to the Hudson's Bay Company* (London: Champlain Society, 1947), p. 214.

[239] In approximately 1826 Louis Setah was born in Xeni (Nemiah Valley). In approximately 1827 Old Nemiah was born in Xeni.

[240] In 1829 the HBC opened the Chilcotin Post. The location of Fort Chilcotin was described as being west of Tsulyu Ts'ilhed (Bull Canyon) between the junctions of Tish Gulhdzinqox (Alexis Creek) and the Chezqox with the Tsilhqox. This site is approximately 15 km east of the northern boundary of the Claim Area at the apex of Tachelach'ed. It is in close proximity to the site of three present-day Tsilhqot'in Reserves: about 8 km from the Tletinqox-t'in (Anahim) Reserve on the north shore of the Tsilhqox; approximately 12 km from the Yunesit'in (Stone) Reserve on the

south shore of the Tsilhqox; and, approximately 8 km from the Tsi Del Del (Redstone) Reserve.

[241] HBC faced many challenges in the establishment and operation of their Chilcotin Post. In a letter to George McDougall, dated January 28, 1830, Chief Factor Connolly wrote:

> … no advantage Can accrue from the Chilcotin Establishment during the winter, and Not deeming it safe to continue it for the summer No manner of injury can therefore arise from withdrawing it as soon as possible.

On March 4, 1830 Connolly wrote to "The Govenor In Chief & Council Northern Development". He stated:

> … I would consider it very unsafe to leave a small establishment amongst a people with whom we are not yet much acquainted, and of whose audacity we have sufficient proofs, I in consequence ordered its abandonment …

[242] The post reopened in 1831. In September of that year, several men who were sent to Tsilhqot'in territory "met with a very rough reception. That tribe behaved with much violence and used some menaces towards them, which prevented them from going so far as was intended": 9 October 1831, Fort St. James Post Journal 1831-2. The HBC's ability to respond to the violence was limited. The October 9, 1831 entry in the Fort St. James Post Journal reads:

> … these untoward Events happen when we have neither Gentlemen, men or Provisions to take any Steps to put a Stop to these insults.

[243] In 1838 Chief Allaw ordered the fur traders off his lands. The event is reported in the HBC Chilcotin Post Journal entry (1837-39) for December 23, 1838:

> He set off quit [sic] displeased and, this day, an Indian was sent to me by his order to apprise me that he had forbidden all the Indians to hunt and that he expected we would be off from his Lands immediately, so that they might have the pleasure of burning the Fort, stating that the whites did them no good, Could not smoke when they wished, that the Ft. at this time was always destitute of Trading goods, that we rejected their bad Furs and sold at a high Tariff …

[244] The dispute between McBean and Allaw was not long in being resolved. It appearing from the journals that both men felt the need to exert some authority.

[245] In 1839 Tsilhqot'in people "completely barred the River" downstream from the fort, preventing Fort Chilcotin employees from catching fish: Chilcotin Post Journal 1839-40.

[246] The entry in the Chilcotin Post Journal for May 9, 1839 reports that a raiding party of Ah-Skut (Stl'atl'imx) Indians attacked the Long Lake village. In response to the attack, Tsilhqot'in people gathered together in collective action to repel the Stl'atl'imx people. The Chilcotin Post Journal from May 10, 1839 recorded that:

> All the Indians at Ponts-een have that day started to join the Long Lake Indians to assist these to make a general attack upon the [Ah-Skut] …

On August 2 and 3, the following was recorded:

> All the Indians are assembled at Allaw's Lodge and notice has been sent to the above Villages, and a great number more are expected in the course of the night when, tomorrow, they will all give them a chase … Last night and About day-light, several Bands of armed Indians from Stelah and Tloquotock stopped here on their way to Allaw's Lodge, the place of rendezvous, and today are to give chase upon the enemy.

[247] In June of 1840 Fort Chilcotin clerk William McBean complained that the Tsilhqot'in people preferred to continue their traditional trade with other Aboriginal people, rather than trading with the HBC. In his letter to John Tod, recorded in the ChilcotinPost Journal, he wrote:

> … I wish next to secure the sundry Furs which the Chilcotins have abt. them, & which, from the scarcity of Goods, I have not been able to trade previous to their disposing them shortly to the Atnahyews [Bella Coolans], a Tribe whom they are in the habit of visiting & trading annually … You will bear in mind also that the Estabt. is without defence (destitute of powder & Balls) which, if possible, should be otherwise, owing to the evil disposition of these Inds.
>
> … The Chilcotins take advantage we are depending on them for provisions & ask an enormous price for them ...

[248] In 1840 the Hudson's Bay Company sent a trader from the Chilcotin Post to Long Lake. Upon his return, the Chilcotin Post Journal entry for February 1, 1840 reported an accusation was made that the trader and his associates were responsible for the death of two wives of a Tsilhqot'in person. After chasing his accuser away, the trader's camp was surrounded by "at least a hundred Indians, who seemed disposed to take the Yg. man's part, and approved his conduct." The matter was ultimately resolved with the assistance of Chief Quill Quall Yaw.

[249] On June 29, 1841 Father Demers set out from Fort Vancouver, Washington, to accompany Peter Skene Ogden, Chief Factor of the HBC for New Caledonia, to Fort Alexandria. Father Demers was the first Catholic missionary to travel to the Cariboo/Chilcotin region.

[250] In 1843 the HBC closed the Chilcotin Post, substituting Tluz-Cus in Dakelh territory. In an entry in the Fort Alexandria Journal for October 4, 1842, the following complaint is recorded:

> The Keeping up such a paltry Establishment is, in my humble opinion, a dead loss to the H.H.B.Co. and risking the lives of People placed at it, who are little better than slaves to the Indians, being unable to keep them in check.

[251] I conclude that Fort Chilcotin was closed by the HBC for sound business reasons; in particular, the insufficient trade with Tsilhqot'in people. The decision was also made easier because of the reported friction from time to time between HBC personnel and Tsilhqot'in people. This was in contrast with the welcoming, friendly disposition of the Tluz-cus people.

[252] In advocating for the Tluz-cus location to the HBC Governor Alexander Anderson, the clerk in charge at Fort Alexandria (who was later appointed a Chief Trader) reported in January 1843 that "[t]o maintain the post, owing to the evil disposition of the Chilcotin Indians, and the threatening aspect which their actions frequently assume, an officer and at least two men are necessary": Letter from Anderson to Simpson, 21 January 1843.

[253] In his 1953 Ph.D dissertation, at p. 91, Robert Lane reports: "a few generations ago" there was a raid by Bute Inlet people who killed a number of Chilcotins, but "the intruders were ambushed en route home and wiped out". As well, in the 1840's, the Tsilhqot'in people "killed a group of Homalco fishermen": Lane Thesis, p. 89.

[254] There is oral tradition evidence of an attack by Qaju (Homalco/Kwakiatl) people on a group of young girls on Tsimol Ch'ed that brought decisive retaliatory action by Tsilhqot'in warriors. This may be the same event as was described by Lane.

[255] In 1845 Father Giovanni Nobili, an Italian Jesuit priest, departed Fort Alexandria and journeyed into Tsilhqot'in territory. His detailed letters, dated November 30 and December 27, 1845, indicate that his route took him through part of the Claim Area. Father Nobili's letters confirm the presence of Tsilhqot'in people, the role of chiefs, hunting, trapping and fishing activities, the use of furs, and the presence of Tsilhqot'in structures including lodges and bridges.

[256] On June 1, 1846, Father Nobili wrote a letter reporting on his trip, which is now found in the Jesuit Oregon Province Archives. He wrote, in part, as follows:

> The 24th of October, I visited the village of the *Chilcotins* – this mission lasted twelve days during which time I baptized 18 children and twenty-four adults, and blessed eight marriages. I blessed here the first cemetery, and I buried, with all the ceremonies of the ritual, an Indian woman, the first converted to Christianity. I visited next two other villages of the same tribe …

[257] In 1845 Nancy Setah was born in Xeni.

[258] On June 15, 1846 the Oregon Treaty was signed. This treaty, also referred to as the Treaty of Washington, settled the boundary with the United States at the 49th parallel.

[259] In 1858 the Fraser River Gold Rush commenced.

[260] In 1858 the Colony of British Columbia was created. It consisted of what is now considered mainland British Columbia and did not include Vancouver Island.

[261] In 1859 Chief Dehtus of Anahim attended an inter-tribal meeting near Lac La Hache. Present were a number of European men. The Tsilhqot'in people were led by Chief Dehtus; the Yubatan Dené were led by Chief LoLo; and the Secwepemc people were led by Chief Williams (Willyums) of Williams Lake. The following account was reported by Peter Dunleavy to Alex McInnes, published by Edith Beeson in *Dunlevy From the Diaries of Alex P. McInnes* (Lillooet: Lillooet Publishers, 1971), pp. 634-65. Chief Dehtus is quoted as making the following speech in 1859:

> It makes warm the heart of the Chilcotin … to come to this old time meeting place of the Shuswaps to visit with our brothers the Denés and the Yabatans and our cousins the Shuswaps … These games are the chief attraction, for they keep us strong and brave, eager and fleet, not only for the hunt but to scare away our enemies. It is mainly for this last point that Anahiem of the Chilcotins has come to make talk and consult with his brother chiefs at this meeting … For some time, our scouts have been bringing us news of white men who are coming up our rivers … We have tolerated these men … thinking them to be weak-minded and therefore entitled to the reverent regard which all Indians have for these weak ones as dictated by the Great Spirit. However, we have found out that these men are really not crazy and are washing out little pieces of yellow stone which they call gold and which they use for what we call sunia (money), to use as we use skins to trade for other goods. The Indians of Lillooet have already been corrupted … this sunia really belongs to us and the white men are taking it without asking us for it. The priests tell us this is stealing. If we steal they tell us that their God will punish us. But these whitemen are stealing from us. Will their God punish them for this bad act or have they made a convenient arrangement with this God? Has He one law for the Indian and another law for the whiteman? … We must keep these white men out! … We tribes must act together. If we do not act immediately we will only have to drive them out later. This will result in much bloodshed, for them and also for our own people. We must act now or we are lost!

[262] In 1860 the Cariboo Gold Rush commenced.

[263] In 1861 R.C. Lundin-Brown, an Anglican priest, wrote that "the agent told me of a tribe of Indians who were camping in the neighbourhood [Fort Alexandria] … They were the Nicootlem Indians, a branch of the Chilcoatens, a powerful tribe … whose fishing-grounds extended over the vast tract of country which lies between the northern part of the Fraser River and the Gulf of Georgia": quoted in David Dinwoodie, Expert Report, p. 11.

[264] On January 15, 1861 Jnos. Saunders wrote from Fort Alexandria to P. Ogden, Esquire C. T., the Officer in Charge of New Caledonia District, noting:

> Perhaps it would not be too much trouble to add in the requisition a few more guns and axes, as they are in great demand here and the Chilcotans rather than go without them, trade their furs with the Atnayuhs who procure these goods from the Coast. This I learnt when on my trading trip, and indeed I found the Chilcotans quite independent and threatening that if they did not get goods more to their liking they would trade altogether with the Atnayuhs with whom they are now at peace having formerly been on unfriendly terms towards each other … *(Fort Alexandria Correspondence Book, 31 Aug. 1860 to 12 Aug. 1865)*

[265] In 1861 Alfred Waddington sent Robert Homfray to survey a road from Bute Inlet to Fort Alexandria. Homfray failed to get beyond the Homathko Canyon, where he and his party were rescued and taken into underground pit houses by Tsilhqot'in people who proved unfamiliar with white men. On December 22, 1894, Homfray wrote an article in *The Province* entitled "A Winter Journey in 1861". Here he reported on his meeting:

> The Indian then slackened his hold, lifted up my arms, looked into my mouth, examined my ears, to see if I were made like himself, as he had evidently never seen a white man before.

[266] By the summer of 1862 a smallpox epidemic had struck several Tsilhqot'in sites. Nagwentl'un (Anahim Lake, Nacoontloon) the Tsilhqot'in headquarters of Chief Anaham and his tribe, suffered significant casualties. Smallpox also claimed many victims at Tatl'ah Biny (Tatla Lake) and the areas south and east through to Tsilhqox Biny in the years 1862-3. This epidemic also struck the Secwepemc people. The significant loss of life caused by smallpox resulted in an eastward migration of both Aboriginal populations. Chief Anaham eventually relocated to the present day site of Tsi Del Del.

[267] There was a second significant event in the spring of 1862 when representatives of Alfred Waddington arrived at Bute Inlet. They brought with them plans to make an exploratory expedition inland through Tsilhqot'in territory to Fort Alexandria and the Cariboo region. The *British Colonist* newspaper reported on May 7, 1862 that upon hearing of the presence of Waddington's party at the head of the inlet, several Tsilhqot'in people descended through the Coast Mountains to trade furs.

[268] In 1862 Lt. H. Spencer Palmer of the Royal Engineers surveyed the route from Bentinck Arm to the gold fields on the Fraser River. His reference to Tsilhqot'in people is found at p. 24 of his *Report of a Journey of Survey from Victoria to Fort Alexandria* (New Westminster: Royal Engineer Press, 1863). He said:

> … others who dwell in the mountains, such as the Chilcotins who occupy the country traversed by the fifth and sixth sections of our journey, are seen in a purely savage state of existence, clothed in furs, armed with bows and arrows, in the use of which they are singularly expert, and devoid of all resources but those which the lakes, rivers, prairies and woods supply.

[269] In 1862 Alfred Waddington and the Commissioner of Lands and Works for British Columbia reached an agreement permitting Waddington to build a road to the Cariboo through Tsilhqot'in territory, in exchange for the ability to charge tolls. On May 16, 1862, H.O. Tiedemann departed Victoria for Bute Inlet in a canoe "with the ultimate view to make a Wagonroad, from a Point on the Homathco River…": H.O. Tiedemann, Journal of the Exploration for a Trail from the Head of Bute Inlet to Fort Alexandria in the year 1862. His objective on this trip was to perform an exploratory survey on behalf of Waddington. He arrived in Fort Alexandria on June 25, 1862.

[270] Waddington's exploratory expedition returned from Fort Alexandria to Victoria on July 29, 1862. It appears that Waddington was encouraged by this exploratory work because he had crews begin construction of a road inland from Bute Inlet in September through November of 1862. They resumed their work, proceeding up the Homathko River watershed during April to December 1863. Waddington's road-builders returned to Bute Inlet on March 22, 1864 to continue construction, only to meet their fate as they encroached on Tsilhqot'in territory.

[271] In 1864, after Waddington's men advanced the road several miles into Tsilhqot'in territory, the road crew was killed. This was the first event in what has been characterized as the Chilcotin War. At dawn on April 30, 1864 a group of

Tsilhqot'in warriors, led by Lha Ts'as?in (Klattessine), attacked and killed most of the men comprising Waddington's main and advance camps on the Homathko River. This area, just above Bute Inlet, is southwest of Tsilhqox Biny and not far from the Claim Area.

[272] Several days later Tsilhqot'in warriors attacked members of Macdonald's pack train on its approach to Tsilhqot'in territory from North Bentinck Arm. Macdonald and two of his men were killed, and five escaped. The Tsilhqot'in warriors also attacked and killed a settler named William Manning.

[273] William Manning had settled on property formerly occupied by Tsilhqot'in people. The fact that Manning's wife was a Tsilhqot'in woman did not spare him. In his bench book, Begbie noted "Land quarrel" alongside the verdict against Tahpitt, the Tsilhqot'in person convicted of Manning's murder: Foster Report, "Tsilhqot'in Law", p. 32.

[274] Reverend Lundin-Brown later reported in *Klatassan and other Reminiscences of Missionary Life* (London: Gilbert and Rivington, 1873) that a Tsilhqot'in person had spoken to someone in the Bute Inlet work party prior to the mass killing. Apparently someone in Waddington's work party accused the Tsilhqot'in people of theft. In response a Tsilhqot'in person is reported by Lundin Brown in *Klatsassan* at p. 9 to have said: "You are in our country; you owe us bread."

[275] A search ensued for the Tsilhqot'in chiefs and warriors who took part in the Bute Inlet uprising. Commissioner William G. Cox, a Cariboo Police Magistrate from Fort Alexandria, led a party down the west side of Tsilhqox Biny and through part of

what is now the Western Trapline Territory. Cox and his search party found trails and a village along Tsilhqox Biny. It is reported:

> He pushed 25 miles south of Tatla Lake into Klatassine's favourite hunting and fishing territory, the mountainous range covering 30 miles east-west between Mosely Creek, a branch of the Homathco, and Chilko Lake … Dozens of Indian trails criss-crossed the area … They discovered a village of deserted Indian lodges … (Dinwoodie Report, p. 16)

[276] In Dispatch No. 7 to the British Colonial Office, dated May 20th, 1864, Governor Frederick Seymour wrote a lengthy report concerning the killing of Waddington's road party. In part he said:

> The witnesses declare there was no provocation given no tampering with the women or abuse of the men. The incentive to the slaughter remains unknown, and the deponents fall back in their conjecture, on cupidity. But this seems an insufficient motive. The property of small values the rough clothes and poor provisions of the road makers would offer but small temptation to the Commission of so terrible an outrage. Some people say that Mr. Waddington's party may have given offence by carrying the road into the Territory of the Chilcoaten Indians without asking for permission. But this again breaks down inasmuch as the perpetrators of the massacre are it is believed the very men, Chilcoaten Indians, who assisted the road makers in their labours. Others throw out the proceedings previous to Sir James Douglas' departure, have led the Indians to imagine that the whitemen are left without a head. Possibly so. We know that the more civilized tribes on the Fraser have been allowed to believe that they are now without a protector or a friend.
>
> The most plausible supposition was made to me verbally by Mosely. There may have been he thinks a quarrel between Smith the ferry man and some Indians. Smith was a man of violent character and irregular habits. The quarrel might have led to blows – the blows to death. A dread of punishment may have arisen. Hence perhaps the throwing of the body into the river, and cutting adrift of the scow. To conceal the murder the general massacre may have taken place. This last hypothesis would assume a greater fear of the white man than I can suppose to exist in the breast of an Indian. All remains mere guess work respecting the motives which caused this melancholy incident.

[277] On August 30, 1864 Governor Seymour sent Dispatch No. 25 to the British Colonial Office that said in part:

> The Chilcotens who massacred Mr. Waddington's road party at Bute Inlet, as mentioned in my Despatch No.7 20th May, marched into the Interior where joined by other members of the tribe, and succeeding in murdering or expelling every white person from the sea to the upper Fraser.
>
> The country in the hands of the insurgents might be described as about 300 miles from East to West by 150 North & South. It was inevitable that steps should be taken for the assertion of our authority, then parties of volunteers were started for the interior. The one under Mr. Cox, a police Magistrate of Cariboo, from Alexandria, the other under Mr. Brew, police Magistrate of New Westminster from Bella Coola at the head of Bentinck Arm. This latter force I accompanied.
>
> These two small bodies had to make their way to Benshee Lake in the heart of the country. Mr. Cox's party of 60 men would then be 112 miles from Alexandria, the base of his operations, and Mr. Brew's band of 40, 250 miles from Bella Coola, whence only he could draw his supplies.
>
> It is hardly necessary for me to say that our communication with the civilized parts of the Colony were closed to these parties as soon as they were in the hostile Country, or at least could only be kept up by detaching a large portion of either force. Thus isolated in the bush our fate became a matter of speculation throughout the Colony, and the most fanciful rumours circulated.
>
> The two forces met at Benshee in the 6th July and on the following day Mr. Cox's party was sent by me down towards the Bute Inlet mountains. They travelled over a country presenting every natural difficulty, for a fortnight pursuing the trails of the Indians and occasionally exchanging shots with them. Mr. McLean the second in command, fell a victim to his excess of zeal.
>
> In the meantime the headquarters of Mr. Brew's party, with which I remained, occupied the important post at Benshee Lake, where all the Indian trails converge …
>
> …
>
> … Alexis, one of the principle Chiefs, of the Chilcoten Indians, who had refrained from joining the hostile movements of the tribe, was induced

> to present himself to me & after many days negotiation promised to accompany the attack, in full force …

[278] In August 1864 Lha Ts'as?in and some of the other Tsilhqot'in warriors surrendered under circumstances that remain to this day the subject of disagreement and debate. They were tried for murder by Chief Justice Begbie and were convicted. They were subsequently hanged at Quesnellemouth. Lha Ts'as?in's final words are reported to be "We meant war, not murder!": William Turkel, *The Archive of Place: Environment and the Contested Past of a North American Plateau* (Ph.D., Thesis, M.I.T., 2004) [unpublished], p. 295.

[279] Governor Seymour later wrote to the Colonial Office to report on the events and said, in part:

> It suited our purpose to treat officially these successive acts of violence as isolated massacres, but there is no objection to our now avowing, an Indian insurrection existed, extremely formidable from the inaccessible nature of the country over which it raged. It seemed that the whole Chilicoten Tribe was involved in it, as Benshee where Manning was murdered is under the jurisdiction of Alexis, Sutleth where McDonald and his two men fell, under that of Anaheim. They must have had the sympathy of at least of the Bella Coola's also for Anaheim descended to their lands to finish the extermination of the whites, & it was only by mere chance that Mr. Hamilton his wife & daughter, escaped with their lives just as the Chilcotens arrived. ... with the departure of the Hamiltons, the white occupation ceased from the sea to the Fraser.

[280] In 1865 two further Tsilhqot'in participants in the Chilcotin War, Ahan and Lutas, were tried. Ahan was executed at New Westminster.

[281] The causes of these events have been variously described by many people in the ensuing years. Tsilhqot'in witnesses gave oral tradition evidence on those

causes: A memorandum written by Chief Justice Begbie is reproduced in the report of H.L. Langevin, printed in the *Sessional Papers* (No. 10) (Ottawa: Taylor, 1872). At p. 27, the following is reported:

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

[282] One triggering event of the Chilcotin War was the theft of some flour by a Tsilhqot'in person, followed by a threat to use smallpox by way of punishment. "You are in our country and you owe us bread" can be seen as a threat of extortion. Professor Hamar Foster, a legal historian, was called by the plaintiff. He was qualified to express opinions on historical relations between Aboriginal and non-Aboriginal people and legal systems in what is now British Columbia. Professor Foster, at p. 30 of his January 2005 report entitled "Chilcotin Law", explained: it is "much more likely that they [the words] represent the straightforward application of a legal principle", namely, an expectation that one would be paid for the use of one's land by another, particularly where such use included the extraction of resources. The work party had paid nothing for the privilege of using Tsilqot'in trails, cutting timber, catching fish and killing game. The work party failed to understand that payment was required not just for work, but also for use and occupation of property. The missing flour prompted Mr. Brewster to write down the names of the Tsilhqot'in

workers and make a threat about the use of smallpox as a punishment. In the language of modern times, one elder described this as a threat of "germ warfare". Given the events of 1862, this would undoubtedly be viewed by Tsilhqot'in people as a direct threat against their security and well being.

[283] Abuse of Tsilhqot'in women, lack of food, and plunder have all been advanced as contributing causes of the Chilcotin War. Almost 250 years later, it is not possible to ascribe the cause to any single event. Undoubtedly, Governor Seymour's observation that the road was being developed without Tsilhqot'in permission was a factor but, as he noted, up to that point the Tsilhqot'in people were assisting the work party.

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

[285] It is not at all clear from the evidence available whether the entire nation of Tsilhqot'in people were involved in the events. If there ever was a united front, this unity was not sustained, as Chief Alexis joined forces with Governor Seymour to track down the Tsilhqot'in individuals who were involved.

[286] In his report to the Court, Professor Foster said at pp. 35-36:

> The immediate cause of the Chilcotin War was the ill-advised threat of smallpox. But the Tsilhqot'in had always been concerned about incursions into their territory and Waddington's wagon road, constructed without permission and without compensation, represented the greatest incursion to date. Even elements of the

> colonial press acknowledged that land was a key issue in the conflict, and so did Judge Begbie.

[287] In 1866 Father James Maria McGuckin, O.M.I., established St. Joseph's Mission in the San Jose Valley just south of Williams Lake. The site is located approximately twelve miles southwest of the present town of Williams Lake. Later it became the Williams Lake Indian Residential School.

[288] In 1867 Fort Alexandria was closed by the HBC.

[289] In 1872 in the face of increasing settlement, Tsilhqot'in people began to stake off land they claimed for themselves and their livestock. In that same year, British Columbia removed the Chilcotin Valley from the operation of the pre-emption Land Ordinance, preventing pre-emption.

[290] On June 6, 1872, settlers L.M. Riske and McIntyre complained to Lt. Governor Joseph Trutch about Tsilhqot'in people and their treatment of John Salmon. They stated that Tsilhqot'in "have always however considered the land theirs, and that we are beholden to them for it, and occupy it on sufferance."

[291] On June 13, 1872 Father McGuckin (McGuggan) made a statement to Chief Justice Begbie describing the ill treatment of Tsilhqot'in people by John Salmon:

> The Indians complain that Salmon has moved both his own stakes & theirs on the meadow. Salmon changed his pre-emption claim again this spring (three times in all) & occupies a favourite hunting ground & water. The Indians seeing the white man putting stakes to mark their claims have followed their example, & have also staked off more land on the meadows which they claim for themselves & their cattle.

[292] On August 20, 1872 Peter O'Reilly wrote to the Provincial Secretary regarding his trip to the "Chilcotin country". The purpose of his trip was to make “enquiry into the cause of the alleged disturbance between them [Tsilhqot’in people] and the settlers in the Chilcotin valley." He described his meeting with "three of the principal Chiefs; Alexis, Annahaim, and Enella":

> They received with evident satisfaction the intelligence that they will not be disturbed in the possession of their hunting, & fishing grounds; and that the whites are desirous of maintaining friendly relations with them; and that it is the intention of the Government to provide for them the means of education, and assist them in their agricultural pursuits.
>
> I explained to the Chiefs … they need not be apprehensive of any loss resulting from it [the road survey]. … they did not evince the least disposition to engage in any occupation of any kind [relating to the survey or road building]; which was probably due to the fact that they do not understand the value of money, and that they are at present fully occupied in fishing, and gathering berries for the support of their families during the Winter.
>
> … it would be highly advisable that the Indian Reserves in this portion of the country should be defined with as little delay as possible; and, that it would be well to instruct the Assistant Commissioner of Lands and Works not to entertain any further applications for pre-emptions in the Chilcotin Country, until the reserves are laid out, in order to prevent the possibility of collision between the Indians and intending settlers.
>
> The population of the Chilcoten tribes amounts to five hundred … of these about one hundred & fifty are adult males. They expressed themselves desirous of cultivating the land; and any assistance to educate them in this direction would be thankfully received …
>
> …
>
> I enquired carefully into the complaint of John Salmon, wherein he accuses the Indians of threatening him, and thereby causing him to abandon his farm, and with burning his premises; these charges they emphatically deny, and appear to be uneasy lest untruthful reports of this River should involve them in trouble similar to that of 1864.
>
> … [the Tsilhqot’in] complain of the treatment they received at the hands of Salmon, who appears to be a man of uneven, and rough

> temper … They further complain, that he more than once moved the stakes on his pre-emption claim, and that he had lately enclosed a portion of land used by them as a meadow.
>
> …
>
> I subsequently ascertained … [that the threats to Salmon had come from a different source and that he voluntarily] packed his traps, set fire to his house, stable and hay stack and drove his cattle away.
>
> Salmon, finding that I was in possession of these facts, afterwards admitted to me that they were substantially correct.

[293] In 1872 C.P. Railways Engineer and surveyor Marcus Smith conducted surveys for the CPR from Bute Inlet inland into Tsilhqot'in territory. In his report to CPR Chief Engineer, Sanford Fleming dated May 1, 1873, Smith noted his arrival at the site where Waddington's work party was killed. His notes, published in Fleming's *Report of Progress of the Explorations and Surveys up to January, 1874* (Ottawa: MacLean, Roger & Co., 1874) records at p. 113, that:

> … the Clahoose Indians were getting tired of the work and would not in any case go beyond the foot of the Canyon, as they were afraid of the Chilcotin Indians; so that all the assistance the party had at present to depend on was from two families of Chilcotin Indians whom we found hunting there …

[294] Upon returning to Bute Inlet on July 10, 1872 Smith met a boat containing County Court Judge P. O'Reilly "with a constable and an Indian servant". In his Journal entry of July 10, Smith wrote:

> Mr. O'Reilly was on a mission at the instance of the Dominion Govt. to arrange with the Chief Alexis some difficulty that had occurred with a squatter named "Salmon" and also to explain the object of our work and pave the way for a good understand between us and his people (the Chilcotins) …

[295] Smith subsequently traveled by ship to Victoria and then journeyed up the Fraser River and beyond, to resume his travel to Bute Inlet from the east. Once again his packers were reluctant to enter Tsilhqot'in territory. In his report to Sanford Fleming, Smith records that his Mexican packers and English cook "were with difficulty persuaded to go as rumours were rife of the warlike attitude of the Chilcotin Indians…".

[296] Smith eventually met with Chief Alexis, one of the Tsilhqot'in Chiefs and persuaded him to accompany the party to meet O'Reilly who was traveling up the Homathko River from Bute Inlet. O'Reilly was late in arriving because:

> … the Eucletah Indians, whom I [Smith] had engaged before I left Bute Inlet, had gone up the Homathco river with supplies as far as the ferry, but there the two Indians whom we had left in charge told them that a band of Chilcotin Indians – (with whom the Eucletahs have a feud) - were coming down the valley, upon which they threw down their loads, ran to their canoes and made for their homes with all possible speed…

[297] In his description of this journey, Smith reported camping on August 7, 1872:

> … by the margin of Tatla lake not far from the camp of Keogh, the chief of a small band of Indians who subsist by fishing on the lakes and hunting on the slopes of the Cascade mountains, from which they have the local name of 'Stone Indians,' – they had a number of horses pastured round the camp.

[298] The next day he reported reaching Tatla Lake and later that day, "camping by a small stream near an Indian burying ground".

[299] On November 29, 1872 Marcus Smith wrote to the Hon. Geo. A. Walkem, Chief Commissioner of Land & Works responding to his request for "information

respecting the Indians settled in the country between Bute Inlet and the Fraser River". Smith wrote:

> At the time I passed through that district there were very few of the Indians at their head quarters – most of them being engaged in Salmon fishing and picking berries on the Fraser and Homatcho rivers-
>
> It is difficult to estimate their numbers…variously estimated at 200 to 300 and I do not think they can much exceed the latter, all told.
>
> … two chiefs – the larger proportion being under the Chief Alexis, whose winter quarters are generally at Alexis Lake or at Puntzee Lake.
>
> The fresh water fishing and shooting-stations most used in the Autumn by the tribes under Alexis are on a string of lakes and swamps, along the margin of which runs the old trail from Fort Alexandria to Bella Coola and Bentinck arm.
>
> … on the northwest shore of Puntzee lake is an important fishing station and a favourite camp of the tribes under Alexis – here they are visited by their neighbours the Stone Indians from the borders of the Cascade range-and those to the westward of them under the Chief Annahime.
>
> On the northwest side of Tatla lake – and near midway of its length – which is about 20 miles – are the headquarters of Keogh, the Chief of the Stone Indians residing on the margin of the string of lakes and swamps from Tatla to Bluff and Middle lakes and down the Homatcho river – They have also stations by the lakes in the mountains from Tatla to the headwaters of the Chilco river-
>
> … Keogh's people keep quite a number of horses.
>
> I am informed by the Surveyors since I passed through the Indians have staked out grounds which they wish reserved-
>
> Above the mouth of the Chilco river if any white settler were sanguine enough to endeavour to make a living at so great a distance from any road – I do not think it would be safe for him to do so until the Indians are consulted and some lands reserve for them – for the good lands above this point are so mixed up with Indian hunting grounds that it would scarcely be possible to avoid a collision.
>
> … the number of Indians estimated above does not include any of those living farther to the north and west under the Chief Annahime… they are said to be numerous and on friendly terms with those under

> Alexis and Keogh – and ready to help them in case of any difficulty with the whites.

[300] On August 21, 1875, Marcus Smith provided further information about his journeys through Tsilhqot'in territory in 1872. His letter addressed to I. Powell, Supt. of Indians, includes the following:

> … I picked up a good deal of information respecting the Indians inhabiting that region which I shall put in form as soon as I have time…
>
> I found the blind Chief Eulas and his tribe encamped near Risky's …
>
> I saw the Chief Alexis at his camp in the Chilcotin valley about 40 miles above Risky's - he was apparently in a dying state. There were only his wife, and a few old women and children round him. The rest of the tribe were away hunting or had gone to a grand Cultus potlatch given by the Chief Annaheim near the Blackwater.
>
> This Chief and his tribe lately had their headquarters at Lake Nacoontloon, situated between the heads of the Dean and Belta Coola rivers, but they are coming down to the Chilcotin valley and it is probable that if Alexis dies, Annaheim will be chosen Chief of the two tribes …
>
> I passed within 5 miles of the Camp of Keogh the Chief of the Indians about Tatla Lake. He was away at the Potlache, but his tribe had received presents of clothing etc. from the survey stores of last year. Keogh gave all away to his people, kept nothing for himself, so I sent him the other suit of uniform, for which his wife sent her son out to thank us.
>
> There is another tribe of Stone Indians to the Northeast of Tatlah Lake which I did not see. But we saw some of them in 1872. Altogether there are between 500 and 600 people (men, women and children) speaking the Chilcotin language … These are divided into six tribes, each with a chief and several petty chiefs.
>
> I met Father Marshall, one of the priests from Williams Lake Mission. … these priests are going to create a great deal of trouble by interfering with the secular affairs of the Indians.
>
> This priest has been marking off claims covering the best agricultural land in the Chilcotin Valley, indeed taking the whole of the valley for 15 miles in length. These he has apportioned among the different tribes

> even including the Stone Indians who are now living 150 miles farther west … This is sheer madness. The Indians cannot live by agriculture alone. They are far more profitably employed both for themselves and the country in hunting and fishing. All that is wanted is a block of arable land subdivided for each family to cultivate a patch of potatoes and other vegetables and some wheat or grain if they desire, but the women and children alone cultivate the land.
>
> At Alexis creek where the tribe have had undisputed possession of the land from time immemorial, there is a patch of less than an acre cultivated by 14 families. It will be a long time before we see an average of one acre to a family under cultivation. But give them say 5 acres of arable land to a family. This would be 500 acres to each tribe of the Chilcotins, but this should be surrounded by a large block of hill ground for pasturing horses and cattle. These are my views, but however that may be, the Priests have no right to interfere. I find also that they undertake to depose and appoint Chiefs not according to their fitness to govern, but as they will best subserve Church interests. They also order or at least encourage the brutality of whipping women for various offences.

[301] By an Order in Council dated January 1873 the Provincial Government partially removed the withdrawal from pre-emption. This opened up a portion of traditional Tsilhqot'in territory to pre-emption.

[302] In 1875 George Dawson journeyed into Tsilhqot'in territory to conduct a survey. His surveys include portions of the Claim Area, and he makes references to "Eagle Lake", "Tallyoco Lake" and "Cochin Lake": *Journals of George M. Dawson: British Columbia, 1875-1878*, Vol.1, ed. by Douglas Cole and Bradley Lockner (Vancouver: UBC Press, 1989).

[303] In a letter dated September 5, 1883 by Father Adrian Morice, published in *Missions de la Congregation des Missionaires Oblats* (Paris, 1883), there is a reference to the "Tchilkotines". He called them the "Tchilkotines des Rochers" or "Stone Chilcotin".

[304] In Minutes of Decision Nos. One and Two regarding the "Anahim Indians" dated July 8, 1887, two reserves for the Anahim Indians ("Anaham Flat and Anaham Meadow) were recorded. In Minutes of Decision Nos. One and Two, dated July 11, 1887, two reserves for the Stone Indians were recorded.

[305] In 1893 Father Morice presented his "Notes on the Western Dénés" to the Canadian Institute. He stated at p. 23: "All of these TsilKoh'tin have abandoned their original semi-subterranean huts to dwell in log houses covered with mud according to the fashion prevailing among the neighbouring whites…".

[306] In 1894 Tsilhqot'in people claimed land at Tish Gulhdzinqox on which they had a number of improvements. The Tsilhqot'in claimed a white settler was attempting to survey. In a letter to the Indian Reserve Commissioner, P.O. Reilly dated August 31, 1894, E.M. Skinner said, in part:

> They seem very anxious to have their land defined with some hay meadows allotted which they are in the habit of cutting, and express fear lest an attempt to acquire their land should lead to violence.

[307] In 1897 James Teit guided anthropologists Franz Boas and Livingston Farrand through Tsilhqot'in territory on horseback.

[308] In 1897 Edmund Elkins became the first white settler to attempt to settle in Xeni. Chief ?Achig ordered Elkins to move out of the valley. Elkins did not follow the order and as a result, a physical altercation between the Chief and Elkins took place. After this struggle, Elkins moved to the end of the valley to a place that is now known as Elkin Creek.

[309] By letter addressed to James A. Smart, Deputy Minister of the Interior Department, dated July 27, 1899, Hewitt Bostock, M.P. for the region, requested that "what is known as Nemaiah Valley in the western end of the Chilcoten country" be made a reserve.

[310] In 1899 Indian Reserve Commissioner A. W. Vowell traveled to Xeni and laid out four reserves: Chilco Lake Reserve, Garden Reserve, Fishery Reserve and Meadow Reserve, all in or near Xeni. The reserves were not formally created due to delays in completing a survey. In a letter dated October 18, 1899 to the Secretary, Department of Indian Affairs, Ottawa, Vowell discussed his trip to Xeni. He noted, in part:

> I learned that the greater number of the Indians were absent in the mountains hunting and fishing and putting up their winter supply of dried meat, etc. I also learned that they are generally absent in the Spring and Fall, engaged in trapping, and that the only time when they are all at home is in the dead of winter. Upon close inquiry I learned that some 59 Indians, men, women and children, have for a long time lived in the valley as far as I could learn having been there located before the laying off of other reserves in the Chilcotin country …

[311] In Minutes of Decision dated September 20, 1904 the Redstone Flat Reserve for the Alexis Creek Indians was recorded.

[312] In September 1909, the proposed Xeni reserves were finally surveyed.

[313] The Annual Report of the Department of Indian Affairs for the year ending March 31, 1912 (Ottawa: Parmelee, 1912) recognized the Nemiah Valley Indian Band and their reserve and noted the population to be 57 persons.

[314] In 1914 Xeni Chief Seal Canim testified before the Royal Commission on Indian Affairs for the Province of British Columbia (Williams Lake Agency) on the need for more land. On July 22, 1914, he testified that there were then 67 persons in the band of whom 14 were married men. At pp. 117-118 from his testimony before Commissioner MacDowall, Chief Canim is reported to have said:

> Q: You want to get the land near No. 2 Reserve on which your houses are built and on which there is a meadow?
>
> A: I wish to get from No. 1 Reserve to No. 2 Reserve.
>
> Q: How much land do you want to get?
>
> A: I want 3 miles along the creek, and 2 miles across it.
>
> Q: How much land do you want on each side of the creek?
>
> A: I want a piece that will join No. 1 and No. 2, going on both sides of the creek, and about 2 miles wide. About 5 square miles in all.
>
> Q: Does any white man own any land there? I understand Mr. Robertson owns some land there?
>
> A Yes; they cut all the meadow between them.
>
> Q: Has any white man got any land near No. 1 or No. 2?
>
> A: Yes; there are two places belonging to white men.
>
> Note: Indian Agent Ogden to find out what is free.
>
> Q: It would be unfair to you if we were to tell you that we would get you land that white men already own, because we cannot take land away from anyone. If the land is free, we will be glad to get you some more, because the Indians here seem to need more. We will ask Mr. Ogden to look at this land with you, and if no arrangement can be made about that, perhaps you will be able to show Mr. Ogden another piece which possibly we may be able to get for you.
>
> I understand you want some pasture land north of No. 2. Is that right?

A: Yes.

…

Q: Now, you want some timber lands south of No. 2?

A: Yes.

…

Q: Now, you want 2 miles square of land for cultivation, east of No. 4 … Is that land good for cultivation?

A: Yes.

[315] Chief Canim went on to say (at p. 119) that the band had 45 cattle and 325 horses. He requested land for a fishing reserve on the creek "adjoining Tsunniah Lake on the Chilco Lake, and directly north of No. 1 Reserve." He also asked for the right to hunt for food when hungry and was told by the Commissioner (p. 119) that "[i]n this district, you can kill a male deer over one year old, out of season — at any time of the year, for your own use; but it must be for your own use and not for sale."

[316] In 1916, three new reserves were created in Xeni.

[317] In a letter dated December 31, 1922, to J.E. Umbach, the Surveyor General, R.P. Bishop wrote of the Xeni Gwet'in Indians:

> Ten families of Indians have their headquarters in the valley but lead a semi-nomadic existence during the greater part of the year. Like all the Chilcotens, they are born horsemen and do not like going where they cannot ride; …
>
> After a few years residence in one place they have a tendency to move on, possibly being influenced by the condition of the range and of the hay meadows. At present the main village of the band is near the

> south boundary of lot 305, but there are several old village sites in the valley.
>
> The Nemaias go in largely for horses, and two members are said to own between them several hundred of these beasts … At present the extent of the Indians' holding is not clearly defined and a good deal of uncertainty exists on the subject. The settlement of this question, which has been pending for some years and is now on the verge of completion, will make things much more satisfactory both for the white men and the Indians …
>
> In the early summer the village is generally deserted, as nearly everybody takes to the hills to gather wild potato or hunt meat for consumption during the haying season … After the hay season a good many take to the hills to hunt the marmot, which is used both for "ground-hog robes" and for meat. In the winter comes the trapping season.

[318] On July 4, 1927 ten chiefs, including six Tsilhqot'in chiefs, one of whom was Chief Seal Canim of Xeni, wrote a letter to Prime Minister McKenzie King asking for the return of their "Old Law":

> We Undersign Beg of you to [see?] in [Regard?] to our trapping and fishing Rights in first place we Have no show to trapp as White Men Chases us away and Police we Have no show to trapp as white man Has trappers Licence so we Ask Government of Ottawa to try Help us and get our Old Law Back … we also ask you to Help out fishing Law in Regard to Indian Agent, we also ask you to Help us; he goes around with Priest Makes very Severe Laws on Indians … We were also trubbled with trappers we were Chased all over we couldint trapp as White men Has trappers Licence and some Had 30, Miles trapp Line and sent Police Officer all over after us, they also wen so far as to thretten us with guns so we urge if you please try to get our old [Law?] Back again so we can trapp [Hunt?] as we did before, we also Ask you to [try] get our Water Right as white men got Water Recorded and we cant get any they wont let use water … Let it go as Olden day no trappers Licence, and Game Laws we cant Kill any Game and Deer some times we are very hungry …

[319] In 1929 the first of the existing traplines in the Claim Area was registered in the name of members of the Nemiah Valley Indian Band. Over the next decades, most of the traplines in the Claim Area were registered to Nemiah Band Members.

[320] From 1950 to 1956, Canada attempted unsuccessfully to purchase additional lands for reserves for the Xeni Gwetin.

[321] In 1964 the federal government assumed responsibility for the St. Joseph's Mission Residential School attended by many of the witnesses in this trial. The school had operated for many years under the Oblate Brothers of St. Joseph, prior to this assumption of responsibility. Margaret Whitehead's 1979 thesis about the St. Joseph's Mission explains the work of the Oblate Fathers: *Missionaries and Indians in Cariboo: A History of St. Joseph's Mission, Williams Lake, British Columbia.* (M.A. Thesis, University of Victoria, 1979) [unpublished]. Father Paul Durieu, later Bishop Durieu, established the Durieu system in willing Aboriginal villages. At pp. 21-22 of her thesis, Whitehead said:

> In a letter to Father Jean Marie LeJacq, dated November 17, 1883, Durieu included a detailed description of the working of his system. "To bring the Indians to lead a Christian life" he stated "the missionary must exercise upon them a twofold action. A destructive action, in destroying sin wherever it flourishes and a formative action, in moulding the inner man by instruction, preaching and the reception of the sacraments." He went on to say that sin had to be destroyed "by repressing and punishing it relentlessly as an evil, horrible and degrading thing." The missionary had to "inculcate horror, fear and flight from sin" and the repression of evil was to be accomplished through the help of the chief and the watchman. The Indians played an active part in the imposition of the Durieu system.

[322] The Durieu System is likely what led to some Tsilhqot'in members being named "Captain". Whitehead, at p. 52, noted that "Father McGuckin appointed the 'usual officers' of the Durieu system" for the "Indians" under Chief Alexis, and promised to do the same for the other two chiefs, Anaham and Ke-ogh, the following year. At p. 21 of her thesis, Whitehead noted that Durieu borrowed from the "Instructions on Foreign Missions" which set out that:

> Every means should therefore be taken to bring the nomad tribes to abandon their wandering life and to build houses, cultivate fields and practise the elementary crafts of civilized life.

[323] In 1977 the Nemiah Valley Indian Band Council passed a resolution to amalgamate twelve traplines into a Band Line.

[324] In 1980 most family traplines were cancelled and replaced by two large traplines in the name of the Nemiah Valley Indian Band.

[325] On August 23, 1989 the Xeni Gwet'in issued the Nemiah Declaration (see Sec. 2. f.: "Description of the Claim Area").

[326] In October 1992 The Honourable Anthony Sarich P.C.J. was appointed by Order in Council to conduct the Cariboo-Chilcotin Justice Inquiry "to inquire into and report on the relationship between the Cariboo-Chilcotin aboriginal community and the police, Crown prosecutors, courts, probation and family court counselors in the administration of justice in the Cariboo-Chilcotin Region": O.I.C. No. 1508 (1 Oct 1992); O.I.C. No. 0967 (23 July 1993).

[327] In 1992 Tsilhqot’in people passed the Tsilhqot’in Declaration of Sovereignty 1992.

[328] As already noted, in 1992 Premier Michael Harcourt promised the Xeni Gwet’in people there would be no harvesting of timber in their traditional territory without their consent.

[329] In 1993 Judge Sarich’s Report on the Cariboo-Chilcotin Justice Inquiry was released. One of the report’s recommendations was that a posthumous pardon be granted to the Tsilhqot’in chiefs sentenced to their deaths as a consequence of the Tsilhqot’in War. In the course of his comments concerning the Sarich Report, The Honourable Colin Gabelmann, Attorney General for British Columbia, extended an apology to the Tsilhqot'in people for wrongs done to them during and after the War.

[330] In 1994 the Province designated Ts’il?os Provincial Park, and erected a sign which states, in part:

> The Tsilhqot’in have steadfastly protected their remote territory through the centuries and because of their sustained presence the land has remained relatively unaltered.

[331] In 1999 the Province unveiled a memorial plaque marking the gravesite of five Tsilhqot'in chiefs who were executed in the aftermath of the Tsilhqot’in War. In part the plaque reads:

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

7. ETHNOGRAPHIC NARRATIVE

a. Ethnography

[332] The Tsilhqot'in are a group of Aboriginal people who speak a variant of the Athapaskan language. They inhabit an area in the west central portion of British Columbia. The Tsilhqot'in are considered to be the southern most group of Athapaskan speaking people in Canada. Today there are six bands of Tsilhqot'in people, five of whom form the Tsilhqot'in National Government (TNG). There is also a seventh group who reside with Ulkatcho Dakelh (Carrier) people on the Ulkatcho reserves located around Anahim Lake. This group of Tsilhqot'in/Ulkatcho people are not a part of the TNG.

[333] The Tsilhqot'in people have not received a lot of attention from anthropologists and ethnographers. A few ethnographers, professional and amateur, wrote on Tsilhqot'in social organization and culture at the very end of the nineteenth century and the beginning of the twentieth century, including Father Adrien Gabriel Morice, James Teit, Livingston Farrand, Diamond Jenness and Verne Ray. In the mid-twentieth century, Robert Lane undertook the first major, and still the most detailed, study of most aspects of Tsilhqot'in ethnography in his 1953 dissertation, *Cultural Relations of the Chilcotin Indians*. Parts of that dissertation were refined and condensed in Lane's 1981 article on the Tsilhqot'in people in the *Handbook of North American Indians*.

[334] Lane was the first anthropologist to place primary emphasis on the Tsilhqot'in. In preparing his dissertation in the early 1950's, Lane reviewed the studies of

ethnographers writing before him. Lane also undertook his own careful fieldwork among Tsilhqot'in speaking communities over a period of four years. His dissertation is an important contribution to the understanding of Tsilhqot'in people and his work continues to be relied upon by contemporary scholars. At pp. 4 - 6 of his 1953 dissertation, he said:

> Thus the Chilcotin have been assigned, with some question, to the Plateau culture area or to a Northern Athapaskan area. On their boundaries, we find Plateau groups, Northwest Coast groups (if we consider the Gulf of Georgia area separately, one group from that area), and possibly groups within a Northern Athapaskan area or at least having linguistic and cultural relationships with the Northern Athapaskans. This is a fairly unique situation in that, in almost every direction, there are peoples certainly with different types of culture; and, in most cases, lying within different culture areas.
>
> This situation made the Chilcotin very much of a border group. They lay on the southwest frontier of the Northern Athapaskans, sharing a language which, in many dialects, was spoken in northern North America from the coast of Alaska eastward to Hudson …
>
> By virtue of their position on the northern boundary or in the northern part of the Plateau, the Chilcotin shared cultural elements with and were influenced by people, primarily Salish speaking, who occupied the interior valleys and plateaus east of the Coast Range.
>
> West of the Chilcotin, the Coast Range is particularly rugged and forms a barrier between the coast and the interior. However, there are valleys through the mountains, and by these routes, the Chilcotin were able to communicate with the central Northwest Coast and, at least in recent times, draw upon the cultural resources of the Northwest Coast and incorporate coast elements into their culture. This was particularly true at the northern point of contact where the Chilcotin met the Bella Coola. Here, however, coastal influences came to the Chilcotin from a people who were themselves somewhat atypical to the central Northwest Coast in that they had a riverine rather than strictly coastal culture.
>
> The cultural position of the Chilcotin is, as has been pointed out, unique. They occupy an area where three (or four) different areas of culture met: the Yukon-Mackenzie or Northern Athapaskan; the Plateau; the Gulf of Georgia Salish; and the Northwest Coast. It is

> logical to expect that the content of Chilcotin culture would reflect this frontier position.

[335] Dr. David Dinwoodie, anthropologist, was called as a witness for the plaintiff. He was qualified to express opinions in the field of anthropology. In his report, there is a short reference to some of the "Evidence in Anthropological Accounts". Dr. Dinwoodie notes, at p. 23, that in 1898 Livingston Farrand wrote the following about the Tsilhqot'in people:

> Intercourse with the coast Indians, and particularly with the Bella Coola, was formerly much more frequent than now, for the reason that the early seat of the Chilcotin was considerably farther west than at present, while the Bella Coola extended higher up the river of that name into the interior. The results of this early intercourse is seen very clearly in certain of their customs, and particularly in details of their traditions. In former times and down to within about thirty years the center of territory and population of the Chilcotin was Anahem Lake, and from here they covered a considerable extent of country, the principle points of gathering beside the one mentioned being Tatlah, Puntze, and Chezaikut Lakes. They extended as far south as Chilco Lake, and at the time of the salmon fishing were accustomed to move in large numbers down to the Chilcotin River to a point near the present Anahem Reservation, always returning to their homes as soon as the fishing was over. More recently they have been brought to the eastward, and today the chief centres of the tribe are four reservations- Anahem, Stone, Risky Creek, and Alexandria - the first three in the valley of the Chilcotin, and the last named, consisting of but a few families, somewhat removed from the others, on the Fraser. Besides these there are a considerable number of families leading a semi-nomadic life on the old tribal territory in the woods and mountains to the westward. These latter, considerably less influenced by civilization than their reservation relatives, are known by the whites as Stone Chilcotin or Stonies.
>
> *1899 "The Chilcotin". The North-Western Tribes of Canada—Twelfth and Final Report of the Committee, 68th Annual Report of the British Association for the Advancement of Science for 1898*. pp. 645-8. London. (Reprinted in: 8(1-2): 338-349.1974.) *Northwest Anthropological Research Notes.*

[336] Dinwoodie's report at pp. 24-25 also quotes James Teit's observations made in 1900:

> At the present day the whites generally divide the tribe into three divisions, named according to their habitat - first, the Lower Chilcotin; second, the Stone Chilcotin, or Stonies; and third, the Stick or Upper Chilcotin. The first-named consist of three bands, originally emigrants from Nacoontloon Lake and neighbourhood. One of these, called the Anahem, live in a village on the north side of the Chilcotin Valley; about eight miles west of Hanceville, where they have reserves; the second band, called the Toozeys, live really within the Shuswap territory, on Riskie Creek, not far from Frazer River; and the remaining band have located at Alexandria, within the Carrier territory. The Stone Chilcotin make their winter headquarters on a reserve on the south side of the Chilcotin Valley, about four miles west of Hanceville. The Stick Chilcotin live in small scattered communities around Chezikut Lake, Puntzee Lake, Anahem or Nacoontloon Lake, Tatla Lake, Chilco Lake, etc. Both they and the Stonies are much more nomadic than the Anahem and other bands, and roam during the greater part of the year over their hunting grounds to the west and south.
>
> Until about thirty-five or forty years ago, nearly two-thirds of the whole tribe lived in the valley which skirts the eastern flanks of the Coast Range from Chilco Lake north to near the bend of Salmon River. Most of them were located in the northern part of the valley, at Anahem or Nacoontloon Lake, just east of the territory of the Bella Coola …
>
> Smaller bands had headquarters around Chilco and Tatla Lakes and some families wintered along Chilco and Chilanco Rivers …
>
> *1909 Notes on the Chilcotin Indians; Memoirs of the American Museum of Natural History* 4(7); 759-789. New York.

[337] Both the Farrand and Teit accounts note the presence of Stone Chilcotin or Stick Chilcotin living in scattered communities around various lakes, including Tsilhqox Biny. These are without a doubt the ancestors of the Xeni Gwet'in, who pursued a semi-nomadic life in the "old tribal territory". The historical record confirms the presence of Tsilhqot'in people down the length of the Tsilhqox corridor up to and including Tsilhqox Biny. At the time of sovereignty assertion, the Stone

Chilcotin made their winter headquarters along that river corridor on both sides and extending to the lakes, rivers and streams to the south, east and west.

[338] At the time of Farrand and Teit's writings reserves had not been established in Xeni. These reserves were set much later than the other Tsilhqot'in reserves due to their remote location and the lack of an adequate transportation network. The "considerable number of families leading a semi-nomadic life on the old tribal territory in the woods and mountains to the westward" resulted in the reserve commissioners and surveyors experiencing a difficult time locating these groups of Tsilhqot'in people.

[339] Even today the community of Xeni Gwet'in may be characterized as remote. At the time of the Court's sitting, electricity had not arrived in the valley and an entire community of people relied upon generated power. The long winter drive over a road from Hanceville covered with ice and snow made this community seem all the more remote.

b. Language and Culture

[340] The most important bond shared by Tsilhqot'in people is language. The capacity to speak and understand Tsilhqot'in appears to have been the most significant identifying trait of members of that community. The number of proficient Tsilhqot'in speakers, at least in some communities (such as the Xeni Gwet'in community) remains today very high.

[341] Lane said the following about the Tsilhqot'in language in his 1953 thesis, at p. 164:

> The Chilcotin were distinguished from their neighbors by their exclusive sharing of a common dialect, a common territory, a common culture, and a feeling of basic unity. Probably the deepest tie was language. I know of or can conceive of cases in which the importance of any of the other criteria might be diminished or lacking; but as long as the linguistic bond was there, the person would be recognized as a Chilcotin. Once the linguistic bond was broken, as it is in the case of a few individuals today, the person's status as a Chilcotin was immeasurably endangered.
>
> …
>
> The common territory as a criterion of unity is, of course, interrelated with the other criteria
>
> …
>
> I get the impression that the common culture was a relatively less important criterion. The Chilcotin were tolerant of cultural and individual differences.

[342] I had the same impression at the conclusion of this trial. For example, differences in the telling of legends and in the details of legends can vary from band to band, indicating an ability to tolerate differences within their own culture.

[343] The Tsilhqot'in language is derived from an original proto-Athapaskan root. If Lane meant that the current Tsilhqot'in language is a dialect of this common root, I agree with his observation. However, today Tsilhqot'in is not characterized as a dialect of the Athapaskan language, rather it is considered a truly distinct language.

[344] The Tsilhqot'in language was one area that did not provoke controversy in this case. The only expert evidence on the subject comes from the report of Eung-Do Cook, Ph. D. (Linguistics), Professor Emeritus, University of Calgary,

"Chilcotin/Tsilhqotin: An Athabaskan Language of Canada", September 2002, filed by the plaintiff. Professor Cook's report was accepted by the defendants and he was not required for cross-examination.

[345] With the assistance of Dr. Cook's report, I understand that "[t]here is no simple and straightforward method of defining distinct languages and dialects". Tsilhqot'in is the term consistently used by those who identify and classify the Athapaskan languages to identify a distinct language. As advised by Dr. Cook, "no one has ever suggested that Chilcotin is a dialect of any other language" and "there is no controversy on the identification of Chilcotin as a distinct language".

[346] Tsilhqot'in is a word used exclusively by the Tsilhqot'in communities in British Columbia to identify themselves. The literal translation of the word Tsilhqot'in is the people of the Tsilhqox (Chilko River).

[347] I accept Dr. Cook's opinion that "there is hardly any mutual intelligibility between Chilcotin and other Athabaskan languages" and "there is no mutual intelligibility whatsoever between Athabaskan (e.g., Chilcotin, Carrier) and any neighbouring Salish languages, including Lillooet, Shuswap, and Thompson".

[348] Changes in phonology (sound system) and grammar (morphology and syntax) are not generally conspicuous and abrupt. It is not possible to say precisely how long Tsilhqot'in or any Aboriginal language has existed as a distinct language. Dr. Cook's evidence is that Tsilhqot'in is "one of many dialects of a parent language (Proto-Athabaskan)" and "has been a distinct speech community for far more than five hundred years or even more than a thousand years".

[349] I accept the evidence of Dr. Cook and conclude that Tsilhqot’in has been a distinct language for more than 500 years.

c. Time Periods

[350] It may be helpful to explain some common Tsilhqot’in words and concepts that are used in the evidence I am about to describe. Tsilhqot’in people traditionally used a lunar calendar, identifying months by the phase of the moon. The Tsilhqot’in calendar also identifies the seasons: xi (winter), ?eghulhts'en (spring), dan (summer) and dan ch’iz (fall). Tsilhqot’in history is not known in terms of calendar years. The depth of Tsilhqot’in oral history and oral traditions is measured in terms of generations and historical events.

[351] Tsilhqot’in people identify sadanx as a legendary period of time which took place long ago. This was a time when legends began and when the ancestors, land and animals were transforming according to supernatural powers.

[352] Yedanx denilin is a long time ago and includes the period of time prior to contact and the time period that is pre- and post-sovereignty. Witnesses described their grandparents and great grandparents as living in yedanx. Theophile Ubill Lulua testified that the Tsilhqot’in War occurred in the yedanx period.

[353] ?Undidanx is a period of time that one might characterize as recent history. People who lived in the first half of the twentieth century lived in a period described by Theophile Ubill Lulua as the ?undidanx.

[354] The time periods progress from sadanx to yedanx to ?unidanx.

[355] As I understood the evidence, Tsilhqot'in people, whether living in sadanx or yedanx, are all ?Esggidam (ancestors). A person living in ?unidanx, or the recent historical period is not an ?Esggidam. Witnesses described the seasonal rounds and the activities undertaken on those rounds as activities carried out by the ?Esggidam in yedanx and as far back as sadanx.

d. Socio-Political Structure

[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 Lane wrote in his 1981 article in the *Handbook of North American Indians*, 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 1953 thesis 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.

e. Tsilhqot'in Dwellings

[364] The harsh climate conditions of the Tsilhqot'in region resulted in specialized survival skills suited to that territory. Tsilhqot'in people used a variety of different dwellings for different purposes. In the winter, they lived in underground lodges or pit houses. In other seasons, more ephemeral structures such as lean to's, wind breaks, and tents served to protect Tsilhqot'in people temporarily from wind and rain.

[365] There are two kinds of winter dwellings used throughout the Tsilhqot'in territory. The niyah qungh (or nenyexqungh) is a structure of Tsilhqot'in design and origin. It is distinguished by its rectangular structure. The lhiz qwen yex is a circular shaped structure dug well into the ground. The lhiz qwen yex is also known as a pit

house, underground house, subterranean house and kigli hole. It is thought to be a structure of Plateau Pithouse Tradition (PPT) design and origin. While its design and origin likely dates to the PPT culture, some lhiz qwen yex were rebuilt and used by Tsilhqot'in people. There is also evidence that Tsilhqot'in people living today observed the fresh construction of such structures and actually lived in these dwellings.

[366] Lane described a basic Tsilhqot'in niyah qungh lodge in his 1953 thesis. Rectangular in shape, the size varied but was generally about 20 feet long by 15 feet wide. The floor was level but not excavated. Usually there were two log posts set into the ground, one at the front of the house and one at the back. A log ridge-pole was elevated and set across between the posts. On each side, at least two log poles were leaned inwards against this ridge-pole. Thus, the niyah qungh house frame was gabled.

[367] According to Lane, whole or split logs were then laid horizontally up the sides of the house, almost to the top. This left an opening several feet wide under the ridge-pole. The fire would be laid in the center of the house along the space under the ridgepole. The ends were generally enclosed with vertical whole or split logs. At one end a space was left for a door, which was covered with an animal skin. The house was externally covered with layers of grass, sod and bark. Lane also described a niyah qungh with cribbed lower walls, four end posts, dual ridge-poles and a deer hide door.

[368] Dr. Matson described the niyah qungh as a type of Tsilhqot'in winter dwelling. From the archeological perspective, key identifying features of niyah qungh sites include the rectangular form of its footprint, the presence of certain projectile points and the elongated fire-pit pattern (the impression of which resembles the shell of a boat). Matson dated a Tsilhqot'in niyah qungh site in the Claim Area at Naghatalhchoz Biny (Big Eagle Lake) as at 1645-1660 A.D.

[369] The anthropological and archaeological evidence about winter dwellings are corroborated by the evidence of Tsilhqot'in witnesses. Various Tsilhqot'in elders testified as to having seen or lived in niyah qungh or variations of this dwelling during their younger days. Elizabeth Jeff gave evidence of her great-grandmother's niyah qungh. Francis Setah stayed in his uncle's more modern version of a niyah qungh as a youth.

[370] Mabel William testified that she saw her uncle build a niyah qungh and gave evidence of its construction with chendi (lodgepole pine) logs, cribbed lower walls and insulation of sunlh (dry pine needles) and tselxay (swampgrass), or alternately t'uz (bark), plugged with nentses (moss). She lived in this niyah qungh with her uncle's family while trapping. Later in her life, she lived in a niyah qungh in the Claim Area with her husband and in-laws when trapping and hunting. She testified that the long fire pits within the niyah qungh, with the passage of time, came to look like a little boat in the ground. She further gave evidence of how Tsilhqot'in people historically felled trees with the tsi dek'ay (a sharp rock), split the logs with nelh (another form of sharp rock) and a hammer made from a section of tree, and secured the logs with ts'u ghed (spruce roots) or softened k'i (willow). Mabel

William, and other Tsilhqot'in elders, provided oral history of Tsilhqot'in people living during xi in niyah qungh since the time of the ?Esggidam.

[371] In her affidavit #1, Mabel William testified that as a child she saw her uncle Peter William build a niyah qungh in an area near Nagwentl'un (Anahim Lake). She said they moved into the niyah qungh when "it started to get cold". She said her grandmother Hanlhdzany taught her that she had lived in niyah qungh in xi when she was growing up and that Tsilhqot'in people "had been making different styles of niyah qungh since sadanx".

[372] In his 1953 dissertation, Lane also described the pit house dwelling known as a lhiz qwen yex. The circular pit was four or five feet deep with a varying diameter. Four or six log centre posts, each about 14 to 16 feet tall, were set into the ground within the pit. Peeled logs were elevated and set across as the main rafters between the post tops, thus forming a square or hexagon. Many additional log rafters, with their butts placed at the edge of the pit, were then laid inwards onto the main rafters. The rafters were lashed to the central frame with spruce roots. The whole structure was covered with a layer of tselxay or k'i and, occasionally, a layer of t'uz. It was then covered with dirt. A central smoke hole remained above a fire pit and acted as an entrance.

[373] Morley Eldridge, an archaeologist called by British Columbia, was qualified to express opinions in the field of archaeology. He agreed that Tsilhqot'in people had a long tradition of building lhiz qwen yex. Relying upon the work of Matson, Eldridge agreed "that Tsilhqot'in people lived in circular pit houses at least as long ago as

1590 plus or minus 80 years AD". In adopting this opinion, Eldridge relied upon the house pit identified on the Tsilhqox that contained Tsilhqot'in artifacts dating to approximately 1600 AD. This house pit is located on the edge of the Claim Area. Eldridge opined that the Tsilhqot'in built and used lhiz qwen yex well into the 1800's.

[374] Mabel William testified about being instructed by her grandmother, Hanlhdzany, at Tl'egwated on how to construct a lhiz qwen yex. She said that a niyah qungh took less time to build than a lhiz qwen yex. The niyah qungh was not as warm as the lhiz qwen yex "because lhiz qwen yex were covered with dirt all over" and "you didn't need as big a fire". She described digging the pit with deer antlers or wood "made flat like a shovel; a four post, square frame from chendi lashed with ts'u ghed; additional log rafters covered with t'uz and then dirt, leaving a smoke hole at the top; a side door with a ladder made from poles lashed with ts'u ghed; and nists'i (deer) or sebay (mountain goat) hides being used to cover the doorway and, when the fire was not burning, the central smoke hole was also covered with hide". She said these structures were hard to build and were used "over and over again, winter after winter".

[375] The oral tradition evidence of Tsilhqot'in witnesses was that lhiz qwen yex were used going back to the time of the ?Esggidam. The oral traditions of Tsilhqot'in people, namely, the legends of Lhin Desch'osh and The Boy Who Was Kidnapped by the Owl feature the use of lhiz qwen yex.

[376] Site selection for construction of winter dwelling was dependant on a number of factors, including the availability of resources and the proximity to others for security and socializing during the long winter months.

[377] Writing in the 1950's, Lane reported that, according to his Tsilhqot'in informants, the large residence sites with numerous closely-spaced pits situated on river banks were not Tsilhqot'in in origin. His informants claimed the isolated pit house sites located near lakes were Tsilhqot'in in origin.

[378] In Lane's view families had rights to certain winter camping sites, providing that they occupied them every season. The stronger attachment to winter residences than to sites used in other seasons was likely due to the longer period passed at the winter site and the more sedentary nature of the activities carried on in this season. According to oral tradition evidence, winter was the season of least movement for Tsilhqot'in people. Joseph William deposed with respect to seasonal movement as follows:

> John Baptiste taught me that the ?Esggidam had to move around to get their game, fish, and food – in spring, summer and fall-time they moved around lots. John Baptiste taught me that in winter, the ?Esggidam would stay in Ihiz qwen yex (underground houses); in winter they would stay in one place.

f. Semi-Nomadic Lifestyle

[379] I have commented several times on the semi-nomadic lifestyle of Tsilhqot'in people. Post Second World War, this lifestyle has changed, partly as a result of declining fur prices and partly as a result of a changing social order. While semi-

nomadic living is a lifestyle in decline, it has not entirely ended. There was evidence that some Tsilhqot'in people still go out on the land to hunt, fish, and gather roots and berries in all seasons, but much less so in the winter months. A more frequent pattern of hunting by a younger generation is to use available roads and to hunt on the road or short distances off road.

[380] The Tsilhqot'in traditional semi-nomadic lifestyle was a movement with the seasons. In his Ph.D. dissertation entitled *The Archive of Place: Environment and the Contested Past of a North American Plateau***,** Dr. William Turkel described Aboriginal seasonal land use that was inclusive of Tsilhqot'in people. He said the following at pp. 156-157:

> Traditional native calendars in the interior started in the winter, in the moon named for ice. … For people across the interior plateau, this was a time to enter subterranean houses. Deer and other animals like sheep, elk, hare and grouse, were hunted as weather permitted, to supplement caches of stored food. … the following moon was a time to stay at home, a time of the first real cold. Occasionally it was possible to ice fish the lakes for whitefish, trout and suckers, but more frequently diets consisted of dried salmon and meat, roots and berries.
>
> The sun turned in midwinter, the time of the big moon, and animals like mink, marten, weasel, fisher, rabbits, lynx, coyote and fox were trapped for their plush winter coats. It was a good time to sew buckskin and to visit. By the following moon, food stores were running low. … the snow crusted over and began to darken with wind-blown debris. This made travel easier, and it became possible to run down game on foot, as hooves broke through the crust when snowshoes did not. With the beginning of spring, bears came out of hibernation and by the end of the moon most of the people had emerged from their winter houses, too.
>
> People began to disperse throughout band territories to hunt and to fish in the lakes. The snow was melting from the high ground, the grass growing in the valleys. By the beginning of summer, most families had moved to lake fishing stations to catch and dry trout, whitefish and suckers. It was a time to dig potatoes, wild onions, tiger-

> lily bulbs, and shoots of balsamroot and cow-parsnip. The summer moons were a time for berrying: strawberries and soapberries and saskatoons gathered beside rivers and lakes. The summer also marked the beginning of the spring salmon run for some, and for others a time to hunt waterfowl, mountain goats, and the other ungulates had grown fat on mountain pastures. The salmon runs occupied most people's time until the moon of the sockeye salmon and for some groups the rest of the autumn as well. Others went hunting in the fall moons, and gathered pine seeds near higher-elevation base camps.

[381] The seasonal semi-nomadic round was vividly recounted by Tsilhqot'in elders. They recalled the days of their childhood and the stories told to them by parents and grandparents. With the passage of time the direct link to a time pre-sovereignty assertion depended on evidence, two, three and even four generations removed. The best documentary evidence of early to mid-nineteenth century activities remains the written records of the HBC and early missionaries. These records confirm the presence of Tsilhqot'in people in the Claim Area and more importantly confirm their semi-nomadic lifestyle.

[382] The evidence showed that the movement of Tsilhqot'in to xi dwelling sites began in November. As the weather turned colder, the hunting of higher elevation species such as debi was discontinued. However, nists'i hunting continued, mainly utilizing ?ash (snow shoes). Fur bearing animals were trapped throughout xi until early March. Snowshoe hares were taken and ice fishing was a regular event.

[383] Xi hunting, fishing and trapping grounds are all found in the Claim Area. In Tachelach'ed there was xi nists'i hunting and dwelling sites along the Tsilhqox corridor and across Xeni. Xi hunting and fishing also took place at the lower elevation lakes in the Western Trapline territory and the areas adjacent to it. The

northern areas of the Eastern Trapline consist of low elevation lands below the mountains. The animals procured by Tsilhqot'in people in xi on and about the plateau are all found in this area. The evidence revealed that nists'i from the nearby Dzelh Ch'ed (Snow Mountains) migrated into these lands. Gex (rabbit), nundi (lynx), nabi (muskrat), chinaz (otter), nembay (weasel), tsa (beaver), dlig (squirrel) and other furbearer animals were also present.

[384] Xi fishing on lakes in and outside the Claim Area occurred during the historical period and continued throughout the twentiety century. Xi house sites were located conveniently close to good fishing, locations near many of the lakes found in the Claim Area.

[385] In ?eghulhts'en activities focused on fishing for dek'any (rainbow trout), lhusisch'el (whitefish), sabay (dolly varden or bull trout) and delji-yaz (sucker). Late spring signalled the return of tislagh (steelhead salmon).

[386] Closely connected to ?eghulhts'en fishing was nists'i hunting. Tsilhqot'in people tracked the nists'i migration routes as they made their way back to the mountain areas. Other game such as mus (moose), xex (geese) and nat'i or tunulh (duck) were also taken. Tsa and nabi were trapped. This was also the season for gathering pine cambium and tsits'ats'elagi (balsamroot sunflower).

[387] In early dan, sunt'iny (mountain potato or spring beauty) and ?esghunsh (bear tooth or avalanche lily) bloom. Tsilhqot'in people, along with the animals, followed the melting snow line into the higher country to hunt and gather roots and berries on the high mountain slopes. Of great importance were roots, corns and tubers such as

sunt’iny, ?esghunsh, tsits'ats'elagi, tsachen (tiger lily), tl'etsen (wild onion) and chinsdad (silverweed) which were all preserved by drying.

[388] The gathering of roots and hunting in the mountainous areas through the summer months continued from historical times up to the mid-twentieth century. The practice began to decline largely due to the growth of ranching in the area.

[389] In the late dan the berries ripen and in good years, the salmon return to the Tsilhqox and Dasiqox. July is Jes Za or Chinook salmon moon; August is Ts’aman Za or Sockeye salmon moon and September is Dants’ex or pink salmon moon. Along with the salmon runs came the ripening of nuwish (soapberries), dig (saskatoon berries), selhchugh (huckleberries) and nelghes (blueberries). Hunting for nists’i, mus (moose), debi and sebay continued. Activities in the twentieth century described by witnesses included plant gathering in late dan on the shores of the major lakes. Tl'edazulh (wild rice) was also gathered at various locations in the Claim Area.

[390] In dan ch’iz nilhish (kokanee, landlocked salmon) spawn in the shallows of certain lakes. White bark pine have seeded their cones and plants like denish (kinnick kinnick) bear fruit. Nists’i begin their migration down from the mountains onto the Chilcotin plateau. As the animals ready for xi, they are fattened and their fur has begun to thicken. Tsilhqot’in people took advantage of this season, fishing for nilhish, gathering ?ests'igwel and denish berries and moving into the mountains to hunt dediny (marmots) and bigger game. Nists'i, debi, sebay and ses (bear) were taken for food, clothing and bedding.

[391] The western portion of the Claim Area was a traditional dan ch'iz hunting ground. Tsilhqot'in people hunt sebay and dediny (groundhog or marmot) in this area. There is also a trail running from these hunting grounds to fishing areas around Naghatalhchoz. Along the trail, Tsilhqot'in people hunted dediny, nists'i and sebay in the mountains.

[392] There was evidence that Tsilhqot'in people stayed at areas in the Western Trapline, transporting dried meat from their dan ch'iz hunting grounds in the south to their xi residences in the north along the trails on the sides of the lakes and on the water, in ?etaslaz ts'i (spruce bark canoes). Norman George Setah testified that while his family was hunting nists'i, nundi-chugh (cougar) and dlig in this area, they would also be fishing for sabay and dek'any.

[393] Martin Quilt testified that the mountains to the west of Tsilhqox Biny are traditional Tsilhqot'in trapping and hunting grounds for sebay, sesjiz (marten), dlig and nundi. He described trips taken through the dan ch'iz up to Christmas.

[394] Salmon was not plentiful in every year. Mabel William testified that Tsilhqot'in people took ?etaslaz ts'i across Tsilhqox Biny and up Talhjez (Franklin Arm) to go over the mountains to get fish from the river that runs into the ocean. She said this was of particular importance in years when there was a shortage of salmon in the Tsilhqox or Dasiqox. Salmon on the coast started in October and continued through xi. A trip to the coast to trade with Homalco people was an event that was more likely to have taken place in the twentieth century when relations with these coastal

peoples was not as strained as it appeared to have been in the mid-nineteenth century.

[395] Dan ch'iz activities also took place in the central portion of the Claim Area. Closer to Xeni, Tsilhqot'in people have hunted sebay, dediny and sesjiz in the mountain ranges in dan ch'iz. Nists'i are hunted as they migrate down through the valleys towards their xi range on the plateau. In recent times, mus have also been hunted in this area. Fishing and berries are gathered, and nat'i or tunulh and xex are hunted in this area.

[396] Debi, sebay, nists'i, nundi-chugh, and dlig are also hunted and denish are harvested in the eastern portion of the Claim Area.

[397] These were the seasonal rounds as told to the court by Tsilhqot'in elders. They testified that their ancestors had performed similar seasonal rounds. I understood that families were not always together and that families did not necessarily go to the same location each year. These rounds are resource dependant. It was important not to deplete a resource in any given area. Some areas were visited annually, others were visited less frequently.

g. Tools and Implements

i. Fishing

[398] In his 1953 thesis, Lane recorded that "fishing was done with a variety of equipment and techniques". He noted the use of "basketry traps of various kinds" weirs, gaff hooks and in recent times, dipnets.

[399] At trial, Tsilhqot’in elders testified about the use of xestl’un (fencing to bar a creek), a biniwed (cone fish trap), lhughembinlh (gill nets), and a binlagh (box fish trap). Fish were retrieved with a daden (three pronged spear), originally made of bone. Tsilhqot’in people also laid a platform across a shallow creek with split logs on the creek bottom to provide a pale background, allowing fish to be taken directly by hand from the platform.

[400] In her affidavit #1, Mabel William deposed to ice fishing, using split chendi inside facing up and laid on the bottom of the stream to see the fish moving in the water. Fish eggs were sprinkled in the water to attract the fish. Two types of spears were used to impale or hook the fish, a danden and a dadzagh, both made with bone or a horn hook.

ii. Hunting and Trapping

[401] Trapping and hunting have separate words. Trapping is known as ?eqe?ats'et'in. Hunting is known as nats'ededah. In his 1953 thesis at p. 44, Lane notes that the “Chilcotin were acquainted with many hunting techniques”. He makes reference to the use of snares, traps, bows and arrows, spears and clubs.

[402] Francis Setah testified about the use of a gex gej teghetl'un (spring snare) to trap gex. Norman George Setah testified about snaring nists’i and naslhiny. Others spoke of snaring gex, dlig, ?elhtilh (prairie chicken), chel?ig (coyote), nundi and other animals. Mabel William deposed to the use of a binlh (snare) made with hide strips to get dlig, gex and nundi. Dead fall traps were also dug and larger animals like ses, nists’i and nundi would fall through and be impaled on spears below.

[403] Francis Setah also testified to the use of a deni gha dats'eyel (spear like weapon). He and other elders also testified about the use of bows and arrows.

iii. Other implements

[404] Other implements included the tsi dek'ay to fell trees. Logs were split with a nelh, pounding it into the log and using a stick to keep the split open, then moving the nelh down and repeating the action until the log split into two pieces. A hammer was made from a section of tree with a strong branch attached to it. Before nails arrived, logs were secured together in the construction of dwellings with ts'u ghed or softened k'i. Spruce roots were used to tie logs together. Softened k'i was put together and used as a form of rope.

[405] Another type of rope was made by braiding strips of animal hides. Nists'i, sebay, debi, bedzish (caribou) and mus hides were used in this manner. Loads were carried by putting such a strap over the shoulder or around the forehead and, unlike cord, such a strap would not cut into the skin.

[406] A bisinchen was a tool made of pine that was used to stretch and soften hides. It was also used to tie, stretch and weave gex pelts.

iv. Baskets and Cooking

[407] Tsilhqot'in people wove baskets decorated with a unique pattern. One form of basket is called a qats'ay. It is made with woven ts'u ghed. The basket is soaked to swell the roots and make it water tight so as it can be used to carry water. Alternatively, pitch would be used to make it leak proof. This basket was also used

as a pot to boil water. Several elders explained how hot rocks were placed in the basket to bring water to a boil. For example, the basket or pot, in that manner, would be used to cook sunt'iny or ?esghunsh.

[408] Chinsdad was boiled using a qats'ay. It was then dried and mixed with dediny fat and a little sugar. Minnie Charleyboy explained that the ?Esggidam placed a fire in a k'eles (dugout). The fire would warm up rocks. The chinsdad was then placed on the warm rocks and additional warm rocks were placed on top.

[409] A second type of basket is called a tenelh. It is made from ch'it'uz (birch bark). This basket was used mainly for berry picking as it was not water tight. It was also used for the gathering of medicines and root plants.

[410] Chief William testified about a basket made from k'i that was made for the carrying of a baby.

v. ?Etaslaz ts'i (Bark Boats)

[411] Francis Setah testified that ?etaslaz ts'i were used to travel on the lakes, including Tsilhqox Biny, Tatl'ah Biny, Talhiqox Biny (Tatlayoko Lake) and Dasiqox Biny (Taseko Lake). These boats were made from ?etaslaz. Mabel William deposed to the use of the same kind of boat to transport nists'i meat across Dasiqox Biny. Others also testified about the use of ?etaslaz ts'i on the lakes.

vi. Bedding

[412] Gex pelts were woven using a bisinchen. This blanket was made with the fur exposed on both sides of the blanket. Dediny, dlig, and dediny pelts were also used to make a blanket in the same fashion.

[413] Sebay hides were also used to make blankets. Mus hides were used as mattresses. Elders also testified about the use of sebay and nists'i mattresses.

[414] All elders spoke of the use of furs and pelts of various types used as mattresses and bedding in their lifetime and dating back to the time of the ?Esggidam. It was the practice to make these household items in the dan ch'iz when the fur of the animals was at its thickest.

vii. Clothing and Footwear

[415] Clothing was made from the pelts of nists'i, sebay, debi and others. Tsa robes were noted in use by the early HBC traders who visited along the Tsilhqox corridor.

[416] Before the arrival of Europeans, Tsilhqot'in people used animal hides to make gloves, bixest'az (footwear), robes and bixesdah (coats). Bixest'az was a shoe that went up halfway over the ankle and kept the feet warm in the winter months.

[417] Tsilhqot'in people also made ?ash (snowshoes) for men that were long; and qilezmbans (snowshoes) that were round for women. These were used to move about and to hunt in the snow during the winter months.

h. Spirituality

[418] Overlooked by early settlers and the missionaries was the fact that Tsilhqot'in people are a deeply spiritual people. Gilbert Solomon testified that Tsilhqot'in people have many guardian spirits. The Supreme Spirit or God is Gudish Nits'il?in or higher chief. The spirituality of Tsilhqot'in people is rooted in a deep respect for the land, the plants and the animals. Mr. Solomon explained:

> When we have to honour all the spirits, we acknowledge the spirits of water, all the elements, the fire, light, the earth, plants, animals. We all believe that they all have spirits, the same spirit that we have, all humans. Spirits are no different. Say if we talk to any -- to any spirits, like the tree spirit, I'll talk to the tree like he's another person.

[419] Respect for the earth, plants and animals meant that before an animal was killed, there would be a silent acknowledgment of its spirit; before the berries were picked, there would be a similar acknowledgment. There was a oneness of the earth, of animals and people; an acknowledgement at death and an offering to accompany them on their spiritual journey. A failure to acknowledge this common spirituality might have consequences for the wrongdoer when he or she had to make their journey to the "other side" after death.

[420] That spirituality remains today for many Tsilhqot'in people despite their acceptance of the religion brought to them by the missionaries.

i. Deyen

[421] A Tsilhqot'in spiritual healer is called a deyen, a person with special healing powers. A person becomes a deyen after having recurring dreams of a particular

animal or some aspect of the land. He or she must then go into the mountains for days at a time on a spiritual quest to gain their powers. This involves fasting. On their return, they would gain their powers as a healer. A deyen does not advertise himself or herself as such but is available to assist in healing the sick. Deyen are respected people in the Tsilhqot'in community. Tsilhqot'in people do not walk in the shadow of a deyen.

[422] At times, Tsilhqot'in people might take a wrong turn in their lives. Their lives undergo some negative change and they become a different person. Tsilhqot'in people view that person as one who has lost his or her soul. A deyen nejede?ah is a particularly powerful deyen who is able to assist in the recovery of a lost soul. If the soul is not recovered, the person dies.

[423] Deyens might have special songs or dances. They perform a healing ceremony for sick people and are particularly knowledgeable about the healing powers of medicinal plants. Deyens draw upon the strength, the spirit and the soul of the animal that is their spiritual power or upon the spiritual and healing powers of a particular aspect of the land such as spring water.

[424] There are deyens today in Tsilhqot'in society who bring to their communities these special spiritual healing powers and knowledge.

ii. Burial Practices

[425] Tsilhqot'in people cremated their dead prior to the arrival of Europeans. Thus there are no ancient burial sites. At death, Tsilhqot'in persons would be cremated

along with their clothing and tools, enabling the journey "to the other side". The ritual of burial was introduced by the missionaries. The first cemetery was blessed by Father Nobili on October 24, 1845.

i. Tsilhqot'in Laws

[426] Professor Hamar Foster prepared a report to the court entitled "Tsilhqot'in Law". At p. 2 he said:

> … as a legal historian I proceed on the assumption that, if people are organized into societies, they participate in rule-governed relationships with others. This is what "law" in its most general sense, means. And it is – to take a telling example from the documentary record in this case – what Judge Begbie meant when he asked the Tsilhqot'in chiefs at their trial what their law of murder was…" (Judge Begbie to Governor Seymour, 30 Sept.1864…).

[427] Professor Foster pointed out that in oral societies the documentary records are exclusively non-Aboriginal and the people who produced those records often had "little understanding of the cultures they were describing". Some of their interpretations were careless and often they were interpretations of "what they saw in terms of their own culture". Thus words used to describe Aboriginal behaviour cannot be taken at their face value. As an example, when there is a report of an Indian committing a "murder", one must ask the important question, "according to whose law?" Professor Foster went on to explain at p. 5 of his report:

> For example, it was generally true that the killing of a member of one's group could be avenged not only by killing the perpetrator but *any* member of the perpetrator's legally relevant group if he could not be caught. In other words…his household, extended family, or clan – depending on the domestic law of that nation – might bear a collective responsibility…

> So, where a colonist (of the British, American or "white" nation) killed an Indian, the death could be avenged by killing any colonist. And the killer of the colonist would not view himself or be viewed by his nation as having maliciously "murdered" an innocent person.

[428] In this way there was a "group responsibility for all deaths caused by a member of the relevant group": Foster Report, p. 6. In addition to collective responsibility, there were also notions of causation, as opposed to fault. Accidental deaths required compensation and a failure to report and compensate an accidental death would justify a killing to "wipe out the debt of blood".

[429] Professor Foster acknowledged it was difficult "to ascertain with any precision, the domestic law of any particular nation solely from the documentary record." Nevertheless from the records he did examine, he was of the opinion "the Tsilhqot'in had laws, and that those for which there is evidence appear to have been broadly similar to the laws of other many North American Aboriginal groups". He noted there was evidence "that supports the view that chiefs had specific lands within Tsilhqot'in territory and that these lands descended on some sort of hereditary principle." I too 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.

[430] Professor Foster also addressed the law relating to the killing of others and the ability to seek blood vengeance. Minnie Charleyboy told a story of a Tsilhqot'in man who was accidentally killed by his brother. The killer was subsequently punished by death.

[431] Tsilhqot'in people were a rule ordered society. Various Tsilhqot'in elders testified about dechen ts' edilhtan (the laws of our ancestors). Chief Ervin Charleyboy testified that there are laws against taking the property of others, and against creating a disturbance in a community. Offenders were punished by being tied to a post from sun up to sun down in order to shame them before the community. Repeat offenders ran the risk of being banned from their community for a period of time. Killing a person meant death to the killer.

[432] There were other rules or laws testified to by several Tsilhqot'in elders. These included: rules about what a boy was to do at the time of his puberty; corresponding rules concerning girls becoming young women; rules concerning what women were able to do "on their moon"; rules about the handling of the dead; rules respecting the weapons of hunter warriors; and rules against marrying a cousin or other person closely related. All of these rules were dechen ts' edilhtan.

j. Legends and Stories

[433] Some of the stories and legends told to the Court by Tsilhqot'in elders include:

- Lhin Desch'osh, the legend of how the land was transformed and the animals made less dangerous;
- Ts'il?os and ?Eniyud;
- How Raven Stole the Sun;
- A Story of Raven Stealing Fire;
- The Story of Salmon Boy;

- The Story of the Woman and the Bear;
- The Story of Lady Rock;
- The Story of Qitl'ax Xen, a boy raised by his grandmother;
- The Story of Guli, the Skunk;
- A Story About a Brother and a Sister;
- A Story About an Owl;
- Two Sisters and the Stars; and,
- Frog Steals a Baby.

[434] This is not a complete list but it is representative of the legends I heard. Each carries with it an underlying message or moral that is intended to instruct and inform Tsilhqot'in people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation.

[435] I distinguish legends from stories. Stories are recordings of actual events in an historical period of time. Often they are of deaths or loss of children. For example, the story of Child Got Lost is about a child who went missing in the northern part of Tachelach'ed. Stories are told to remind people of significant events and are not necessarily designed to carry a life directing message.

k. Summary

[436] In the early nineteenth century, Tsilhqot'in people lived in a semi-nomadic hunter, gatherer society in a harsh environment. They were a rule ordered society, tied by language, kinship and customs. Reverence for the land that supported and nourished them continues to the present generation. Tsilhqot'in people no longer

live as their forefathers at the time of sovereignty assertion. However, the land continues as a central theme in their lives, providing continuity and stability from generation to generation.

8. ABORIGINAL GROUP

a. The Proper Rights Holder

[437] Aboriginal rights are communal rights. They arise out of the existence and practices of a contemporary community with historical roots. When making a declaration of Aboriginal rights, the court must identify which present group or community holds those rights. The plaintiff and Canada assert that the proper rights holder is the community of Tsilhqot'in people. British Columbia says that the proper rights holder is the community of Xeni Gwet'in people.

[438] Most of the cases that touch on this issue are regulatory cases in which individuals claim Aboriginal rights that belong to a larger collective. In many of these circumstances it is not necessary to identify with precision the appropriate collective. The Supreme Court of Canada has offered some guidance on how to identify and define the distinctive societies that hold Aboriginal rights.

[439] This inquiry is primarily a matter of fact to be determined on the whole of the evidence relating to the specific society or culture. One factor to consider is who made decisions about land use and occupation in the historic Aboriginal culture. The Supreme Court of Canada considered this factor in ***Delgamuukw*** at para. 115:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

[440] In ***Marshall; Bernard***, the Court related the identification of the proper group to the continuity requirement. McLachlin C.J.C. stated the following at para. 67:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, *per* Lamer C.J.C., at paras. 150-51.

[441] In ***R. v. Powley***, [2003] 2 S.C.R. 207, 2003 SCC 43, the Court considered a claim to Métis rights under s. 35(1). In order to identify the proper rights holder, the Court undertook a two stage process. The first stage was to identify the historic community that exercised the right. The second stage was to identify the contemporary rights-bearing community.

[442] When identifying the historic rights-bearing community, the Court reviewed the historical evidence including demographic evidence contained in Hudson's Bay Company journals. The Supreme Court of Canada noted several other factors in ***Powley*** at para. 23:

> In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim . . .

[443] After finding the existence of an historic rights-bearing community, the Court went on to consider the claimant's ancestrally based membership in the present community. The Court noted at para. 34:

> It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

[444] In my view, the tests for demonstrating the existence of an Aboriginal community that can support the claim to s. 35(1) rights in this case can be no different than those required of a Métis community. I add to the analysis the view that identification as a member of a community is not external. Membership is identified by the community. It should always be the particular Aboriginal community that determines its own membership.

[445] No matter how a contemporary community defines membership, a critical inquiry for the purposes of s. 35(1) rights is an ancestral connection to the relevant community extant at contact in the case of rights, or at sovereignty, in the case of title. In all of the Aboriginal rights and title decisions I have reviewed, the relevant

historic community has been the larger First Nation that existed at the time of contact or sovereignty.

[446] Aboriginal people, like people in societies everywhere, typically belong to more than one group that helps to define their identities. 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.

[447] Of interest in the passage from para. 115 of ***Delgamuukw*** (S.C.C.) is the observation that Aboriginal title is held by all members of the Aboriginal nation. British Columbia submits that in ***R. v. Marshall***, [2002] 3 C.N.L.R. 176, 2002 NSSC 57, the summary conviction appeal judge, Scanlan J., found the rights holder group to be the band rather than the larger Mi'kmaq Nation. At para. 84, Scanlan J. said:

> Occupancy necessary to establish Aboriginal possession is a question of fact and Aboriginal title should be determined on the facts pertinent to the band and not on a global basis. That is especially important in this case owing to the fact that Mi'kmaq were organized largely at the band level.

[448] In the trial court, (***R. v. Marshall***, [2001] 2 C.N.L.R. 256, 2001 NSPC 2), Curran P.C.J. made a number of findings at para. 5, including:

> a) all the defendants, except perhaps Roger Ward [Mr. Ward was a member of a New Brunswick Band], are entitled to exercise whatever remains of any aboriginal title or any treaty rights the Mi'kmaq of Nova Scotia had in the 18th century;
>
> b) the Mi'kmaq of mainland Nova Scotia in the 18th century likely had aboriginal title to lands around some bays and rivers;
>
> c) the Mi'kmaq did not have aboriginal title to any part of Cape Breton Island;

d) 18th century Mi'kmaq might have had some claim to coastal lands from Musquodoboit to the Strait of Canso.

[449] Thus, Curran P.C.J. found the rights holder group to be the Mi'kmaq of Nova Scotia. Curran P.C.J. made some findings about band level organization, but the above remarks of Scanlan J. seem to be entirely the views of that jurist on the summary conviction appeal. In addition, Scanlan J. concluded at para. 117 that "there is evidence to support the Trial Judge in his conclusions" and then went on to cite the findings of the trial judge noted above. The Supreme Court of Canada restored the trial judgment, thereby rejecting the view of Scanlan J. concerning the band as the rights holder.

[450] British Columbia argues that the proper historic and modern rights holder group here should be found at the band level. They support this argument by referring to the evidence that, among the historic community of Tsilhqot'in people, decisions about the uses of particular locations were made at the band or encampment level. Thus, it was a group of Tsilhqot'in people, subsequently known as the Alexandria Band**,** rather than all Tsilhqot'in people, who decided to take up permanent residence near Fort Alexandria in 1860. Similarly, British Columbia points out that when reserves were set aside for the various Tsilhqot'in Bands commencing in the 1880's, decisions concerning the desired locations appear to have been made by individual bands or chiefs, rather than by any pan-Tsilhqot'in institution.

[451] In my view, British Columbia places too much emphasis on the notion of a single decision-making body at the time reserves were established. The use of a

small decision-making body for one particular purpose is not necessarily the hallmark of a community.

[452] As an historical footnote on the growth of the concept of Aboriginal title in Canada, it is worth noting that in ***Baker Lake v. Minister of Indian Affairs and Northern Development***, [1980] 1 F.C. 518, Mahoney J. found that the Inuit people comprised a sufficiently "organized society" to hold rights in the land at common law, notwithstanding their nomadic, widely scattered population and the absence of any overarching social or political organization.

[453] The search for a pan-Tsilhqot'in decision-making institution is not unlike the ***Baker Lake*** test for an "organized society". Such an approach is weighed down with superficial value judgments about Aboriginal ways of life. The need to measure traditional Aboriginal societies against the legal ideals and institutions of a "civilized society" has passed. As Hall J. (dissenting) said in ***Calder v. British Columbia (A.G)***, [1973] S.C.R. 313, (S.C.C.), at p. 346:

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species …

[454] In setting out the test for Aboriginal title in ***Delgamuukw*** (S.C.C.), the Court made no reference for the need to find an "organized society". Lamer C.J.C. referred to the ***Baker Lake*** test at para. 21 but later ignored this element in the test for Aboriginal title set out in his judgment.

[455] Bands are defined by the ***Indian Act*** but are not expressly made legal persons by that statute. While they have an existence separate from that of their members, they lack many of the abilities of natural persons, corporations, municipalities and even unincorporated associations: see ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***, [2001] 4 F.C. 451, 2001 FCA 67, at para. 15 *et seq*.

[456] There is no legal entity that represents all Tsilhqot'in people. The Tsilhqot'in National Government, a federally incorporated legal entity, only represents five of the seven Tsilhqot'in communities. It does not represent either the Toosey/Tletinqox-tin Band or Tsilhqot'in people who are members of the Ulkatcho Band at Nagwentl'un (Anahim Lake). It seems to me that the search for a legal entity does not assist in the effort to define the proper rights holder.

[457] The recognition by the Supreme Court of Canada in ***Powley*** at para. 23 that "different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification" applies equally to Tsilhqot'in people. The political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.

[458] Aboriginal nations are characterized as such in the same way that French speaking Canadians are viewed as a nation. Nations in this sense are a group of people sharing a common language, culture and historical experience. They are a culturally homogeneous collective of people, larger than a clan, tribe or band. A nation state is a self-governing political entity that has sovereignty and external recognition. First Nations are not nation states; they are nations or culturally homogeneous groups of people within the larger nation state of Canada, sharing a common language, traditions, customs and historical experience.

[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.

[460] When Simon Fraser first met with Tsilhqot'in people on the banks of the Fraser River in 1808, he described them as "Chilk hodins". On his return trip later that year, he again met with people he described as Chilk-hodins, "a tribe of the Carriers". The next reference to Tsilhqot'in people is in the journals of the HBC following the establishment of Fort Alexandria.

[461] It is significant that the HBC journals and census documents between 1822-1838 refer to Tsilhqot'in people belonging to certain chiefs. These records

provide repeated references to Tsilhqot'in people, with variations on spelling. There is no reference to Xeni Gwet'in people in these documents.

[462] Nobili's journals refer to visits to Tsilhqot'in villages. His contact with Tsilhqot'in people included the ancestors of people who today describe themselves as Xeni Gwet'in people.

[463] Marcus Smith makes reference to the "Stone Indians" in his 1872 journal when talking about his travels among the Tsilhqot'in people. He wrote that his party had camped "by the margin of Tatla lake not far from the camp of Keogh, the chief of a small band of Indians who subsist by fishing on the lakes and hunting on the slopes of the Cascade mountains, from which they have the local name of "Stone Indians". The Xeni Gwet'in people are the descendants of these people.

[464] When reserves were set aside in the "Nemaiah Valley" by A. W. Vowell in 1899, there was no reference to Xeni Gwet'in people. The minutes of his decision to set aside Chilco Lake, Garden, Fishery and Meadow Reserves dated September 20, 1899 refer to the "Nemaiah Valley Indians".

[465] The laying aside of these reserves 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. I have already noted in my historical summary that 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.

[466] For decades, the people who have lived on these reserves were known as the Nemiah Valley Indian Band. This was the name given to them by the Federal Department of Indian Affairs. The Tsilhqot'in words Xeni Gwet'in translates to "people of the Nemiah Valley". The Xeni Gwet'in people officially changed the name of their band to the Xeni Gwet'in First Nations Government in 1995.

[467] At the time reserves were fixed, tribes, clans or families of Tsilhqot'in people lived in different locations across a vast territory. The creation of reserves was a consequence of requests made by these clans or families through their chiefs. Prior to and after the allocation of reserves, Tsilhqot'in people watched as Europeans pre-empted land that was a part of Tsilhqot'in territory. The requests for reserves were as much a part of self-preservation as anything else; a way of protecting some smaller part of the whole from pre-emption by others.

[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.

[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.

[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 sub-group 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.

[471] This conclusion accords with Professor Slattery's view of the law of Aboriginal title. In his article entitled "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 745, Professor Slattery stated:

> 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].

[472] Almost 20 years later, Professor Slattery's view has not altered. In B. Slattery, "The Metamorphosis of Aboriginal Title", (2006) 85, Can. Bar Rev. 255, he discusses Aboriginal title as a *sui generis* right at common law and says, in part, at p. 270:

> According to this theory, aboriginal title is not grounded in English property law, nor is it based on the customary laws of particular Indigenous groups. It is a distinctive form of title — a *sui generis* right — that gives an Indigenous group the exclusive right to possess and use its traditional lands for such purposes as it sees fit, subject to the restriction that the lands cannot be transferred to outsiders but may only be ceded to or shared with the Crown, which holds an underlying title to the land.
>
> Viewed *externally*, aboriginal title is a uniform right, which does not differ from group to group. Viewed *internally*, it delimits a sphere within which the customary legal system of each group continues to operate, regulating the manner in which the lands are used by group members and evolving to take account of new needs and circumstances.

9. ABORIGINAL TITLE

a. Nature of Aboriginal Title

[473] The origin and nature of Aboriginal title in Canada has been the subject of great debate both inside and outside the courts. Canadian courts began to outline and define Aboriginal title (also referred to as Indian title or native title) in ***St. Catherine's Milling and Lumber Company v. The Queen*** (1888), 14 App. Cas. 46 (P.C.). That case arose out of a timber licensing dispute in the Province of

Ontario and did not directly involve Aboriginal people. In 1873 the Saulteaux Tribe ceded certain lands to the federal Crown when they entered into Treaty 3. The company claimed it had a right to log on those lands pursuant to a licence issued by the Canadian government. The Province argued it had the sole authority to license pursuant to s. 109 of the ***British North America Act***.

[474] The case was ultimately decided by the Privy Council who made several significant findings. The first was that Indian title to lands in Ontario originated from the ***Royal Proclamation*** (1763), R.S.C. 1985, App. II, No. 1. Lord Watson, speaking for the Court, expressed the view that the land "tenure of the Indians was a personal and usufructuary right, dependant upon the good will of the Sovereign": ***St. Catherine's Milling***, p. 54.

[475] A usufruct is a legal right to use, benefit from and derive profit from property belonging to another person, provided the property is not damaged or altered in any way. According to this concept of title, the Aboriginal occupants have the right to live on the lands but they are prevented from doing anything that would affect the underlying title held by the Crown.

[476] The Privy Council also found that the Crown "all along had a present proprietary estate in the land, upon which the Indian title was a mere burden": ***St. Catherine's Milling*** at p. 58. The personal usufructuary right held by the Saulteaux people disappeared when the lands were surrendered to the Crown under the 1873 treaty. The Court held that the federal government ceased to have

jurisdiction over the lands pursuant to s. 91(24) of the ***BNA Act*** because the entire beneficial interest passed to the Province of Ontario under s. 109.

[477] The Privy Council later qualified its description of the Aboriginal interest as a personal right. The Court explained that "personal" meant the land was "inalienable except by surrender to the Crown": ***Attorney General (Quebec) v. Attorney General (Canada)***, [1921] 1 A.C. 401, pp. 410-411 (P.C.) (the ***Star Chrome*** case). The right was thought to be held at the pleasure of the Crown and could be extinguished at any time.

[478] The description of Aboriginal title as a usufructuary right was favoured by the Supreme Court of Canada into the 1980's: see, for example, ***Smith v. The Queen*****,** [1983] 1 S.C.R. 554 at pp. 561-2; ***Guerin v. The Queen***, [1984] 2 S.C.R. 335, per Dickson J. at p. 379 and p. 382. Viewed through a more contemporary lens, it is not surprising the Supreme Court of Canada has found that describing Aboriginal title as a usufructuary right is "not particularly helpful": ***Delgamuukw*** (S.C.C.) at para. 112. Given the nature of Aboriginal title as now defined by the jurisprudence, it is fair to say that it can no longer be characterized as a usufructuary right.

[479] The historical view of Aboriginal title grew out of Canada's colonial past, what Professor Slattery calls "the Imperial Model of the Constitution": Slattery, B. "The Organic Constitution: Aboriginal Peoples And The Evolution of Canada*"* (1995) 34 Osg. Hall. L.J. 101 at p.103. This concept of the Constitution is constructed upon British law, primarily consisting of statutes passed by the Imperial Parliament. From

this perspective Aboriginal people had no inherent jurisdiction over their lands and peoples, and had only those rights that were recognized by a Crown Act.

[480] Prior to the 1970's, there was little support in Canadian law for the recognition of Aboriginal title, unless the claim was based on the ***Royal Proclamation*****, *1763*.** D.W. Elliott summarized the situation in an article entitled "Aboriginal Title" reproduced in Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985) 48 at p. 61:

> By January 1973, the Canadian common law position on the question of the legal status of aboriginal title was little different from that resulting from the *St. Catharine's* case eighty-four years earlier. Canadian courts recognized a Proclamation-based title. Although this title had legal status, it was subject to all the geographical and other uncertainties of the Proclamation. There was no clear indication from the courts as to whether the broader concept of an occupancy-based right had any status at common law.

[481] The notion of an occupancy-based Aboriginal title started to gain acceptance at a time when countries such as Canada began the process of decolonization. The first major phase of decolonization began after the Second World War, spurred on by the work of the United Nations. The United Nations was setting a new agenda for human rights and equality of the world's peoples: see Peter H. Russell, *Recognizing Aboriginal Title*, (Toronto: University of Toronto Press, 2005). In Canada decolonization experienced its first legal challenge with the Supreme Court of Canada's decision in ***Calder***.

[482] ***Calder*** was a turning point which changed our basic understanding of Aboriginal rights and allowed us "to move from a framework grounded in imperial

history to a framework more open to local history, tradition, and perspectives": Slattery, "The Organic Constitution" at p. 107.

[483] In the ***Calder*** case the Nishga people sought a declaration of Aboriginal title to lands their ancestors had occupied and used from time immemorial. The Court split three ways, disagreeing on the result. A majority of the Court suggested that Aboriginal title may exist separately from the ***Royal Proclamation***. Judson J., speaking for Maitland and Ritchie JJ., found that the geographical limitations of the ***Royal Proclamation*** meant that it had no bearing upon the question of "Indian title" in British Columbia. He went on to observe at p. 328:

> … the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".

[484] Judson J. agreed that any right of occupancy had been extinguished in lands not set aside for Indian occupation. He stated at p. 344:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

[485] Judson J. would have dismissed the appeal on the ground that title had been extinguished. However, he also agreed with Pigeon J. that the absence of a fiat

from the Crown deprived the trial court of jurisdiction. Due to the court's split decision on extinguishment, Pigeon J.'s decision is the *ratio decidendi* of the case.

[486] Hall J., speaking for Spence and Laskin JJ., disagreed with Judson J. on the extinguishment issue. He concluded that if a right was to be extinguished, it must be done by specific legislation, not by general land legislation.

[487] In what appears as a fresh approach to the issue of Aboriginal title, Hall J. recognized that the Nishga people were a distinctive cultural entity "with concepts of ownership indigenous to their culture and capable of articulation under the common law": ***Calder***, p. 375.

[488] A question left open by Hall J. was whether Aboriginal possession of the kind disclosed by the admitted and proved facts in ***Calder*** was sufficient juridical possession to give rise to proprietary rights. In the Court of Appeal, ***Calder v. A.G.B.C.*** (1970), 13 D.L.R. (3rd) 64 (B.C.C.A.) at p. 66, Davey C.J.B.C. explained that although "the boundaries of the Nishga territory were well known to the tribes and to their neighbours … These were territorial, not proprietary boundaries, and had no connection with notions of ownership of particular parcels of land". The issue of boundaries is one which arises repeatedly in Aboriginal title cases.

[489] The ***Calder*** decision was applied in ***Baker Lake***. The Inuit people who lived in the Baker Lake area brought an action in the Federal Court of Canada asserting claims over an undefined portion of the Northwest Territories, including approximately 78,000 square kilometres surrounding the community of Baker Lake.

The plaintiffs' ancestors lived a nomadic existence on the "barren lands" and their survival depended primarily upon the availability of caribou.

[490] The plaintiffs advanced "ownership" claims, including injunctions restraining the Crown from issuing land use permits, and mining companies from mining. They also requested a declaration that the claimed lands were not public or territorial lands. The plaintiffs also made non-proprietary claims of a title to hunt and fish.

[491] In regard to the hunting and fishing rights claim, the plaintiffs sought "a declaration that the lands comprising the Baker Lake area" were "subject to the aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon": ***Baker Lake***, p. 524. As Mahoney J. noted at p. 559: "The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did."

[492] Mahoney J. considered the source of Aboriginal title and at p. 556 referred to the ***Calder*** (S.C.C.) decision as:

> … solid authority for the general proposition that the law of Canada recognizes the existence of an aboriginal title independent of *The Royal Proclamation* or any other prerogative act or legislation. It arises at common law.

[493] Mahoney J. then determined that to establish such a "title" to hunt and fish, the claimants must prove:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.

> 4. That the occupation was an established fact at the time sovereignty was asserted by England.

This territorial standard of occupation has since been termed the ***Baker Lake*** test.

[494] The standard used in the ***Baker Lake*** test reflected the limited content of the right claimed. Mahoney J. commented on the fact that the Inuit were few in number and wandered over a large area, saying at p. 561:

> The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them.

[495] Mahoney J. decided that the Inuit of Baker Lake had established their claim to a right to hunt and fish over most of the lands in issue, excepting a portion in the southwest claimed area that had been used by other non-Inuit Aboriginal people. He concluded that the plaintiffs had a common law "aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it …": ***Baker Lake***, p. 563.

[496] The court considered that this right to hunt and fish could coexist with the radical or allodial title of the Crown, or with notional occupation by the Crown. However, it could not coexist with physical occupation by private landholders or by the trading posts of the Hudson's Bay Company. Mahoney J. said at p. 565:

> The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land. However, its

> coexistence with the radical title of the Crown to land is characteristic of aboriginal title and the [Hudson's Bay] Company, in its ownership of Rupert's Land, aside from its trading posts, was very much in the position of the Crown. Its occupation of the territory in issue was, at most, notional.

[497] Mahoney J. emphasized the vulnerable nature of the "title" he was finding, stating at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

[498] And further, at p. 576:

> To the extent that their aboriginal rights are diminished by those laws [*Territorial Lands Act; Public Lands Grants Act*], the Inuit may or may not be entitled to compensation. That is not sought in this action. There can, however, be no doubt as to the effect of competent legislation and that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails.

[499] The plaintiffs' ownership based claims and requests for a declaration that the lands in question were not public lands and that the Inuit were holders of surface rights were refused.

[500] The next important development in Canadian Aboriginal law was the patriation of the Canadian Constitution with the enactment of the ***Constitution Act, 1982***, and in particular, s. 35(1). That section reads:

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

[501] In Professor Slattery's opinion this provision represents "a basic shift in our understanding of the constitutional foundations of Canada": "Organic Constitution" at p. 108. He pointed to the response of the Supreme Court of Canada in ***R. v. Sparrow*****,** [1990] 1 S.C.R. 1075 at pp. 1105-1106 where the Court quotes with approval an article by Professor Noel Lyon entitled, "An Essay On Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95:

> … the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

[502] Professor Slattery argues for a new concept of the Constitution which he calls the Organic Model. This model "holds that the Constitution is rooted ultimately in Canadian soil rather than in Europe, while acknowledging the important influences of Great Britain and France … the Model rejects the positivist view that our most fundamental laws are embodied in legislation and are grounded ultimately on the sovereign's power to command obedience…": "Organic Constitution" at p. 111.

[503] The view that Aboriginal title is rooted in Canadian soil is embodied in the theory that title is *sui generis*. Put in more simple terms, Aboriginal title in this country is unique and in a class by itself.

[504] In ***Canadian Pacific Ltd. v. Paul***, [1988] 2 S.C.R. 654 the Supreme Court of Canada said at p. 678 "that the Indian interest in land is truly *sui generis*. It is more

than the right to enjoyment and occupancy although … it is difficult to describe what more in traditional property law terminology".

[505] The description of Aboriginal title as *sui generis* captures the essence of a proprietary right shaped by both the common law and Aboriginal legal systems. Aboriginal title does not belong to either one of these perspectives, and can only be explained and understood by reference to both: ***Delgamuukw*** (S.C.C) at para. 112. The Court went on to explain the underlying principles of this *sui generis* title at para. 113 of ***Delgamuukw***::

> The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

[506] The source of Aboriginal title also reflects the relationship between common law and pre-existing systems of Aboriginal law. As Lamer C.J.C. explained in para. 114 of ***Delgamuukw:***

> It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin*, *supra*, Dickson J. described aboriginal

> title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title — the relationship between common law and pre-existing systems of aboriginal law.

[507] Another *sui generis* aspect of Aboriginal title is that it is held communally. Aboriginal title cannot be held by individual persons. Lamer C.J.C. at para. 115 of ***Delgamuukw*** stated:

> … it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.

[508] While those rights are held communally by the Aboriginal title holders, the underlying title remains vested in the Crown. The Supreme Court of Canada explained as follows in ***Sparrow*** at p. 1103:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, 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 …

[509] One of the key challenges of Aboriginal law is reconciliation between present day Aboriginal title holders and the Crown. For there to be a lasting reconciliation, this relationship must be negotiated with reference to contemporary interests and

needs, bearing in mind the realities of modern society. As the Court of Appeal in ***R. v. Sparrow*** (1986), 32 C.C.C. (3rd) 65 (B.C.C.A.), explained at pp. 90-1:

> The constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests. The "existing right" in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.

[510] A further *sui generis* aspect of Aboriginal title is that it contains an inherent limit on the uses Aboriginal peoples can make of their lands. Thus "…lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands": ***Delgamuukw*** (S.C.C.) at para. 125. The Supreme Court of Canada explained at para. 126 that the purpose of this limit is to:

> … afford legal protection to prior occupation in the present-day. Implicit in the protection of historical patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

[511] As Brian Slattery points out in his article "The Metamorphosis of Aboriginal Title" ((2006) 85 Can. Bar Rev. 255), the common law has adapted in light of current circumstances. He states at p. 262:

> The adaptation was shaped by three needs: to ensure the continuity of aboriginal title and its recognition in a modern form; to supply appropriate remedies for the wrongs visited on Indigenous peoples;

> and to accommodate public and private interests in the lands concerned.

[512] The common law recognition of Aboriginal rights and title calls for a reconciliation of Aboriginal people's prior occupation of Canada and the sovereignty of the Crown. The ***Constitution Act, 1982*** enshrined the principle of reconciliation by way of s. 35(1). Lamer C.J.C.'s majority decision in ***Van der Peet*** clarified our current understanding of the origin and nature of these rights.

[513] ***Van der Peet*** arose out of the prosecution of a regulatory offence pursuant to the ***Fisheries Act***, R.S.C. 1970, c. F-14 and Regulations. Two members of the Sto:lo First Nation caught ten salmon in the Fraser River. They held an Indian food fishing licence which permitted them to catch fish for food. The federal fisheries Regulation specifically prohibited the sale or barter of any fish caught under the authority of such a licence. Ms. Van der Peet, the common law wife of one of the fishermen, sold the salmon for $50. She was charged under the ***Fisheries Act***. She defended the charges against her on the basis that in selling the fish she was exercising an existing Aboriginal right to sell fish.

[514] In the result, the majority of the Supreme Court upheld Ms. Van der Peet's conviction. In doing so, Lamer C.J.C. confirmed that s. 35(1) did not create the legal doctrine of Aboriginal rights. Those rights existed and were recognized under the common law prior to 1982. Lamer C.J.C. explained the foundation of the modern doctrine of Aboriginal rights at para. 30, as follows:

> … the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans

> arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.

[515] Lamer C.J.C. also explored the purpose behind s. 35(1) and found it goes even further than simply recognizing the existence of Aboriginal rights. The Chief Justice explained in para. 31 that the purpose of s. 35(1) is to:

> … provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose: the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[516] In ***Van der Peet*** the court also articulated a test for determining whether a particular activity is protected as an Aboriginal right, as follows: para. 44:

> In order to fulfill the purpose underlying s. 35(1) – *i.e.*, the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

[517] What emerges from this is that prior to the 1990's, it was thought that fishing and hunting rights were derived from and were dependent upon the existence of a title, usually called Indian title, which existed throughout an Aboriginal group's traditional territory. This approach was summarized by the Quebec Court of Appeal in ***R. v. Côté*** (1993), 107 D.L.R. (4th) 28 where Beaudouin J.A., at p. 43, said:

> Aboriginal Indian title, let us recall, is a sort of *sui generis* right of usufruct implying the right to hunt and fish for subsistence…

[518] Today we no longer speak of an overarching Aboriginal title. It is more accurate to speak of a variety of Aboriginal rights. One of these rights is Aboriginal title to land. Aboriginal title is one manifestation of the broader concept of Aboriginal rights: ***R. v. Adams***, [1996] 3 S.C.R. 101 at para. 25. Aboriginal rights are not a subset of Aboriginal title derived from or dependent upon proof of an overarching or underlying Aboriginal title. Lamer C.J.C. in ***Van der Peet*** at para. 33 described Aboriginal title as a subcategory of Aboriginal rights:

> Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights.

And further, at para. 74:

> … aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.

[519] This refinement in the terminology used in modern Aboriginal rights and Aboriginal title cases has to be considered when discussing historic Canadian cases and foreign jurisprudence which use different terminology, or sometimes the same terminology, to describe different concepts. In ***Van der Peet*** at para. 35, the Court recognized that Aboriginal law in the United States and Australia is "significantly different from Canadian aboriginal law".

[520] The Supreme Court of Canada made a similar observation regarding Australian jurisprudence in ***Van der Peet*** at para. 38:

> Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada.

[521] In the foregoing discussion I have attempted to demonstrate that our understanding of Aboriginal rights and title has evolved as particular issues have been addressed by the courts. In the pre-***Constitution Act, 1982*** era, claims were made that Aboriginal title existed throughout traditional territories and gave rise to a right to continue to use Crown lands that had not been granted to others, for traditional pursuits. The content of the Aboriginal title was commonly understood to be inclusive of Aboriginal rights to hunt and fish for food and subsistence with a geographic scope based on a territorial concept of occupation, existing throughout entire traditional territories.

[522] This view has been altered in the post-***Constitution Act, 1982*** jurisprudence. In the Supreme Court of Canada cases ***Adams*** and ***Côté***, the Court confirmed that "claims to title to the land are simply one manifestation of a broader-based conception of aboriginal rights": ***Adams*** at para. 25.

[523] ***Côté*** and ***Adams*** confirmed that site-specific Aboriginal rights to fish and hunt may be established over some or all of a group's traditional territory even where a claim of Aboriginal title is not made out. Aboriginal title does not subsist everywhere that Aboriginal rights are carried out, and Aboriginal title does not exist everywhere in a group's exclusive traditional territory.

[524] This development shed new light upon previous arguments concerning the geographic extent of Aboriginal title. It was possible for an Aboriginal group to show

that a particular practice, custom or tradition taking place on particular lands was integral to their distinctive culture so as to establish site-specific Aboriginal rights, but not establish Aboriginal title on those same lands. Thus, it was clear there were areas used by Aboriginal people upon which Aboriginal title did not exist.

[525] In ***Adams***, the Supreme Court rejected the position of the Quebec government that an Aboriginal fishing right could not be found on land in relation to which the Indians had surrendered their Aboriginal title. In ***Adams*** at paras. 26 and 27, it was noted "that some Aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances" and that these peoples' form of occupation and use of lands was not "sufficient to support a claim of title to the land" even though "many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures".

[526] In ***Côté*** the appellants, members of the Algonquin nation, were convicted of the offence of entering a controlled harvest zone in the Outaouais region of Quebec without paying a provincially required fee for motor vehicle access. Côté was also convicted of the offence of fishing within the zone without a valid licence. The appellants jointly challenged their convictions on the basis that they were exercising an Aboriginal right and concurrent treaty right to fish based on a claimed Aboriginal title to their ancestral lands.

[527] As with the other pre-1990 cases, throughout the lower court proceedings the appellants in ***Côté*** framed their claim as a right to fish incidental to Indian title to their ancestral lands. They relied on the ***Baker Lake*** test of occupation.

[528] The Supreme Court of Canada concluded in ***Côté*** that fishing for food within the lakes of the relevant territory was a significant part of the life of the Algonquin people. This gave rise to an Aboriginal right exercisable in that territory even in the absence of Aboriginal title.

[529] At para. 67 of ***Côté*** the Supreme Court of Canada stated:

> … I conclude that Frenette J. made a finding of fact that … the *ancestral lands* of the Algonquins lay at the heart of the Ottawa River basin. These *ancestral lands* included the territory demarked by the Z.E.C. … The Algonquins, as a socially organized but nomadic people, moved frequently within these lands. The traditional diet of the Algonquins depended on the season, but Parent concluded on the basis of the available anthropological evidence that the Algonquins predominantly relied on fish to survive during the fall season prior to winter.

[530] Not all the ancestral lands or traditional territory used by an Aboriginal people are subject to Aboriginal title. Freestanding Aboriginal rights may be exercised within those ancestral lands without establishing Aboriginal title. An Aboriginal people may demonstrate that an activity on a specific tract of land gives rise to an Aboriginal right, but this will not be sufficient to satisfy the further hurdle to establish Aboriginal title.

[531] The developments in ***Adams*** and ***Côté*** were described in an article written by Kent McNeil titled “Aboriginal Title and Aboriginal Rights: What’s the Connection?” (1997), 36 Alta. L.R. 117. At p. 121 he said the following:

> The picture which emerges from Lamer C.J.C.’s discussions of the relationship between Aboriginal title and Aboriginal rights in *Adams* and *Côté* can be summarized as follows. Aboriginal title depends on proof of a connection with specific land that meets an as yet undefined threshold of sufficient occupation, one aspect of which is a degree of permanence that is also undefined.

[532] Since this comment was made, the Supreme Court of Canada has delivered several important decisions that have provided further guidance on the nature and content of Aboriginal title. Perhaps the most significant Aboriginal title case to be decided to date is ***Delgamuukw***. That case involved a claim by the Gitksan and Wet’suwet’en people to ownership or title to lands traditionally occupied by their ancestors. In it, the Court provided the current definition of Aboriginal title and explained how that title could be proven.

[533] The Court examined in abstract terms: the content of Aboriginal title, how it is protected by s. 35(1) and what is required for its proof. Although the majority of the judgment is considered *obiter dicta*, it is, as Lambert J.A. has observed, “very persuasive *obiter*”: D. Lambert, “Van der Peet and Delgamuukw: Ten Unresolved Issues” (1998) 32 U.B.C. Law Rev. 249 at p. 255.

[534] Lamer C.J.C. wrote the principle judgment in ***Delgamuukw*** (S.C.C.). He repeated at para. 2 that the court in ***Adams*** and ***Côté*** had “rejected the proposition that claims to Aboriginal rights must also be grounded in an underlying claim to

aboriginal title". He also affirmed that Aboriginal title is a "distinct species of aboriginal right that was recognized and affirmed by s. 35(1)": ***Delgamuukw***, para. 2. Lamer C.J.C. then authored a theory of Aboriginal rights in which those rights fall along a spectrum, depending on their degree of connection to the land.

[535] Lamer C.J.C. adopted Dickson J.'s characterization of Aboriginal title in ***Guerin*** as *sui generis*. Lamer C.J.C. further stated at para. 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 culture 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, to be explained more fully below, 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.

[536] The Court pointed out that Aboriginal title cannot be explained by reference to only the common law rules about real property or to property rules found in Aboriginal legal systems. It must be understood with reference to both: ***Delgamuukw*** at para. 112.

[537] Lamer C.J.C. then provided the following explanation for the content of Aboriginal title at para. 117:

> …first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal

> cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.

[538] To summarize, Aboriginal title is a species of Aboriginal right which differs from Aboriginal rights to engage in particular activities. It confers a *sui generis* interest in land, that is, a "right to the land itself". That interest can "compete on an equal footing with other proprietary interests": ***Delgamuukw***, para. 113.

[539] Aboriginal title confers a right to exclusive use, occupation and possession to use the land for the general welfare and present-day needs of the Aboriginal community: ***Delgamuukw***, para. 121. Aboriginal title also includes a proprietary-type right to choose what uses Aboriginal title holders can make of their title lands. Title is subject to an inherent limit which is defined by "the nature of the attachment to the land which forms the basis of the particular group's aboriginal title": ***Delgamuukw***, para. 111. Such inherent limits prohibit those uses that would destroy the ability of the land to sustain future generations of Aboriginal peoples: ***Delgamuukw***, para. 128.

[540] Aboriginal title also has an economic component, which will ordinarily give rise to fair compensation when Aboriginal title is infringed, varying in amount with the nature and severity of the infringement "and the extent to which Aboriginal interests were accommodated": ***Delgamuukw***, para. 169.

[541] Aboriginal title, like Aboriginal rights more generally, is held communally: ***Delgamuukw***, para. 115. It is inalienable to third parties, but can be surrendered to

the Crown: ***Delgamuukw***, paras. 129-131. It must be surrendered in order to use the lands in a way contrary to the inherent limit.

b. Test for Aboriginal Title

i. Pre-sovereignty Occupation

[542] Aboriginal title is proven by demonstrating three critical elements, all of which are concerned with occupation of the land, and all of which must be met in order to make out a successful claim. The Aboriginal people must establish that they occupied the lands in question at the time when the Crown asserted sovereignty over those lands. "If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation." And finally, "occupation must have been exclusive": ***Delgamuukw***, para. 143.

[543] Aboriginal title arises out of the claimant's connection to their ancestral lands. The particular lands must have been occupied by the claimants prior to sovereignty. Although the Court notes that the group's connection with the land must have been integral to the distinctive culture of the claimants, Lamer C.J.C. also directed 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": ***Delgamuukw***, para. 151.

[544] Lamer C.J.C. explained at para. 149 that the standard of occupation required to prove Aboriginal title 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.

[545] The cultural relationships between the claimant Aboriginal group and the land, and the ceremonial and cultural significance of the land will also be relevant to this inquiry.

ii. Exclusivity

[546] Exclusive occupation may be demonstrated by the ability to exclude others, including "the intention and capacity to retain exclusive control" of the lands: ***Delgamuukw***, paras. 155-156. Proof of exclusivity must rely on both the perspective of the common law and the Aboriginal perspective, placing equal weight on each. The Court went on to explain at para. 156:

> … exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by "the intention and capacity to retain exclusive control" (McNeil, *Common Law Aboriginal Title, supra* at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive occupation.

iii. Continuity

[547] Continuity is not a mandatory element for proof of Aboriginal title. It becomes an aspect of the test where an Aboriginal claimant relies on present occupation to

raise an inference of pre-sovereignty occupation of the claimed territory. Establishing continuity may be difficult for some claimants where their occupation shifted due to colonial settlement, disease and other post-sovereignty conditions.

[548] Where an Aboriginal group provides direct evidence of pre-sovereignty use and occupation of land to the exclusion of others, such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present-day. Upon the assertion of sovereignty, Aboriginal title crystallized into a right at common law, and it subsists until it is surrendered or extinguished.

[549] Aboriginal claimants do not need to establish an unbroken chain of continuity between present and prior occupation: ***Van der Peet***, para. 65. Aboriginal occupation may have been disrupted "perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title": ***Delgamuukw*** (S.C.C.), para. 153. Claimants must demonstrate that a substantial connection between the people and the land has been maintained: ***Delgamuuukw*** (S.C.C), para. 154.

[550] Because Aboriginal title is grounded in the continuing relationship between Aboriginal people and the land, it cannot be made the subject of a transfer. This common law principle meant settlers had to derive their title from the Crown, not from Aboriginal inhabitants.

[551] In ***Delgamuukw*** (S.C.C.) Lamer C.J.C. said at para. 126:

> Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

[552] And further, at para. 127:

> The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well.

[553] In ***Delgamuukw*** (S.C.C.) Lamer C.J.C. clarified that changes in land use would not typically undermine the continuity element of the test for Aboriginal title. He stated at para. 154:

> I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.

c. *R. v. Marshall*; *R. v. Bernard*

[554] ***Marshall; Bernard*** is the Supreme Court of Canada's most recent decision on Aboriginal title. That case stands for the proposition that Aboriginal title is not co-extensive with any particular Aboriginal group's traditional territory. The parties in the case at bar appear to accept that proposition but fail to agree upon what that means, taking into account the facts in this case.

[555] The parties in this case agree that the modern cases have defined Aboriginal title as an Aboriginal right, grounded in the continuing relationship between the

Aboriginal people themselves and the land. They are divided on the application of the principles and in particular on the impact of the Supreme Court's decision in ***Marshall; Bernard***. The plaintiff is accused of misconceiving Aboriginal title as an over arching title, alleged to exist throughout the entire traditional territory of the Tsilhqot'in Nation. The defendants say the plaintiff arbitrarily defines the Claim Area, as one part of the larger traditional territory.

[556] The plaintiff says that the above characterization of his claim is entirely incorrect. He says the defendants have taken an untenably narrow view of Aboriginal title, completely divorced from the realities of Aboriginal life. The plaintiff argues that the defendants misunderstand the characterization of definite tracts of land used by the Tsilhqot'in people for hunting, fishing and gathering, and are attempting to confine Aboriginal title to narrowly defined pinpoint sites. He says British Columbia's acknowledgement that Aboriginal title might be established in some exceptional circumstances to a specific "salt lick" or a "narrow defile" where game concentrate each year as opposed to a more broadly used area for hunting, fishing and gathering, is entirely incorrect. In the submission of the plaintiff, this is not the promise of Aboriginal title foretold by the foregoing decisions. Due to the importance of the ***Marshall; Bernard*** decision, I must consider in detail the decisions of the lower courts and the Supreme Court of Canada.

[557] In ***R. v. Bernard***, [2000] 3 C.N.L.R. 184 (N.B. Prov. Ct.), Mr. Bernard, a Mi'kmaq person, cut timber on Crown lands near Miramichi, New Brunswick. He was charged under the provincial statute. In his defence he claimed treaty rights

and Aboriginal title to a watershed area that included the Crown lands where the particular cut blocks were located.

[558] In rejecting the Aboriginal title claim to the Miramichi watershed, Lordon P.C.J. made the following findings at paras. 98-100 and 103-110:

a) at the time of sovereignty, the Miramichi Mi'kmaq were a hunting, fishing, and gathering people who would migrate up and down the Miramichi River seasonally. "In summer they would congregate in large numbers in summer villages." In winter they moved inland, particularly to the area of the confluence of the Little Southwest Miramichi and the Northwest Miramichi. Settlements there had some permanency to them. These areas of permanent or semi-permanent occupation were well-established and well-defined and are now included in Indian reserves;

b) to what extent they would disperse from these areas and to where was uncertain;

c) the entire geographic area of present-day New Brunswick was considered to be the traditional territory of either the Mi'kmaq, the Maliseet or the Passamaquoddy;

d) there were large areas of the province that were considered vacant and available to be granted by the Crown without interfering with any land that was actually occupied by Indians;

e) there was no evidence of recent use of the particular area of the cut blocks;

f) the trial judge was unable to conclude that the cutting site was used on a regular basis. Such trips made there at the time of sovereignty would have been occasional;

g) there was no evidence of capacity to retain exclusive control and, given the vast area of the land and the small population, the Mi'kmaq did not have the capacity nor the intent to exercise exclusive control, which was held by the trial judge to be fatal to the claim for Aboriginal title.

[559] In the trial judge's view "[o]ccasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land": ***R. v. Bernard***, para. 107. The accused were convicted.

[560] An appeal to the Court of Queen's Bench sitting as a Summary Conviction Appeal Court confirmed Mr. Bernard's conviction: ***R. v. Bernard***, 2001 NBQB 82, 239 N.B.R. (2d) 173. The defendant then appealed to the Court of Appeal, where the majority set aside the conviction and entered an acquittal: ***R. v. Bernard***, 2003 NBCA 55, 262 N.B.R. (2d) 1.

[561] In the New Brunswick Court of Appeal, Daigle J.A. disagreed with the trial judge on the standard of occupation required to establish Aboriginal title. Daigle J.A. was satisfied that the claimed area was subject to Miramichi Mi'kmaq Aboriginal title. Daigle J.A. also upheld the treaty defence, finding the harvesting of logs to be the contemporary form of a treaty right. Robertson J.A. also disagreed with the trial judge on the standard of occupation required to establish Aboriginal title. Robertson J.A. refrained from answering the question as to whether the evidence was sufficient to support a declaration of Aboriginal title, concluding it was unnecessary in the circumstances. Instead he overturned the conviction on the basis of the existence of a treaty right to harvest and sell logs. Deschenes J.A., dissenting, would not have interfered with the trial judge's findings of fact.

[562] In expressing his disagreement with the trial judge, Daigle J.A. said the following at paras. 86-88:

In my view, the trial judge's statement in para. 107 that "occasional" use or "occasional forays for hunting, fishing and gathering are not sufficient to establish aboriginal title in the land" is incorrect and exhibits a fundamental misunderstanding of what *Delgamuukw* requires as sufficient elements of physical occupation to ground title. In para. 74, above, I quoted a passage from *Delgamuukw* in which Lamer C.J. refers specifically to a number of factors to be taken into account in determining the sufficiency of physical occupation. In providing guidance concerning the concept of occupation he first states that physical occupation can be established in a variety of ways, one of which is the "regular use of definite tracts of land for hunting, fishing or otherwise exploiting resources". On this point, he references the work of Prof. McNeil, excerpts of which I have quoted in para. 77 above. The relevant factors emphasized are the group's size, manner of life, material resources and the character of the lands claimed. In particular, the inclusion of "manner of life" in the list of factors to be considered for occupation at common law would undoubtedly include consideration of the seasonal pattern of exploitation of the resources of the entire Northwest Miramichi watershed by the Mi'kmaq. I pointed out earlier the overarching principle set out in *Delgamuukw* that the aboriginal perspective must be taken into account alongside the perspective of the common law. Therefore, as a matter of law, the same factor of the Mi'kmaq subsistence pattern, which represents the essential feature of their perspective on the occupation of their lands, must be taken into account in determining the requisite degree of occupation.

As to the meaning of "regular use" of land, the following comments by Prof.McNeil, tacitly adopted although not quoted by Lamer C.J. in *Delgamuukw*, shed light on the nature of the use of land that amounts to physical occupation at common law (p. 202):

> Probably even outlying areas that were visited occasionally, and regarded as being under their exclusive control, would also be occupied by them in much the same way as the waste of a manor would be occupied by the lord …

As to occupation of land by a hunter-gatherer aboriginal group such as the Miramichi Mi'kmaq, it was the author's opinion that such a group "who habitually and exclusively ranged over a definite tract of land … exploiting natural resources in accordance with their own interests and way of life, would have been in occupation of that land … As to the extent of their occupation, it would include not just land in actual use by them at any given moment, but all land within their habitual range" (p. 204).

[563] ***R. v. Marshall*** also involved a consideration of the standard of occupation required to prove Aboriginal title. This time, a number of status Mi'kmaq persons cut timber on Crown lands without provincial authorization. They too were charged under the provincial statute. In this case the cutting had taken place in five counties on mainland Nova Scotia and three counties on Cape Breton Island. All the sites were near reserves. In admitting the cutting the defendants sought acquittal on the basis that they were entitled to cut timber for commercial purposes by virtue of their Aboriginal title to Nova Scotia.

[564] The trial judge recognized that Nova Scotia was Mi'kmaq territory, unchallenged by any other Aboriginal group. He concluded that the Mi'kmaq probably had Aboriginal title to lands around their local communities but not to the cutting sites. In reaching that conclusion, the trial judge explored the degree of occupancy necessary to establish Aboriginal title saying at para. 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.

[565] The trial judge described the line separating sufficient and insufficient occupancy for title at para. 141, as follows:

> 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.

[566] The convictions were appealed to the Queen's Bench. Scanlan J. agreed with the approach taken by the trial judge to the proof of Aboriginal title, stating at para. 108:

> Occasional use of land prior to contact or at the time of sovereignty is not enough to establish Aboriginal title. I reject the submission as put forth by the Appellants that the Mi'kmaq occupied all of Nova Scotia prior to contact to the extent required to prove title. The term occupation is not an absolute term as it applies to the concept Aboriginal title. There are degrees of occupation. Some use and occupation of the lands may be sufficient to establish particular rights short of title. As noted by Judge Curran, given the rather small number of Mi'kmaq at the time of contact and at the time of sovereignty they simply could not use all of the land in Nova Scotia at the same time.

[567] Scanlan J. rejected the Mi'kmaq argument that treaties made by Canada in other areas covered vast tracts of land and by so doing Canada must have been recognizing Aboriginal title to those areas. He acknowledged that the Mi'kmaq were a formidable military force. He considered the fact that there are varying degrees of occupation and said at para. 117: "some are sufficient to establish title and some are not".

[568] The Nova Scotia Court of Appeal allowed the appeal, set aside the convictions and ordered new trials: ***R. v. Marshall***, 2003 NSCA 105, [2003] N.S.J. No. 361. Cromwell J.A. and Oland J.A. concluded that the Supreme Court of Canada had only provided limited guidance on the nature of Aboriginal occupancy that must be proven to establish Aboriginal title. They concluded at paras. 135-138 that:

> (a) the appropriate standard of occupation for aboriginal title, from the common law perspective, is that of a "general occupant", "a

> person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain", not the test applied to a trespasser under the doctrine of adverse possession;
>
> (b) when "dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering" as part of a seasonal pattern of subsistence living should be given more weight than they would be if dealing with enclosed, cultivated land.

[569] The Nova Scotia Court of Appeal in ***Marshall*** concluded that the lower courts had erred in requiring proof of regular, intensive use of the specific cutting sites to establish Aboriginal title. Cromwell J.A. stated at paras. 183-184 (Saunders J.A. also concurring on this point):

> The test as expressed in *Delgamuukw* is whether the claimant has established exclusive occupation at sovereignty of the lands claimed. The question, in my opinion, is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established. Insistence on proof of acts of occupation of the specific cutting sites within that territory is, in my opinion, not consistent with either the common law or the aboriginal perspective on occupation.
>
> I have not overlooked the Crown submission that the appellants have not established the boundaries of their occupation with sufficient certainty to demonstrate occupation of the whole present day province of Nova Scotia. In my view, that is not an issue which it is necessary for us to resolve in this case. To make out the defence on which they rely (and putting aside questions of whether proof of exclusive occupancy at sovereignty would afford a defence), the appellants do not have to establish Mi'kmaq aboriginal title to the whole province (although that is their claim); they have to show aboriginal title to the cutting sites. The question, therefore, is not whether the outer limits of the area of title have been established, but whether the cutting sites fall within an area to which aboriginal title has been proved.

[570] In ***Marshall; Bernard***, the Supreme Court of Canada rejected the approaches taken by the appellate courts of Nova Scotia and New Brunswick and restored the convictions on the grounds that Aboriginal title had not been established. McLachlin C.J.C., speaking for five of seven justices, concluded that the trial judges had correctly rejected the claim for Aboriginal title in the relevant areas.

[571] At para. 53, McLachlin C.J.C. confirmed the modern concept of a variety of independent Aboriginal rights. She went on to say the following at para. 54:

> One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158

[572] On the subject of occupation and exclusivity, McLachlin C.J.C. said the following at paras. 55-57:

> This review of the general principles underlying the issue of aboriginal title to land brings us to the specific requirements for title set out in *Delgamuukw*. To establish title, claimants must prove “exclusive” pre-

> sovereignty "occupation" of the land by their forebears: *per* Lamer C.J.C., at para. 143.
>
> "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.
>
> "Exclusive" occupation flows from the definition of aboriginal title as "the right to *exclusive* use and occupation of land": *Delgamuukw*, *per* Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).

[573] At para. 58, McLachlin C.J.C. emphasized the need to satisfy the common law requirement of title, saying:

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

[574] McLachlin C.J.C. points out at para. 60, when title is at issue, the question is:

> … whether the pre-sovereignty practices established on the evidence correspond to the right of title to land. These practices must be assessed from the aboriginal perspective. But, as discussed above,

> the right claimed also invokes the common law perspective. The question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed.

[575] At para. 61 McLachlin C.J.C. cautions that it is wrong to apply a Eurocentric perspective on an issue of Aboriginal title. She states:

> The common law, over the centuries, has formalized title through a complicated matrix of legal edicts and conventions. The search for aboriginal title, by contrast, takes us back to the beginnings of the notion of title. Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land. It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.

[576] At para. 62 she continued by saying:

> 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.

[577] At paras. 64-65, she continues:

> The first of these sub-issues is the concept of exclusion. The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on

> evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.
>
> It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.

[578] As to whether a nomadic or semi-nomadic people would ever be able to claim Aboriginal title, McLachlin C.J.C. said, at para. 66, that was entirely dependant on the evidence.

[579] At para. 67, she addressed the issue of continuity, saying:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, *per* Lamer C.J., at paras.150-51.

[580] At paras. 68-69 she reminds the trier of fact to take a sensitive and generous approach to the evidence, evaluating it from the Aboriginal perspective. Then, having evaluated the evidence:

> the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.

[581] To conclude, she says at para. 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.

[582] The case at bar turns on an application of the principles enunciated by the Supreme Court of Canada in ***Marshall; Bernard***. While this case clearly raises similar issues with respect to the land use patterns of semi-nomadic people, there are differences. In ***Marshall; Bernard*** the persons accused both attempted to prove Aboriginal title at specific sites. Here the plaintiff's evidence is not limited to site specific use and occupation. The evidence ranges over tracts of land. The plaintiff argues the evidence proves a regular use of these tracts of land as well as use of site specific locations, sufficient to warrant a declaration of Aboriginal title.

[583] It appears to me that The Supreme Court of Canada has set a high standard, requiring "regular use or occupancy of definite tracts of land". The Supreme Court has now clearly stated that "[t]o say that title flows from occasional entry and use is inconsistent with […] the approach to aboriginal title which this Court has consistently maintained": ***Marshall; Bernard,*** at para. 59.

[584] Bearing in mind the directions I have set out above, I must now consider the evidence in the manner directed by the Supreme Court to see whether this is an appropriate case for a declaration of Aboriginal title.

10. DATE OF SOVEREIGNTY ASSERTION

[585] In ***Delgamuukw*** (B.C.S.C.), McEachern C.J., said at p. 309:

> The Oregon Boundary Treaty, 1846 has been judicially accepted as establishing, conclusively, British sovereignty over what is now British Columbia: *Re A.-G. Can. and A.-G. B.C.* (1984), 8 D.L.R. (4th) 161 at pp. 173-6, [1984] 1 S.C.R. 388 *sub nom. Reference re Ownership of the Bed of the Strait of Georgia,* 54 B.C.L.R. 97. Occupation of sorts started in New Caledonia, as has been mentioned, in 1805-06 with the establishment of posts by Simon Fraser.

And continuing at p. 310, he said:

> Because of the view I have of this case, I do not think it is necessary to make a specific finding about a date of British sovereignty over the northern part of the province. No specific argument was made by counsel on this question. For practical purposes, especially in the territory it could well have been as early as the 1820's but legally it may not have been until the creation of the colony in 1858. 1846 was the date chosen by Judson J. in *Calder*. In my view the actual date of British sovereignty, whether it be the earliest date of 1803 or the latest date of 1858, or somewhere in between makes no difference.

[586] On appeal in the Court of Appeal in ***Delgamuukw*** and again in the Supreme Court of Canada, all counsel appear to have agreed to treat 1846 as the date of British sovereignty in British Columbia.

[587] In these proceedings, both the plaintiff and British Columbia are content to accept the date of sovereignty assertion as 1846, the date of the Oregon Treaty. The Oregon Boundary Treaty, 1846 is also referred to as the Washington Treaty. As noted by McEachern C.J. in ***Delgamuukw*** (B.C.S.C.) at p. 309:

> the Oregon Treaty divided the United States and British territory west of the Rockies at the 49th parallel, but the treaty left Vancouver's Island in British hands (although the actual boundary through the inland sea was not settled until 1898).

[588] Canada argues that the most compelling date for the assertion of British sovereignty is 1792; the date Captain George Vancouver made a formal assertion on behalf of King George III.

[589] The plaintiff and Canada point out that in ***Delgamuukw*** (S.C.C.), Lamer C.J.C., in three separate places, referred to the "assertion of sovereignty", to "sovereignty" and to the "conclusive establishment of sovereignty". The plaintiff says that Lamer C.J.C. drew no distinction between these three terms and treated them as the same event. Canada disagrees. Canada says that this court must distinguish between the date that sovereignty was "conclusively established" (Canada suggests this date is 1846) and the date that sovereignty was "asserted".

[590] Canada suggests the following possible dates of sovereignty assertion:

a) **1579**: The date of Sir Francis Drake's voyage along the Pacific coast and his alleged claim to New Albion (Drake's name for the coast of Northwest America).

b) **1606**: The Charter of Virginia, as noted by Norris J.A. in ***R. v. White and Bob***, see para. 220, *supra*.

c) **1763**: The signing of the Treaty of Paris, whereby France ceded to the British Crown almost all of its North American possessions east of the Mississippi River, including its claims to what is now the Canadian Province of Quebec.

d) **1778**: The arrival of Captain James Cook at Nootka Sound on Vancouver Island.

e) **1786**: James Strange made a formal claim on behalf of King George III to what is now British Columbia on August 2, 1786. He made this claim in the vicinity of the Scott Islands near the northern tip of Vancouver Island.

f) **1788**: Captain Meares' annexation of "the Straits of John de Fuca … in the name of the King of Britain" as noted by Dickson C.J.C. in ***Attorney General of Canada v. Attorney General of British Columbia*** [1984] 1 S.C.R. *sub nom*. ***Re: Ownership of the Bed of the Strait of Georgia***, at pp. 402-403.

g) **1792**: Captain George Vancouver's assertion of sovereignty on behalf of the Crown. In advancing this date, Canada relies upon the evidence of Dr. Kenneth Coates, historian and Dr. Kenneth Brealey, cartologist and historical geographer. It should be noted that this was evidence of sovereignty assertion and was not an attempt by these witnesses to express an opinion on the legal effect of this explorer's actions.

h) **1803**: ***An Act for Extending the Jurisdiction of the Courts,*** *1803* (U.K.), 43 George III, c. 138 ***(Canada Jurisdiction Act)***. This *Act* provided the courts of Upper and Lower Canada with extraterritorial jurisdiction. Relying on the evidence of Professor Hamar Foster, legal historian, Canada says that this statute extended jurisdiction to the "Indian territories" and in particular, to what is now British Columbia.

i) **1818**: The date of an Anglo-American Treaty establishing the 49th parallel as the international border from Lake of the Woods to the Rocky Mountains (or the "Stony Mountains" as they were then known). This treaty included a "standstill" agreement that was to last for ten years (which was extended indefinitely in 1827) with respect to any country that might be claimed by Britain or the United States on the northwest coast of America, west of the Rockies. It was agreed that the citizens of each country would have free access to such country without prejudice to the claims of the other. At trial, Dr. Coates accepted the assertion of counsel made during cross-examination that "while United States and Britain could not agree on who owned the

area, that in 1818 they did agree that one or the other of their two countries had sovereignty over the area".

j) **1821**: ***An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within certain Parts of North America, 1821*** (U.K.), 1 & 2 Geo. IV, c. 66. This statute formalized the union between the Hudson's Bay Company and the North West Company. One of its provisions specifically granted rights to trade with the Indians in "any Country on the North West Coast of *America*, to the Westward of the *Stony Mountains"* (at p. 423, para. III). The result was that trading rights were granted to the Hudson's Bay Company to the exclusion of all other British subjects. It also explicitly allowed citizens of the United States to engage in such trade pursuant to the terms of the 1818 Anglo-American convention. Canada says that this legislation would appear to be the first British legislation which contained language making it specifically applicable to what is now British Columbia, although earlier legislation such as ***Canada Jurisdiction Act*** had actual effect in this area.

k) **1829**: The date that the Hudson's Bay Company established Fort Chilcotin.

[591] The assertion of sovereignty is a matter of international law. In his article, "Some Thoughts on Aboriginal Title" (1999) 48 U.N.B.L.J. 19 at p. 38, Professor Slattery states:

> … [t]he Privy Council and the Supreme Court have authoritatively held that there is a basic distinction between sovereignty and property rights. Sovereign title to a territory does not necessarily import full property rights to the lands located in that territory, any more than property rights to such lands necessarily import sovereign title. Sovereignty is, of course, a question of international law. It entails the right to rule a certain territory to the exclusion of other international entities. By contrast, property rights are primarily a matter of domestic law. They entail the right to occupy and use a certain tract of land to the exclusion of other individuals and groups.

[592] Recognizing the distinction between sovereignty and property rights serves to assist in an understanding of the status and interests of Aboriginal nations. Aboriginal nations were not recognized as nation states by the European nations colonizing North America. The European explorers encountered groups of First Nations that were tied together by language, customs, traditions, a shared historical experience and organized in distinct cultures. Each collective of Aboriginal people formed a nation that exercised various Aboriginal rights in their territory. These Aboriginal rights are now provided constitutional protection so that the modern descendants of Aboriginal nations may continue to enjoy the rights held by their ancestors.

[593] In *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), Professor R.Y. Jennings states at p. 4:

> When we come to look more closely at the various modes which international law recognizes as creating a title to territorial sovereignty we shall find that all have one common feature: the importance, both in the creation of title and of its maintenance, of actual effective control. Every mode, like the Roman Law counterparts, requires the presence of *corpus* as well as *animus*. Not since the 16th century, for example, has it been possible to argue that a mere discovery, coupled with an intention eventually to occupy, is sufficient to create a title.

[594] In *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff Publishers, 1997), Surya P. Sharma says at p. 100 that the exercise or display of sovereignty sufficient to confirm sovereignty must be peaceful, actual, sufficient and continuous. In discussing the "actual" requirement, he states at p. 101:

> The rule that the exercise or display of sovereignty must be actual means, at the one extreme, that it must not be just a mere paper claim pretended to be an act of sovereignty and, at the other extreme, it must not require that there must be its "noticeable impact in every nook and cranny of the territory". As Judge Huber remarked, sovereignty cannot be exercised in fact at every moment on every point of territory.
>
> …
>
> In the light of the above cases it can be maintained that the rule of actual exercise or display of sovereignty means "real acts of sovereignty; that is, acts which are either a genuine exercise of domestic jurisdiction in regard to the territory or amount to a genuine international dealing with the territory, e.g., in a treaty". Since the sovereignty cannot and need not be exercised in fact on every point of a territory, it would suffice, for legal purposes, if the sovereignty is exercised or displayed in respect of the territory as a whole.
>
> [Footnotes omitted.]

[595] Canada argues that the formal and explicit assertion of sovereignty by Captain George Vancouver is the compelling date.

[596] I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in my

view, just words blowing in the wind. I agree entirely with Lambert J. A. when he said in ***Delgamuukw*** (B.C.C.A.) at para. 707:

> Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control.

[597] There is no reason to doubt the sincerity of Captain Vancouver's solemn acts on the date of the King's birthday, June 4, 1792. However, there is every reason to conclude that his gift to the sovereign was decidedly less grandiose than he had intended. No doubt it was a step towards the British acquiring sovereignty. But in 1792 there was no British occupation and no ability to maintain control of the territory.

[598] Canada argues that even if 1792 were not the date of the assertion of sovereignty, then the correct date could not be much later. This is because by 1818 and 1821 Britain was already acting as if it had previously asserted sovereignty over this area. Canada cites the fact that Britain entered into a treaty with the United States of America in 1818 based upon its claims of sovereignty. Britain also passed legislation to regulate the fur trade in the area in 1821.

[599] In addition, Canada says Dickson C.J.C. held in ***Re: Ownership of the Bed of the Strait of Georgia***, (S.C.C.) at p. 404 that Britain had "continued to assert sovereignty in, and proprietary rights over, the entire expanse of territory between the California border and the Alaska panhandle" during the period that preceded the 1846 Oregon Treaty. In the submission of Canada, 1818 would therefore seem to

be the absolute latest date by which Britain could be found to have asserted sovereignty over the Claim Area.

[600] It seems to me that Canada's argument builds on the failed assertion of sovereignty in 1792. While it might be argued that the events of 1818, 1821 and 1830 were a vast improvement over Captain Vancouver's act of imperialism, in my view, these events do not meet the tests imposed by international law. New Caledonia was not sufficiently occupied by the Crown on any of these dates. More importantly, there was no actual or effective control over the area. The legislative acts of a distant Parliament do not occupy a territory. Nor do the words on a page, in any sense, provide a *de facto* administrative control over the area.

[601] I have no difficulty in concluding that The Treaty of Oregon, 1846 is a watershed date that the courts have relied upon up to now. I see no reason to move from that date. Indeed, as the Province has argued, the authorities would appear to be too well entrenched to admit any reconsideration at this level of court: see ***Calder*** (S.C.C.) at p. 325, per Judson J.; ***Delgamuukw*** (B.C.S.C.); ***Delgamuukw*** (B.C.C.A.); ***Delgamuukw*** (S.C.C.); ***Haida First Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 65.

[602] Apart from that, by 1846 there was a *de facto* British presence in the area. The Treaty of Oregon is a treaty with another nation settling a boundary dispute and providing international recognition of sovereignty to the land and territory north of the 49th parallel. The assertion of sovereignty, recognized by another nation, is clear at this point in our history.

11. TSILHQOT'IN ABORIGINAL TITLE

a. Introduction

[603] The plaintiff says that a declaration of Aboriginal title, providing a right to exclusive possession and the economic benefits of the land, is fundamental to the cultural and economic survival of Tsilhqot'in people as a distinct society. Such a declaration would help preserve their connection to the land that sustains their communities. The plaintiff says a declaration of Aboriginal rights that does not include a declaration of Aboriginal title to the land would be insufficient to ensure Tsilhqot'in "cultural security and continuity": ***R. v. Sappier; R. v. Gray*****,** [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33. In the plaintiff's submission, the evidence supports a declaration of title to the entire Claim Area. In the alternative, the plaintiff says such declarations can be made for smaller areas within the Claim Area.

[604] The Province says the plaintiff's claims for Aboriginal title are contrary to the existing authorities and cannot be supported. In the submission of the Province, similar claims were made in ***Marshall; Bernard*** and failed. In that case, a similar "territorial" approach to Aboriginal title did not succeed.

[605] The Province says it struggled to identify specific sites within or outside the Claim Area that are candidates for Aboriginal title status, on the basis of the recent cases. This process cannot be completed without the plaintiff's involvement. The Province is prepared to negotiate with the plaintiff in this regard, should the plaintiff move beyond the "all or nothing" claim presently advanced. In these circumstances, the Province submits that the court could best assist the parties if it dismissed the

claim as made. The Province submits that further reconciliation in this case would be enhanced if the dismissal be without prejudice to the right of the plaintiff to make an alternative claim to specific sites if the parties cannot, through negotiations, resolve this issue.

[606] Canada says that the legal test for Aboriginal title contained in the more recent cases is not broad enough to allow the plaintiff to succeed in his request for a declaration of Aboriginal title. Canada submits that the evidence is insufficient to allow the Court to find occupation throughout the Claim Area so as to warrant a declaration of Aboriginal title. Canada says there were no village sites or definite tracts of land used on any regular basis. Canada adds there was no Tsilhqot'in occupation of the Claim Area at the time of sovereignty assertion, which it says was 1792.

[607] I conclude that the date of sovereignty assertion was 1846. The question, therefore, is whether Tsilhqot'in people exclusively occupied the Claim Area at that date.

[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.

[611] Marcus Smith in his letter to The Honourable George Walkem, Chief Commissioner, Lands and Works, November 29, 1872 reported:

> During the progress of the surveys, parties of these Indians were met with at various places but as they are continually wandering it is difficult to estimate their numbers …

[612] Even as the Xeni Gwet'in reserves were fixed at the turn of the twentieth century, Tsilhqot'in people continued to move around their traditional territory. The first reserves were surveyed by Indian Reserve Commissioner, A.W. Vowell. He set aside 1,257 acres "eastward of Chilko Lake, Coast District," acknowledging at the time that "[a] good deal of this land is entirely worthless": Vowell to Deputy Commissioner of Lands and Works, October 14, 1899. Perhaps from the perspective of a European person, the land could be so described. From the perspective of a Tsilhqot'in person, this land provided their cultural security and continuity. The land sustained them and they were deeply connected to it. Vowell's letter gave a hint of movement in his report that "[s]eventy Indians winter in the valley, some of these however belong to other bands and having already been provided with land were not taken into consideration."

[613] Correspondence the following year records the movement of Indians from Xeni (Nemiah Valley) to settle "on the Stone Reserve and at the mouth of Whitewater": E. Bell, Indian Reserve Commissioner, May 3, 1900. In the view I take of these events, the movements of a semi-nomadic people continued, despite the efforts to contain them on reserves.

[614] When European people arrived in the nineteenth century, Tsilhqot'in people lived a semi-nomadic life ranging inside and outside the Claim Area. Taking into account the directions of the Supreme Court of Canada, my task almost 200 years later is to decide whether Tsilhqot'in occupation of the Claim Area at the date of sovereignty assertion was sufficient to ground a modern day declaration of

Tsilhqot'in Aboriginal title. I am required to apply the test set out by McLachlin C.J.C. at paras. 72-75 of ***Marshall; Bernard*****,** as follows:

> The trial judge in each case applied the correct test to determine whether the respondents' claim to aboriginal title was established. In each case they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.
>
> In *Marshall*, Curran Prov. Ct. J. reviewed the authorities and concluded that the line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other. "Settlements constitute regular use of defined lands, but they are only one instance of it" (para. 141).
>
> In *Bernard*, Lordon Prov. Ct. J. likewise found that occasional visits to an area did not establish title; there must be "evidence of capacity to retain exclusive control" (para. 110) over the land claimed.
>
> These tests correctly reflect the jurisprudence …

[615] Put in the language of the Supreme Court of Canada, I must "sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control": ***Marshall; Bernard***, at para. 77.

[616] My task is to determine the degree of Tsilhqot'in occupation of the Claim Area at the time of sovereignty assertion. It is convenient to begin with a consideration of Tsilhqot'in territory more generally.

b. Tsilhqot'in Traditional Territory and the Claim Area

[617] Dr. Kenneth Brealey is a cartologist and historical geographer. He was called as a witness for the plaintiff. Dr. Brealey was qualified to express opinions on the historical territoriality of First Nations, including the Tsilhqot'in people. In his report

to the court entitled “Historical Geography of the Tsilhqot’in”, at p. 13, footnote 6, Dr. Brealey said the following:

> Writ large, the discipline of geography understands territoriality … as a fundamental condition of human socio political organization. More specifically, territoriality is defined as the attempt by any individual, group or institution to affect, influence, or control people, phenomena, and relationships by delimiting and asserting control over a geographic area, which becomes the territory. Put alternatively, it is a function of three interdependent exertions: a) one that classifies an area with respect to others; b) one that involves some form of shared communication within or across it; and c) one concerned with enforcing control over it. … there are many forms of territoriality, and each must be assessed and understood on its own terms and through the spatial referencing systems immanent to them. The important point is that oral nomadic societies … are not ‘less territorial’ than, say, nation-states or trading blocs. They are simply different …

[618] Aboriginal witnesses testified that Tsilhqot’in traditional territory extended from the Fraser River westward to the eastern slopes of the Coast Range. The western boundary was defined by the Coast Range, although there appear to be overlaps with the Homalco and the Nuxalk traditional territories. On the east, the Fraser River boundary appears to overlap with the Secwepemc (Shuswap) territory. The northern boundary was at a point commencing just south of Quesnel, at Alexandria, over to the Coast Range. These territorial boundaries appear to have a large overlap on the northern edge with the Dakelh (Carrier) traditional territory. Similarly, the southern boundary appears to overlap with the Stl’atl’imx (Lillooet) and Secwepemc territories.

[619] I note that in a separate action for a declaration of Tsilhqot’in title excluding the Claim Area, Tsilhqot’in territory is described as extending well north of Quesnel,

British Columbia and includes a large tract of land to the east of the Fraser River. To the south, the boundary appears to go as far as the town of Lillooet.

[620] Governor Frederick Seymour in Despatch No. 37, September 9, 1864, reported to the Colonial Office, Great Britain, on the "massacre of Mr. Waddington's road party at Bute Inlet by the Chilcoten Indians". In reporting the difficulty of reaching the interior from the head of Bute Inlet, he said that he "never saw so difficult a country." He described the territory as follows:

> Within the great barrier of the Cascade range lies the Chilcoten country … It was almost unknown to white men until recent events …
>
> The Territory occupied by the Chilcotens extends probably 200 miles north & South. From the summits of the Bute Inlet mountains to the West Road River E. & W. The tribe roamed from the Cascade Range to the Fraser, a distance of 300 miles. …
>
> Little was known of the Chilcoten country & not much more of its inhabitants. …

[621] Dr. Brealey's report reviewed the available historical record spanning from the early explorations of Alexander MacKenzie and Simon Fraser, to the twentieth century anthropological and archaeological literature. With regard to Tsilhqot'in boundaries, Dr. Brealey concluded at p. 12:

> In my opinion, and as shown on Map 1, pre-contact Tsilhqot'in territory would be (very roughly) triangulated by Anahim's peak in the northwest, Palmer and/or Alexis Lakes in the northeast, and Chilko and Taseko Lakes in the south; but more by the headwaters of the Chilanko and Chilcotin rivers to the northwest, Moss and Tautri Lakes to the northeast, and Chilko and Taseko Lakes in the south after contact. The important point is that neither orientation compromises Tsilhqot'in territorial integrity or continuity in the claim area.

[622] After scrutinizing the historical record with respect to Tsilhqot'in conflicts with their Aboriginal neighbours, Dr. Brealey concluded at pp. 20-21 of his report that "[t]he important point, again, is that both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory."

[623] In the course of his evidence, Chief William accepted counsel's suggestion that the claimed areas comprise about five percent of what is considered Tsilhqot'in traditional territory. I conclude the Claim Area lands, from the time prior to contact and through to the assertion of Crown sovereignty and beyond, fall well within the much broader area described as Tsilhqot'in traditional territory.

c. Tsilhqot'in Migration, South and East

[624] In my historical review I noted that some 500-800 years ago, Tsilhqot'in people began to diverge linguistically from other Northern Athapaskan people. This took place in British Columbia, some distance to the north of where Tsilhqot'in people are at the present time. Over time there was a gradual movement along the curve of the Coast Range mountains, leading Tsilhqot'in people in a southeast direction and out onto the vast plateau region. During the nineteenth century there was a central Tsilhqot'in community at Nagwentl'un (Anahim Lake) which, from the base map, appears to be 70 to 80 kilometres outside of the northwestern edge of the Claim Area.

[625] In his report to the court, Dr. R.G. Matson expressed the view that Tsilhqot'in people have been in Tachelach'ed (Brittany Triangle) since at least A.D. 1645-1660. Their presence in the Trapline Territories was reported to be about the same time or

a little later. It is clear from Dr. Matson's work that Tsilhqot'in people, a people of Athapaskan origin, were preceded in the Claim Area by people of Salish origin. It would seem that this displacement or movement of Salish people from the Claim Area preceded or was co-existent with the movement of Tsilhqot'in people into the area. Certainly, the transition was completed well before first contact with European peoples.

[626] Relying on Fraser's journal, we know that by June 1808 Tsilhqot'in people could be found on the banks of the Fraser River interacting with Secwepemc people.

[627] The evidence reveals that although Tsilhqot'in groups could be found in areas throughout Tsilhqot'in traditional territory, these groups resided at different sites during different periods. Recent large-scale migrations of Tsilhqot'in groups toward the south and east are well known. In 1900, ethnographer James Teit wrote the following about Tsilhqot'in patterns of movement in his "Notes on the Chilcotin Indians" in the *Jesup North Pacific Expedition*, p. 761:

> Until about thirty-five or forty years ago, nearly two thirds of the whole tribe lived in the valley which skirts the eastern flanks of the Coast Range from Chilco Lake north to near the bend of Salmon River. Most of them were located in the northern part of the valley, at Anahem or Nacoontloon Lake, just east of the territory of the Bella Coola, who at that time were a numerous tribe, and had settlements far up the Bella Coola River. Smaller bands had headquarters around Chilco and Tatla Lakes, and some families wintered along Chilco and Chilanco Rivers. Other people, probably belonging to a different sept, lived farther east, at Puntzee and Chezikut Lakes, some of them occasionally wintering in the Chilcotin Valley as far east as Alexis Creek. The band now called the Stonies seem to have wintered on the south side of the Chilcotin River at points considerably father west than their present headquarters, many of them probably on the lower part of the Chilco River.

[628] According to Teit, the exodus of Tshilqot'in people from the Nagwentl'un area had occurred by 1870. By 1900, the locations of various Tsilhqot'in groups had shifted appreciably. According to Teit at pp. 760-762, the community from Nagwentl'un had moved south and east, eventually concentrating in the area of what is now the Anaham Band's set of reserves, leaving their former home at Nagwentl'un "practically deserted" by 1870. The few remaining Tsilhqot'in families joined with incoming Ulgatcho Dakelh (Carrier) peoples, resulting in the Ulgatcho Tsilhqot'in reserve community that currently inhabits the Nagwentl'un area.

[629] The Tsilhqot'in group Teit referred to as the Tl'esqox (Toosey Band) also relocated eastward to the Riske Creek area, where reserves were set aside for their use. A diminution of the Secwepemc population caused by smallpox permitted this movement; until then, according to Teit at p. 760, Riske Creek had been "really within Shuswap territory … not far from Fraser River." Teit described the situation that prevailed in the earlier part of the nineteenth century as follows at p. 761:

> The country from a little below Hanceville, or at least all of it east of Big or Deer Creek, was looked upon strictly as Shuswap territory; and the Chilcotin never wintered within even a number of miles west of this line, for fear of attack by the Shuswap and other war-parties from the east or south.

[630] Other Tsilhqot'in groups took advantage of the departure of Dakelh groups from lands further north along the Fraser. These Tsilhqot'in bands shifted their base to the area around Fort Alexandria, where reserve lands were eventually set aside for them.

[631] Even if Teit was mistaken in his identification of particular groupings of Tsilhqot'in or where each community moved, the pattern he identified remains valid. Some of those lands that were considered the centres of Tsilhqot'in residence in the first half of the nineteenth century were no longer so in the latter half. Nagwentl'un, probably the most important Tsilhqot'in settlement at one time, had converted into a predominantly Ulgatcho Dakelh community by the late nineteenth century and remains so today. Tatl'ah Biny (Tatla Lake), Bendzi Biny (Puntzi Lake) and Chezich'ed Biny which were once Tsilhqot'in centres, have seen their populations shift as well, although a reserve was set aside relatively nearby at Tsi Del Del (Redstone). Alexandria, apparently Talkotin Dakelh country in the early to mid-nineteenth century, is now the site of a predominantly Tsilhqot'in reserve.

[632] Closer to the Claim Area, a similar pattern of movement can be traced. The archaeology confirms that some of the large pit house villages along the Tsilhqox (Chilko River) and at the mouth of Tsilhqox Biny (Chilko Lake) are Plateau Pithouse Tradition (PPT) rather than Athapaskan in origin: Martin Magne and R.G. Matson, "Athapaskan and Earlier Archaeology at Big Eagle Lake, British Columbia" (Univerversity of British Columbia, Report to SSHRC, 1984).

[633] However, by the early nineteenth century, some of those pit houses were serving as Tsilhqot'in residential sites. Hudson's Bay Company employees and missionaries visited these pit house villages from the 1820's to the 1840's and observed Tsilhqot'in communities. Other smaller Tsilhqot'in encampments, such as those we find in places within Tachelach'ed, were spread out along lakes and creeks, temporarily housing extended families.

[634] By the latter half of the nineteenth century, the village sites on the Tsilhqox appear to have been abandoned as primary habitation sites. Colonial forces did not travel to these communities when searching for the perpetrators of the Waddington massacre in 1864. Similarly, Father Lejacq, who visited the Tsilhqot'in plateau in 1870, made the following report in a letter to Father Durieu dated June 7, 1870:

> Les Chilcotins n'ont pas de villages proprement dit: Ils vivent par famille. Chaque famille a son fishing-ground, hunting-ground, son [...]-ground. Ils n'ont pas de places fixes. Ils errent d'une place à l'autre [...]. La plupart du temps ils ne se rencontrent que pour certaines grandes occasions: à la mort d'un grand personnage, à l'occasion d'un grand festin.
>
> [The Chilcotin do not have a village as such. They are living by family, each family has its own *fishing ground, hunting ground*, its own *(illegible)-ground*. They do not have fixed places. They *(illegible)* from one place to the next *(illegible)* most of the time they do not gather together but for certain big occasions: at the visit of a great person, in the event of a big feast.]

[635] When A. W. Vowell attended to Tsilhqot'in reserves in 1899, the Tsilhqot'in people did not ask for the Tsilhqox corridor sites to be surveyed for reserve purposes. Lands were set aside in Xeni (Nemiah Valley) for a community whose fixed residence in the area had not been recorded by HBC traders or the later missionaries. I find this lack of documentary evidence is the result of the fact that none of the early visitors appear to have ventured into the area. Hewitt Bostock, a Member of Parliament for the federal riding of Yale Cariboo, wrote a letter to James A. Smart, Deputy Minister, Interior Department dated July 27, 1899 and set in motion the reserve identification process in the Xeni area. According to Bostock, Xeni was the refuge of "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".

[636] The reasons for these movements are complex and cannot be adequately understood on the evidence advanced in this case. Technological changes as a result of contact (including the availability of guns), the impact of the fur trade, the arrival of settlers and land pre-emption, the influence of colonial and church authorities, and large-scale demographic shifts, likely as a consequence of smallpox, all played their parts. The traditionally semi-nomadic lifestyle of Tsilhqot'in people, with its emphasis on mobility and seasonal exploitation of scarce resources, must also be taken into account.

[637] The deadly consequences of smallpox in the early 1860's resulted in major shifts among the Aboriginal populations of the interior of British Columbia. As already noted, in the case of some Tsilhqot'in people, this was a movement south and east to locations *already occupied* by Tsilhqot'in people. The movement was largely a regrouping of families as a consequence of the massive number of deaths from smallpox. As evidenced by the records of the HBC, Tsilhqot'in people had already located themselves south and east of Nagwentl'un well before this migration.

[638] It was not only Tsilhqot'in people who suffered from the smallpox epidemic and the consequent loss of many lives. Their neighbours to the north — the Dakelh people, to the east — the Secwepemc people, and to the south — the Stl'atl'imx people, all endured the same fate. They too were on the move and some of the territories they vacated became occupied by Tsilhqot'in people. As I have already

noted, the area around Fort Alexandria in the 1820's was Dakelh territory. The post-smallpox migration saw Tsilhqot'in people move into that area and today there is a Tsilhqot'in reserve in an area that does not appear to have been occupied by Tsilhqot'in people at the time of sovereignty assertion. Fort Alexandria falls outside the Claim Area and its occupation at the time of sovereignty is not in issue here.

[639] Perhaps the most important pieces of historical documentary evidence that show a Tsilhqot'in presence in and about the Claim Area arise from the establishment of Fort Chilcotin in the fall of 1829. As I have already noted, this HBC trading post was located west of Tsulyu Ts'ilhed (Bull Canyon, also known as Tobacco Jump) between the junctions of Tish Gulhdzinqox and the Chezqox with the Tsilhqox, approximately 15 km east of the northern boundary of the Claim Area at the apex of Tachelach'ed. It was in close proximity to the site of three present-day Tsilhqot'in Reserves: approximately 8 km from the Tletinqox-t'in (Anaham) Reserve on the north shore of the Chezqox; approximately 12 km from the Yunesit'in (Stone) Reserve on the south shore of the Chezqox; and, approximately 8 km from the Tsi Del Del Reserve (Redstone).

[640] The establishment of this trading location resulted from a business decision made by the HBC. It was preceded by eight years of trade with Tsilhqot'in people, the first recorded transaction taking place at Fort Alexandria in November 1821. I have no difficulty in concluding that there was a Tsilhqot'in occupation of the areas adjacent to and surrounding Fort Chilcotin. Had there been no Tsilhqot'in people present, Fort Chilcotin would not have been established. I note however that the site of Fort Chilcotin is not within the boundaries of the Claim Area.

d. Boundaries of the Claim Area

[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. Indeed, Tsilhqot'in people constructed bridges to allow regular crossings of the rivers. The Tsilhqox was the major salmon stream in the area and it is clear that both sides of the river were used by Tsilhqot'in people for fishing, hunting, berry picking, root gathering and for dwelling sites.

[642] The boundaries of the Trapline Territories are the result of a legislative scheme that did not exist at all until well into the twentieth century. Again, the activities of Tsilhqot'in people did not stop at these boundaries but moved across them as people gathered what was needed for survival.

[643] At the north end of Tsilhqox Biny, the eastern boundary of the Western Trapline and the western boundary of Tachelach'ed separate as they wind their way to the north. Between these two boundaries is a small piece of land, not included in the Claim Area. It is impossible to conclude anything other than that this small piece of land was occupied and used by Tsilhqot'in people to the same extent as the land to the east and west that is included in the Claim Area.

[644] To the south, the separation of the eastern boundary of the Western Trapline Territory and the western boundary of the Eastern Trapline Territory create a similar situation. This land, which does not form part of the Claim Area, is much larger than the piece I referred to in the last paragraph. However, on the evidence I heard, it is equally difficult to conclude that this piece of land was not utilized to the same extent and for the same purposes as the land included in the Claim Area to the east and to the west.

[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.

[646] It is important to consider the issue of boundaries from the Aboriginal perspective. In this case, that perspective emerges from an understanding of nomadic or semi-nomadic subsistence patterns. Dr. Brealey's report at p.13, footnote 1, provides a helpful understanding of nomadism. He states:

> While the term 'nomadism' generally implies a high degree of territorial mobility and little or no reliance on 'cultivation' in the Lockean sense, it does not mean 'haphazard' or 'unorganized'. Rather, nomadism is properly conceived as a 'way of living' in which individual or groups are occasionally compelled to alter movements on short notice when conditions demand it, but beyond that inhabit recognizable spaces,

> know where they can and or cannot go, and whose daily or seasonal patterns of land use tend to follow the same cyclical trajectories over time. Put alternately, nomadism is a form of territoriality … that accommodates the need of kinship based societies having a relatively low level of technological 'development' and operating in physiographic or climatic environments that often yield their resources grudgingly.

[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. In his discussion of Tsilhqot'in boundaries on p. 6 of his report, Dr. Brealey said:

> Reconstructing boundaries of oral, relatively nomadic, societies in a cartographic register is an exceedingly hazardous undertaking, and never the more so than in the Chilcotin country. To begin with, boundary construction in such societies is, by definition, rather more a 'social', than it is a 'geographical', exercise. In oral societies, boundaries are recognized, understood and validated not by maps and plans, but from 'inside the collective' – i.e. by where creation narratives

> fade, where genealogical linkages can no longer be traced, where place names are not recognizable, and where languages become unintelligible. Indigenous boundaries often do trace, in metes and bounds fashion, defined watersheds, creeks or lakes, but even then as much by 'coincidence' as design and the lesser the degree of physiographic relief the more 'fuzzy' boundaries tend to get. Further complicating matters in the Chilcotin country … is the fact that until at least the late 19th century, European explorers, traders, missionaries and surveyors know almost nothing of the plateau country between the Fraser River and the coastal ranges, and south of Mackenzie's course along the Blackwater River. Finally, boundary reconstruction cannot be detached from the disruptions or dislocations engendered by a European presence more generally. In short, tracking Tsilhqot'in boundaries must grapple with the limited geographical knowledge often held by those who documented them, any changes induced by contact and colonization, and, especially, the mobile territorialities that characterized Athapaskan regional bands in the pre-contact period.

[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".

12. SUMMARY OF EVIDENCE - OCCUPATION

a. Introduction

[650] I turn now to consider the issue of Tsilhqot'in occupation of the Claim Area at the time of sovereignty assertion viewed, as best I can, with an awareness of the Tsilhqot'in perspective. What follows is a summary of evidence prepared, for the most part, from the arguments of counsel. I am indebted to counsel for their work in marshalling the evidence for my assistance. At this point, a reference to Appendix A, Map 3, would be of assistance to the reader.

[651] My consideration of the evidence is over a period of time extending from pre-sovereignty assertion into the period post-sovereignty assertion. It is evident that the presence of Tsilhqot'in people in the Claim Area has been uninterrupted and continuous throughout and up to the present time.

[652] Marcus Smith, in his November 29, 1872 report to the Honourable George Walkem said in part, the following:

> On the northwest side of Tatla Lake – and near midway of its length – which is about 20 miles – are the headquarters of Keogh, the Chief of the Stone Indians residing on the margin of the string of lakes and swamps from Tatla to Bluff and Middle lakes and down the Homathco river – They have also stations by the lakes in the mountains from Tatla to the headwaters of the Chilco River –
>
> …
>
> Above the mouth of the Chilco river if any white settler were sanguine enough to endeavour to make a living at so great a distance from any road – I do not think it would be safe for him to do so until the Indians are consulted and some lands reserved for them – for the good lands above this point are so mixed up with Indian hunting grounds that it would scarcely be possible to avoid a collision –

b. Oral Traditions: Legends and Landmarks

[653] Numerous geographic landmarks play a prominent part in the stories and legends of Tsilhqot'in people.

[654] The legend of Lhin Desch'osh is a Tsilhqot'in creation story. It is central to understanding of some of the Claim Area's geographic features. The legend was told to the court by several Tsilhqot'in witnesses. No single witness was able to recount it with the detail that is found in the story recorded by Livingston Farrand

during a visit to the Tsilhqot'in territory in 1897: see Farrand, "Traditions of the Chilcotin Indians" in *The Jesup North Pacific Expedition*.

[655] Lhin Desch'osh was recorded by Farrand as "Lendix'tcux". In this legend Lhin Desch'osh, a mythical person who is half man and half dog, together with his sons decided to leave a Tsilhqot'in village and "go and visit the Chilcotin country": Farrand, p.10. The mother did not want her sons to make the visit. Eventually she consented but "taught the boys all the things they would need to know on their journey" because in those times, "all the animals used to kill men … and she taught the boys how they could get the better of the animals, and make them harmless": Farrand, p. 10. During their wanderings, they came to Tsilhqox Biny, the dominant water body of the Claim Area. While there, they saw "a great beaver dam", the resident of which pulled Lhin Desch'osh under water and swallowed him. The boys searched for their father and followed the Tsilhqox as far as Gwetsilh (Siwash Bridge). This is a course which defines the western boundary of Tachelach'ed. This legend's status as a creation story was developed further by Tsilhqot'in witnesses who testified that the boys, in looking for their father, actually created the rivers by kicking or digging up the earth. In the words of Doris Lulua: "They were kicking up the earth, and it turned into a river, making all the rivers around this area. They made Chilko River and all the small creeks."

[656] After backtracking up the Tsilhqox from Gwetsilh, Farrand recorded Lhin Desch'osh's boys searched for him "up the Whitewater" River (Dasiqox) to "its head" (Nadilin Yex), where they eventually found him: Farrand, p. 13. Oral tradition related by the witness Patricia Guichon confirms this part of the legend. Their

course traces the eastern boundary of Tachelach'ed and the northwestern portion of the Eastern Trapline boundary. A small portion of the Dasiqox is not included in the Claim Area.

[657] According to Farrand at p. 14, Lhin Desch'osh and his sons then returned down the Whitewater River (Dasiqox). Thereafter they transmogrified, turning into several stones at the location where a mythical chipmunk escaped their attempt to catch it. This place, known to Tsilhqot'in people as Lhin Desch'osh, is located near Tsulyu Ts'ilhed (Bull Canyon, also known as Tobacco Jump) on the plateau just north of Tachelach'ed. Doris Lulua testified this event of transmogrification occurred when they were "almost home to Chilko Lake."

[658] Farrand's record of the Tsilhqot'in legend of Lhin Desch'osh closes at p. 14 by noting that "[b]efore turning into stone, they made Indian potatoes, and scattered them all about on the snow mountains." The oral tradition evidence of Patricia Guichon and Elizabeth Jeff confirms Lhin Desch'osh was the source of sunt'iny (mountain potatoes). The Dzelh Ch'ed (Snow Mountain) identified by Tsilhqot'in witnesses as having sunt'iny include those above Tsi Tese?an (Tchaikazan Valley), Yuhitah (Yohetta Valley) and Tl' ech' id Gunaz (Long Valley). All of those locations are directly south of Tachelach'ed and are partially in the Western Trapline area.

[659] Another important Tsilhqot'in legend is that of Ts'il?os and ?Eniyud. Ts'il?os (Mount Tatlow) towering over 10,000 feet is the dominant mountain in the Claim Area.

[660] In the times of the ?Esggidam (ancestors), Ts'il?os and ?Eniyud were married and lived with their family in the mountainous area around Xeni. When Ts'il?os and ?Eniyud decided to separate, each took children with them. Shortly after separation, ?Eniyud, Ts'il?os and the children transmogrified into mountain formations. Ts'il?os now presides over the Claim Area. ?Eniyud travelled northwest to the area around Naghatalhchoz Biny (Big Eagle Lake) just prior to the transmogrification. She is now known as ?Eniyud Dzelh. Both are charged with the responsibility of protecting and watching over Tsilhqot'in people forever.

[661] According to oral tradition, as ?Eniyud wandered about, she sculpted the land to create Xeni and Ts'uni?ad (Tsuniah Valley). Above these valleys sit the lesser snow mountains of Xeni Dzelh (Konni Mountain), Gweq'ez Dzelh (Mount Nemaih) and Ts'uni?ad Dzelh (Tsuniah Mountain).

[662] Tsilhqot'in oral tradition explains that ?Eniyud left Ts'il?os in the mountains around Xenedi?an where sunt'iny and ?esghunsh (yellow avalanche lily/bear tooth) grow. ?Eniyud seeded various other areas with these root vegetables in the course of her journey before she transmogrified into ?Eniyud Dzelh. She seeded the sunt'iny areas of ?Esqi Dzul Tese?an, ?Esgany ?Anx, Gughay Ch'ech'ed and Tl'egwezbens above Xeni. Upon arriving in the area of Naghatalhchoz Biny where her childhood family continued to reside, ?Eniyud seeded Tsimol Ch'ed (Potato Mountain).

[663] Various Tsilhqot'in witnesses recounted the legend of Salmon Boy. Farrand recorded it as well at pp. 24-26. In this story, a group of Tsilhqot'in boys were

playing on the banks of the Tsilhqox near Henry's Crossing. One boy jumped on a piece of ice floating down the river and rode it all the way to the distant ocean. The legend instructs the listener that this is where the salmon come from, and where they are to be found spawning in Tsilhqot'in country. In the words of Minnie Charleyboy, "if [our ancestors] did not teach you the story, you wouldn't know where the fish came from". The Tsilhqot'in boy is transmogrified into a salmon and swims with the many other salmon on the long journey to the spawning grounds on the Tsilhqox. Approaching their spawning beds near the mouth of Tsilhqox Biny, the salmon are guided by Tizlin Dzelh (Tullin Mountain). A Tsilhqot'in family catches Salmon Boy. He then transforms back into his human form and reveals he is their lost son. The Tsilhqox forms part of the western boundary of Tachelach'ed and Tizlin Dzelh is within the Claim Area.

[664] Farrand's accounts identify other Tsilhqot'in landmarks. Tatl'ah Biny (Tatla Lake), lying to the northwest of the Western Trapline is the location of the legend, The Man and Three Wolves. That lake is also featured in the legend of Bird Pulled Under Water to Catch Fish as told by elder Elizabeth Jeff and reported by Robert Lane in 1953. Francis Setah, Minnie Charleyboy and Elizabeth Jeff told the legend of Guli (skunk). This was named The Adventures of Two Sisters by Farrand. The story describes the location of a slide area where the mountain was broken up by Guli. The mountain is called Ts'uni?ad Dzelh, the slide area is called Guli Dzelh ?Elhghenbedaghilhdenz or Sa Ten (the place where skunk blew out the mountain). These areas are all within the Claim Area.

[665] I acknowledge that many of the legends that form the oral traditions of Tsilhqot'in people are not unique. Many legends are found in the oral traditions of other Aboriginal people. The names of the geographic locations are adapted to their particular circumstances. The fact that others have similar oral traditions does not reduce the cultural significance of Tsilhqot'in oral traditions to Tsilhqot'in people. I conclude that the references to lakes, rivers and other landmarks formed a part of these legends for Tsilhqot'in people at the time of sovereignty assertion.

[666] For Tsilhqot'in people, Lhin Desch'osh is an account of both their origins as a people and of their homeland. Tsilhqot'in witnesses variously stated the purpose of Lhin Desch'osh and his sons' mission was to "fix the land", "make the land better" and to "make Tsilhqot'in land safe for humans". Lhin Desch'osh also explains the origins of sunt'iny in the Dzelh Ch'ed.

[667] Ts'il?os and ?Eniyud as well as Guli**,** explain the origins of key mountains, valleys and geographic landmarks in the transitional mountain-plateau zone on the perimeter of the Dzelh Ch'ed (Snow Mountains) at the plateau. Their legend also explains the dispersal of sunt'iny as an important food resource.

[668] Salmon Boy explains the origins of the salmon that return annually to the Tsilhqox. These legends also instruct Tsilhqot'in people on the legendary means of root extraction and recovery using root digging sticks. For Chief William, the legends reveal how one is to become a "Tsilhqot'in person"; they are "what we live by" and provide an understanding of Tsilhqot'in land. For Minnie Charleyboy, "the

legends were told to you is so you learned how our ancestors live and you also survive by the stories and that's how you – we survived".

[669] Ts'il?os and ?Eniyud explain the Dechen Ts'edilhtan (the law) against separation. Consequences include ba ts'egudah (bad luck; negatively affecting one's future). In the case of Ts'il?os and ?Eniyud, they were transmogrified into mountains. Even now, it is considered improper behavior to point at either peak. To do so will bring ba ts'egudah, often in the form of foul weather. Ts'il?os and ?Eniyud are persons to be respected. Tsilhqot'in people are taught that they are charged with the responsibility of respecting all of the land, no less than these two mountain peaks.

[670] Lhin Desch'osh and his sons were turned to stone because they neglected to ask all the necessary questions before starting on their journey. As a result, they were unable to complete the task they had been entrusted with, namely, changing all the animals into ones that would not harm humans. They did not completely fix Tsilhqot'in country and thus the ses (bear), for example, remains a lethal threat to Tsilhqot'in people. Lhin Desch'osh also instructs that twins are powerful, and have special responsibilities to fix and maintain the land.

[671] This is not intended to be a complete review of all oral traditions relating to the Claim Area. It should also be noted that the teller of these oral traditions does not, as a matter of routine, offer an explanation of the meaning of any particular legend. The listener is left to distill and then apply the meaning to their own life.

This is a lifelong process and is enhanced by maturity and reflection on one's various life experiences.

c. Time Depth

[672] The abundance of Tsilhqot'in place names in and about the Claim Area is an important consideration in determining the time depth of occupation. Archaeologist Morley Eldridge testified that "[p]lace names, by their nature, tend to be relatively stable". He provided the example that on the British Columbia coast there are Salishan place names in areas that have been Kwakiutl for the past 150 to 200 years. Coast Salish languages are part of the Salishan language family. Coast Salish territory includes the coastal areas surrounding Georgia Strait and Puget Sound. Kwakiutl is a different group of First Nations people located in areas of Central and Northern Vancouver Island, Queen Charlotte Strait and Johnstone Strait. These are people who do not speak Salishan. In short, there is some longevity in place names.

[673] In the central region of British Columbia in which the Claim Area is located, there is an abundance of place names that were anglicized upon the arrival of the European fur traders and settlers. Some examples include Tsilhqox (Chilko River and Lake), Chuzquox (Chilcotin River), Dasiqox (Taseko River), Yuhitah (Yohetta Valley and Lake), Ts'uni?ad Biny (Tsuniah Lake), noted by early Europeans as "Sooneat L., Talhiqox Biny (Tatlayoko Lake), Tatl'ah Biny (Tatla Lake) and Bendzi Biny (Puntzi Lake), first recorded as Benzhee or Puntseen L. Of central significance is the entire Tsilhqot'in (Chilcotin) plateau.

[674] Tsilhqot'in place names in and about the Claim Area include prominent mountain peaks, prime resource areas, archaeological sites, sites that related to specific oral traditions and sites that are othewise significant for Tsilhqot'in people. I accept the evidence of both Eldridge and Dr. Dinwoodie when they say that these place names indicate Tsilhqot'in people have been in the area for a very lengthy period of time.

[675] Dr. Nancy J. Turner, a distinguished ethnobotanist and ethnoecologist, provided evidence on the time depth of the presence of Tsilhqot'in people in the Claim Area. Her evidence was the subject of several objections raised by counsel and dealt with by the Court: ***William v. British Columbia***, 2005 BCSC 131. I concluded that Dr. Turner was entitled to express opinions as an expert in ethnoecology and ethnobotany. She was qualified to express opinions on a range of subjects related to her expertise, including timelines for the acquisition of ecological knowledge.

[676] Dr. Turner expressed the opinion that when people first move to an area they are unfamiliar with the local resources. It takes time and observation at a particular location to gather practical knowledge about how to harvest the resources and how to conserve and maintain the resource for future use. Dr. Turner testified that it takes: "a lot of time, generations of teaching and observation, to build up a really complex system of knowledge that leads to sustainable use of people's environment." Tsilhqot'in people have names and uses for numerous plants found in the Claim Area. They have managed and harvested those plants for generations. In Dr. Turner's opinion, it would not have been possible for Tsilhqot'in people to have

acquired this knowledge and developed this connection to the plant resources in their territory within the last 150 years. Based on the names of plants and the knowledge of their uses, she concluded Tsilhqot'in people had been resident in the Claim Area for at least 250 to 300 years.

[677] Dr. Turner was cross-examined extensively in this area. I have no difficultly in accepting the opinions she expressed. I conclude that Tsilhqot'in people have been present in the Claim Area for over 250 years based on the length of time required to develop the names and knowledge of the Claim Area plants used for food and medicine.

[678] In accepting this opinion, I am mindful of Dr. von Gernet's view of Dr. Turner's conclusions. He is critical of her methodology. I appreciate that Dr. Turner was in "uncharted territory". Her opinions were another piece of the puzzle tying together the archaeology, anthropology, cartology and history of the Claim Area to be considered along with the evidence of oral history and oral traditions.

d. Trails, Hunting, Fishing and Trapping

[679] There was and is an extensive network of Tsilhqot'in trails in the Claim Area. Dr. Brealey used evidence from the historical record to map the transportation trails throughout the Claim Area and beyond. I accept Dr. Brealey's evidence that the rivers, trails, routes, creeks and portages have been used by Tsilhqot'in people since pre-contact times. Cultural anthropologist, John Dewhirst also concluded that a Tsilhqot'in trail network was well established by 1864 and had been used by Tsilhqot'in people prior to 1846, the date of sovereignty assertion. I conclude that

prior to contact and at the time of sovereignty assertion there was an extensive network of trails forged and used by Tsilhqot'in people within and adjacent to the Claim Area.

[680] One obvious use of this trail network is to assist with hunting, fishing, trapping and resource gathering. In its written argument, the Province submits: "British Columbia does not contest the plaintiff's claim on behalf of the Xeni Gwet'in of an Aboriginal right 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." Similarly, in its written argument, "Canada does not contest the plaintiff's claim to an aboriginal right to hunt and trap for domestic purposes throughout the Claim Area." Canada submits that the plaintiff's claim is "weaker in certain specified portions of the Claim Area". I take what Canada says as a reluctant concession. However reluctant, it must have some meaning.

[681] Attached to these concessions is the implicit acknowledgement of Tsilhqot'in occupation of the Claim Area at the date of first contact, despite disagreement as to what that date might be and despite arguments as to the precise location of Long Lake. I find that the date of first contact in this case pre-dates sovereignty assertion. Therefore, it follows that these concessions on Aboriginal rights are an acknowledgment that Tsilhqot'in people occupied the Claim Area at the time of sovereignty assertion and before. I find that Tsilhqot'in people, some of whom were the forefathers of the group of people who today call themselves the Xeni Gwet'in, were present in the Claim Area at the time of first contact and at the time of sovereignty assertion.

e. Regular Use of Definite Tracts of Land

[682] It is the nature and extent of this occupation that presents the next challenge. As was reiterated in para. 73 of ***Marshall; Bernard***:

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

Permanent village sites, cultivated fields and other lands showing visible signs of an investment of labour would satisfy this test for Aboriginal title.

[683] There do not appear to be village sites that were occupied year round by Tsilhqot'in people. At the time of sovereignty assertion, Tsilhqot'in people had no cultivated fields or other lands showing visible signs of an investment of labour. The fields they relied upon were not cultivated in the usual sense. However in Dr. Turner's opinion the mountain slopes that provided the berries and root plants showed evidence of many generations of plant harvesting and management. These slopes have sustained Tsilhqot'in people since before the arrival of Europeans. Historical village sites were more in the nature of a collection or grouping of niyah qungh or lhiz qwen yex in which they resided during cold winter months.

[684] Another way to demonstrate sufficient occupation is to prove regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: ***Delgamuukw*** (S.C.C.) at para. 149, citing McNeil, *Common Law Aboriginal Title*, at pp.201-2.

[685] In this case, the plaintiff says that both Tachelach'ed and the Trapline Territories are definite tracts of land used on a regular basis by Tsilhqot'in people. Tsilhqot'in seasonal rounds define these tracts of land within the traditional territory over which Tsilhqot'in people traversed. In the alternative, the plaintiff says that smaller areas within Tachelach'ed and the Trapline Territories form other definite tracts of land that were used on a regular basis by Tsilhqot'in people. These tracts were also defined by the seasonal movements of Tsilhqot'in people. In both his primary position and his alternate position, the plaintiff says Tsilhqot'in occupation has been exclusive and continuous since the date of sovereignty assertion.

[686] Earlier I explained that I intend to consider the submissions setting out what the plaintiff considers to be lesser tracts of land included within the whole. While the pleadings confine the nature of the declaration the plaintiff may be entitled to, I am not precluded from expressing a view as to whether other areas might be subject to Aboriginal title. Indeed, in my view both British Columbia and the plaintiff invited me to express my views on what land might qualify for Tsilhqot'in Aboriginal title. I do not intend, after this lengthy trial, to shy away from expressing an opinion in areas that might assist in the ultimate resolution of matters between Canada, British Columbia and the Tsilhqot'in people.

[687] Both defendants object to any declaration of Aboriginal title. They point out the artificiality of the Claim Area boundaries and say that the occupation by Tsilhqot'in people within those boundaries has not been sufficient to ground a declaration of title throughout the Claim Area. As already noted, both acknowledge

that there might be Tsilhqot'in Aboriginal title to some discrete spots of significance in and about the Claim Area.

13. CLAIM AREA SITES

a. Tsilhqox (Chilko River) and the Historical "Long Lake"

[688] In a review of land use and occupation by Tsilhqot'in people both inside and outside the Claim Area, it is appropriate to assess their presence on the Tsilhqox corridor. Canada argues there were no Tsilhqot'in people occupying the Claim Area at the time of sovereignty assertion. To reach that position, Canada argues that the "Long Lake" referred to in historical documents is not Tsilhqox Biny but rather, Tatl'ah Biny.

[689] The literal meaning of Tsilhqot'in is people of the Tsilhqox: see Dr. Eung-Do Cook report. The name indicates a longstanding presence of Tsilhqot'in people on this river corridor.

[690] They are the people of the Tsilhqox, not the Chezqox. It is true that Tsilhqot'in people have had a presence on the Chezqox for generations. They continue to have that presence. But the Tsilhqox is the major salmon bearing stream at the core of their existence as Aboriginal people, weaving its way into their oral traditions and providing them with sustenance and shelter for centuries.

[691] This basic fact is one reason why Canada's argument that Long Lake is actually Tatl'ah Biny and not Tsilhqox Biny remains only a speculative venture. I am entirely satisfied that close scrutiny of all the evidence in this case leads to but one

conclusion. The reference in the historical documents to Long Lake is a reference to Tsilhqox Biny. For greater clarity I will review some of those historical documents.

[692] The importance of Long Lake can be seen in considering the identification of Chief Quill Quall Yaw and Chief Konkwaglia. The records of Fort Chilcotin refer to Chief Quill Quall Yaw, who was said to be the "Chief of Long Lake": see for example, the entries in the Chilcotin Post Journal for Friday, January 25, 1839 and Tuesday, October 22, 1839. In 1825, William Connolly visited Chief Quill Quall Yaw. In 1845, Jesuit Father Nobili visited Chief Konkwaglia. Eldridge and Dewhirst agreed that Chief Quill Quall Yaw identified in the HBC records and Chief Konkwaglia identified in the correspondence of Nobili were the same person. I acknowledge that neither expert is a historian, but in my view their work in this particular area satisfies me that their conclusions on this point are entirely correct.

[693] Based upon his opinion concerning the Chief's identity, Eldridge concluded that Connolly and Nobili had both reached either Henry's Crossing or Biny Gwechugh (Canoe Crossing) on the Chilko River in 1825 and 1845 respectively. There they both found Tsilhqot'in people living in villages. This is compelling evidence that there were Tsilhqot'in people living near the north end of Tsilhqox Biny in both 1825 and 1845.

[694] Connolly's first visit to "Chilcotin Country" was in 1825. This visit is recorded in the Journal of Occurrences, New Caledonia District 1825/26, entries for December 1825. Connolly proceeded southwest from Fort Alexandria to "Chilcotin

country", eventually reaching the Chezqox, encountering Tsilhqot'in people at various locations along the way. On December 17, 1825, Connolly reported that:

> At seven oclock we proceeded on our voyage, and at nine we passed a second fork of the Chilcotin which appears to take its rise in the mountains to the southward. Our route lay along the Main Branch which we continued to follow.

[695] Connolly continued his narrative, describing what he encountered along the "Main Branch" of the river:

> At eleven OC we passed a small lodge, containing only one man and his wife … and at five oclock in the evening reached the last camp consisting of eight lodges Inhabited by about fifty men and a large number of women and children. The Chief, who visited Alexandria this summer, is a young man and he with all his followers turned out to meet us as soon as we made our appearance and conducted us to his lodge, a large and spacious habitation where we were treated with all the politeness of which an Indian is capable. He was overjoyed to see Mr. McDougall … They feasted us with the Fat of a Sheep they lately Killed, and gave us as much Salmon as we required for ourselves & Dogs. Tho' of a very inferior quality we are informed that the Chilkotin Lake from whence the main Branch of this River flows is distant only a quarter of a Days march from their present Camp. The entrance of the lake is where they generally reside but the conveniency of being nigh their Salmon Caches is what induces them to remain where they now are. When salmon fails, which frequently happens, they either fish in the lake during the winter or Repair to the River which Sir Alexr. McKenzie descended on his way to the Pacific Ocean, which is inhabited by a numerous Tribe of Atnahs, among whom they live …

[696] Connolly went on to explain that Atnah is "a name applied by the Carriers to all nations who are not of their Race." The Atnahs referred to in the above passage are the Nuxalk (Bella Coola) people.

[697] Connolly's journal continues as follows:

> The distance between Alexandria and this spot I should think is from one hundred and eighty to two hundred miles, three fifths of which is in the space which divides Frasers River from the Chilcotin, and the remaining two fifths following the Banks of the latter river to this place. … along the river a Prairie extends throughout the whole route … The country is very uneven, and to the south lofty mountains are seen, by which likewise the lake, which lies to the westward, appears to be surrounded …

[698] Eldridge concluded that the "entrance of the lake" where Tsilhqot'in people were said to "generally reside" is the archaeological site EjSa-11, the former village site known as Gwedats'ish, located at the north end of Tsilhqox Biny.

[699] Dewhirst also visited the confluence of the two rivers, taking pictures of the locations for the court to consider. He said the Chezqox at this point is "quite small" and compared to the Tsilhqox it is "a kind of creek". It was his opinion that the Tsilhqox was the main river and the Chezqox was a tributary. Dr. Brealey in his Report at p. 56 described the Tsilhqox as the "main salmon bearing stream in the territory". Canada (Department of Fisheries) has for many years maintained a salmon counting site near the Tsilhqox Biny outlet. By contrast, there are no salmon in Tatl'ah Yeqox (Tatla Creek) which feeds in to the Chilanko River which then flows into the Chezqox.

[700] On February 1, 1840, McBean reported that he had reached a village called Tse-lah about sundown on the first day and a village called Long Lake on the second day, somewhat after sundown. Both Dewhirst and Eldridge interpreted this to mean that the village Tse-lah was somewhere along the Tsilhqox between Fort Chilcotin and Tsilhqox Biny, which is consistent with their theory that Tsilhqox Biny is Long Lake. Brealey acknowledged Tse-lah could be a village at the east end of

Tatl'ah Biny as an unlikely possibility. However, in his opinion, all of the evidence points to the fact that Tse-lah was Tsilangh, a fishing and winter encampment on the Tsilhqox.

[701] Father Nobili also visited the area in 1845. Canada argues that it is not at all clear that he was anywhere near Tsilhqox Biny. It is true that Father Nobili likely did not see the lake. However, as I understand the evidence, Tsilhqox Biny was not visible from the location where he stood which is graphically described in his journal.

[702] Dewhirst considered the historical documents and made some personal observations of the area. His evidence was that he stood at that point described in a letter by Father Nobili dated November 30, 1845. Nobili wrote:

> We were standing facing a canyon between two huge mountains of sheer rock, without a single twig or bush ... and the wind coming from the northern coast of the Pacific tore wildly through that channel. I did not know that I was no more than a two days' journey on foot from that coast, I say on foot, because they told me that it was impossible to cross over those two mountains on horseback.

[703] Dewhirst's personal observations were made at the north entrance to Chilko Lake at a point where the lake is not visible. The description would not fit the north end of Tatl'ah Biny.

[704] In his written report entitled "Tsilqot'in Use and Occupancy of the Xeni Gwet'in Claim Area, 1793-1864", August 2005, Dewhirst said the following:

> In my opinion, the modern names for the Chilko River and Chilcotin River do not reflect the actual geographical relationship of the main river to its tributaries. Names on modern maps suggest that the Chilko River is a tributary of the Chilcotin, when, in fact, the main river

> consists of the Chilko River and the Chilcotin River below the Chilko. The much smaller Chilcotin River above the Chilko is really a tributary of the main river.
>
> In 1825 Connolly visited the last camp on the Chilko River, located above the Taseko-Chilko confluence. The last camp was also the largest visited by Connolly, containing "about Fifty Men and a large number of women and children" (Connolly 1825: 17 Dec 1825). These people told Connolly that they generally resided near the entrance to the "Chilcotin Lake" from which the "main Branch of the River flows" (Connolly 1825: 17 Dec 1825). Connolly also commented in the same entry that "Lofty Mountains" to the south appear to surround the "Lake." High mountains do surround Chilko Lake, and the "main branch" of the river is the Chilko River.

[705] In footnote 81, p. 81 of his report, Dr. Brealey set out the evidence he relies upon to express his opinion that "Long Lake" is "an early contact period designation for Chilko Lake": Historical Geography of the Tsilhqot'in, Map Series and Report, September 22, 2004.

[706] When I consider the historical documents and the evidence in this case, I have no difficulty in accepting the opinions expressed by Brealey, Eldridge and Dewhirst on this issue. I conclude that the "Long Lake" described in the historical documents is Tsilhqox Biny. Canada's theory is not supported by the weight of the evidence. In reaching this conclusion I have not ignored Canada's submissions regarding the lack of other historical evidence concerning occupation of the Claim Area. It was and remains a remote part of this Province and it comes as no surprise that historical knowledge of the area is sparse. The silence is a direct result of the fact that visits by non-Aboriginals were few and brief.

b. The Tsilhqox (Chilko River) Corridor

[707] The Tsilhqox corridor provides the best evidence of residential sites that might qualify as village sites especially during the fall and winter months. Even in these areas, there were no "cultivated fields" as those words are generally understood. The Tsilhqot'in people were not an agrarian people. They utilized what nature had to offer on the mountain slopes and valleys: berry picking, harvesting medicinal plants, mountain potato and other root vegetables. They used and managed these resources and in that sense these areas were their "cultivated fields". McDougall, Connolly, McBean, other HBC employees and Jesuit priest Father Nobili found village or dwelling sites along the Tsilhqox corridor. Dr. Brealey's report to the court said this about the Tsilhqox at p. 56:

> Because it was the main salmon-bearing stream in the territory, occupancy of the banks proper was higher in later summer and fall, but there seems to have been year-round habitation at several selected sites; and in 1872, Smith remarked that the plateaux on either side were important Tsilhqot'in hunting grounds. Indeed, archaeological work in the 1970s revealed some 105 previously occupied or used sites (including 40 housepits) in the first 30 kilometres downstream from the outlet of the lake, but there were larger encampments at the Keekwillie Holes, Siwash Flats and Bridge, Taseko Mouth, Brittany Creek and Lava Canyon.

[708] Archaeological studies of the Tsilhqox corridor have identified a series of sites with a substantial number of large, round cultural depressions (frequently referred to as house pits or pit house remains), as well as a number of sites with fewer, smaller cultural depressions in either round or rectangular form. Tsilhqot'in witnesses call the dwellings which left round cultural depressions lhiz qwen yex and the rectangular lodges niyah qungh. As already noted, the latter structures are generally regarded

as typically Athapaskan, whereas the former – the round house pits, particularly the larger of these – are seen as non-Tsilhqot'in and more likely Plateau Pithouse Tradition (Salish) in origin. A map from Robert Lane's dissertation provides an overview of Tsilhqot'in and non-Tsilhqot'in origin pit house sites on the Chilcotin plateau: Lane Thesis at p. 36.

[709] Experts both for the plaintiff and for British Columbia compared the historical records pertaining to Tsilhqot'in villages from the first half of the nineteenth century to the archaeological materials describing sites on the Tsilhqox. These experts theorized that it is likely some of the larger pit house sites of non-Tsilhqot'in origin were partly reoccupied by Tsilhqot'in communities in this time period. Eldridge drew the following conclusion in his report entitled, "The Correlation of Archaeological Sites and Historic Tsilhqot'in Villages along the Chilko River and Vicinity" (March 2006) at p. 17:

> In my opinion, the large houses found at the Chilko Lake outlet and Kiggly Holes probably were first constructed during a Salishan presence that predates the entry of the Chilcotin and the collapse of the large mid-Fraser River villages. ... I think it probable that some of the very large pithouses, that were probably initially inhabited a thousand years or more before, were likely rebuilt and used around the time of the establishment of Fort Chilcotin.

[710] The house pits along the Tsilhqox were not all occupied simultaneously. The historical records suggest that two or three of the largest pit houses on the Tsilhqox corridor could lodge a community of upwards of 60 individuals. If all of the house-sized depressions were occupied at such densities at the same time, the population would far exceed the maximum carrying capacity of the area.

[711] Human carrying capacity can be roughly defined as the number of individuals an environment can sustain or support, taking into account the technologies of resource exploitation adopted by the population. The plaintiff's demography expert estimated the carrying capacity of the whole Claim Area at 100-1000 persons: Mathis Wackernagel, "Assessment of Human Population Carrying Capacity prior to European Influence and Trade of the Brittany Triangle and Xeni Gwet'in Trapline Areas in the Nemiah Valley, British Columbia" (the "Claim Area"), December 2004.

[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 Connolly, McDougall, McBean and Father Nobili travelled the Tsilhqox corridor they recorded the fact that Tsilhqot'in people were in occupation of these winter dwellings. 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.

i. Gwetsilh (Siwash Bridge)

[713] There was considerable evidence, particularly from Aboriginal witnesses, about the site known as Gwetsilh or Siwash Bridge on the Tsilhqox. It is located

north of the junction of the Tsilhqox and Dasiqox and was an important gathering place for Tsilhqot'in people outside the Claim Area but clearly within what would be considered Tsilhqot'in territory.

[714] Gwetsilh is an important archaeological site, with pit house remains on both sides of the river. As its English name suggests, Gwetsilh was the site of an Aboriginal bridge, one of three such bridges that Lane discussed in his 1953 dissertation on the Tsilhqot'in. The archaeological sites at Gwetsilh are registered as FaRv-3 and FaRv-1. Eldridge, in his report for British Columbia correlating archaeological sites with historic Tsilhqot'in villages, noted the location of the sites and provided inserts of the site form maps in Figure 7 attached to his report.

[715] Dewhirst said that Gwetsilh was the home of one of the four Tsilhqot'in groups identified in the 1838 Hudson's Bay Company census as attached to Fort Chilcotin. In fact, the Gwetsilh or "Koo Tsil" was the group most closely associated with the Chilcotin post, appearing in the 1838 census as "Indians about the Fort" and making frequent appearances in the journals kept by William McBean, the clerk in charge of the fort during that period.

[716] Eldridge agreed with Dewhirst's identification of Koo Tsil with Gwetsilh. Of the four sites that appear to be associated with the 1838 HBC census (Gwetsilh, Tlegwated, Tsilangh, and Biny Gwechugh / Gwedats'ish), Gwetsilh, situated approximately five kilometres away from the probable location of Fort Chilcotin, would lie closest to the post.

[717] Evidence in this case suggests that Gwetsilh continued to be used in the twentieth century as a preferred fishing location and summer gathering site by Tsilhqot'in people from different bands. Fish drying racks are maintained in the bush above the river, next to a campground.

ii. ?Elhixidlin (Whitewater)

[718] At the confluence of the Tsilhqox and the Dasiqox (also called the Whitewater) is a site named ?Elhixidlin. It appears to have been located by elder Martin Quilt on the north side of the confluence and would thus be outside the Claim Area. This site is also called Taseko Mouth. There are no archeological records referring to this site. Dr. Brealey in his report at p. 73 wrote: " ... the earliest firm reference appears to be in 1864, when Cox dispatches McLean to what Brown later called a 'great rendezvous' of the Tsilhqot'in, and which seems to have been the confluence between the Taseko and Chilko Rivers."

iii. Tl'egwated

[719] Tl'egwated is located on the Tsilhqox, roughly parallel to the north end of Little Eagle Lake (Lhuy Nachasgwengulin). Here, there are at least 15 pit houses located on both sides of the river. At one time there was also a Tsilhqot'in foot bridge (binlish) across the river providing access to Tachelach'ed.

[720] The main site at Tl'egwated, where archaeologists have recorded a large number of extensive pit house depressions (ElRw-4), is located on the west bank of

the Tsilhqox, and thus outside of the Claim Area. The pit houses on the east bank are within Tachelach'ed and fall inside the Claim Area.

[721] The archaeological site recorded as ElRw-4 represents "the largest and most impressive site in the area" of Naghatalhchoz Biny and the Tsilhqox: Matson et al., *The Eagle Lake Project: Report of the 1979 Season* (University of British Columbia, 1980) [unpublished], p. 64. 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. A cross commemorating Nobili's visit has been re-erected by Tsilhqot'in people on the site.

[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. An inference can be drawn that even in the mid-1800's, the population of larger village sites was not stable, or alternatively, the population figures are a reflection of semi-nomadic movements. The Hudson's Bay Company census recorded only four families, with a total of 28 people, as Tlo quot tock "Indians" resident at the site during the winter of 1838. Yet, when Father Nobili visited Tl'egwated seven years

later, he recorded upwards of 120 residents staying in two very large pit houses and additional people in a smaller third pit house. It is possible, although unlikely, that the majority of Tlo quot tock Indians were staying at a different site, or a variety of different sites, during the winter of 1838. Eldridge suggested Father Nobili might have visited a different group at a separate site nearby. And there is always the possibility that the counting was poorly done and incomplete.

[723] Mabel William testified that her Grandmother Hanlhdzany's family lived in a Ihiz qwen yex at Tl'egwated during winter when it was really cold when she was a child. Mabel William said that when she was a child, her family would camp at Tl'egwated in the late summer. The use of Tl'egwated in this manner, with both sides of the river connected by a footbridge (binlish) for access to Tachelach'ed, continued into the twentieth century.

[724] I conclude that the number of people recorded in a given location reflect movements of people with the seasons, returning to this site on both sides of the Tsilhqox in the late summer, most likely to remain throughout the winter season. There are gravesites at this location but these sites would post date the arrival of missionaries who persuaded Tsilhqot'in people to cease the practice of cremation.

[725] The archaeological studies show the remains of a very considerable series of house pits, only three of which were occupied during Father Nobili's visit. Thus, it appears that not all pit houses on the site were occupied simultaneously, at least at the time of his visit.

iv. Tachi

[726] Theophile Ubil Lulua testified that Adam Guichon told him there are lhiz qwen yex located at Tachi, a Tsilhqot'in word meaning mouth of a river or creek. In this case, it refers to the mouth of Dan Qi Yex (Bidwell Creek) where it flows into the Tsilhqox. There is a Tsilhqot'in burial site at that location. Tachi appears to lie outside the Claim Area. This site, located by only one witness, appears to be very close to Tl'egwated.

v. Tsilangh

[727] About 1.5 kilometres upstream from Dan Qi Yex lies Tsilangh which Minnie Charleyboy said was a Tsilhqot'in salmon fishing place. It too seems to be on the west side of the Tsilhqox and therefore outside the Claim Area. Dewhirst identified Tsilangh with the "Tsu Luh" Indians as attached to Chilcotin post in the Hudson's Bay Company census of 1838. Eldridge agreed with Dewhirst's association of the Tsu Luh with the place known as Tsilangh, although he was not able to confirm the location of a site because there is, at present, no archaeological inventory of the specific area. In Eldridge's view, Tsilangh may be where Connolly encountered 35 men and a large number of women and children contained in three pit houses, and may also be where Father Nobili stopped in the winter of 1845, if not at Tl'egwated. Brealey expressed the opinion that this was the Tse-lah referred to by McBean of the HBC.

vi. Tsi Lhizbed

[728] In her affidavit # 1, Mabel William testified that Tsi Lhizbed was “not far upriver, over the hill from Tsilangh.” It is “across the river from Tachelach’ed.” This would place Tsi Lhizbed on the west side of the Tsilhqox, outside of the Claim Area.

[729] In her affidavit, which appears to be the sole source of evidence concerning this site, Mabel William deposed that she saw lhiz qwen yex at Tsi Lhizbed. She stated as well that when she was young, Tsilhqot’in people, mainly from Tsi Del Del (Redstone), would camp there for salmon fishing.

vii. Nusay Bighinlin

[730] Nusay Bighinlin is upstream from Tsi Lhizbed on the Tsilhqox, where a single pit house site lies near the confluence of Natasewed Yeqox (Brittany Creek) and the Tsilhqox inside Tachelach’ed’ed. Nusay Bighinlin is within the Claim Area.

[731] No historical records were cited that confirm Tsilhqot’in residence at Nusay Bighinlin at or about the time of sovereignty assertion. There is some archaeological evidence for the area nearest the confluence of Natasewed Yeqox and the Tsilhqox. In *The Eagle Lake Project* report, at p. 67, Matson et al. recorded a riverside lithic scatter site (EkSa-33) with “abundant surface material but little depth.” After recording the presence of a klo-cut or kavick point, as well as a multiple-side notched point, Matson et al. concluded at p. 67:

> The radiocarbon date indicates the presence of a Pre-Chilcotin occupation, as suggested for ElRw 4. It also confirms the probable mixed nature of the site and lack of substantial time depth.

[732] There is an additional site located by Matson et al and referred to as EkSa-35. It is described in *The Eagle Lake Project* report at p. 69 as a "housepit truncated by the river" near Natasewed Yeqox. Found during the investigation were two projectile points associated with recent Athapaskan archaeological sites. The report concluded at p. 72 that, although the sample from EkSa-35 was limited, the information gathered was in "agreement with what would be expected for a Chilcotin [o]ccupation". EkSa-35 is located further upstream than EkSa-33 and lies perhaps a kilometre south of the juncture of Natasewed Yeqox and the Tsilhqox. In a personal note from Magne to Tyhurst referred to in the latter's Ph.D dissertation dated July 1984, Magne said that the site had subsequently been radiocarbon dated to 500 years B.P. (Before Present). This would locate a presence of Tsilhqot'in people well before sovereignty assertion making it a 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.

[733] Use of Nusay Bighinlin continued into the twentieth century. There is a cabin at that location which was used as a salmon fishing site. Norman George Setah picked berries at this site and testified that there was an ancient crossing at this location as it was part of a trail network connecting Tatl'ah Biny to Niba ?Elhenenalqelh (Capt. Georgetown). Setah used the crossing to get from Tis Tis Gunlin to Nusay Bighinlin. Tsilhqot'in people fished in the spring and hunted in the fall at this location, living in ?el bid qungh (lean to's).

[734] Slightly south of Nusay Bighinlin, still on the eastern bank of the Tsilhqox, is an archaeological site featuring a number of cultural depressions registered as

EkSa-85, marked with a star in Figure 1 attached to Eldridge's report, denoting a site of five pit houses or more. Eldridge did not discuss the site in the body of his report as he was not aware of historical records pertaining to the site. The archaeological site form for EkSa-85 identifies the cultural affiliation for the site as Athapaskan Chilcotin/Stone Chilcotin. The form also indicates that the site was on Crown land when the site form was entered *circa* 1979-1980.

viii. Ts'eman Ts'ezchi or Ts'esman Ts'ez

[735] Ts'eman Ts'ezchi or Ts'esman Ts'ez is located a few miles upstream from Nusay Bighinlin, on the western bank of the Tsilhqox. Theophile Ubill Lulua's family built a cabin there in the fall of 1950. It is located about six miles northeast of Naghatalhchoz Biny. The site lies outside of the Claim Area.

[736] In his affidavit, Theophile Ubill Lulua deposed that Felix Lulua had a cabin in the same location, built *circa* 1948, which has since burnt down. Theophile Ubill Lulua's family built a cabin in the area as did Oggie and Elmer Lulua. Members of the Lulua family continue to live in both remaining cabins. David Lulua, who was 51 when he testified, told the court that he had stayed at Ts'eman Ts'ezchi between the ages of five and 19 while trapping.

[737] Minnie Charleyboy testified that she was born at Ts'eman Ts'ezchi in 1934. She told the court that she had seen lhiz qwen yex at Ts'eman Ts'ezchi and that she had been told they belonged to the ?Esggidam. She testified that Nimayaz's (Nemiah's) daughter Julianna is buried at that location. She stated there were no dwellings on the other side of the Tsilhqox, inside the Claim Area.

ix. Tsi T'is Gulin and Henry's Crossing

[738] Henry's Crossing, named after Eagle Lake Henry, is located on the Tsilhqox to the east of Naghatalhchoz Biny. It has a footprint on both banks of the Tsilhqox. Tsi T'is Gunlin is the name used by Tsilhqot'in people for the place on the river just south of Henry's Crossing.

[739] Henry's Crossing was marked in slightly different locations by Chief William and Harry Setah (place name 77) and Theophile Ubill Lulua (place name 13). Witnesses for the plaintiff, Martin Quilt, Francis Setah and Theophile Ubill Lulua, marked three separate locations for Tsi T'is Gunlin, perhaps a kilometre or two apart It is not unusual or surprising that there would be such differences with witnesses working on a map they had not seen before. If witnesses were asked to take someone to these locations I am certain all would arrive at the same place. However, the multiple locations for the sites, coupled with the indeterminacy of the Trapline boundary (which nears the Tsilhqox in the vicinity of Tsi T'is Gunlin and Henry's Crossing), make it very difficult to say whether the sites fall inside or outside of the Claim Area. The lands on the eastern bank of the Tsilhqox lie within the Claim Area. The lands on the western bank, however, may fall within the narrow gap between the Western Trapline's northeastern boundary and Tachelach'ed.

[740] According to Mabel William, there are pit house remains at Tsi T'is Gunlin, upstream from Nusay Bighinlin on the western bank of the Tsilhqox. Chief William testified he had been told there were pit house remains on the west bank of the Tsilhqox just north of the bridge at Henry's Crossing, although he had not seen them

himself. According to his grandmother and uncles, Tsilhqot'in people lived in the pit houses.

[741] Cultural depressions have been recorded on the eastern bank of the Tsilhqox in an area that may correspond roughly to Henry's Crossing. In response to a question put by counsel for Canada, Eldridge marked an archaeological site of five or more pit houses on the eastern bank of the Chilko, registered as EkSa-124. No historical records connect this site to Tsilhqot'in residence *circa* 1846.

[742] Two of Dewhirst's photos show Tommy Lulua's old cabin and his son, Henry Lulua's cabin near Henry's Crossing. In one of them there is a house pit depression right next to Tommy Lulua's old cabin. Dewhirst testified that the site showed physical remains of Tsilhqot'in use over several generations, at least back to Nunsulian. Nunsulian was born before 1850, and was the father of Jack Lulua and an ancestor of many present members of the Xeni Gwet'in.

[743] Various Tsilhqot'in witnesses testified to the use of Henry's Crossing as a summer fishing site. It is also the site of the modern annual "Brittany Gathering". David Setah testified that his family camped on the east bank of the river at Henry's Crossing. As a child, Harry Setah stayed in a canvas tent on the Natasewed Biny (east) side of Henry's Crossing, at one of a dozen or so campsites there; his family was often one of several who were there at the same time.

[744] There are lhiz qwen yex at Tsi T'is Gulin and Tsilhqot'in people, including Jack Lulua (who was born in 1870), continued to build houses and live there well into the twentieth century. Some houses remain standing. In 1964 the provincial

Lands Branch noted that Jack Lulua's son Tommy Lulua (1901 - 1978) was "still residing" on the north eastern portion of District Lot 350, Coast District, "and has possibly built a log fence around the bottom land which extends onto the SW corner of Lot 353 …".

[745] Minnie Charleyboy, Eliza William and Doris Lulua testified that their great grandfather Nentsul ?Eyen (Nunsulian) is buried at Tsi Tis Gulin. In addition, Minnie Charleyboy identified the location as a salmon fishing camp.

[746] In 1910, a B.C. government surveyor sketched and attested to the location of "Indian Graves" on Lot 363 near the mouth of Lingfield Creek, just south of Tsi T'is Gunlin.

x. Ts'u Nintil

[747] Norman George Setah testified that Ts'u Nintil is about a half mile away from Tsi T'is Gunlin. He camped at this location on the west side of the Tsilhqox, outside the Claim Area. This is a salmon fishing area on the river frequented by Tsilhqot'in people. Minnie Charleyboy said that the salmon fishing always took place on the Nemiah side (east) of the Tsilhqox. Fishing at this location continues to take place, in season. Theophile Ubill Lulua testified that there were lhiz qwen yex in the area. This is a location that spans both sides of the river and is inside and outside the Claim Area.

xi. Biny Gwetsel

[748] Biny Gwetsel was marked in two different locations along the eastern bank of the Tsilhqox by Francis Setah and Norman George Setah. Both these locations would appear to lie in the narrow gap between Tachelach'ed and Western Trapline portions of the Claim Area, and thus outside the Claim Area. Although she did not locate Biny Gwetsel on a map, Minnie Charleyboy described the area as roughly where a big creek flowed into the Tsilhqox from the west. She testified that it was both a cremation and grave site. Gilbert Solomon identified Biny Gwetsel as the site of a pit house village on the east side of the Tsilhqox that he visited with archaeologist Michael Klassen. If this site corresponds with EkSa-97, located on the eastern bank of the Tsilhqox about halfway between Tsi T'is Gunlin to the north and Biny Gwechugh (Canoe Crossing) to the south, the site would lie within the Claim Area.

[749] Francis Setah described Biny Gwetsel as a spring tislagh (steelhead salmon) spawning location. He testified that, according to his grandmother, the ?Esggidam killed or chased the ?Ena Tsel from Biny Gwetsel. Minnie Charleyboy testified that the place known as Biny Gwetsel was a popular tislagh fishing spot, where people would fish on both sides of the river. She said that ancestors and moderns alike slept either in tents or under the trees at this location. She said there was a Tsilhqot'in gravesite on the western bank of the Tsilhqox between Biny Gwetsel and Lingfield Creek.

[750] No historical records were cited that would confirm Tsilhqot'in residence on the eastern bank of the Tsilhqox near Biny Gwetsel in or around 1846. Eldridge concluded that the archaeological site recorded as EkSa-97 could not be the village visited by Father Nobili in 1845 since Nobili traveled only on the west bank of the Tsilhqox.

xii. Gwedeld'en T'ay

[751] In his affidavit, Theophile Ubill Lulua said that Tsilhqot'in people used to live in pit houses at Gwedeld'en T'ay, about two miles downstream from Biny Gwechugh. In oral testimony, Theophile Ubill Lulua confirmed that the site known as Gwedeld'en Tay is confined to the western side of the Tsilhqox, which means that the site falls outside of the Claim Area.

[752] Both Theophile Ubill Lulua and Minnie Charleyboy associate the campsite at Gwedeld'en T'ay with graves and drumming; the name means "Indian Drum". Theophile Ubill Lulua testified that Tsilhqot'in people are buried there and that you can hear them drumming. Minnie Charleyboy testified that no one drums there now.

xiii. Biny Gwechugh (Canoe Crossing)

[753] Biny Gwechugh, as its English name, Canoe Crossing, suggests, is a place where the Tsilhqox could be conveniently forded. The name applies to sites on both banks of the Tsilhqox, although the main site appears to be situated on the western bank. Biny Gwechugh is located about 3.5 kilometres north of the mouth of Tsilhqox Biny. Eldridge and Dewhirst agreed that this location next to the village site at

Talhiqox Biny (Tatlayoko Lake) has the best correlation between historical records of village sites and the archaeological records. The site is registered in Victoria under Borden numbers EjSa-5 and EjSa-1483.

[754] This site was identified on the base map by Francis Setah, Chief William, and Theophile Ubill Lulua. The western side of Biny Gwechugh falls outside of the Claim Area, while the eastern side is within the Claim Area.

[755] Minnie Charleyboy testified that she had been told that Qaq'ez (or Kahkul), the great-great grandfather of Chief William (and brother of Lha Ts'as'?in), was raised in an underground house at Biny Gwechugh. She also fished in a deep area of Biny Gwechugh called Qats'ay bid, using a net. She said that the ?Esiggdam used to fish at Biny Gwechugh. She named other Tsilhqot'in people who lived in the Tsilhqot'in pit house village at Biny Gwechugh including Nezulhtsin's parents and Nisewichish's parents. This dates the site as early nineteenth century.

[756] Theophile Ubill Lulua testified to learning from Eagle Lake Henry that about 40 lhiz qwen yex once lined both sides of the river in the area of Biny Gwechugh. Theophile Ubill Lulua could not say how many people lived in the lhiz qwen yex, but he did know that the residents of Biny Gwechugh had all moved away or died of old age by the time Eagle Lake Henry was 18 years old.

[757] Archaeological evidence confirms the existence of cultural depressions on both sides of the Tsilhqox in the area of Biny Gwechugh. The main archaeological site, EjSa-5, is located on the west bank of the Tsilhqox. Matson et al. described the site in 1979 as including "several concentrations of large housepits as well as a large

lithic scatter located on a grass covered terrace next to the stream": *The Eagle Lake Project* report, pp. 55-56. A secondary site, for which archaeological information is also available although it cannot be linked to historical records, lies on the eastern bank within the Claim Area.

[758] Both Eldridge and Dewhirst were of the opinion that either Biny Gwechugh or Gwedats'ish was the home of the "Tase Ley" or Long Lake Indians, identified as one of four Tsilhqot'in groups attached to Fort Chilcotin according to the HBC census of 1838. In addition, the larger archaeological site at Biny Gwechugh, EjSa-5, located on the west bank of the Tsilhqox, probably corresponds to one of the Tsilhqot'in villages visited by HBC traders, McDougall and Connolly and the missionary Father Nobili in the first half of the nineteenth century. Nobili, who is thought to have visited the site in his travels on the Chilcotin plateau in 1845, recorded erecting a cross on a hill near the village.

[759] Modern Tsilhqot'in people have commemorated the missionary's visit to Biny Gwechugh by re-erecting the cross on a ledge on the west shore of the Tsilhqox, overlooking the river.

[760] Directly across the river from Biny Gwechugh (EjSa-5) is archaeological site, EjSa-14, also recorded by a team of anthropologists in 1979. EjSa-14 contains some 14 house pits and 21 cache pits. Tsilhqot'in people used and continue to use both sides of the river at this location.

xiv. Sul Gunlin

[761] Sul Gunlin is located very near to the outlet of Tsilhqox Biny on the eastern shore of the lake. It is within the Claim Area. Doris Lulua was taught that the ancestors lived in lhiz qwen yex in the vicinity of Sul Gunlin.

[762] Theophile Ubill Lulua described Sul Gunlin as a "wild rhubarb place" where Eagle Lake Henry had a hunting cabin. He also testified that he grew up in the area. He said he had seen four lhiz qwen yex at what is now the site of an airport. The airport was constructed in 1962 over top of these archeological remains. 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, 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.

[763] Sul Gunlin appears to lie within the boundaries of Ts'il?os Provincial Park. According to Doris Lulua, the area of Sul Gunlin includes the DFO site and Chilko Lake Lodge.

c. Xeni (Nemiah Valley)

[764] Xeni is a place of long standing Tsilhqot'in occupation. The word Xeni is said to be a rough substitute for Nemiah. Xeni Yeqox (Nemiah Creek) drains into the valley. Unlike the Tsilhqox corridor, the Xeni sites do not appear in the historical documents until the turn of the last century. The first distinct reference came when Edmund Elkins attempted to take up residence in the valley in the late nineteenth

century. The southern boundary of Tachelach'ed cuts through Xeni and thus it is only partly within Tachelach'ed. It is also within the Western Trapline Territory.

[765] As with other parts of the Claim Area, and taking into account the invitation of counsel to express an opinion on where Tsilhqot'in Aboriginal title might lie, it is convenient to consider Xeni as a separate area.

[766] Tsilhqox Biny provides the western boundary of Xeni. Ts'il?os (Mount Tatlow) defines its southern boundary. Gweqez Dzelh and Xeni Dwelh provide the northern boundary, while the base of Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) where it meets the Dasiqox, marks its eastern boundary.

[767] When Indian Reserve Commissioner A.W. Vowell set aside two reserves on the eastern shore of Tsilhqox Biny, he wrote to the Deputy Commissioner of Lands and Works on October 14, 1899 that one of them was located "where some families have built houses and live in the winter." R.P. Bishop noted in his December 31, 1922 Report to Surveyor-General J.E. Umbach under "Indians" that "there are several old village sites in the valley". Thus, at the time the reserves were created, Tsilhqot'in people were there living in long-established winter quarters.

[768] Despite the presence of reserves in Xeni and the fact that most band members reside on reserve, there are a number of band members who live off reserve. The reserves are not included in the Claim Area. There seems to be little regard paid to the fact that not all of Xeni is reserve land. The land appears to be used as needed by the Xeni Gwet'in without licence, lease or payment. Band members who occupy homes off reserve in Xeni include: Eileen William, Emma

Pierce, Elsie Quilt, Alex Lulua, Ubill Hunlin, Eugene William, Danny Sammy William and William Lulua.

[769] Chief Nemiah was born in Xeni *circ*a l827. It appears that he died on July 11, 1927. His death certificate notes his age to be in excess of 100 years at that time. Dewhirst notes his D.O.B. as *circa* 1830. Chief Sil Canem was buried in Xeni. Chief ?Achig was buried at Xexti in Xeni. Current Chief William was also born in Xeni.

i. Various Sites

[770] There are numerous sites in the valley with Tsilhqot'in names. These sites include Ses Ghen Tach'I (a fishing site) and Tses Nanint'i (a camping site), where several trails come together at the west end of the valley.

[771] Lhiz Bay at the western end of the valley is both on and off reserve. It is the site where Chief ?Achig had an altercation with the settler named Edmund Elkins in the late nineteenth century. As a result of this incident, Elkins was forced to relocate to another area in Tachelach'ed. It appears that the location of Elkins' attempted pre-emption is now on reserve.

[772] Lhiz Bay is a likely candidate for one of the "several old village sites in the valley", noted by the surveyor, R. P. Bishop, in 1922. Norman George Setah personally recalled houses at Lhiz Bay which were occupied by people now deceased. He recalled that when he was around five years old he burned down the house of Johnny Setah or ?Eweniwen (b. *circa* 1871 or 1875, d. 06 March 1955). It

was a log house with a grass floor. Little George Setah (b. 1897 or 1899, d. 07 Octover 1971) also had a house in Lhiz Bay.

[773] There is some confusion in the evidence between Lhiz Bay and Lhiz Bay Biny, a small lake south of the Lezbye I.R. #6 boundary. It is clear, however, that most of Lhiz Bay is on reserve and, to that extent, not included in the Claim Area. There is no archaeological evidence available for either of these locations.

[774] On March 5, 1969, British Columbia sold Block A of lot 305 to Daniel William (then Chief of the Nemiah Valley Indian Band) for $845. The band requested that the land be made into a reserve, and it eventually became Lezbye I.R. #6.

[775] Xexti is a Tsilhqot'in burial place in Xeni near Xexti Biny (Nemiah Lake). It is not on reserve. Four generations of Setahs are said to be buried at this site dating back to Old Sit'ax (Louis Setah). His death certificate records that he was about 100 years of age when he died in Xeni on October 29, 1927. There is no archaeological evidence available for this site.

[776] Tl'ebayi lies at the west end of Xeni Biny. Much of it, but not all, is on reserve. There are the remains of at least two lhiz qwen yex at this location. It is the present school site and the site of the band offices of the Xeni Gwet'in First Nations.

[777] ?Et'an Ghintil is an underground house site on the south shore of Xeni Biny. Gilbert Solomon said that it was occupied by the ?Esggidam.

[778] North of Xeni Biny, roughly at the centre of the lake, is Tl'ets'inged. This site is approximately half way between the reserves at the east and west ends of Xeni

Biny. Ubill Hunlin has lived there with his family for about 25 years. Francis William has an old cabin there. Members of Chief William's family have a cabin at this site and use it as a fishing camp from time to time. Xeni Gwet'in people camp there for berry picking.

[779] Joseph William was taught by his grandmother, Annie William, that the ?Esggidam would pile rocks and set up a snare to catch ?elhtilh (wild chickens) at a place called Tsi Nadenisdzay, which is above Tl'ets'inged on the slope of Xeni Dzelh which rises up from Xeni Biny. It is not on reserve and therefore, within the Claim Area.

[780] Naghataneqed is at the east end of Xeni Biny and is mostly on reserve. There are several old house pits in the vicinity. Tsilhqot'in houses and a gravesite are located there. Gatherings are held at Naghataneqed and have been from a time before the church was built there. David Setah also referred to an old village at Naghataneqed which is not on reserve.

[781] The gravesite at Naghataneqed is called Chel Letesgan. When the “big flu” came in 1918, before the reserve was surveyed, there were a number of people living in cabins at Naghataneqed. Those people included Tselakoy and his wife, ?Estinlh and their family, ?Amed's mother and ?Eskish (Captain George). Thirty two people who died in the sickness of 1918 are buried there. Captain George (1883 - 1973) is buried at Chel Letesgan.

[782] Tl'etates is said to be off reserve at the east end of Xeni Biny at Naghataneqed. This is where Chief William was born. Many other Tsilhqot'in people have lived at Naghataneqed during the last century**.**

ii. Summary

[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, 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.

d. Tachelach'ed (Brittany Triangle)

[784] The name Tachelach'ed refers to the whole area between the Tsilhqox and Dasiqox. Tsilhqot'in people identify the waters of Tachelach'ed as follows. In the southwest, Natasewed Yeqox runs through Natasewed Biny (Brittany Lake), Tsi Tex Biny (Murray Taylor Lake) and Ben Chuy Biny to its outlet on the Tsilhqox at Nusay Bighinlin. The spring water of north central Tachelach'ed is found at ?Esqi Tintenisdzah (Child Got Lost). In the southeast, the Nuntsi chain of waters runs to the Dasiqox. Elkin Valley, named for the first settler in the area and whom Chief ?Achig caused to move to the valley's southern perimeter, contains ?Elhghatish Biny

(Vedan Lake) and Nabi Tsi Biny (Elkin Lake). Together these lakes are known as the Twin Lakes. To the valley's west is Tsanlgen Biny (Chaunigan Lake), which drains northeast to Elkin Creek.

[785] The western boundary of this triangular tract follows the banks of the Tsilhqox. Its southwestern edge runs along the eastern shore of Tsilhqox Biny from the lake outlet to a point at the southwest corner of the Xeni Gwet'in reserve in Xeni where it meets the baseline southern boundary. The eastern boundary is defined by the Dasiqox. The northern tip is at ?Elhixidlin (Tsilhqox-Dasiqox confluence).

[786] The southern boundary of Tachelach'ed was described in three different locations by witnesses. Mabel William described Tachelach'ed as extending south to Ts'il?os. This description includes Xeni, as Ts'il?os stretches eastward to the head of the Dasiqox. Martin Quilt testified that Tachelach'ed extends further south to the head waters of Tsilhqox Biny and Dasiqox Biny. Francis Setah's evidence indicates the southern boundary is as discussed below.

[787] Viewed conservatively, the southern boundary runs west to east from Tsilhqox Biny along the Claim Area's mountain plateau transition zone, to the Dasiqox. The boundary on the base map follows the Nemiah Valley Road from the Davidson Bridge crossing over the Dasiqox in a westerly direction until it reaches Xeni Biny, then follows that lake's southern shore to its confluence with Xeni Yeqox where it follows the creek to the eastern shore of Tsilhqox Biny. This triangular tract of land is bounded on the south by Ts'uni?ad Dzelh (Tsuniah Mountain), Ts'uni?ad

(Tsuniah Valley), Gweq'ez Dzelh (Nemiah Mountain), Mainguy Lake and Xeni Dzelh (Konni Mountain).

[788] Excluding this disagreement over the southern boundary, all Tsilhqot'in witnesses were unanimous that the above mentioned lands and waters are within Tachelach'ed. Thus, Tachelach'ed is seen as a triangular tract of land with a largely uniform character, namely, the plateau dominated forestlands between the Tsilhqox and Dasiqox. The plaintiff's argument proceeded on the assumption that the conservative definition of the southern boundary applies.

[789] The plaintiff says that Tsilhqot'in people physically occupied Tachelach'ed prior to, at and well after the assertion of Crown sovereignty. That occupation includes the construction of dwellings, as well as a regular use of Tachelach'ed by Tsilhqot'in people for hunting, fishing and trapping.

[790] Few sites within Tachelach'ed can be linked by either historical or archaeological evidence to Tsilhqot'in villages or communities in the time period around 1846. In 1822 McDougall recorded that the land east of the Tsilhqox was a "favourite hunting ground" for Tsilhqot'in people. Most of the evidence available concerns twentieth century use and residence. During the twentieth century, Tsilhqot'in people appear to have moved into areas in Tachelach'ed where hay and water could be readily obtained in order to engage in ranching.

[791] The evidence discloses that the area around the major lakes in Tachelach'ed, including Natasewed Biny, Tsalngen Biny, ?Elhgatish Biny, and Ts'uni?ad Biny contains pit house remains. Mabel William saw a niyah qungh near Ben Chuy Biny

in Tachelach'ed. She said that it had "rotted down" and all the logs had fallen in. Ben Chuy Biny is a long lake inland from Nusay Bighinlin.

[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 Tachelch'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 Aborignal 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 HBC 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.

[795] I now consider specific locations where Tsilhqot'in Aboriginal title might lie in Tachelach'ed.

i. Gweq'ez Dzelh and Xeni Dzelh

[796] Gweq'ez Dzelh (Nemiah Mountain) and Xeni Dzelh (Konni Mountain) are located in the transition zone between the Chilcotin Range and the rolling terrain of the Chilcotin Plateau. They are bounded on the northwest by Ts'uni?ad, on the west by Tsilhqox Biny, on the south by Xeni, on the east by Elkin Valley and on the north by the leveling Chilcotin Plateau lands between the Dasiqox and Tsilhqox.

[797] The mountains are oriented on a west-east axis; Gweq'ez Dzelh on the west and Xeni Dzelh on the east. The two mountains are joined by a small valley, ?Esqi Dzul Tese?an, that drains waters south into central Xeni. These waters originate from both Shishan Tl'ad (moutain sheep basin) on east Gweq'ez Dzelh and from small lakes on northwest Xeni Dzelh, in particular, Nen Nuy Dilex Biny, Chantl'ex Biny and Ts'itse?ex Biny.

[798] The areas surrounding and including these mountains are tied together by a network of Tsilhqot'in trails. These trails connect Xeni to the fishing grounds on Tsuni?ah Biny and farther to the Tsilhqox. These trails provided a regular means of access for Tsilhqot'in people to areas where they hunted, fished and gathered medicinal plants, root plants and berries.

ii. ?Esqi Nintanisdzah (Child Got Lost)

[799] Midway between Natasewed Biny and the confluence of the Tsilhqox and Dasiqox is a place known as ?Esqi Nintanisdzah. There is a story of a child getting lost in the area in the early 1930's. Spring water and a meadow that provides feed for horses is available in this area. This location was used in the last century as a late fall or early winter deer hunting site. The use of this location seems to have fallen off with the passing of the years. There is no written historical or archeological evidence about this site.

iii. Nu Natase?ex (Mountain House)

[800] Nu Natase?ex is located east of the Tsilhqox, roughly parallel to the north end of Naghatalhchoz Biny (Big Eagle Lake).

[801] No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site in or around 1846. According to the oral history evidence, Tsilhqot'in families have had houses at Nu Natase?ex since the turn of the twentieth century. Burial grounds at the site mark the graves of a number of people who died there as a result of the 1918 influenza epidemic.

[802] Mabel William deposed that ?Elegesi (Eagle Lake Henry) told her that at the time of the great flu, Nezulhtsin (also known as Jamadis, born *circa* 1824 or 1827) and his wife had a niyah qungh at Nu Natase?ex . This oral history link between Nu Natase?ex and Nezulhtsin appears to indicate occupation of this site by Tsilhqot'in people at the time of sovereignty assertion.

[803] Nu Natase?ex is closely associated with Eagle Lake Henry. He and his two wives are said to be buried at that location. A number of witnesses testified that Eagle Lake Henry lived at Nu Natase?ex, where he was sometimes joined by other Tsilhqot'in people from time to time. A series of documents detail Eagle Lake Henry's application to purchase Coast District Lot 1191. This lot is located several kilometres east of the Tsilhqox and was to be used for ranching purposes. The survey documents suggest that Eagle Lake Henry was living in the area for about 16 or 17 years before applying to purchase the land in the early 1940's. He applied as an enfranchised Indian. A Crown Grant to Lot 1191 was issued to Eagle Lake Henry in December of 1944.

iv. Natasewed Biny (Brittany Lake)

[804] Not far from Nu Natase?ex is Natasewed Biny. It is a horseshoe shaped lake located east of Naghatalhchoz Biny and is within Tachelach'ed.

[805] While no historical records were adduced that would confirm Tsilhqot'in residence at this site in or around 1846, there is some evidence of pre-sovereignty occupation. Theophile Ubill Lulua testified that he saw four pit house remains at the north end of Natasewed Biny where "old people" used to live. He was also told about other pit house remains at that location. Eliza William deposed that her adoptive grandfather, Nezulhtsin fished in the area of Natasewed Biny.

v. Captain George Town

[806] Captain George Town, and nearby Neba?elhnaxnenelh?elqelh (Deni Belh Tenalqelh) are located east of Natasewed Biny and north of the Twin Lakes (?Elhghatish Biny and Nabi Tsi Biny) within Tachelach'ed. The site is named after Captain George, an enfranchised Tsilhqot'in person, who established a ranch in the area.

[807] Ubill Hunlin testified that Captain George's grandfather lived at Deni Belh Tenalqelh, and that Tsilhqot'in ?Esggidam occupied the site before him.

[808] The plaintiff argues that Captain George became enfranchised in order to take back a parcel of land that had been pre-empted by a non-Tsilhqot'in person. However, there is no indication that Lillooet Lot 7381, which Captain George eventually obtained, was previously alienated to another person.

vi. Far Meadow

[809] North of Captain George Town, still within Tachelach'ed is Far Meadow. While no archaeological or historical evidence was adduced that would confirm Tsilhqot'in residence at this site in or around 1846, there is evidence of residence by individual Tsilhqot'in people throughout the twentieth century. According to Chief William, Sil Canem built a cabin at Far Meadow. That cabin was later occupied by Eagle Lake Henry. A number of Tsilhqot'in witnesses testified to having lived there during the winter.

[810] In 1926, Surveyor J. Davidson surveyed Lillooet District Lot 5411 at or near the place marked as Far Meadow. The survey was requested by Eagle Lake Henry. It appears to have been facilitated by a letter dated 14 January 1922 from W. E. Ditchburn, Chief Inspector of Indian Agencies, to the provincial Deputy Minister of Lands. The letter, written 3 September 1921 to W. E. Ditchburn, cites a report by Indian Agent A. Daunt as follows:

> I beg to inform you that there is one Indian in the area north and west of Hanceville, whose holdings of Crown lands should receive some protection.
>
> The case is, however, somewhat difficult to deal with, for not only are the lands unsurveyed, but he has so many places, and so much grazing fenced, that it would be impossible to obtain a representative portion within the confines of, say a 160 acre lot.
>
> The man's name is "Eagle Lake Henry", 29 years of age, married, no children, but sister aged eleven lives with him.
>
> He belongs to no Band, and acknowledges no Chief, having been born in the vicinity of Eagle Lake of parents who had themselves remained aloof from other Indians.

[811] The letter continues on to note that Eagle Lake Henry had "50 head of cattle and 30 horses", and identified his house as a "very good log cabin of three rooms ... situated about five miles south of the mouth of Brittany Creek, and three miles east of the Chilco River". In 1933 Eagle Lake Henry applied for, and received, a Crown Grant for Lot 5411.

vii. Delgi Ch'osh or Lhuy Tu Xadats'ebe?elhtalh (Big Lake)

[812] Captain George's family had a fishing site at Delgi Ch'osh. There he constructed a pine windbreaker as a shelter. A number of Tsilhqot'in people have used this location as a springtime fishing campsite.

viii. Ts'uni?ad Biny (Tsuniah Lake)

[813] Ts'uni?ad Biny is a significant valley bottom lake. It is the large lake east of Tsilhqox Biny and north of Xeni. The southwest end of the lake lies close to Tsilhqox Biny. The northeast end lies at roughly the same latitude as the juncture of Tsilhqox Biny and the Tsilhqox. As a result of the McKenna-McBride Commission, a fishing reserve – Tsuniah Lake IR #5 – was set aside for Tsilhqot'in people on the southwest end of Ts'uni?ad Biny in 1916.

[814] The valley includes a small peninsula, Ts'utalh?ad, to the north of Ts'uni?ad Biny. Ts'uni?ad Yeqox drains the lake in the southwest and runs a short distance down to Tsilhqox Biny. At the southwest perimeter of the valley is Nenatats'ededilh (Four Mile Lake, Little Lagoon). On the northwest is Ts'uni?ad Dzelh (Tsuniah Mountain) and to the south, Gweq'ez Dzelh.

[815] Theophile Ubill Lulua and Gilbert Solomon testified to seeing, or knowing of, pit house remains at both ends of Ts'uni?ad Biny. According to Theophile Ubill Lulua, some of these remains were filled in during the construction of the Tsuniah Lake Lodge and Merritt airstrips, and are no longer visible. Theophile Ubill Lulua also knew of old niyah qungh at the north end of Ts'uni?ad Biny. Mabel William

testified that Nezulhtsin and his wife had a niyah qungh at a place called Ts'u Talh?ad at the north end of the lake. Ts'uni?ad Biny served as a spring fishing site for the distant relatives of some witnesses. According to Norman George Setah, the ?Esggidam hunted in the spring around the lake, and held a gathering called dishugh delmid nagwaghized there every May.

[816] A map of the Chilcotin plateau dating from 1864 (Cox Map) shows a fishing site at the present location of Tsuniah Lake IR #5 and the reference "Certain to find Indians at this point early in Spring." In the twentieth century, Tsilhqot'in people camped around the lake and used it as an early spring fishing camp. Witnesses also testified about cremation and burial sites at both ends of the lake. Nezulhtsin is buried at the north end of the lake and a structure has been built to mark the grave location.

[817] By the mid-twentieth century few people appeared to use Ts'uni?ad Biny as a residence site. Theophie Ubill Lulua stated in his affidavit that when he was young, his family stayed in two cabins on Ts'uni?ad Biny; a small one at the north end of the lake as well as a larger one that had originally been built by a white man. Theophile Ubill Lulua's family used the cabin only seasonally. No other Tsilhqot'in people had cabins there when he was growing up. Theophile Ubill Lulua's family stopped using the cabins when he was 13 years old.

[818] Ts'uni?ad Biny lies within that definite tract of land, connecting Xeni to the shores of Tsilhqox Biny, the Tsilhqox and further north to Naghatalhchoz.

ix. ?Elhghatish (Between the Lakes)

[819] ?Elhghatish is the name of an area between the Twin Lakes (?Elhghatish Biny and Nabi Tsi Biny) in Tachelach'ed, north of the southeast corner of Xeni.

[820] No archaeological or historical records were adduced that would confirm Tsilhqot'in residence at this site in or around 1846. Tsilhqot'in witnesses identified pit house remains (lhiz qwen yex) at ?Elhghatish which were said to have been occupied by Tsilhqot'in ancestors. Ubill Hunlin testified that Captain George's family had a fishing site at this location. They constructed a pine windbreaker as a shelter at this site.

[821] Lot 4669 was surveyed on behalf of, and leased for residential purposes to Rosie Pierce and her (non-Tsilhqot'in) husband in 1976. In a letter dated July 1974, received by the Inspection Division, Lands Service in Williams Lake, explaining why she wanted to lease the land, Pierce stated in part:

> 1. I am a chilcotin indian who was born and raised in this area.
> 2. I am now married to a white man and can no longer claim Indian rites.
> 3. I would like to have this as a home site, garden and room to keep two or three horses for our own use.
> 4. Much of my family and friends live in this area and would like land of my own to call a home.
> 5. The land in question has been a garden ground for my family for many years.

[822] The difficulty referred to in para. 2 has since been corrected by federal legislation. After receiving the lease, Ms. Pierce attempted in 1989, without success, to have it transferred to the Xeni Gwet'in band.

x. Tsanlgen Biny (Chaunigan Lake)

[823] Tsanlgen Biny lies just west of ?Elhghatish in Tachelach'ed.

[824] According to Gilbert Solomon, there are remains of pit houses that were once occupied by Tsilhqot'in ancestors at Tsanlgen Biny. Martin Quilt testified that one of the pit houses contained human remains.

e. Western Trapline Territory

[825] The Western Trapline Territory overlaps with areas in Tachelach'ed. 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.

i. Lhuy Nachasgwengulin (Little Eagle Lake)

[826] Lhuy Nachasgwengulin is at the northwestern tip of the Western Trapline Territory. It is located southeast of Tatl'ah Biny. It is a shallow plateau lake draining

north to Tatl'ah Biny on the edge of the Chilcotin Plateau. The boundary of the Western Trapline runs through Lhuy Nachasgwengulin. Therefore the southeastern part of the lake falls outside the Claim Area. The balance of the lake is within the Claim Area.

[827] Norman George Setah testified to seeing 10 to 12 pit houses at Lhuy Nachasgwengulin some of which were intact when he first visited the site 50 years ago. He marked these sites at the westernmost end of the lake. When he first saw them, some of the structures were complete with the notched pole used by the occupants as a ladder.

[828] Setah noted that there was a little cabin on the trail close to the pit house remains that his family and other Tsilhqot'in people would use when they traveled to Tsi Del Del. In the twentieth century, a trip each year to see the priest at Tsi Del Del was integrated into the seasonal rounds.

[829] There is no other evidence concerning occupation or use of this site.

ii. Gwedzin Biny (Quitzee or Cochin Lake)

[830] Gwedzin Biny is a smaller lake lying northwest of Naghatalhchoz Biny. It is also a shallow plateau lake and it drains south to feed into Talhiqox Biny. Talhiqox Biny is a significant valley-bottom lake with a southern outlet located in the Coast Range or Cascade Mountains. Gwedzin Biny falls within the Claim Area. Gwedzin are the lands about Gwedzin Biny.

[831] In August 1875 George Dawson, traveling through the Chilcotin plateau as a surveyor on behalf of the Geological Survey of Canada, camped at Gwedzin Biny. His notes are published in the *Journals of George M. Dawson: British Columbia, 1875-1878*. His journal for August 31, at p. 76 reports:

> Passed White Water L. & camped at S.E. end of Cochin L, where site of indian village marked on map really only a camp, & now abandoned. A newly made indian grave on the crest of a little knoll logs piled in square form on the ground, & a pole standing up with an old tin pan spiked upon it, & bearing a red rag for a flag. Found Cached in the bushes several fish traps which had been used in the lake.

[832] Numerous Tsilhqot'in people are said to have stayed at Gwedzin in the twentieth century to fish during the summer. Some Tsilhqot'in people have cabins there and live there more permanently. Many Tsilhqot'in people go to this location for early summer fishing and camp all around the lake, often on their way to Tsimol Ch'ed (Potato Mountain). The area has also been used for late fall nists'i hunting as they move from the mountain to the plateau land for winter. Doris Lulua deposed that Eagle Lake Henry told her that a Tsilhqot'in person, ?Ighelqez, lived there year-around but she did not say when or for how long. ?Ighelqez is said to be buried there.

iii. Ch'ezqud

[833] Ch'ezqud is a site located just off the western end of Naghatalhchoz Biny. Minnie Charleyboy described it as the area where the creek leaving ?Edibiny enters Naghatalhchoz Biny. Ch'ezqud is within the Claim Area.

[834] Minnie Charleyboy said she had seen niyah qungh remains at the site, and that her grandfather had lived in one at that location. Minnie Charleyboy testified that she stayed at Ch'ezqud in early summer with Tommy Lulua and her adoptive grandmother, Sa Yets'en. According to Minnie Charleyboy, Sa Yets'en's mother, Elizabeth, used to spend winters at Ch'ezqud. This evidence indicates a mid-nineteenth century use. She also named a number of Tsilhqot'in people who used Ch'ezqud as a station for catching nilhish (kokanee) in September, and delji-yaz (suckers) in the spring. Her family stayed in a tent while fishing in spring and fall. Tl'etsen (wild onions) are gathered and hay is cut nearby. According to Minnie Charleyboy, there are also graves at the site.

[835] Doris Lulua also testified that her mother had a winter home at Ch'ezqud. She deposed that her mother told her there was a cremation site at that location.

[836] According to Mabel William, some of the colonial forces sent to arrest the Tsilhqot'in people who had killed members of Waddington's road crew camped at Ch'ezqud. In her affidavit, Mabel William said that her grandfather taught her that Samadlin (McLean) was killed at Ch'ezqud. His killers escaped into Naghatalhchoz Biny.

iv. ?Edibiny

[837] ?Edibiny is a small lake lying south of the west end of Naghatalhchoz Biny, connected to Naghatalhchoz Biny by a creek. It lies within the Claim Area. Minnie Charleyboy testified that there are cache pits and lhiz qwen yex remains near ?Edibiny. Sa Yets'en told Minnie Charleyboy that sites like ?Edibiny were chosen

for winter residence by Tsilhqot'in people prior to the introduction of horses, since Tsilhqot'in people needed resources such as fish, water, and fuel for fires close by. Minnie Charleyboy testified that she herself had stayed in a niyah qungh at ?Edibiny. Minnie and Patrick Charleyboy keep a cabin at ?Edibiny, which they use a few times a year.

[838] Norman George Setah testified that his family and other Tsilhqot'in people fished at ?Edibiny using gill nets for delji-yaz in the spring, and nilhish in the fall.

v. Naghatalhchoz Biny (Chelquoit Lake or Big Eagle Lake)

[839] Naghatalhchoz Biny is the Tsilhqot'in name for Big Eagle Lake. The boundary of the Western Trapline Territory runs through this lake lengthwise from its western to its eastern end. The northern half of the lake falls outside of the Claim Area, while the southern half is inside the Claim Area.

[840] Naghatalhchoz is the area around Naghatalhchoz Biny. Only the southern portion is included in the Claim Area. The area on the north side of the lake is excluded from the Claim Area.

[841] The Naghatalhchoz Biny basin is situated just northwest of Tsilhqox Biny outlet and west of the Tsilhqox. Naghatalhchoz Biny is a shallow plateau lake that drains northeast to the Tsilhqox as it begins its run through the Chilcotin Plateau.

[842] A number of witnesses associated Naghatalhchoz Biny with a particular group of Tsilhqot'in people, the Naghatalhchoz Gwet'in. These people later merged with the Xeni Gwet'in Band. In the twentieth century Naghatalhchoz Biny was associated

with the Lulua family. Other individuals and families visited or used the area for hunting, fishing and gathering purposes into the twentieth century.

[843] In the 1970's, a team of archaeologists led by Richard Matson undertook a comprehensive survey of the area around Naghatalhchoz Biny, recording most, if not all, of the sites for which archaeological information is available today. That research refers to the location as the Bear Lake site or EkSa36. According to Matson, this site was particularly interesting for understanding early occupation of the Claim Area. This site at Naghatalhchoz Biny was thought likely to have been Athapaskan in origin. This can be contrasted with the major pit house villages along the Tsilhqox at sites such as Tlegwated, which are understood to have been originally inhabited by Plateau Pithouse Tradition people.

[844] There are lhiz qwen yex remains on the south side of the lake. Sa Nagwedijan is the Tsilhqot'in name for one of these sites. Theophile Ubill Lulua testified that Eileen Ellen Lulua and her son, Edward, lived in a niyah qungh at Naghatalhchoz Biny in the mid-1920's. Eliza William deposed that Nezulthsin lived in the area. There is evidence of occupation of this area dating back to Nezulthsin. It is said that he and his wife lived in a niyah qungh in the area of Naghatalhchoz Biny.

[845] In his 1953 dissertation, Robert Lane identified Tsilhqot'in pit house remains on the south shore of Naghatalhchoz Biny. The Naghatalhchoz Biny pit houses are one of only two or three such sites identified by Lane that fall within the boundaries of the Claim Area. Lane also reported six or more sites with pit houses of non-

Tsilhqot'in origin. Although he reported that Tsilhqot'in people abandoned the use of lhiz qwen yex before the 1850's, Lane also stated that a "reputable white informant" claimed that one pit house was still inhabited in the 1930's or early 1940's near Naghatalhchoz Biny: Lane Thesis, p. 157. From the evidence I heard in the course of the trial, I conclude that Lane was incorrect in this observation concerning the abandonment of lhiz qwen yex.

[846] In contrast to the larger Tsilhqox corridor sites such as those at Tl'egwated and Biny Gwechugh, the typically Athapaskan cultural sites in the area of Naghatalhchoz Biny are much smaller in size, and would have supported a much smaller population. While archaeological evidence suggests that Athapaskan habitation at certain sites in the Naghatalhchoz Biny area may date prior to the end of the eighteenth century, the historical literature only begins to record Tsilhqot'in use of and residence in the area in the 1860's.

[847] It is significant that members of the Lulua family continue to use this location for fishing, hunting and a range of other activities on the land.

vi. Tsi gheh ne?eten

[848] Doris Lulua has a home located at Tsi gheh ne?eten, just a few miles south of the east end of Naghatalhchoz Biny. It is within the Western Trapline Territory. An airstrip was built nearby. Tsi gheh ne?eten is at a main trail linking communities at Gwedats'ish (the mouth of Tsilhqox) and Biny Gwechugh with those downstream on the Tsilhqox, and at Naghatalhchoz Biny. It connects to other trails, including trails to Tsimol Ch'ed, Gwedzin Biny, Ts'uni?ad Biny, Xeni and Talhiqox Biny. This main

trail is also part of a network used to access areas seasonally for hunting and fishing and gathering sunt'iny, berries and medicinal plants.

[849] At the time of Chief William's testimony in the fall of 2003, Casimir and Madeline Lulua were living north of Naghatalhchoz Biny, outside the Claim Area. Only Doris Lulua was living near the airstrip south of Shishan-qox.

[850] It is significant that the British Columbia Crown surveyor declared that Indian cabins at Naghatalhchoz were "owned" by Indians. Mr. Taylor, the surveyor in 1910 of District Lot 357, which is adjacent to the south east end of Naghatalhchoz Biny, swore a declaration on June 25, 1910, attesting to certain facts, including, among other things, that Lot 357 had Indian cabins: "The Indian cabins below shown owned by a ... siwash …".

vii. Sa Nagwedijan

[851] Theophile Ubill Lulua identified a site he called Sa Nagwedijan on the south shore of Naghatalhchoz Biny, towards the eastern end of the lake. Sa Nagwedijan falls within the Claim Area. No other witnesses described a site by this name.

[852] Theophile Ubill Lulua testified that he grew up in the area of Sa Nagwedijan. He noted that his Aunt Eileen (or Madeline) Lulua and her son Edward stayed in a niyah qungh at Sa Nagwedijan in the 1920's. According to Theophile Ubill Lulua, there were also lhiz qwen yex remains at Sa Nagwedijan.

[853] No archaeological or historical records were adduced that would confirm Tsilhqot'in residence at this site in or around 1846.

viii. Tsi Ch'ed Diz?an

[854] A number of Tsilhqot'in witnesses described a place called Tsi Ch'ed Diz?an. Tsi Ch'ed Diz?an lies at the far eastern end of Naghatalhchoz Biny, within the Claim Area. It marks the location of a grave yard where members of the Lulua family are buried.

[855] According to Theophile Ubill Lulua pit house remains are located about a mile west of the graveyard at Tsi Ch'ed Diz?an. This site is close to, but does not appear to overlap the Bear Lake site discussed by Matson as a typically Athapaskan site with three pit features.

[856] This site was at one end of the connecting corridor between the Xeni Gwet'in and the Naghatalhchoz Gwet'in in the area around Naghatalhchoz Biny.

ix. Tsilhqox Biny (Chilko Lake) Area

[857] On January 18, 1822, HBC Clerk George McDougall concluded in a letter to John Suart that, "By dint of enquiry & with the help of small sticks", there were "6 Large Ground Lodges, about the Lake, containing 53 Families". Eldridge concludes that this number excludes the lodges on the River, which were counted separately. There has been no archaeological study of Tsilhqox Biny. Eldridge is of the view that if a survey was done, the six large ground lodges could be found.

[858] There are lhiz qwen yex remains on both sides of Tsilhqox Biny. Tsilhqox Tu Tl'az (Edmond Creek) is at the south end of the lake. There is a trapping campsite located there. Most of Tsilhqox Biny, apart from the very north

end of the lake and the land bordering Xeni, falls within Ts'il?os Provincial Park. The entire lake is in the Western Trapline Territory with the exception of a small portion on the northeast side of the lake which is outside the Claim Area.

x. Tsilhqox Biny Area - Gwedats'ish

[859] Gwedats'ish is located at the very north end of Tsilhqox Biny. It is a substantial archaeological site, likely pre-Tsilhqot'in in origin. This site was partly inhabited by Tsilhqot'in groups by the early 1800's.

[860] Witnesses also referred to Gwedats'ish, or part of it, as the "DFO site". The Department of Fisheries and Oceans has operated a research station at the north end of Tsilhqox Biny for a number of decades. It is also referred to as "Chilko Lake Lodge". That lodge and its airstrip are also located at the north end of the lake. The relation of any of these sites to the Claim Area remains very unclear. Canada says that District Lot 599, where the Department of Fisheries and Oceans operates its research centre on lands leased from the provincial government, falls outside the Claim Area.

[861] Remains of a substantial village of pit houses can be found at the north end of Tsilhqox Biny where it joins the Tsilhqox. The site was first registered as EjSa-11 by a team of archaeologists working in the area in 1979 and was revisited for a more detailed investigation in 1997. In 1997 archaeologists mapped 21 cultural depressions, but also noted that five depressions previously recorded had disappeared as a result of site disturbance. Witnesses testified that the lodge and DFO site currently cover an ancient lhiz qwen yex village that was inhabited by

Tsilhqot'in people. These pit houses may have comprised some of the 25 lodges that were said to have lined the Tsilhqox; or they may have been included in the "6 Large Ground Lodges" referred to by McDougall in 1822.

[862] Mabel William said that these pit houses were occupied up to the time of her grandmother Hanlhdzany's time. This would place the abandonment of these pit houses at some period in the latter half of the nineteenth century.

[863] Dewhirst and Eldridge were of the opinion that either Biny Gwechugh or Gwedats'ish was the home of the "Tase Ley" or Long Lake Indians. As already mentioned, this was identified as one of four Tsilhqot'in groups attached to Fort Chilcotin according to the Hudson's Bay Company census of 1838. In Eldridge's opinion, EjSa-11 probably marks the location where, according to Connolly's 1825 report, Tsilhqot'in people associated with Tsilhqox Biny generally resided. Later HBC accounts link the Long Lake Indians to a Chief known as Quill Quall Yaw. Both Eldridge and Dewhirst accept that this is likely the same chief that Father Nobili met, either at Gwedats'ish or Biny Gwechugh, in the winter of 1845.

[864] Several witnesses also testified that this was also an ancient Tsilhqot'in cremation site. They described fishing at this site. Doris Lulua said that Tsilhqot'in people do not like to camp there because people were buried at that location.

xi. Tsilhqox Biny Area - Ch'a Biny

[865] Ch'a Biny is the Tsilhqot'in name for a lagoon opposite Xeni on the west side of Tsilhqox Biny. It lies within the Claim Area. Witnesses for the plaintiff testified

that there are both niyah qungh and lhiz qwen yex remains in the area. Mabel William deposed that she stayed in one niyah qungh at Ch'a Biny, built by her husband's father, Sam Bulyan. Theophile Ubill Lulua said that there are at least four lhiz qwen yex remains at Ch'a Biny. Other witnesses testified to a campsite and trapping cabin in the area. No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site in or around 1846. Ch'a Biny was a point used to cross Tsilhqox Biny in modern and ancestral times.

[866] From the perspective of Tsilhqot'in people, Ch'a Biny has some mythical meaning as reflected in the story told by Francis William. According to the story, behind Ch'a Biny is the grave of a deyen with owl powers who died under a rockslide. Ch'a Biny lies within the boundaries of Ts'il?os Provincial Park.

xii. Ts'il?os (Mount Tatlow)

xiii. Dzelh Ch'ed (Snow Mountains) - Coast or Cascade Mountains

xiv. Tl'ech'id Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts'i Talh?ad (Rainbow Creek), Tsi Tese?an (Tchaikazan Valley) and Tsilhqox Tu Tl'az (Edmond Creek) watersheds

[867] Ts'il?os is located south of Xeni Biny inside Ts'il?os Park. Part of Ts'il?os is within the Claim Area. The eastern slope is between the two Trapline Territories. The name Ts'il?os derives from the legend of Ts'il?os and ?Eniyud.

[868] There are different resource gathering sites in the mountainous area bordering Tsilhqox Biny south of Xeni. Ts'il?os, the highest peak in the region, bounds southern Xeni. Its western slopes meet the shore of Tsilhqox Biny. South of

Ts'il?os are the watersheds of Tl'ech'id Gunaz, Yuhitah, Ts'i Talh?ad, Tsi Tese?an and Tsilhqox Tu Tl'az. These lands are part of the sweep of the Coast or Cascade Mountains known to Tsilhqot'in people as Dzelh Ch'ed.

[869] East of Tsilhqox Biny is Yuhitah. It is bisected by the eastern boundary of the Western Trapline Territory. Only a part of the valley is in the Claim Area.

[870] As the Yuhitah area was not visited by traders, missionaries or explorers there is no written historical record of the area. There is no doubt the area was used by Tsilhqot'in people in the twentieth century. While trapping activities of Tsilhqot'in people have fallen dramatically with the apparent collapse of the fur market, they continue to use this area for hunting and fishing. Witnesses recounted oral history of their ancestors using the area for hunting, trapping and fishing.

[871] The evidence leads to a conclusion that Tsilhqot'in people were present in these areas where they constructed dwellings for use as base camps. From these sites they hunted, trapped, fished and gathered roots and berries.

xv. Talhiqox Biny (Tatlayoko Lake)

[872] Talhiqox Biny is a long narrow lake to the west of, and running roughly parallel to, the north end of Tsilhqox Biny. The boundary of the Western Trapline Territory runs through the middle of Talhiqox Biny from the northern end to near its southern end. The entire west shore of the lake falls outside the Claim Area. Most of the eastern shore lies within the Claim Area. ?Eniyud, the legendary wife of Ts'il?os, presides over the west side of Talhiqox Biny. Information on Tsilhqot'in use

of Talhiqox Biny in the pre- or early contact period is limited. However, there are historical references to sites on Talhiqox Biny dating from the 1860's and 1870's.

[873] In 1863 road builder Alfred Waddington produced an untitled sketch map of the Homathko River and Tatl'ah Biny area. Waddington's map identifies a "Village and horses" at the north end of the unnamed Talhiqox Biny. It also shows trails connecting the village at north Talhiqox Biny to a fishery at south Lhuy Nachasgwengulin; south Lhuy Nachasgwengulin to the southwest end of "Tacla Lake" (Tatl'ah Biny). These trails run along the southeast side of Lhuy Nachasgwengulin towards the northeast end of Tatl'ah Biny and Bendzi Biny.

[874] On July 22, 1864 as part of a colonial expedition during the Chilcotin War, magistrate William Cox signed a map based on information from Chiefs Alexis and Eulas that is commonly known today as the Chilcotin War Map. This map identifies a trail network that includes a trail connecting to the Tsilhqox Biny outlet and running the west side of the Tsilhqox. Dewhirst described these trails as "an extensive trail network that connects the Tatlayoko-Tatla Valley to the Chilko Lake-Chilko River Valley".

[875] On August 19, 1864 John Brough's party, present in the area as part of the colonial expedition under Chartres Brew, poled their raft from the head of Talhiqox Biny 11 miles south along its east shore. This area is located in the Claim Area. Brough noted that he "[s]aw some old habitation by the way and places on the creeks where they [Indians] had been trapping long ago": Dewhirst Report, p. 58. On the return trip north several days later, Brough wrote that "J. Berry and two

Indians left by the trail as they did not like to risk the raft": Dewhirst Report, p. 58. Dewhirst commented at p. 58 of his Report that , "[t]he Brough account of 1864 … records an old habitation site and trails on the east shore [of] Tatlayoko Lake that … likely pre-date 1846".

[876] No primary residence sites were marked by Tsilhqot'in witnesses at the northern end of Talhiqox Biny. Archaeological and historical records show two sites within the Claim Area, EjSc-9 and EjSc-1, both located near the north end of Talhiqox Biny at the foot of Tsimol Ch'ed. Of these two, EjSc-1 is the more significant habitation site, consisting of four or five small house pits. This site was first recorded in 1968 during a survey of park reserves. EjSc-1 is located on the eastern shore of Talhiqox Biny, about a kilometre from the head of the lake. As it is the only site in the present inventory with pit house features in an area that has undergone systematic archaeological sampling, Eldridge concluded that EjSc-1 likely corresponded with the habitations observed by John Brough in 1864. EjSc-9, located within the tree cover at the northern tip of Talhiqox Biny, was identified in 1982 as a camp or site where people returned regularly, although no pit house depressions were found in the area. The archaeological team who first investigated EjSc-9 identified the camp as the site mentioned in Tiedemann's 1862 journal. Eldridge agreed with this conclusion.

[877] In 1862, H.O. Tiedemann, who traversed parts of the Claim Area while exploring a trail from Bute Inlet to Fort Alexandria on behalf of Alfred Waddington, found a well beaten trail and reached the north end of Talhiqox Biny in mid-June. According to his 1862 journal, there, he met an "old Indian" on June 16. A map

dated to 1863 and attributed to Alfred Waddington showed a “village and horses” at the north end of Talhiqox Biny.

[878] As noted earlier, on August 19, 1864, John Brough reported seeing “some old habitations by the way and places on the creeks where they [Indians] had been trapping long ago” while he was rafting south down the east side of Talhiqox Biny. In Eldridge’s opinion, the habitations observed by Brough were likely pit houses since they were visible from the lake and not set back in the forested areas.

[879] Passing through the area a dozen years later, Surveyor George Dawson reported on September 1, 1875 finding an “indian Camp on the Trail near the N. end of Tallyoco L.”: *Journals of George M. Dawson: British Columbia, 1875-1878*, p. 78.

[880] Norman George Setah testified that Tsilhqot’in people stayed at Tach’idilin (a creek running into Talhiqox Biny) on the eastern shore of Talhiqox Biny. Tsilhqot’in people transported their dried meat from their fall hunting grounds in the south to their winter residences in the north along the trails on both sides of the lake and on the water, in ?etaslaz ts’i (spruce bark canoes). He also testified that his family hunted nists’i, nundi-chugh (cougar) and dlig (squirrel) at Tach’idilin and also fished for sabay (dolly varden) and dek’any (rainbow trout).

[881] Tsilhqot’in people camped in the area around Ch’a Biny, Gwech’az Biny and Tach’idilin and would hunt throughout this mountainous region down as far as Talhjez (Franklin Arm). Martin Quilt testified that the mountains to the west of Tsilhqox Biny are traditional Tsilhqot’in trapping and hunting grounds for sebay

(mountain goat), sesjiz (marten), dlig (squirrels) and nundi (lynx). He described hunting and trapping trips taken through the fall up to Christmas.

xvi. Tsimol Ch'ed (Potato Mountain)

[882] Tsimol Ch'ed is located between the north ends of Tsilhqox Biny and Talhiqox Biny. It lies within the Claim Area. British Columbia maps describe the larger area of elevation into which Tsimol Ch'ed falls as the Potato Range.

[883] Talhiqox Biny is on the western boundary of this mountain range. Naghatalhchoz sits at the Range's northern boundary. Tsilhqox Biny borders Tsimol Ch'ed. Tizlin Dzelh (Tullin Mountain) is found in the northeast. The Ses-Chi (Cheshi Creek) pass bounds the southeastern frontier. Shishan-qox (Lingfield Creek) is the major waterway, its sources include ?Edaz Biny and ?Enes Biny, two small high elevation lakes. Tsimol Ch'ed drains northeast to the Tsilhqox.

[884] Tsilhqot'in people gathered roots on Tsimol Ch'ed and hunted in the area through the summer months. This practice continued from historical times up to the mid-twentieth century when it began to decline, largely due to the growth of ranching in the area.

[885] The area was used by Xeni Gwet'in and Naghatalhchoz Gwet'in and also by other Tsilhqot'in communities in the summer, generally mid to late June into July, when sunt'iny could be identified and harvested. Into the twentieth century, considerable numbers of Tsilhqot'in people have camped all over the mountain at sites such as K'anlh Gunlin, ?Edaz Biny and ?Elagi seqan. No single site on the

mountain appears to have been used every year, or by all harvesters. Some families returned to preferred areas on a regular basis. According to Doris Lulua, ?Edaz Biny was one site where larger numbers of Tsilhqot'in people would congregate to fish, race horses, and play net'e?ah, a game played with bones.

[886] The slopes of Tsimol Ch'ed are as close as Tsilhqot'in people came to "cultivated fields" at the time of sovereignty assertion. They were not cultivated in a way that would have been recognized by a European person. However, the root extraction was managed and cultivated in a fashion that ensured a passing on of this important resource from generation to generation.

[887] The use of the mountain as a gathering ground fell off during the mid-twentieth century partly due to the use of the area as a grazing range. However, to this day Tsilhqot'in people continue to camp on Tsimol Ch'ed during the relatively brief period in the summer when sunt'iny are harvested.

xvii. Area West and South of Tsilhqox Biny

[888] At the southwest extremity of Tsilhqox Biny is Talhjez, lying in a southwest direction towards Bute Inlet. Lofty mountains surround the north and south boundaries of the arm. Nachent'az Dzelh is to the north of Talhjez. Yanats'idlush lies to the west. Tsi Nentsen Tsinsh Dzelh and Sebay Talgog provide a southern boundary. Tsilhqox Dzelh is located at the south-western end of Tsilhqox Biny.

[889] Tsilhqot'in people have used the lands surrounding Talhjez, including Nachent'az Dzelh, Tsi Nentsen Tsinsh Dzelh and Sebay Talgog, all around the southern end of Tsilhqox Biny, as hunting and trapping grounds.

xviii. West Side of Tsilhqox Biny

[890] To the north of Talhjez is T'asbay se?an Tl'ad (Mount Moore or Goat Mountain), Nilht'isiquz (Stikelan Creek Valley) and Tach'i Dilhgwenlh (Huckleberry mountain).

[891] This area west of Tsilhqox Biny, and southeast of Talhiqox Biny, is also a mountainous region. Dominating the area, and surrounding the Nilht'isiquz, is T'asbay se?an Tl'ad. To the northeast, and essentially on Tsilhqox Biny is Tach'i Dilhgwenlh. Between the two is the Tsilhqox Biny valley, surrounding the small body of water named Ch'a Biny, and running a narrow course north around Tach'i Dilhgwenlh Dzelh to Gwedats'ish. Tsimol Ch'ed bounds the Tsilhqox Biny valley to the northwest at this location.

[892] Since before the time of first contact, Tsilhqot'in people have used these lands as important hunting, trapping and gathering grounds, moving about from base camps.

f. Eastern Trapline Territory

[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. Despite this conclusion, I will review certain discrete areas within this portion of the Claim Area.

i. Dasiqox Biny (Taseko Lake) and Eastward

[894] Dasiqox Biny and the Claim Area lands to the east are situated at the intersection of the mountain–plateau transition zone. Rugged mountains define the southern boundary of this area. A number of creeks and rivers, including the Lord River, Chita Creek, and the Dasiqox, drain into Dasiqox Biny. Moving northward, the Bisqox (Beece Creek) watershed separates Nabas Dzelh (Anvil Mountain) from its southern counterpart Dzelh Ch'ed. Further to the north the terrain is characterized by forests and meadows straddling the basins of Lhuy Nentsul (Little Fish Lake) and Teztan (Fish Lake) system, and the Jididzay Biny (Onion Lake) watershed.

[895] Dzelh Ch'ed dominates the southern landscape. Rivers including ?Ena Ch'ez Nadilin and the headwaters of the Dasiqox flow into Dasiqox Biny at its southernmost extremity, at Ts'i Ts'elhts'ig. The southern reaches are known as Dasiqox Tu Tl'az. Its narrows are known as Nanats'eqish and its outlet is called Nadilin Yex. The Dasiqox flows northward from Nadilin Yex to meet the Tsilhqox. Eastward from Nanats'eqish, the mountainous Gwetex Natel?as provides a passage for migrating nists'i as they make their way to the plateau country. In the northern portion of these lands, Nabas Dzelh towers over the Bisqox watershed, the meadows of Nabas, and the fish-bearing Teztan Biny and Jididzay Biny.

[896] Nists'i from the nearby Dzelh Ch'ed migrate into these lands through corridors such as those of T'ox T'ad, Nadilin Yex and Gwetex Natel?as. Gex (rabbit), nundi, nabi (muskrat), tsa (beaver), dlig and other furbearer animals are present near Teztan Biny, Jididzay Biny and Nabas Dzelh.

[897] There is evidence of Tsilhqot'in people occupying the lands to the east of Dasiqox Biny, centred in the lowlands of Nabas and about Bisqox, Teztan Biny, Jididzay Biny and Lhuy Nentsul. Tsilhqot'in people moved into the mountainous areas to the south and east of Dasiqox Biny in the summer and fall to harvest resources and prepare for the winter. They did so via the ancestral trail network, which is still used today.

ii. Teztan Biny (Fish Lake)

[898] Teztan Biny is located within the northern part of the Eastern Trapline Territory, roughly on the same latitude as the north end of Xeni.

[899] Brealey testified that archaeological studies of Teztan Biny indicate "18 roasting and/or pit depressions" in the area. Whether the cultural depressions have been identified as Tsilhqot'in in origin is not clear. Brealey's only source for this information is Robert Tyhurst's article, "Shuswap and Chilcotin use of Churn Creek" (Calgary: Environment Canada, 1994). That study that is not part of the evidence in this case. Gilbert Solomon saw the cultural depressions at Teztan Biny for the first time when visiting with archaeologists. He said that although he was told that Tsilhqot'in people lived there while fishing, he was not told they lived in underground homes.

[900] Tsilhqot’in witnesses have testified to the use of Teztan Biny in the twentieth century as a fishing and hunting camp. Francis William said there are also smaller lakes in the area around Dasiqox Biny where sabay and dek’any could be caught. He also spoke of killing a mus near Teztan Biny, along the road to Dasiqox Biny. Cecelia Quilt said that that Old Seymour had a cabin near Teztan Biny. She recalled that her husband once stayed there all winter taking care of cattle and he said that an old Tsilhqot'in lady was buried there.

iii. Nabas Dzelh (Anvil Mountain)

[901] Nabas Dzelh was marked at two different locations by Harry Setah and Chief William. Both locations are on the eastern boundary of the Eastern Trapline. The mountain and area surrounding it straddles the border of the Claim Area. The name Nabas is also sometimes used to refer to the large area between Nebas Dzelh and Teztan Biny to the north.

[902] Cecelia Quilt was raised in the area of Nabas. She testified that Tsilhqot’in families used to stay in Nabas (on either side of the mountain) in the winter. They travelled into the mountains in the summer and fall to hunt, harvest plants, and dry meat. The people would stay up on Dzelh Ch’ed, in the summer and then move back to Nabas for the winter. Few of the cabins and barns they used are still standing. She understood from her parents that Tsilhqot’in people lived in the area since before their time. Other witnesses identified sites near Nabas (for example, Jididzay Biny) where other Tsilhqot’in families would stay.

[903] Henry Solomon had a cabin between Nabas and Teztan Biny, northwest of Nabas. Francis William testified that his brother Jimmy Bulyan lived in a cabin with his family at Whitewater Meadow, east of the Dasiqox. He also said that Lebusden had a cabin not far from his brother's cabin. He said that Tsilhqot'in people would camp at the north end of Dasiqox Biny, at Nadilin Yex. This location appears to be on the border of the Eastern Trapline. Other witnesses also identified campsites at Nadilin Yex.

[904] Brealey testified that Lhuy Nentsul, south of Nabas, has "several log buildings that were built at various points in time." He identified the site as an important fresh water fishery. The archaeology of the area was studied in conjunction with a mining proposal advanced by Taseko Mines. This study found that Lhuy Nentsul and its buildings were associated with the William family. The time frame of the William family's use of the area was not indicated in the excerpt from the report cited.

[905] Chief William indicated that at present there are no Tsilhqot'in people living in the Eastern Trapline area on a full-time basis.

[906] I am satisfied that this area was used for hunting, trapping and fishing and gathering prior to first contact with Europeans.

iv. Gwetex Natel?as (Red Mountain)

[907] Gwetex Natel?as is located east of Dasiqox Biny within the Eastern Trapline Territory. According to Joseph William, nists'i cross Dasiqox Biny at the north and

south end or at the narrows in the fall, and then sometimes stay in the mountains on the east side of the lakes before moving into the low country around Dediny Qox.

[908] Joseph William testified that his family used to stay at Nadilin Yex, at the north end of Dasiqox Biny and from there would go in search of nists'i and dediny at Gwetex Natel?as. He said Gwetex Natel?as was one of the areas where nists'i would cross the mountains. Tsilhqot'in people would hunt nists'I there from behind rock blinds.

[909] Harry Setah, who had been shown the site on an excursion with William Setah, described the deer blind as follows:

> We took a crossing and we went over towards Red Mountain, and he showed us a place where – right over here there's a rock stand here somewhere. There's a plateau and there's a blind – it's built about 5 feet high and it's about 10 feet long, where the deer goes by, and they had a spear or bow and arrow back in those days and it's still there right today.

[910] There is no archaeological information concerning the rock blinds at Gwetex Natel?as. David Setah testified that blinds were "used long time ago by our ancestors" when Tsilhqot'in people used bows and arrows to hunt.

[911] The evidence indicates occupation by Tsilhqot'in people to hunt and trap sufficient to ground such a Tsilhqot'in Aboriginal right to those activities in Gwetex Natel?as.

14. EXCLUSIVITY

[912] An Aboriginal group seeking a declaration of Aboriginal title must prove the essential element of exclusivity. In ***Delgamuukw*** (S.C.C.) at para. 155, Lamer C.J.C. explained that title will only vest in the Aboriginal community that held the ability to exclude others from the title lands.

[913] Trespass by other Aboriginal groups may actually support an inference of exclusivity where the claimant group had certain laws or practices such as granting permission to visitors to the territory: ***Delgamuukw*** at para. 157.

[914] The Court revisited this subject in ***Marshall; Bernard***. The Court acknowledged that pre-sovereignty Aboriginal societies may not have had a law or convention around excluding others. In that situation, one must look to the evidence to determine whether the element of exclusivity has been met. McLachlin C.J.C. observed in ***Marshall; Bernard***, at paras. 64-65:

> But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.
>
> It follows that evidence of acts of exclusion is not required to establish aboriginal title. *All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference*. This is what is meant by the

> requirement of aboriginal title that the lands have been occupied in an exclusive manner. [Emphasis added.]

[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 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".

[918] The evidence at trial was that the early fur traders and explorers and later the CPP surveyors did indeed offer "presents" to the Tsilhqot'in people and other First Nations. The motivation behind giving these presents was to develop a positive economic relationship with the Aboriginal recipients. However, as Dr. Coates and

Professor Foster pointed out, we do not know how these presents were received from the Aboriginal perspective. A letter written by Chief Factor Connolly in October 1829 to George McDougall states:

> Presents also ought to be dealt out with a sparing hand, as they not unfrequently defeat the intention for which they are given, and in time instead of being received as favors are claimed as dues.

[919] Notwithstanding Connolly's advice and with consequent knowledge of how those payments would be perceived, the HBC fur traders continued to make presents to Tsilhqot'in people. These presents were given with such frequency that the payments to chiefs are referred to throughout the fur trading journals by terms such as "usual present", "ordinary present", "ordinary allowance", "annual present", "customary present", and "accustomed present". Considered from the Tsilhqot'in perspective, demands for payment were very likely linked to non-Tsilhqot'in passage through or use of Tsilhqot'in lands. Europeans were often well aware of the significance of these payments from the Aboriginal perspective and they made such payments for precisely this reason.

[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.

[921] The historical records document situations where non-Tsilhqot'in Aboriginal guides refused to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in people. One example of this was recorded by CPP Surveyor Marcus Smith in 1872, printed in Sandford Fleming's *Report of Progress*, p. 113. On this particular occasion Smith was armed and accompanied by a gun-boat to the head of Bute Inlet because of concerns about what Tsilhqot'in people might do. Once his "Clahoose" guides and porters reached the site of the 1864 massacre, the Clahoose refused to go past the foot of the canyon because "they were afraid of the Chilcotin Indians". Smith later engaged the services of three Tsilhqot'in men and two women whom they "found hunting there": *C.P.R. Report of Progress*, p. 113.

[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 leaving the land 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 HBC 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.

[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.

[928] There is merit in both arguments. However, I took the plaintiff's argument to be a review of the evidence that would lead not just to a defence of territory but to an exclusive use of the Claim Area. I am unable to conclude there was sufficient occupation of the Claim Area as a whole. Therefore, my focus on exclusivity will be directed to those parts of the land, inside and outside the Claim Area, that in my view do demonstrate a sufficient degree of exclusive occupation to support a finding of Aboriginal title.

[929] The question is: does the evidence shows 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?: ***Marshall; Bernard***. In my view the answer to that question must be in the affirmative.

[930] As one might expect, the struggle, if any, between different Aboriginal groups came at the margins of their territories, those areas of overlap that existed in the absence of defined and accepted boundaries. For Tsilhqot'in people, the high mountains of the Cascade Range provided a natural barrier from any intrusive actions by others.

[931] The historical evidence and oral tradition evidence revealed conflict with other Aboriginal people in areas outside of the Claim Area. These conflicts include: the struggle at Tsulyu Ts'ilhed (Bull Canyon a.k.a. Battle Mountain) with Secwepemc (Shuswap) people and a subsequent killing of two Dakelh (Carrier) people said to have taken place pre-contact; Father Morice's report of a Tsilhqot'in attack on the

Dakelh village at Chinlac in 1745; a battle with Secwepemc people at Chinilgwan (Churn Creek) to the east of Dasiqox Biny (Taseko Lake); an incursion revealed by oral tradition accounts of a conflict on Tsimol Ch'ed (Potato Mountain) with the Qaju (Homalco) people; a struggle, revealed by oral tradition, with Secwepemc people before sovereignty assertion at Nen Nalmelh (Bald Mountain); an oral tradition account of a war at Bendzi Biny (Puntzi Lake) with the Dakelh people; another skirmish at Tsulyu Ts'ilhed in the early nineteenth century with the Fraser River Secwepemc people; the Talkotin War with the Dakelh people to the north in mid-1826, recorded in the HBC journals; occasional skirmishes with the Qaju people to the south and west of the Claim Area; the Tsilhqot'in War, south and west of the Claim Area; an unsuccessful attempt by the Stl'atl'imc (Lillooet) to raid Tsilhqot'in sites, see for example, HBC Journal May 9, 1839; and, the war in Deni Deztsan (Graveyard Valley) in the late nineteenth century with the Stl'atl'imc people to the south and east of the Claim Area.

[932] An exception to these conflicts is the oral tradition evidence of two incursions by Qaju people into Tsimol Ch'ed inside the Western Trapline Territory reported by Robert Lane in his 1953 dissertation, *Cultural Relations of the Chilcotin Indians.* At p.91, he records the following:

> Through the years, fighting with the Homalco was not completely one-sided. The Chilcotin have a detailed account of a raid by Bute Inlet people a few generations ago. The raiders penetrated deep into Chilcotin territory and killed a number of people. However, according to the Chilcotin, the intruders were ambushed en route home and wiped out. Informants claimed that at an earlier date Bute Inlet people came up to Chilko Lake, built "salt water" houses and canoes, and attempted raids. They wintered on the lake for several years but this

> introduction of coastal patterns of living and raiding by water was unsuccessful. The Chilcotin simply avoided the lake at that time.

[933] There is oral tradition evidence of an attack by the Qaju people causing the deaths of several Tsilhqot'in young women on Tsimol Ch'ed. With the assistance of a deyen (medicine man), Tsilhqot'in warriors killed and drove off the Qaju warriors. Whether that oral tradition is the same event noted by Lane is uncertain. It is clear that the event predated sovereignty assertion, as there was no evidence linking that skirmish to the time of sovereignty assertion or any time thereafter.

[934] If there was a settlement of Qaju people as recorded by Lane, the settlement is more likely to have been at the lower part of Tsilhqox Biny about the area of Talhjez. This area is inside the Claim Area, but is not one of the areas I find sufficient evidence to ground Tsilhqot'in Aboriginal title.

[935] Aside from these two instances, it appears that others respected the territorial integrity of the lands included in the Claim Area. I conclude that, at the time of sovereignty assertion, Tsilhqot'in people did have exclusive control over those lands which they used regularly. A summary of those lands is provided in Section 16 of these reasons.

[936] At the time of sovereignty assertion, the Tsilhqot'in people enjoyed a reasonable trading relationship with the Nuxalk (Bella Coola) people to the northwest and the Secwepemc people to the east.

[937] The evidence demonstrates the obvious. Aboriginal groups had overlapping territories. They were constantly pushing the limits of their territories and this often

resulted in fighting. These conflicts helped define areas that everyone accepted as "belonging" to a particular Aboriginal group. It was understood that one did not venture into a particular area without permission. The absence of permission placed lives at risk.

[938] The area over which I have found a sufficient degree of occupation to ground Aboriginal title, both inside and outside the Claim Area, does not include overlapping territory and was effectively controlled by Tsilhqot'in people. Tsilhqot'in people were there in sufficient numbers to monitor European traders, missionaries, settlers and railway surveyors on their arrival. There is evidence that each of these groups of new arrivals were aware that Tsilhqot'in people considered this to be their land. Others were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people.

[939] Two of the first European settlers in the Tsilhqot'in region, L. W. Riske and Donald McIntyre, wrote a letter to Lt. Gov. Trutch dated June 6, 1872 where they stated:

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

[940] Ten years later, Riske and McIntyre and three others wrote a letter to Indian Superintendent A.W. Powell. In that letter dated March 19, 1883, the settlers described themselves as “inhabitants of Chilcotin” who were “living here … at their [the Indians’] sufferance.”

[941] With respect to the land that I describe in Section 16 outlining my conclusions on Tsilhqot’in Aboriginal title, there are only two incidents that raise any evidence of adverse claimants and a possible loss of control or diminution of control. The first is the possibility of the presence of the ?Ena Tsel (Little Salishans). These people unquestionably lived along the Tsilhqox corridor at some point in time. I am satisfied that well before the assertion of sovereignty, this group of Aboriginal people had vacated the area. There is no mention of them in the HBC diaries and records, and equally no record is made of their presence in the area by the early missionaries.

[942] I heard no evidence about Qaju salt water houses on Tsilhqox Biny from Tsilhqot’in witnesses. If there was such an event, there is no archaeological or historical evidence to indicate when it might have occurred. I am satisfied that at the time of sovereignty assertion there was no such settlement on that part of Tsilhqox Biny that is included in the area described in my conclusions on Tsilhqot’in Aboriginal title.

[943] In summary, there is no evidence of adverse claimants at the time of sovereignty assertion in the area I describe in my conclusions on Tsilhqot’in Aboriginal title. I conclude that Tsilhqot’in people were in exclusive control of that area at the time of sovereignty assertion.

[944] My conclusion follows logically from the entire migration of Tsilhqot'in people and the historical record. As I have already described, the migration was southeast, following the curve of the Cascade Mountains. At the time of sovereignty assertion, this migration of people had brought some numbers of Tsilhqot'in people to the entire Claim Area where they led a semi-nomadic lifestyle as hunter gatherers. The occupation of the area I have described in my conclusions on Tsilhqot'in Aboriginal title was exclusive and sufficient to provide a foundation for that title.

15. CONTINUITY

[945] I am satisfied Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion. There has been a "substantial maintenance of the connection" between the people and the land" throughout this entire period: ***Delgamuuku*** (S.C.C.) at para. 153.

16. CONCLUSIONS ON TSILHQOT'IN ABORIGINAL TITLE TO THE CLAIM AREA

[946] I have taken the arguments advanced by the parties and attempted to analyze them in detail with particular references to the evidence. In so doing, I have considered the Tsilhqot'in people's use and occupation of the Claim Area from three different perspectives.

[947] First, I considered the use and occupation of the Claim Area by locating those sites that would have a measure of permanency attached to them so that they could be characterized as possible villages, dwelling sites, cultivated fields, camping sites, resource gathering sites and the like. At times it was difficult to conclude if a

particular site was inside or outside the Claim Area. Other sites were easy to distinguish as being either inside or outside the boundaries selected by the plaintiff.

[948] Second, I considered the use and occupation of the Claim Area from a land use perspective. What emerged from that analysis was a clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area.

[949] Third, I considered the evidence of post-sovereignty use and occupation of the various sites within the Claim Area. What emerged from that analysis was that the historical pattern of seasonal resource gathering in various locations in the Claim Area has continued over time. That pattern has shifted as governments attempted to settle Tsilhqot'in people on reserves. Despite these attempts, a number of Tsilhqot'in people have continued to gather resources and otherwise reside in the areas their ancestors have used for generations, regardless of whether these areas are on reserve or not.

[950] While conducting this analysis, I considered the smaller "definite tracts of land" not pleaded individually by the plaintiff but included in the larger Claim Area of Tachelach'ed (Brittany Triangle) and the Trapline Territories. This micro analysis highlighted the fact that use and occupation of some land outside the Claim Area by Tsilhqot'in people was at least as extensive as that within portions of the larger Claim Area.

[951] What is not revealed by any of these approaches to the evidence is the number of people that were likely in the Claim Area at the time of sovereignty assertion. Some numbers can be found in the records of the HBC. Father Nobilli's

papers are also helpful in that regard. Chief Roger William testified in the fall of 2003 that the Xeni Gwet'in First Nations Band membership was approximately 390-400 people. Of these, he estimated that approximately 200 persons lived on the Xeni Gwet'in reserves, and about 15 lived off reserve in the Claim Area. The balance live off reserve and not in the Claim Area. I conclude that, at the time of sovereignty assertion, the population of Tsilhqot'in people living in the entire Claim Area was higher than it is today, but not more than 400 persons.

[952] Life today for Tsilhqot'in people is very different than it was at the time of sovereignty assertion, or even 50 or 60 years ago. There are few Tsilqot'in people today who travel about the Claim Area as people did in the first part of the last century. Many Tsilhqot'in people living in and about the Claim Area today are ranching and work in various occupations including forestry, park maintenance and guiding. Chief William estimated that using the traditional means of transportation available at the time of sovereignty assertion, it would take 10 to 15 days to travel around the Claim Area. He personally had not visited Tsimol Ch'ed (Potato Mountain) until 2002, nor had he travelled beyond Far Meadow in Tachelach'ed. Other non-First Nations persons have settled in the area, bringing many changes. One example of this that emerged from the evidence was that ranching practices on Tsimol Ch'ed have dramatically affected the harvesting of sunt'iny (wild mountain potato).

[953] At the time of sovereignty assertion, Tsilhqot'in people living in the Claim Area were semi-nomadic. They moved up and down the main salmon bearing river, the Tsilhqox (Chilko River), in season. They fished the smaller lakes to the east and

west of the Tsilhqox, particularly in the spring season. They gathered berries, medicines and root plants in the valleys and on the slopes of the surrounding mountains. They hunted and trapped across the Claim Area, taking what nature had to offer. Then, for the most part, they returned on a regular basis to winter at Xeni (Nemiah Valley), on the eastern shore of Tsilhqox Biny (Chilko Lake), on the high ground above the banks of the Tsilhqox, and on the shores of adjacent streams and lakes, from Naghatalhchoz Biny (Big Eagle Lake) and eastward into Tachelach'ed.

[954] In Tachelach'ed, the area of more permanent use and occupation was from the Tsilhqox corridor east to Natasewed Biny (Brittany Lake) and from there, south to Ts'uni?ad Biny (Tsuniah Lake) and east past Tsanlgen Biny (Chaunigan Lake) and over to the twin lakes, ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake).

[955] The areas that provided a greater degree of permanency and regular use are the sites where abandoned lhiz qwen yex and niyah qungh are found. The majority of these dwelling sites are not on the reserves set aside for Xeni Gwet'in people at the turn of the twentieth century.

[956] In early spring, Tsilhqot'in people would disperse again across the area that is, in part, defined in these proceedings as the Claim Area.

[957] I am unable to find regular use in the entire area of any of the discreet three parts that make up the whole Claim Area, Tachelach'ed, or the Eastern and Western Trapline Territories. I am unable to make such a declaration of Tsilhqot'in Aboriginal title to smaller areas included within the whole because they have not been

separately pleaded, as discussed earlier in Section 4 of these Reasons for Judgment.

[958] I took the invitation by counsel to express an opinion on Tsilhqot'in Aboriginal title to be an invitation to go where the evidence lead me. I acknowledge that in expressing this opinion, I am doing precisely what I was uncomfortable with in the course of the trial, namely setting boundaries that are ill defined and not contained within usual metes and bounds. They are, however, boundaries that are shaped by the evidence. On the western side, I have followed the western boundary of the Trapline Territory because it was there, and not because there was a sudden end to the activities of Tsilhqot'in people.

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

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

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

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

- With a northern boundary from Gwedzin Biny in a straight line to include the area north of Naghatalhchoz Biny (Big Eagle Lake or Chelquoit Lake) to

Nu Natase?ex on the Tsilhqox where it joins the northern boundary of Tachelach'ed over to the Dasiqox at Elkin Creek.

[960] The foregoing describes a tract of land mostly within the Claim Area but not entirely. It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: ***Marshall; Bernard*** at para. 77. This was the land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion: ***Sappier; Gray*** at para. 33.

[961] It should be borne in mind that this view of Tsilhqot'in Aboriginal title is not binding on the parties given the conclusion I have reached in Section 4 on the preliminary issue. If I am wrong on this preliminary issue, then my conclusion on Tsilhqot'in Aboriginal title, insofar as it describes land within Tachelach'ed and the Trapline Territory, is binding on the parties as a finding of fact in these proceedings. My discussion of those lands that are outside the Claim Area remains only an

expression of opinion I have made to assist the parties in the negotiations that lie ahead.

[962] While the court cannot make a formal declaration of Tsilhqot'in Aboriginal title, I trust that expressing the foregoing opinion will assist the parties to achieve a fair and lasting resolution of the issues, which must be found to achieve a reconciliation of all interests.

17. STATUTORY AUTHORITY TO ISSUE FOREST TENURES AND AUTHORIZATIONS

[963] The plaintiff says the ***Forest Act***, R.S.B.C. 1996, c. 157 and each iteration of that Act in place at all material times does not and did not apply to Tsilhqot'in Aboriginal title land. The plaintiff characterizes this issue as a matter of statutory interpretation. Simply put, the forestry legislation does not provide the necessary statutory authority to harvest on Aboriginal title lands.

[964] Between 1945 and 1978, British Columbia authorized timber harvesting in the Claim Area under the authority of the ***Forest Act***, R.S.B.C. 1936, c. 102, as amended. Subsection 17(1) of that Act provided ministerial authority to advertise and sell "a licence to cut and remove any Crown timber which is subject to disposition by the Crown". During this period, at least twenty-four timber licences were issued pursuant to the 1936 ***Forest Act***. Harvesting occurred in the Claim Area under the authority of these licences.

[965] Later amendments allowed the Minister to delegate officials to advertise and sell the timber licences. That authority was always limited to the sale of "Crown

timber". Throughout this period, the definition of "Crown timber" found in s. 2 of the 1936 ***Forest Act***, remained consistent:

> **"Crown timber"** includes any trees, timber, and products of the forest in respect whereof His Majesty in right of the Province is entitled to demand and receive any royalty or revenue or money whatsoever:

[966] A new ***Forest Act***, S.B.C. 1978, c. 23 came into effect on January 1, 1979. That legislation also confined provincial forestry officials to the granting of rights in relation to "Crown timber".

[967] The 1979 ***Forest Act*** introduced a new definition of "Crown timber". Pursuant to s. 1 of the 1979 ***Forest Act***:

> **"Crown land"** has the same meaning as in the Land Act, but does not include land owned by an agent of the Crown;
>
> **"Crown timber"** means timber on Crown land;
>
> …
>
> **"Private land"** means land that is not Crown land;

[968] The 1979 ***Forest Act*** referentially incorporates the definition of "Crown land" from the ***Land Act***, R.S.B.C. 1979, c. 214. The 1979 ***Land Act*** provided the following definition in s. 1:

> **"Crown land"** means land, whether or not it is covered by water, or an interest in land, vested in the Crown;

[969] These definitions have remained unaltered to the present day, with one minor exception. The definition of "Crown timber" under the 1979 ***Forest Act*** was soon

expanded to include “timber reserved to the Crown”: ***Forest Amendment Act***, S.B.C. 1979, c. 11, s. 1.

[970] The current ***Forest Act*** also authorizes provincial forestry officials to enter into agreements granting rights to harvest “Crown timber”; that is, timber situated on “land … or an interest in land, vested in the government”.

[971] The plaintiff says that timber on Aboriginal title lands is not “Crown timber” and as a result British Columbia lacked the statutory authority required to grant an interest in this timber to third parties. The plaintiff says that timber situated on Tsilhqot’in Aboriginal title lands is not “Crown timber” for the following reasons:

a. Aboriginal title is a right to the land itself. Tsilhqot’in Aboriginal title encompasses the right to the exclusive possession, occupation, use and enjoyment of the land and its resources.

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

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

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

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

f. Finally, if the ***Forest Act*** were intended to apply to Aboriginal title lands, it would be discriminatory in its effect, such that it could not be characterized as a law of general application. Accordingly, it would be *ultra vires* for the Province to enact.

[972] Canada made no submissions on the foregoing arguments advanced by the plaintiff.

[973] British Columbia says lands burdened by Aboriginal title remain provincial Crown lands, on the authority found in ***Guerin v. The Queen*** where Dickson J said at p. 382:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown.

[974] British Columbia acknowledges that Aboriginal title, if it exists, constitutes an encumbrance or burden on the provincial Crown's title to its lands and that Aboriginal title to land can include an interest in the standing timber: ***Haida Nation v. British Columbia (Minister of Forests)*** (1997), 45 B.C.L.R. (3d) 80 (B.C.C.A.).

[975] In ***Delgamuukw*** at para. 111, the Supreme Court of Canada described the contents of Aboriginal title as follows:

> 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, to be explained more fully below, 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.

[976] The Court emphasized this again, at para. 140:

> Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.

[977] Professor Kent McNeil, in "Aboriginal Title and the Supreme Court: What's Happening?", (2006) 69 Sask. L.Rev. 679, at p. 693 states:

> The nature of the underlying title the provincial Crown has by virtue of s. 109 is therefore determined negatively: it amounts to whatever interest remains after the Aboriginal title that burdens it has been subtracted. This is the way s. 109 operates where any interests in land are concerned, as they are all burdens on the Crown's underlying title. For example, if burdened by a fee simple estate, the Crown's underlying title does not amount to any present beneficial interest, but rather is a mere right to have the lands go back to the Crown by escheat if the fee simple comes to an end. Like a fee simple, Aboriginal title amounts to a right of exclusive use and possession of potentially infinite duration that includes natural resources. In neither case does the Crown have a present beneficial interest.

[978] Aboriginal title brings with it a right to the exclusive use and possession of land, including the use of natural resources. Until there is a finding of Aboriginal title, there must be a presumption that forest lands not held privately are Crown lands. Provincial legislative provisions apply, even where Aboriginal title and other Aboriginal rights are alleged to exist. When Aboriginal title or rights are claimed the duty to consult is engaged: ***Haida Nation*** (S.C.C.). I am content to give the usual statutory meanings to Crown land and Crown timber in situations where the Crown's interest in the land and timber remains unencumbered by a declaration or finding of Aboriginal title. The Crown's duty to consult, if properly discharged, gives adequate protection to any alleged Aboriginal interests. Should there be a later declaration of rights or title there is a serious risk that, without proper consultation and

accommodation, these rights may be infringed. As a result of government action, those persons whose rights or title have been so compromised will have their remedy in damages. There is also the possibility of injunctive relief prior to infringement, assuming the applicant could meet the tests for an interlocutory injunction.

[979] The ***Forest Act*** is primarily a mechanism for managing, protecting, conserving and planning the use of the forest resources of the Crown and not those forest resources belonging to other parties. It is directed towards the regulation of public lands, held in the possession of the Provincial Crown for the benefit of the Province as a whole.

[980] Private timber is excluded from disposition under the ***Forest Act***. There is no statutory mechanism included in the ***Forest Act*** for expropriating interests in privately owned timber and allocating them to third parties by way of timber licences or other authorizations. The legislation distinguishes between timber resources belonging to the Crown as public landlord (which are available for disposition under the Act) and timber possessed by other parties (which are not). Private lands and timber already owned by a licensee may be included in some forms of tenure granted under the ***Forest Act*** for certain management purposes (such as tree farm licences and woodlot licences): see ***Forest Act***, ss. 11-12, 35(1)(b), (e), 45(1)(b), (c). However, this does not alter the basic point that the granting of rights to harvest timber is limited to Crown timber on Crown land.

[981] While I am unable to conclude that the Tsilhqot'in people have Aboriginal title over the entire Claim Area, I do find that there are areas both inside and outside the Claim Area that qualify for a finding of Tsilhqot'in Aboriginal title. The present provisions of the ***Forest Act*** do not apply to those areas that meet the test for Aboriginal title.

18. PRIVATE LANDS ISSUE

[982] There are a number of private lots and other private interests within the Claim Area. The Crown has granted fee simple title to some of these lots to non-Tsilhqot'in persons. British Columbia argues that private lands have been excluded from the claims as defined by the parties to this litigation. However, the Province refers to these private lots throughout their submissions on Tsilhqot'in occupation of the Claim Area. The plaintiff argues that I may make declarations that affect these private lands. While I make no declaration of Aboriginal title in this action, I do express an opinion as to where such title may exist. I now propose to address the issue of private lands within the Claim Area and their impact on Aboriginal title, in the hope that it will assist in the process of reconciliation.

[983] The plaintiff's statement of claim defines the Trapline Territory as "the lands within the boundaries of Trapline Licence #0504T003". In the application for registration of this trapline (approved on January 18, 1980), the metes and bounds descriptions for both blocks of the trapline conclude with the words: "including all intervening territory except private property". British Columbia submits that the

plaintiff appears to have chosen to define the lands claimed in the Trapline Action in a manner that excludes private property.

[984] When the two actions were consolidated, the Trapline Territory continued to be defined by reference to the boundaries of Trapline Licence #0504T003. On May 22, 2003, the plaintiff amended the description of the Trapline Territory to exclude Indian Reserves within the Claim Area.

[985] The definition of the boundary of Tachelach'ed (Brittany Triangle) does not on its face exclude private property. British Columbia argues that when the Tachelach'ed definition is considered against the allegations of infringement by the British Columbia Forest Service, private lands are also excluded. This is because under the ***Forest Act*** the Forest Service does not manage forestry on private lands. The Province says the exclusion of private lands from the claims may explain why the plaintiff makes no reference in his argument to the many Crown granted tenures in the Williams Lake Timber Supply Area.

[986] The fact that the plaintiff's argument does not address these Crown granted tenures within the William Lake Timber Supply Area is entirely consistent with the plaintiff's position which is that private lands are included and that the holders of such tenures could take no more than what the Crown had to offer, namely, land burdened with Tsilhqot'in Aboriginal title.

[987] I have some difficulty in understanding the position now taken by British Columbia given that this issue has already arisen in this litigation. In 2002, British Columbia brought a motion for directions with respect to the service of notice on

tenure holders whose interests might be affected by the proceedings. In ***William v. Riverside Forest Products Limited***, 2002 BCSC 1199 at para. 12, I noted the fact that "British Columbia says that the plaintiff has framed claims for relief that may potentially affect the interest of non-parties". It was understood then that the action included private lands. Nothing in the amended pleadings could be taken as a signal that private lands were removed.

[988] In my view, the pleadings have always been inclusive of private lands. Indian Reserves were removed from the Claim Area but private lands were not. The description of the Trapline Territory is a reference to the external boundaries of those two pieces of land and is inclusive of "the whole of the lands within the boundary of Trapline Licence #0504T003…" (para. 12, statement of claim). A plain reading of those words leaves no doubt that the plaintiff intended to include all of the land within the boundaries of the Claim Area as described in the pleadings.

[989] The second issue which arises is whether any declaratory relief can apply to private lands within the Claim Area. The ***Forest Act*** does not manage forest resources on private lands. The Province argues that this court cannot grant declaratory relief with respect to such lands because private lands are not engaged in any live controversy based upon forestry operations. In that regard, British Columbia relies upon ***Cheslatta Carrier Nation v. British Columbia***, 2000 BCCA 539.

[990] In ***William v. B.C.***, 2003 BCSC 249, I considered the implications of ***Cheslatta*** and how it was to bear on the future of this case. I concluded that a plea

of specific and discrete infringement of title was not required in order for the plaintiff to proceed. The view I expressed in that decision was that the pleadings alleged past, present and threatened infringement of rights and title: para. 60. In paras. 63-66 I concluded that, upon the basis of the pleadings, the plaintiff was able to argue:

a) the establishment of the legislative and administrative regime under the ***Forest Act*** may be an infringement;

b) the inclusion of the Claim Area in the Williams Lake Timber Supply Area may be an infringement; and

c) the authorization of past, present and threatened logging may be an infringement.

[991] The plaintiff now urges this Court to make a declaration for relief wherever it is warranted on the evidence. The plaintiff argues that ***Cheslatta*** was concerned with the ripeness of the conflict at the outset of the litigation, on the face of the pleadings. Different considerations must govern the "almost unlimited" discretion of the Court to issue a declaration at the end of the litigation process. In the plaintiff's submission this court can distinguish ***Cheslatta*** on the basis that it simply does not speak to the availability of declaratory relief where infringements have been pleaded, voluminous evidence has been led, years of trial have been consumed, argument has been heard, and the Court is situated to make findings on the basis of a fully litigated evidentiary record.

[992] I do not agree with the plaintiff when he argues that after a lengthy trial, the Court is in a position to exercise discretion and, in effect, do whatever appears appropriate in the circumstances. The Court remains bound by the pleadings. In this case the only infringements pleaded are those infringements raised by the forestry legislation and activities conducted pursuant to that legislation. That legislation does not regulate activities on private lands and accordingly there is no plea of an infringement on any private lands in the Claim Area.

[993] It may well be that the transfer of a fee simple title, the granting of a grazing permit or a water licence or any other interest from British Columbia to others would all be infringements of Aboriginal rights. But they have not been pleaded. In the absence of any plea of infringement of Tsilhqot'in title and rights existing on private lands in the Claim Area, the Court is unable to make a declaration of such rights in relation to those lands.

[994] I also wish to address the Province's repeated reference to private lands within their argument on Tsilhqot'in occupation of the Claim Area. It seems to me that their review of the evidence is attempting to suggest that the granting of fee simple title to non-Tsilhqot'in people has caused a break in continuity. Though not framed as such, the Province appears to be making a veiled attempt to argue that the granting of fee simple title has extinguished Aboriginal title to these privately held lands.

[995] In Australia the courts have concluded that Native title can be extinguished by inconsistent grant. The High Court of Australia has held that Native title is

extinguished by grants in fee simple, true leases, and other dispositions that are inconsistent with the survival of native title: ***Mabo and Others* v. *Queensland (No. 2)*** (1992), 175 CLR 1, paras. 81, 83 (*per* Brennan J.); see also paras. 23, 29, 39 (*per* Gaudron and Deane JJ.).

[996] The Supreme Court of Canada has reached a different conclusion. Prior to the constitutional entrenchment of Aboriginal rights pursuant to s. 35 (1) of the ***Constitution Act, 1982*** the power to extinguish Aboriginal title was an exclusive federal power under s. 91 (24) of the ***Constitution Act, 1867***. Land held by the Province pursuant to s. 109 of the ***Constitution Act, 1867*** was subject to existing trusts. Those trusts included Aboriginal rights such as Aboriginal title.

[997] Given that the jurisdiction to extinguish has only ever been held by the federal government, the Province cannot and has not extinguished these rights by a conveyance of fee simple title to lands within the Claim Area: see ***Delgamuukw v. British Columbia***, (S.C.C.) paras. 172-176.

[998] Thus, regardless of the private interests in the Claim Area (whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province), those interests have not extinguished and cannot extinguish Tsilhqot'in rights, including Tsilhqot'in Aboriginal title.

[999] What is not clear from the jurisprudence are the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area. While they have not extinguished the rights of the Tsilhqot'in people, their existence may have some impact on the application or exercise of

those Aboriginal rights. This conclusion is consistent with the view of the Ontario Court of Appeal in ***Chippewas of Sarnia Band v. Canada (Attorney General)***, [2001] 1 C.N.L.R. 56 (Ont.C.A).

[1000] Reconciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use. Such a task has not been assigned to this Court by the issues raised in the pleadings.

19. CONSTITUTIONAL ISSUES – DIVISION OF POWERS

a. Interjurisdictional Immunity

[1001] The Province's legislative and regulatory framework must accord with the division of powers under the ***Constitution Act, 1867***. A provincial law that in pith and substance relates to "Indians "or "Lands reserved for the Indians" is *ultra vires* the Province: ***Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)***, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 67. Provincial laws of general application apply to Aboriginal people provided they do not touch the "core" of Indianness: ***Paul v. British Columbia (Forest Appeals Commission)***, [2003] 2 S.C.R. 585, 2003 SCC 55, at para. 14; ***Delgamuukw*** (S.C.C.) at paras. 177-178; ***R. v. Morris***, [2006] 2 S.C.R. 915, 2006 SCC 59, at para. 84.

[1002] The plaintiff argues there are two reasons why British Columbia lacks the constitutional authority to manage forestry resources on Tsilhqot'in title lands. The first is that the provincial ***Forest Act*** singles out Aboriginal title holders and

discriminates against them. The second is that the granting of timber licences or the approval of forest development activities on Aboriginal title lands strikes at the very core of both Aboriginal title and Parliament's jurisdiction under s. 91(24) of the ***Constitution Act, 1867***. The plaintiff says the doctrine of interjurisdictional immunity is thus engaged. As a result, British Columbia does not have the constitutional authority to grant interests in the timber situated on Tsilhqot'in title lands to third parties. Nor does British Columbia have the authority to approve forest development activities on these lands.

[1003] Further, the plaintiff says that British Columbia lacks the constitutional capacity to impair the exercise of Aboriginal rights to hunt and trap through the operation of its forestry legislation. Again, such impairment is an impermissible intrusion into the protected core of federal jurisdiction.

[1004] In addition, the plaintiff pleads that the ***Forest Practices Code of British Columbia Act***, S.B.C. 1994, c. 41, is constitutionally inapplicable. The ***Forest Practices Code*** has since been substantially repealed. For that reason, I have not expressly considered the constitutional implications of that statute with respect to Aboriginal title lands. I note, however, that in ***Paul***, Bastarache J. for the Court said in para. 4:

> The Code, a law of general application, is clearly legislation in relation to the development, conservation and management of forestry resources in the province under s. 92A(1)(*b*) of the *Constitution Act, 1867*.

[1005] Both Canada and British Columbia say that the Province has the constitutional capacity to infringe upon Aboriginal rights, including title. They argue that the plaintiff's interjurisdictional immunity argument amounts to an "enclave" argument that has been consistently rejected by the courts.

[1006] Canada further says that the argument advanced by the plaintiff is both disruptive and unnecessary. If the plaintiff were to succeed, all lands subject to Aboriginal title would cease to be "Public Lands belonging to the Province" within the meaning of s. 92(5) of the ***Constitution Act, 1867***. The provincial government would then have no ability to manage timber on such lands. This would be a dramatic shift in the division of powers underlying British Columbia's entry into Confederation.

[1007] The starting point for this discussion is the ***Constitution Act, 1867***. Section 91 sets out the jurisdiction of the federal government. Section 92 sets out the jurisdiction of the various provincial governments. From the outset of Confederation, the Parliament of Canada has held the responsibility over matters relating to "Indians and Lands reserved for the Indians" pursuant to s. 91(24).

[1008] In ***Constitutional Law of Canada***, 4th ed. looseleaf, (Scarborough: Thompson Carswell, 1997) Professor Hogg explains the rationale for s. 91(24) as follows at p. 27-2:

> The main reason for s. 91(24) seems to have been a concern for the protection of the Indians against local settlers, whose interests lay in an absence of restrictions on the expansion of European settlement. The idea was that the more distant level of government – the federal government – would be more likely to respect the Indian reserves that

> existed in 1867, to respect the treaties with the Indians that had been entered into by 1867, and generally to protect the Indians against the interests of local majorities.

[1009] Provincial jurisdiction under s. 92 of the ***Constitution Act, 1867*** includes:

> s. 92(5) - The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon
>
> …
>
> s. 92(13) - Property and Civil Rights in the Province
>
> …
>
> s. 92A (1) In each province, the legislature may exclusively make laws in relation to
>
> …
>
> (b) development, conservation and management of non-renewable natural resources and forestry resources in the province …

[1010] The plaintiff asserts that, insofar as the ***Forest Act*** purports to apply to Aboriginal title lands, it is *ultra vires* the Province because it singles out Indians for special and discriminatory treatment. The plaintiff argues that under the ***Forest Act***, Aboriginal title holders' rights in the land are comprehensively managed and are vulnerable to wide-scale appropriation and transfer to third parties. This is a markedly different forestry regime than the one affecting British Columbians who possess land in *fee simple*.

[1011] Provincial legislation that singles out Aboriginal people for special treatment or that discriminates against them is invalid and of no force and affect: see ***Dick v. The Queen***, [1985] 2 S.C.R. 309, at para. 35; ***Kitkatla Band***, at para. 67; ***Morris*** at para. 41.

[1012] The ***Forest Act*** is a law of general application designed for the management and control of British Columbia's forest resources. It clearly falls within the Province's jurisdiction under s. 92(5) and s. 92A(1)(b) of the ***Constitution Act, 1867***. I have already concluded that where Aboriginal title lands have been clearly defined, those lands are not "Crown lands" as defined by the ***Forest Act***. The definition of "Crown timber" does not capture the forest resources located on Aboriginal title lands. In my view, Aboriginal title lands must be treated in the same manner as "private lands" under that Act.

[1013] A different situation arises where there is merely an assertion or claim of Aboriginal title to a particular geographic area. Because of the overlapping nature of Aboriginal territories, the sum total of Aboriginal title claims has been said to exceed 100% of the provincial land mass. An Aboriginal title claim cannot place that land in the same category as private lands. When particular lands are the subject of a declaration or a clear finding of Aboriginal rights or title, the situation has crystallized, and the definition of "Crown lands" and "Crown timber" no longer applies. In my view, at all material times, the ***Forest Act*** was and remains valid legislation; it simply does not apply to the forest resources located on Aboriginal title lands.

[1014] If this conclusion is incorrect and if the definition of "Crown timber" includes the timber situated on Tsilhqot'in title lands, it is necessary that I also consider the plaintiff's second argument. The plaintiff submits that the doctrine of interjurisdictional immunity deprives British Columbia of the constitutional authority to grant interests in timber on Tsilhqot'in title lands to third parties, or to approve forest development activities on these lands, even under a law of general application.

[1015] The doctrine of interjurisdictional immunity provides that otherwise valid provincial legislation is not allowed to operate in a way that would fundamentally affect a matter within exclusive federal jurisdiction. The doctrine was raised in ***Paul***. In that case, Paul argued that the Province could not grant the Forest Appeals Commission the authority to consider and determine questions about his Aboriginal rights**.**

[1016] On the subject of interjurisdictional immunity, the Court said at para. 15:

> The doctrine of interjurisdictional immunity is engaged when a provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. The doctrine provides that, where the general language of a provincial statute can be read to trench upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations: *Grail*, *supra*, at para. 81. The doctrine has limited the application of a provincial statute to a matter of exclusive federal power in numerous contexts. For example, in *Grail*, a provincial statute of general application was found to have the effect of regulating indirectly an issue of maritime negligence law. The provincial statute had the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively altered rules within the exclusive competence of Parliament. Accordingly, the provincial statute of general application was read down so as not to apply to a maritime negligence action. In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, this Court held that a provincial occupational health and safety statute was inapplicable to a federal undertaking. More relevant, for present purposes, in *Delgamuukw*, *supra*, at para. 181, Lamer C.J. held that s. 91(24) protects a “core” of Indianness from provincial laws of general application, through operation of the doctrine of interjurisdictional immunity. See also *Kitkatla Band*, *supra*, at para. 75: in that case it was not established that the impugned provisions affected “the essential and distinctive core values of Indianness”, and thus they did not “engage the federal power over native affairs and First Nations in Canada”.

[1017] The Court found that "British Columbia has the constitutional power to enable the Commission to determine questions relative to Aboriginal rights as they arise in the execution of its valid provincial mandate respecting forestry": ***Paul***, at para. 34.

[1018] ***Paul*** did not raise the question posed by the plaintiff in this case. Here the plaintiff says that those provisions of the forestry legislation that touch on the management, acquisition and sale of timber on Aboriginal title land would constitute a direct (in the case of title) and indirect (in the case of hunting and trapping rights) intrusion on the defining elements of "Indianness".

[1019] As I understand the arguments of the defendants, the doctrine of interjurisdictional immunity protects Aboriginal rights and title from extinguishment but not from infringement. They say the Supreme Court of Canada has formulated a distinct set of rules with respect to infringement of s. 35 rights. In ***Delgamuukw*** (S.C.C.) at para. 160, the Court stated:

> The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

[1020] A provincial law of general application that does not touch upon core Indianness applies to the exercise of Aboriginal rights, including Aboriginal title. In my view, the Chief Justice referred to these laws in the foregoing passage from ***Delgamuukw***. When the Chief Justice stated that provincial laws that infringe Aboriginal rights must pass the test of justification, he was not signalling that the

doctrine of interjurisdictional immunity would never apply to a consideration of s. 35 rights.

[1021] It is clear from the decision in ***Morris*** that provincial laws found to infringe upon Aboriginal treaty rights are constitutionally inapplicable due to the operation of the doctrine of interjurisdictional immunity. In ***Morris***, two members of the Tsartlip Indian Band of the Saanich Nation were hunting at night. They shot at a deer decoy set up by provincial conservation officers to trap illegal hunters. They were charged with several offences under the ***Wildlife Act***, S.B.C. 1982, c.57, including hunting wildlife with a firearm during prohibited hours and hunting by the use or with the aid of a light or illuminating device. The accused claimed a treaty right to hunt over unoccupied lands. The majority held that the provincial ***Wildlife Act*** did not apply because treaty rights go to the core of Indianness under s. 91(24).

[1022] I do not believe there can there be any principled reason for treating Aboriginal rights, including title, protected by s. 35, any differently than Aboriginal treaty rights. In ***Van der Peet***, Lamer C.J.C. said at paras. 19-20:

> Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality", Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991), 29 *Alta. L. Rev.* 498, at p. 502; they are the rights held by "Indians *qua* Indians", Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 776.

> The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

[1023] I have found the judgments of both the majority and minority in ***Morris*** to be most helpful with respect to the approach to be taken here. Both the majority and dissent in ***Morris*** approached the question of whether provincial legislation is valid or applicable under the constitutional division of powers (ss. 91 and 92) as a separate and distinct inquiry from the question of whether such legislation can be justified under the s. 35 framework. It appears there is no disagreement between the majority and the minority judges as to the analytical approach to be followed.

[1024] The first step is to determine whether the impugned provincial law falls within a provincial head of power. The ***Forest Act*** is directed at the management of the provincial timber resource. It specifically manages the forest resources vested in the provincial Crown. In other words, the purpose of the Act is to manage and allocate the forest resources located on Crown land. Its pith and substance relates to a provincial head of power, specifically s. 92(5) and s. 92A(1)(b). It is not directed at any federal head of power.

[1025] Step two is a consideration of the paramountcy doctrine. Pursuant to that doctrine, “valid provincial legislation will be rendered inoperative if it enters into an

operational conflict with valid federal legislation": ***Morris***, para. 89. As there is no conflicting federal legislation, the paramountcy doctrine does not apply in this case.

[1026] The next step requires a consideration of whether the validly enacted legislation affects the core of a federal head of power. As stated in ***Morris***, para. 90:

> Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects "core Indianness" from provincial intrusion: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 177. Valid provincial legislation which does not touch on "core Indianness" applies *ex proprio vigore.* If a law does go to "core Indianness" the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.

[1027] There can be no doubt that s. 35 Aboriginal rights are part of the core of federal jurisdiction under s. 91(24) of the ***Constitution Act, 1867***, such that provincial legislation cannot extinguish Aboriginal rights. In ***Delgamuukw***, Lamer C.J.C. described the extent of federal jurisdiction, as follows at paras. 177-178:

> The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction – whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.
>
> It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop,

> encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians".

[1028] However, as noted in para. 84 of ***Morris***:

> Although s. 91(24) attributes exclusive jurisdiction over "Indians" and "Lands reserved for the Indians" to Parliament, valid provincial legislation normally applies to aboriginal persons. It is well established that "First Nations are not enclaves of federal power in a sea of provincial jurisdiction" (*Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 66)

[1029] In ***Kitkatla Band*** the Supreme Court of Canada considered the applicability of the provincial ***Heritage Conservation Act***, R.S.B.C. 1996, c.187. That Act regulates the protection of heritage sites and objects within the Province, including heritage sites and objects of Aboriginal origin. The Court held that not all objects altered by Aboriginal people as part of traditional use, or that had cultural, historical and scientific importance for First Nations in British Columbia were at the "core of Indianness". The Court emphasized that evidence has to be adduced with respect to the relationship between the objects and the Indian culture before the proposition could be accepted that the destruction of the objects impaired the status or capacity of Indians.

[1030] The removal of timber from Aboriginal title land does not extinguish the Aboriginal title. The title to the land would remain even if the land was impoverished by the removal of such a vital asset. I conclude that the provisions of the ***Forest Act*** authorizing the management, acquisition, removal and sale of timber on Aboriginal title lands do affect the very core of Aboriginal title. These provisions of the ***Forest Act*** purport to affect a primary asset on that land. Such forests are no longer a public asset, but an asset in the collective hands of the Aboriginal title holders. The Act purports to manage the asset in such a way as to render meaningless the Aboriginal right to manage the very land over which Aboriginal title is held.

[1031] The ***Forest Act***, an Act of general application, cannot apply to Aboriginal title land because the impact of its provisions all go to the core of Aboriginal title. The management, acquisition, removal and sale of this Aboriginal asset falls within the protected core of federal jurisdiction: ***Simon v. The Queen,*** [1985] 2 S.C.R. 387, at p. 411; ***Delgamuukw,*** at para. 178; ***Morris,*** at para. 91.

[1032] Section 35 Aboriginal rights, including title, go to the core of Indianness and are protected under s. 91(24). On principle, they cannot be viewed any differently than Aboriginal treaty rights in that respect. While the exercise of the provisions of the ***Forest Act*** to which I have just referred do not extinguish Aboriginal title, their exercise goes to the core of Aboriginal title. Accordingly, the doctrine of interjurisdictional immunity is engaged and the ***Forest Act*** is inapplicable where it intrudes or touches upon forest resources located on Aboriginal title lands.

[1033] The fourth and final step in this analysis requires a consideration of s. 88 of the ***Indian Act***:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

[1034] The defendants did not place any reliance on s. 88. Instead, they rested on their position that the doctrine of interjurisdictional immunity does not apply because a provincial law can infringe Aboriginal rights and title, subject to the test of justification.

[1035] Section 88 of the ***Indian Act*** makes some provincial laws applicable to Indians by referential incorporation in the ***Indian Act***. That section provides that the provincial laws of general application "are applicable to and in respect of Indians…" There is no reference to the second element of s. 91(24), "Lands reserved for the Indians".

[1036] This question was raised and discussed in ***Derrickson v. Derrickson***, [1986] 1 S.C.R. 285, at pp. 297-299. Chouinard J. concluded it was unnecessary to decide the question as the case turned on the application of the federal paramountcy doctrine. In ***Cardinal v. Attorney General of Alberta***, [1974] S.C.R. 695, Laskin J. (as he then was) noted at p. 727 that s. 88 "deals only with Indians, not with Reserves …" Laskin J. was writing for the minority in that decision; the majority did

not address the question of the meaning and effect of s. 88. In ***Paul***, at para. 12, the Court concluded there was no need to consider s. 88.

[1037] In ***Derrickson v. Derrickson*** (1984), 51 B.C.L.R. 42, at p. 46, the B.C. Court of Appeal unanimously concluded that s. 88 does not apply to Indian reserve lands which, like Aboriginal title lands, are "Lands reserved for the Indians". (The Court of Appeal decision was affirmed by the Supreme Court of Canada, but this point was not addressed as noted in the foregoing paragraph.) In ***Paul v. Forest Appeal Commission***, (2001), 89 B.C.L.R. (3d) 210, 2001 BCCA 411, the majority of the Court of Appeal decided that s. 88 could not constitutionally invigorate provincial legislation in relation to its application to "aboriginal title and the main body of aboriginal rights which are intimately related to the use of land": para. 76. The Court of Appeal's decision was reversed, but not on this point.

[1038] Lysyk J. undertook an extensive analysis of this question in ***Stoney Creek Indian Band v. British Columbia*****,** [1999] 1 C.N.L.R. 192 (B.C.S.C.), reversed on other grounds, 1999 BCCA 527. He concluded that s. 88 did not constitutionally invigorate provincial laws in their application to Indian lands.

[1039] The application of s. 88 to "Lands reserved for the Indians" has not been conclusively resolved by the Supreme Court of Canada. On a consideration of the case law outlined above, I conclude that provision is directed only to "Indians" and cannot be used to invigorate provincial legislation in its application to Aboriginal title lands. This view accords with the opinions expressed by Kent McNeil in ***"***Aboriginal Title and Section 88 of the *Indian Act****"*** (2000) 34 U.B.C.L. Rev. 159, and Brian

Slattery in "Understanding Aboriginal Rights***"*** (1987) 66 Can. Bar Rev. 727 at pp. 779-81.

[1040] I am supported in this conclusion by the dicta of Lambert J.A. in ***Haida Nation*** (B.C.C.A.) where he said at paras. 78-79:

> …as a matter of constitutional analysis, aboriginal title must lie at the core of Indianness, so provincial laws of general application do not apply to aboriginal title of their own force and, arguably, can not be constitutionally invigorated by s.88 of the *Indian Act* because s.88 applies to Indians but not to Indian lands, a distinction drawn from the wording of s.91(24) of the *Constitution Act, 1867*.
>
> This seeming inconsistency will be resolved in due course …

[1041] I turn now to the question of whether provisions of the ***Forest Act*** which allow for the management, acquisition, removal and sale of timber applies to Tsilhqot'in Aboriginal rights. These rights include:

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.

[1042] In both situations, I conclude that the provisions of the ***Forest Act*** do not go to the core of "Indianness" or to the core of these two Tsilhqot'in Aboriginal rights.

[1043] It bears repeating that this is the type of situation to which Lamer C.J.C. referred in ***Delgamuukw***, when he said, at para. 160:

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

[1044] The application of the ***Forest Act*** providing for the management, acquisition and removal of timber cannot be applied to a forest asset owned by an Aboriginal collective. Forestry activities might well infringe and, to some degree, impact upon an Aboriginal right other than title. In such circumstances, the Province would bear the burden of justification for the acts of infringement.

[1045] I summarize my conclusions as follows:

a) Section 35 Aboriginal rights are part of the core of federal jurisdiction under s. 91(24) of the ***Constitution Act, 1867***, such that provincial legislation cannot extinguish Aboriginal rights: ***Delgamuukw*** (S.C.C.); ***Morris*** (S.C.C.).

b) Provincial management of timber and the acquisition, removal and sale of timber by third parties under the provisions of the ***Forest Act*** does not extinguish Aboriginal title.

c) The provisions of the ***Forest Act*** that provide for the acquisition, removal and sale of timber by third parties go to the core of

"Indianness", or put in contemporary language, go to the core of Aboriginal title.

d) The provisions of the ***Forest Act*** do not apply to Aboriginal title land under the doctrine of interjurisdictional immunity.

e) The same provisions do not go to the core of Tsilhqot'in Aboriginal rights. Any infringement of these rights by such activities must be justified by the Province.

[1046] The conclusions I have reached reaffirm the central role of Parliament in matters relating to Aboriginal Canadians. The denial or avoidance of this constitutional responsibility is unacceptable if there is to be a just reconciliation in this era of decolonization.

[1047] I am aware of the serious implications this conclusion will have on British Columbia. However, I agree with Professor Kent McNeil when he explains that long established principles have been conveniently ignored. At p. 194 of **"**Aboriginal Title and Section 88 of the *Indian Act***",** he states:

> Ever since the *St. Catherine's Milling* decision in 1888, it has been apparent that exclusive federal jurisdiction over "[l]ands reserved for the Indians" might well include jurisdiction over Aboriginal title lands. So in acting as though it had constitutional authority over Aboriginal title lands in British Columbia, the province has skated on thin constitutional ice for over a century. In reality, it appears that the province has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871. What is truly disturbing is not that the province can no longer do so, but that it has been able to get away with it for so many years.

[1048] The right of exclusive use and possession is fundamental to Aboriginal title. Aboriginal title confers a right to the land itself, and the right to determine how it will be used. Legislation that authorizes the granting of rights to harvest timber from these lands to third parties strikes at the very core of Aboriginal title. These legislative enactments are beyond the constitutional reach of the Province. They fall within the exclusive domain of Parliament under s. 91(24).

[1049] At all material times, the ***Forest Act*** was and remains constitutionally inapplicable to the extent that it purports to authorize:

a) the inclusion of Tsilhqot'in Aboriginal title lands in the applicable Public Sustained Yield Units or in the Williams Lake Timber Supply Area;

b) the issuance of Forestry Tenures and Authorizations that affect Tsilhqot'in Aboriginal title; or

c) strategic planning decisions with respect to the use, management and control of forest resources on Tsilhqot'in Aboriginal title lands.

b. Submerged Lands

[1050] In ***William v. British Columbia***, 2006 BCSC 399, I concluded that the pleadings were inclusive of some rivers, lakes and streams. At para. 21 I found there is no plea of "any infringement of rights and title by Canada. Specifically, there is no plea that the exercise of federal jurisdiction under the ***Navigable Waters Protection Act***, R.S.C. 1985, c. N-22, or any other federal legislative or

administrative enactment, constitutes an infringement on the plaintiff's alleged rights and title".

[1051] As there was no claim of infringement of Aboriginal title over submerged lands, it is not necessary for me to consider this issue. There was evidence that Tsilhqot'in people used the lakes, rivers and streams to move about in bark canoes from time to time and for the purpose of resource gathering. While fishing was a large part of the seasonal rounds, the plaintiff does not allege an Aboriginal right to fish. The only evidence concerning the use of submerged lands related to the setting of weirs, traps or devices to assist in the sighting of fish that might, in some situations, lay on submerged land.

[1052] In the circumstances, it is unnecessary to decide the effect, if any, of a declaration of Aboriginal title over submerged lands.

20. INFRINGEMENT OF ABORIGINAL TITLE

[1053] I have concluded that the provisions of the ***Forest Act*** do not apply to Aboriginal title land. If I am wrong, it becomes necessary for me to consider whether such legislation or the application of the legislative scheme established by the ***Forest Act*** infringes Tsilhqot'in Aboriginal title. I conclude that the passing of the ***Forest Act*** does not infringe Aboriginal title but I have no difficulty in finding that the application of the legislative scheme established by the provisions of the ***Forest Act*** does infringe that title for the following reasons.

a. General Principles

[1054] Today we understand that Aboriginal title confers "the right to the land itself": ***Delgamuukw*** (S.C.C.) at para. 138. Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures": ***Delgamuukw*** (S.C.C.) at para. 117. The Crown does not have a present proprietory interest in such lands. The Crown's interest is residual and is only perfected on surrender of the land by the Aboriginal title holders.

[1055] Aboriginal rights are not absolute. Infringement by the Crown "is justified in pursuance of a compelling and substantial legislative objective for the good of larger society": ***Marshall; Bernard*** at para. 39, citing ***Sparrow*** at p. 1113. This holds true for all Aboriginal rights.

[1056] The Supreme Court of Canada first established the infringement and justification framework in ***Sparrow***. Dickson C.J.C. and La Forest J., writing jointly for the Court, described this framework as a vehicle for reconciling Aboriginal rights with the interests of the greater public. Starting from the premise that the Crown's powers must be reconciled with its duties to Aboriginal peoples, Dickson C.J.C. and La Forest J. at pp. 1109-1110 said:

> … the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra,* and the concept

> of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada ...
>
> …
>
> The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

[1057] The choice of language in ***Sparrow*** is informative. Justification is demanded of government regulation "that infringes upon or denies aboriginal rights". The denial of Aboriginal rights, as well as infringement, demands justification.

[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.

[1059] The test for infringement was set out in ***Sparrow*** at pp. 1111-1112, as follows:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.
>
> …
>
> 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.

[1060] The ***Sparrow*** test also requires the Court to consider the factual context in which the issue arises. This involves asking whether the purpose or effect of the legislation or regulation infringes the interests protected by the right.

[1061] In ***R .v. Gladstone***, [1996] 2 S.C.R. 723, the Supreme Court revisited the criteria for infringement of an Aboriginal right and further clarified the concepts raised in the ***Sparrow*** case. In ***Gladstone***, Lamer C.J.C., for the majority, stated, at para. 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.

[1062] The onus of establishing a *prima facie* infringement is not high. While the interference must be shown to have more than a *de minimis* effect on Aboriginal rights, the claimant is only required to demonstrate that the claim of infringement is,

on its face, meritorious. In ***R. v. Sampson***, [1996] 2 C.N.L.R. 184, 131 D.L.R. (4th) 192, at paras. 42-43, the B.C. Court of Appeal said:

> The fact that s. 35(1) of the Act does not fall within the ambit of s. 1 of the ***Canadian Charter of Rights and Freedoms*** - as acknowledged in *Sparrow* at p. 287 C.C.C., p. 408 D.L.R. — suggests that caution should be exercised in determining what factors are relevant to the issues involved in the first stage of the test — infringement. Consideration of factors which go to the issue of justification would minimize the importance of aboriginal rights established by s. 35(1).
>
> The purpose of the three questions posed in the first stage of the test (is the limitation unreasonable; does the regulation impose undue hardship; and does the regulation deny to the holders of the right their preferred means of exercising that right) is, in our view, to ensure that only meritorious claims are considered. The onus on the applicant is not heavy. The establishment of an infringement on a *prima facie* basis is sufficient. To include consideration of such factors as priority and consultation — factors which are relevant to the second stage of the test — would adversely affect the onus of proof resting upon the applicant. It would diminish the safeguard for aboriginal rights established by s. 35(1) as interpreted by the Supreme Court in *Sparrow*.

[1063] The foregoing cases all dealt with an Aboriginal right, not Aboriginal title. A decision relating to infringement of Aboriginal title by government legislation or regulation has yet to be decided.

[1064] In ***Delgamuukw*** at para. 166, Lamer C.J. C. explained that Aboriginal title encompasses three features: the right to exclusive use and occupation of land; the right to choose to what uses land can be put; and that lands held pursuant to Aboriginal title have an inescapable economic component.

[1065] There is potential for substantial interference with Aboriginal title at every stage of government land-use planning with respect to Aboriginal title lands. For

example, the granting of conditional harvesting rights to third parties in an area encompassing land held subject to Aboriginal title stands in conflict with the right to exclusive use and occupation of the land, and the right to choose to what uses land can be put. Similarly, the economic impact of such grants may arise long before cutting occurs on the ground. Once it is known that the timber on Aboriginal title land is subject to conditional harvesting rights granted by the Crown, the economic value of that timber to the title holder is undermined.

[1066] To have any significance for Aboriginal people, Aboriginal title must bring with it the collective right to plan for the use and enjoyment of that land for generations to come. Prior to European colonization, the lands and forests of Tsilhqot'in traditional territory supplied Tsilhqot'in people with sustenance and protection from the elements, as well as a moderate livelihood. Tsilhqot'in people were able to make all land use decisions with respect to that territory. The imposition of the provincial forestry management scheme removes the ability of Tsilhqot'in people to control the uses to which the land is put. Such a scheme also creates uncertainty concerning the protection of the land and forests for future generations of Aboriginal rights holders. In addition, it deprives Tsilhqot'in people of the ability to realize certain economic gains associated with harvesting rights. In my view, this constitutes an unreasonable limitation on Aboriginal title, denying Tsilhqot'in people their preferred means of enjoying the benefits of such title. The cumulative effects of these government decisions with respect to timber harvesting on Aboriginal title lands constitute a *prima facie* infringement and requires justification.

[1067] The application of the provincial forestry scheme to Aboriginal title lands amounts to a clear denial of Aboriginal title. Planning to use the land and resources of an Aboriginal group without acknowledging the constitutionally entrenched interests of the Aboriginal group requires justification. Infringement or denial of title can occur at each stage of any land use process and so, at each stage, the Crown must justify its proposed actions with respect to Aboriginal title land.

[1068] In the context of an Aboriginal right to fish, the directions in ***Sparrow*** are clear. The court must determine the following: is the limitation unreasonable; does the regulation impose undue hardship; and does the regulation deny to the holders of the right their preferred means of exercising that right? An application of this test to Aboriginal title land is possible. By failing to acknowledge Aboriginal title, the Crown's plans for Aboriginal title land are unreasonable and impose undue hardship on the title holders. Land use planning that contemplates the removal of an asset attached to the land, without recognition of the true owner of that asset, denies to the holders of Aboriginal title the means of exercising and enjoying the benefits of such title.

[1069] In ***Haida Nation*** (B.C.C.A.), at para. 81, Lambert J.A. stated:

> I consider that the only real question at this stage is whether the aboriginal people have been constrained in the use of the land subject to the aboriginal title, or, in the case of an aboriginal right, whether the holders of the right have been prevented from exercising it by their preferred means.

[1070] British Columbia argues there is no evidence to suggest that Tsilhqot'in use of the land has been affected by provincial land use planning, by the inclusion of the

land in the Williams Lake Timber Supply Area (TSA), or by the granting of timber licences. It seems to me that this argument misses an important point: Aboriginal title land does not vest in the Province such that they have the authority to engage in such activities. By so doing, the Province constrains the Aboriginal title holder's use of the land and deprives the Aboriginal group of the right to make decisions with regard to land use and resource extraction.

[1071] In addition, the argument advanced by British Columbia fails to acknowledge the denial of Aboriginal title implicit at every stage of the planning process. That denial also constitutes an infringement.

[1072] In ***Haida Nation***, at para. 84, Lambert J.A. stated:

> In the case of the provincial Crown, the infringing actions may be expected to lie in passing the *Forest Act*, issuing the Tree Farm Licence, approving the Management Plans, granting the Cutting Permits, and overseeing Weyerhaeuser's compliance with the scheme embodied in those legislative and exclusive licence provisions. I am only giving an outline of potential infringements.

[1073] The foregoing comments were *obiter dicta.* Although Finch C.J.B.C. agreed with Lambert J.A., in the result, he did not endorse his reasons for judgment. Thus, the comments of Lambert J.A. stand alone. His remarks did not attract comment in the Supreme Court of Canada on appeal. As the Supreme Court of Canada did not look at the issue of infringement, their silence on the foregoing passage cannot be viewed as an endorsement of those comments.

b. Application

[1074] I am not prepared to say that the mere passing of legislation by a provincial Legislative Assembly, even if it has the potential to infringe Aboriginal title land, is a *prima facie* infringement. For that reason, I do not consider the passing of any forestry legislation to be a *prima facie* infringement on Tsilhqot'in Aboriginal title land. It is not legislation directed at Aboriginal title land but general legislation concerning a Crown asset. It is only when public officials seek to engage the provisions of such legislation in relation to Aboriginal title land that a *prima facie* infringement occurs.

[1075] For example, when timber on Aboriginal title land is included in a TSA pursuant to the relevant legislation, there is a *prima facie* infringement of Aboriginal title. Thus, the inclusion of timber on Tsilhqot'in Aboriginal title land in the Williams Lake TSA is an infringement on Tsilhqot'in Aboriginal title. Each administrative step taken thereafter that might ultimately result in timber removal and sale by third parties is also an infringement of Tsilhqot'in Aboriginal title.

[1076] It follows that the approval of cut blocks in forest development plans and the allocation of cutting permits are equally an infringement on Tsilhqot'in Aboriginal title.

[1077] It bears repeating that the right to use resources, the right to choose land use, and the right to direct and benefit from the economic potential of the land are all aspects of Aboriginal title. If the Crown is engaged in land use planning for its own economic benefit and the economic benefit of third parties, then such activities are a direct infringement on any Aboriginal title. The rights holders do not have to wait for

a decision to harvest timber before there has been an infringement. The infringement takes place the moment Crown officials engage in the planning process for the removal of timber from land over which the Crown does not have a present proprietary interest.

[1078] As the Supreme Court observed at p. 1110 of ***Sparrow***:

> Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

[1079] I conclude that if the Province has legislative authority and if there is to be provincial legislation that regulates land use planning and the sale and removal of timber from Aboriginal title lands, then the clear directions set out in ***Adams*** must be adhered to. While these passages refer to Parliament, they apply with equal force to the enactments of the Provincial Legislative Assembly. The Court in ***Adams*** stated at paras. 53-54:

> In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which

> encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1078-79; *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 1010-11; and *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.
>
> I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982.* In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

[1080] In its final submission, British Columbia argued that the Supreme Court of Canada in ***Haida Nation*** did not suggest that the ***Forest Act*** was invalid for failure to satisfy the ***Adams*** requirements. That is correct. The Court in ***Haida Nation*** found, at para. 51:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory

> scheme, may guard against unstructured discretion and provide a guide for decision-makers.

[1081] In this case the provincial forestry guidelines failed to prevent an infringement. I conclude that if the current provincial forestry scheme applies to Aboriginal title land, then its application to Tsilhqot'in Aboriginal title land constitutes a *prima facie* infringement or denial of Tsilhqot'in Aboriginal title triggering the need for justification.

21. JUSTIFICATION OF INFRINGEMENT OF ABORIGINAL TITLE

a. General Principles

[1082] Government power must be reconciled with government duty, "and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights": ***Sparrow*** at p. 1109.

[1083] The test for the justification of infringement of Aboriginal title has two parts. The infringement must be in furtherance of a compelling and substantial legislative objective: ***Delgamuukw*** (S.C.C.), at para. 161. The infringement must also be consistent with the fiduciary relationship that exists between the Crown and Aboriginal peoples: ***Delgamuukw*** (S.C.C.), at para. 162.

[1084] In this case, British Columbia bears the burden of justifying infringements caused by provincially authorized forestry activities.

b. Compelling and Substantial Legislative Objective

[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.

[1086] The foregoing view was initially developed by Lamer C.J.C. in the ***Van der Peet*** trilogy (***Van der Peet***, ***Gladstone***, and ***R. v. N.T.C. Smokehouse Ltd.***, [1996] 2 S.C.R. 672). In these cases, Lamer C.J.C. expressed the opinion that government limits on the exercise of Aboriginal rights are a necessary part of that reconciliation, provided such "limits are of sufficient importance to the broader community as a whole": ***Gladstone***, at para. 73. A discussion of the minority opinions of McLachlin J. (as she then was) in ***Van der Peet*** and ***Gladstone*** are set out later in this judgment under the heading "Reconciliation".

[1087] In the context of the disposition of Crown resources, the focus is on the particular measure or government activity and not on the overall legislative regime. Normally, such cases proceed on the premise that the Crown's infringing activity is constitutionally valid. It is this validity that raises potential for it to be an infringement. If the activity was unconstitutional the act itself is invalid and there is no need to consider infringement.

[1088] I have already decided that provincial forestry legislation is inapplicable to Aboriginal title land. The discussion that follows is upon the basis that this conclusion is incorrect and that British Columbia's forestry legislation does apply to Aboriginal title land. What follows also takes into account the fact that there has been a finding of an infringement of title such as I have made in the preceding section.

[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.

[1091] In ***Delgamuukw***, Lamer C.J.C. reiterated at para. 161 that legitimate government objectives include "the pursuit of economic and regional fairness". Lamer C.J.C. went on to state that: "By contrast, measures enacted for relatively unimportant reasons such as sports fishing without a significant economic component ("*Adams*", *supra*), would fail this aspect of the test of justification."

[1092] This conclusion flows from ***Adams*** where the Court said at para. 58:

> I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone*, at para. 74) to warrant the limitation of aboriginal rights.

[1093] There is no doubt that the compelling and substantial nature of the legislative objective will vary from one region to the next. Given the economic importance of forestry activities in British Columbia and in Tsilhqot'in territory, the focus must be on the rationale behind these activities in the Claim Area.

[1094] Because Aboriginal title confers the right to the land itself: ***Delgamuukw*** (S.C.C.), at para. 138, British Columbia's forestry activities infringe Tsilhqot'in Aboriginal title as I have described in the preceding section.

[1095] British Columbia argues, largely from a policy perspective, that there are good reasons for land use and forestry rules in the Claim Area. I believe this oversimplifies the test I must consider and apply.

[1096] The question is not whether there is any merit in a provincial regulatory and administrative regime relating to forestry activities on Aboriginal title lands. There may well be merit in the existence of such a scheme. The inquiry here must focus on the application of that scheme to the circumstances of this case. Is there a compelling and substantial objective that justifies the infringements caused by British Columbia's land use planning and forestry activities on Tsilhqot'in title lands?

[1097] Dr. Hamish Kimmins, a professional forester and expert in forest ecology, was called as a witness for British Columbia. The opinions he expressed were candid and of considerable assistance to the court. Dr. Kimmins testified that forests can be managed to address a wide range of options. They can be managed to protect a particular species of wildlife or to maximize the production of wood fibre. He confirmed that if one was aware of the cultural and economic objectives of a particular First Nation, a forest could be managed so as to afford that First Nation the opportunity to carry on trapping in a culturally and economically sustainable manner.

[1098] As Dr. Kimmins explained, taken individually, each approach to forestry management constitutes single value management. He expressed the following opinions.

a) The current legislative system in British Columbia does not allow for ecosystem management. This is because under the tenure system forest companies and professional foresters are licenced only to manage for timber, with all other values as a constraint on that objective.

b) A major shortcoming in forestry in the past, and sometimes today, is that allowable annual timber harvests (AAC) have been based on timber supply models that are spatial and are driven by stand level growth and yield models that are insensitive to changes in key ecosystem processes that result from human and natural disturbance.

c) The current time and timber supply models used by the Ministry of Forests do not adequately account for climate, ecosystem and management change, although the recalculation of the AAC every 5 years is a way of addressing the shortcoming of the process.

[1099] A legislative scheme that manages solely for timber, with all other values as a constraint on that objective, faces a formidable challenge when called upon to balance Aboriginal rights with the economic interests of the larger society.

[1100] For many years now, Tsilhqot'in people have opposed clear cutting in the Claim Area. They have argued for a form of ecosystem management that can sustain the region for generations to come. Their proposals have not been accepted because, as Dr. Kimmins observed, the current legislative system in British Columbia does not allow for ecosystem management.

[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.

[1102] Mountain pine beetle is currently destroying the pine forests of British Columbia, including those pine forests located in the Claim Area. Fire suppression activities are one reason offered for the advance of this forest infestation. Another reason is climate change. The absence of a sustained cold period during the winter means the beetle is able to survive into another year. However, it must be acknowledged that trees affected by mountain pine beetle play an important ecosystem function, providing valuable wildlife habitat that is consistent with the plaintiff's interests.

[1103] What is clear from the evidence of Dr. Kimmins is that "sustainability is multi-faceted, 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.

[1104] In an appendix to his report, Dr. Kimmins answered specific questions related to the mountain pine beetle infestation. He expressed the view that from the perspective of forest health, harvesting of lodgepole pine in the Claim Area was not necessary given the unprecedented nature of the mountain pine beetle epidemic and the climatic conditions of the past decade. If there was to be a harvesting of such timber, then, in the view of Dr. Kimmins, clear-cut harvesting would be appropriate so long as there were patches of dead trees of various sizes retained that would be consistent with the habitat need of the animal species of concern. I take it that in such an approach there would be specific consideration given to the well-being and continuity of the animals that are of particular concern to Tsilhqot'in people.

[1105] Dr. Kimmins advised that conventional harvesting techniques could be carried out in a sustainable manner. However, this is dependant "on the values one is considering, and the time and spatial scale over which one is considering it": Kimmins report, p. 40.

[1106] It is not possible to predict the future in this changing environment. The need to protect Tsilhqot'in Aboriginal rights throughout the Claim Area brings with it the need for a fresh approach to sustainability. This challenge can be met through the

development of cooperative joint planning mechanisms taking into account the needs that must be addressed on behalf of the Tsilhqot'in community and the broader British Columbia and Canadian communities.

[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.

c. Honour of the Crown

[1109] Whether a particular infringement is consistent with the fiduciary relationship between the Tsilhqot'in people and the Crown will be a function of the "legal and factual context" of each case: ***Gladstone***, at para. 56, cited in ***Delgamuukw, (S.C.C)*** at para. 162. Three aspects of Aboriginal title are relevant when assessing

whether or not the Crown's duty has been discharged in any given instance: the right to exclusive use and occupation of land; the right to choose to what uses the land will be put; and, the inescapable economic component": ***Delgamuukw*** (S.C.C.), para. 166.

[1110] Government is required to demonstrate "'both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest' of the holders of aboriginal title in the land": ***Delgamuukw*** (S.C.C.) at para. 167, citing ***Gladstone***, at para. 62. British Columbia must demonstrate that it gave adequate priority to Tsilhqot'in Aboriginal title and rights.

[1111] In ***Sparrow*** and ***Gladstone***, the application of this branch of the justification test meant that Aboriginal people received priority in the exploitation of the fishery resource. The Court indicated that the demands of the fiduciary relationship can manifest themselves in many other guises, including the duty of consultation, and ordinarily including a duty of fair compensation in all cases where title is being infringed.

[1112] As suggested in ***Delgamuukw, (S.C.C.)*** at para. 167, the Crown has a duty to accommodate the participation of Tsilhqot'in people in developing the resources on their title lands. The conferral of fee simple lands for agriculture, and of leases and licences for forestry and mining must reflect the prior occupation of Aboriginal title lands. Economic barriers to Aboriginal uses of their lands, such as licensing fees,

may be reduced. The Court explained that this is not an exhaustive list. There must also be an assessment of the various interests at stake in the resources in question.

[1113] British Columbia must also demonstrate that "there has been as little infringement as possible in order to effect the desired result": ***Sparrow***, p. 1119. Rather than observing this minimal requirement obligation, British Columbia does not appear to have considered in advance how its land use planning activities and proposed forestry activities might result in an infringement on Tsilhqot'in Aboriginal title and rights. Examples of these planning activities include:

a) the process by which British Columbia developed timber targets and other resource targets and priorities for the Claim Area in the Cariboo Chilcotin Land Use Plan, (CCLUP) and the decision-making process followed by British Columbia to establish those targets as a legally binding higher level plan governing resource use including timber extraction for the Claim Area;

b) the determination of the Annual Allowable Cuts for the Williams Lake Timber Supply Area, which affects the rate of logging in the TSA and hence the Claim Area;

c) the process by which British Columbia awarded and subsequently replaced forest tenures relevant to the Claim Area; and

d) the approval of forest development plans and cutting authorities under those licences relevant to the Claim Area.

d. Duty to Consult

[1114] Where Aboriginal title exists or is alleged to exist, there is always a duty of consultation. As explained in ***Delgamuukw, (S.C.C.)*** at para. 168, the nature and scope of the duty of consultation will vary with the circumstances:

> In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[1115] In ***Haida Nation*** the Court established a framework for the duty to consult and accommodate. The government's duty to consult and accommodate is "grounded in the honour of the Crown" and this is a "core precept": ***Haida Nation***, at para. 16. McLachlin C.J.C. went on to say at para. 17:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[1116] Canadians need to understand that it is not a distant monarch whose honour is at issue. "Honour of the Crown" in our country, in this age, translates to a matter

of national honour, an obligation all Canadians are bound to uphold and respect. At para. 18, the Court in ***Haida Nation*** said:

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > . . . "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

[1117] After a review of earlier decisions of the Court on the subject of the duty to consult, McLachlin C.J.C. in ***Haida Nation*** said at para. 25:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[1118] Noting that the proof of an Aboriginal right may take considerable time (as this case and the current treaty process demonstrate), the Court points out the

underlying "need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty" and continues at para. 26 to pose the central questions:

> Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

[1119] The answer to these questions is provided in para. 27:

> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

[1120] The Court in ***Haida Nation*** rejected the Province's argument that there is no duty to consult and accommodate prior to final determination of the scope and content of any right, saying at para. 33:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

[1121] At para. 35, the Court explains that the "duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.". At para. 37, the Court in ***Haida Nation*** explains that "[k]nowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate".

[1122] The Court then considered the scope and content of the duty to consult, noting in para. 41 that "it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified." The Court presented "the concept of a spectrum", stating at paras. 43-45:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> At the other end of the spectrum lies cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

e. Application

[1123] To assist the Court in the consideration of the evidence, British Columbia summarized the evidence in a booklet entitled, “Chronologies, including consultation chronologies, dating from February 10, 1982 up to December 5, 2005”. The consultation chronology consists of 193 pages. There is no doubt that considerable effort has been made to engage Tsilhqot’in people in the forestry proposals and the land use planning in the Claim Area. The central question is whether all of this effort amounts to genuine consultation.

[1124] British Columbia argues that it has met its consultation duties respecting the CCLUP and other land use planning processes, but that the plaintiff has not responded in good faith. The plaintiff disagrees and argues that in the CCLUP and other land use planning processes, British Columbia has failed to reconcile its sovereignty with the Tsilhqot’in people’s claims of Aboriginal title and rights.

[1125] It is informative to consider the setting of the AAC under the provisions of the ***Forest Act***. This task is assigned to the Chief Forester. The legislation is silent with

respect to Aboriginal title and rights. The Chief Forester interpreted this silence as a direction to him to ignore any actual or claimed Aboriginal title or rights when determining the AAC. The AAC is based on the assumption that all areas contribute to the timber supply within the TSA until the issue of Aboriginal title is finally resolved.

[1126] In 1992 the Premier of British Columbia, Premier Michael Harcourt, gave his undertaking to the Tsilhqot'in chiefs that no harvesting would occur in the Brittany Triangle without the consent of the Xeni Gwet'in.

[1127] The Chief Forester was aware of this commitment when he made the 1996 AAC determination. Despite this knowledge, the Chief Forester considered it to be his statutory duty to fully incorporate the Claim Area into the timber harvesting land base and to ignore the potential for Tsilhqot'in Aboriginal title. The 1996 AAC was dependant on timber from that area. Notwithstanding that this decision clearly and specifically related to the future use and exploitation of lands in the Claim Area, Tsilhqot'in Aboriginal title is not mentioned as a relevant factor in the 1996 AAC rationale.

[1128] The former Chief Forester testified that he did not (and believed he could not) adjust his AAC determination on the basis of a claim to Aboriginal rights and title. But the claims of the Tsilhqot'in people to Aboriginal rights and title imposed upon him a duty to consult. His failure to consult is not an infringement of Tsilhqot'in Aboriginal rights, including title. But what it means is that the Province is unable to justify their actual infringements of Aboriginal title and rights that might flow from the

decision. This failure to consult might result in a later claim for damages dependant on the consequences of the decision that was made.

[1129] British Columbia says that while strategic planning decisions may have serious impacts on Aboriginal title, all that such decisions trigger is a duty to consult. There can be no infringement until there is an authorization by the Crown for the removal of timber. Until that occurs, there is no direct infringement, only the potential for infringement.

[1130] In ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73 when discussing the duty to consult, the Court said at paras. 75-76:

> The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).
>
> I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. *Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title.* The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which

> in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.
>
> [Emphasis added.]

[1131] In my view, all of the events that lead up to the granting of a cutting permit signal the Province's intention to manage and dispose of an Aboriginal asset. These events demand consultation and, where necessary, appropriate accommodations where Aboriginal rights are claimed. The nature of accommodations, if any, would be entirely case specific.

[1132] The 1992 Tsuniah Lake Local Resource Use Plan and the 1993 draft Brittany Lake Forest Management Plan demonstrate the Province's determination to open up the Claim Area for logging. This objective was confirmed by the terms of the Cariboo-Chilcotin Land Use Plan established in 1994, and the related planning processes. The CCLUP is an expression of the highest level of provincial land use planning. The portions enacted by Cabinet as a higher level plan have the force of law and establish a process for all lower level decisions. These include timber targets for harvesting that direct a substantial level of commercial harvesting in the Claim Area in order to meet the targets mandated by the Plan.

[1133] I do not propose to review these land use plans in detail. It is sufficient to note that none of the three plans took into account any Aboriginal title or Aboriginal rights that might exist in the Claim Area.

[1134] The Province's express purpose in establishing the CCLUP was "resolving uncertainty" and dedicating "resource lands for industry and jobs". In its October 1994 explanation of the CCLUP, the Province said, in part:

> The provincial government recognizes the need to ensure that all Cariboo residents and business interests have certainty of access to the natural resources they depend on to make a living, while ensuring recognition of special values. Secure access to these resources will provide economic and social stability, plus increase opportunities for sustainable growth and investment throughout the region.

[1135] Pursuant to the CCLUP, the Province determined how the Claim Area lands were to be used. Despite the statement that the Province's decision was being made "without prejudice" to Aboriginal rights, the CCLUP makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title. Title encompasses the right to determine how land will be used and how forests will be managed in the Claim Area. In effect, the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot'in people without any attempt to acknowledge or address Aboriginal title or rights in the Claim Area.

[1136] Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that Aboriginal title and rights could only be addressed or considered at treaty negotiations. At all material times, British Columbia has refused to acknowledge title and rights during the process of consultation. Consequently, the pleas of the Tsilhqot'in people have been ignored.

[1137] Consultation involves communication. It has often been said that communication is the art of sending and receiving. Provincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the plaintiff. This has meant that at every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded. A statement to the effect that a decision is made "without prejudice" to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated.

[1138] Tsilhqot'in people also appeared from time to time to have a fixed agenda, namely the promotion of an acknowledgment of their rights and title. It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.

[1139] Consultations with officials from the Ministry of Forests ultimately failed to reach any compromise. This was due largely to the fact that there was no accommodation for the forest management proposals made by Xeni Gwet'in people on behalf of Tsilhqot'in people. Forestry proposals that concerned timber assets in the Claim Area were usually addressed by representatives of Xeni Gwet'in people.

But, from the perspective of forestry officials, there was simply no room to take into account the claims of Tsilhqot'in title and rights.

[1140] Conversely, there was good communication between Tsilhqot'in people with officials in the Ministry of Lands, Parks and Housing. Here the two groups were able to reach a consensus on the establishment and management of Ts'il?os Provincial Park, without prejudice to the rights and title claims of Xeni Gwet'in and Tsilhqot'in people in the park area. The joint management model of this Provincial Park has been such a success that it has been extended to the management of Nuntzi Provincial Park in the northeastern portion of Tachelach'ed.

[1141] Utilizing the concept of a spectrum proposed in ***Haida Nation*** (S.C.C.), I place the rights and title claimed here at the high end of the scale, requiring deep consultation and accommodation. I have already noted there are areas of title inside and outside of the Claim Area. Aboriginal rights in the Claim Area have been acknowledged by the defendants in these proceedings. I have found the plaintiff is entitled to a finding of specific Aboriginal rights on behalf of all Tsilhqot'in people. On the whole of the evidence, and in particular with respect to forestry and land use planning throughout the Claim Area, 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. For these reasons, and for the reasons earlier expressed, the Province has failed to justify its infringement of Tsilhqot'in Aboriginal title.

22. ABORIGINAL RIGHTS (Excluding Title)

a. Introduction

[1142] Earlier in these reasons I discussed the development of the modern concept of Aboriginal rights, focusing on one of those rights, Aboriginal title. It is helpful at this point to review and expand on that discussion as it relates to the additional Aboriginal rights that are claimed in this litigation: the right to hunt and trap and the right to trade skins and pelts obtained by hunting and trapping.

[1143] Section 35(1) of the ***Constitution Act, 1982*** contains a promise that Aboriginal rights are recognized and affirmed. The method through which that promise is to be fulfilled was left to governments and Aboriginal people to resolve, and if necessary, adjudicate.

b. Test for Aboriginal Rights

[1144] The first case to outline the framework for analyzing s. 35(1) claims was ***Sparrow***. Mr. Sparrow, a member of the Musqueam Band, was charged under the Federal ***Fisheries Act***, R.S.C., c. F-14, for fishing with a drift net longer than permitted by the terms of his band's food fishing licence. He admitted the facts alleged to constitute the offence but defended himself on the ground that he was exercising an existing s. 35 Aboriginal right to fish.

[1145] Both the trial judge and the county court judge in ***Sparrow*** followed the B.C. Court of Appeal's decision in ***Calder*** and held that Aboriginal rights no longer exist in this Province. The Court of Appeal disagreed and recognized an Aboriginal

right to fish for food. The Supreme Court of Canada agreed with the Court of Appeal.

[1146] The Supreme Court of Canada examined the history of Aboriginal claims prior to 1982 and emphasized the significance of the adoption of s. 35(1), quoting with approval from the article by Professor Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at 100, para. 54. It was clear that the Supreme Court of Canada was renouncing the old rules and opening the way for the development of the modern jurisprudence on Aboriginal rights.

[1147] In ***Van der Peet*** at para. 2, the Supreme Court of Canada summarized the four step analysis of a claim under s. 35(1) of the ***Constitution Act, 1982***, first presented in ***Sparrow***: The analysis is as follows:

1. determine whether an applicant has demonstrated that he or she was acting pursuant to an Aboriginal right;

2. determine whether that right was extinguished prior to the enactment of section 35(1);

3. determine whether that right has been infringed; and finally,

4. determine whether that infringement was justified, considering the specific factual context of the case.

[1148] On the evidence in ***Sparrow***, the Supreme Court of Canada recognized the appellant had an existing Aboriginal right to fish for food, or for ceremonial and social

purposes. This right had not been extinguished by previous regulations and should have been given priority over non-Aboriginal rights to fish. A new trial was ordered to allow the judge to apply an infringement and justification analysis to the net length restriction.

[1149] Due to the nature of the claims made in ***Sparrow***, the Supreme Court did not set out how a court is to define a s. 35(1) right. That issue was considered in ***Van der Peet***. In ***Van der Peet***, the Supreme Court of Canada succinctly explained the doctrine of Aboriginal rights at paras. 30-31:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose: the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[1150] The Court clearly indicated in **V*an der Peet*** at para. 74, that Aboriginal rights encompass but are not limited to Aboriginal title, and that Aboriginal rights arise out of both the prior occupation of land and the prior social organization of Aboriginal peoples:

> As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

[1151] In ***Adams*** the Supreme Court of Canada expanded on the definition of Aboriginal rights and the relationship between Aboriginal rights and title at paras. 26-27:

> … 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.
>
> 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.

[1152] In ***Adams*** the Court established a middle ground between Aboriginal rights *simpliciter* and Aboriginal title: site-specific Aboriginal rights. In ***Delgamuukw*** (S.C.C.) at para. 138, the Court further explained how its judgment in ***Adams*** set out a "spectrum" of Aboriginal rights:

> 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" (at para. 26 (emphasis in original)). 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. I put the point this way in *Adams*, at para. 30:
>
> > 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. [Emphasis added]
>
> At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices,

> customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.

[1153] In ***Van der Peet***, the Court set out the following test for Aboriginal rights at para. 46:

> In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[1154] The test for Aboriginal rights set out in ***Van der Peet*** and elaborated on in subsequent jurisprudence involves, in essence, four stages:

1. characterizing the claimed Aboriginal right;

2. establishing that the ancestors of the claimant Aboriginal group engaged in particular practices, customs or traditions prior to European contact that correspond with the claimed right;

3. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the Aboriginal group prior to European contact; and

4. determining whether there is continuity between the claimed Aboriginal right and the pre-contact practices, customs and traditions on which the right is based.

[1155] In ***Van der Peet*** at para. 49, Lamer C.J.C. emphasized that the perspective of the Aboriginal people claiming the right must be taken into account. That perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure". This means that sensitivity to the Aboriginal perspective has to be balanced with the common law perspective:

> Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again from Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

[1156] The Chief Justice concluded at para. 50 that:

> … the only fair and just reconciliation is … one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

c. Characterizing the Right

[1157] With these underlying considerations in mind, the first step in approaching a claim of Aboriginal rights is to properly characterize the right claimed. The focus is on ascertaining the true nature of the claim, rather than on assessing the merits of the claim or the evidence offered in support.

[1158] In ***Van der Peet*** the Court set out three factors to guide the characterization of a claim for an Aboriginal right: the nature of the activity undertaken pursuant to an Aboriginal right; the nature of the legislation or government action alleged to infringe the right; and "the ancestral traditions and practices relied upon to establish the right": at para. 53; see also ***Mitchell*** at para. 15.

[1159] Claims to Aboriginal rights must be characterized in context, on a specific rather than general basis, and must not be artificially broadened or narrowed. In ***Mitchell*** at para. 20, the Court noted that "narrowing the claim cannot narrow the aboriginal practice relied upon, which is what defines the right." The Court repeated this statement at para. 22 and added "[a]n aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise."

[1160] In ***Mitchell*** Chief Mitchell of the Akwesasne Mohawk people claimed the right to bring goods across the Canada - U.S. border without having to pay customs or duties. He also claimed the right to trade these goods with other First Nations. On appeal to the Supreme Court of Canada he sought to limit the scope of his claim by designating specific trading partners, specifically First Nations in Quebec and Ontario. The Court characterized these limitations as part of Chief Mitchell's strategy of negotiating with the government and minimizing the potential effects on its border control.

[1161] The trial judge characterized the right at issue in ***Mitchell*** as including a right to exchange in small, non-commercial scale trade. The Supreme Court held this artificially narrowed the right, and stated at para. 21 that the "right is best

characterized as a right to trade *simpliciter*." Chief Mitchell also denied that his claim entailed the right to pass freely over the border (i.e., mobility rights). The Court held that narrowing the claim could not narrow the Aboriginal right, and stated at para. 22 that "any finding of a trading right would also confirm a mobility right." The Supreme Court characterized the right claimed as "the right to bring goods across the St. Lawrence River for the purposes of trade": ***Mitchell*** at para. 25.

[1162] In ***Sappier; Gray*** the Court 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. In ***Sappier; Gray***, the defendants were charged with the unauthorized cutting, damaging, removing and possession of timber from Crown lands. In their defence they claimed an Aboriginal right to harvest timber for personal use. The Court found this characterization to be too general. The Court stated at paras. 24-26:

> … the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfil the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community.
>
> The word "domestic" qualifies the uses to which the harvested timber can be put …
>
> The right to harvest wood for domestic uses is a communal one. Section 35 recognizes and affirms existing aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the aboriginal right to harvest wood for domestic uses must be tied to this purpose. The right to harvest (which is distinct from the right to make personal use of the

> harvested product even though they are related) is not one to be exercised by any member of the aboriginal community independently of aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.

[1163] In ***Powley*** the Court indicated that hunting rights need not be characterized on a species-specific basis. In that case the two defendants had shot a bull moose without a valid license. They argued that they had an Aboriginal right to hunt for food. The Court characterized the right as "the right to hunt for food in the environs of Sault Ste. Marie": ***Powley*** at para. 19. The Court went on to state at para. 20 that: "[t]he relevant right is not to hunt moose but to hunt for food in the designated territory".

[1164] In Canada's submission, the Court's jurisprudence indicates that trading rights must be characterized in a species-specific manner. By way of example, Canada points out that in ***Gladstone***, the claimants established a right to trade herring spawn on kelp, rather than a right to trade all fish.

[1165] I disagree with Canada on this point. The Court has been silent on whether a right to trade must be characterized as species specific. In ***Gladstone*** the right claimed and the supporting evidence were entirely about herring spawn. In ***Van der Peet*** the defendant was charged after selling salmon but the right was characterized at para. 77 as "an aboriginal right to exchange fish for money or other goods" and not the right to exchange salmon for money. In ***Smokehouse*** the defendant was charged after selling and purchasing Chinook salmon caught under the authority of an Indian food fishing license. The right was characterized as "the

exchange of fish for money or other goods": ***Smokehouse*** at para. 26. In ***R. v. Marshall***, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513, the defendant was charged with catching and selling eels out of season. The treaty right was characterized as the right to obtain necessities through hunting and fishing.

d. Establishing the Ancestors of the Claimant Aboriginal Group Engaged in a Particular Practice, Custom or Tradition Prior to European Contact – Continuity Element

[1166] The function of the doctrine of Aboriginal rights is to reconcile the existence of pre-existing, distinctive Aboriginal societies with the sovereignty of the Crown. Thus, it is to those pre-existing societies that the courts must look in defining Aboriginal rights. The focus of the inquiry is on the time period prior to the arrival of Europeans. To this end, the Court stated in ***Van der Peet*** at para. 60:

> The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

[1167] In ***Sappier; Gray*** at para. 22, the Court again emphasized that Aboriginal claimants must lead evidence on a pre-contact practice, tradition or custom in order to establish an Aboriginal right:

> … The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically

> important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.

[1168] While Aboriginal rights claimants may rely on evidence of practices, customs and traditions post-contact, that evidence must "be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact": ***Van der Peet***, para. 62. In other words, post-contact evidence may be led but it must be demonstrably linked to pre-contact times. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims: ***Van der Peet*** at para. 68.

e. Integral to the Distinctive Culture

[1169] To satisfy the "distinctive culture" test, the Aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the Aboriginal society of which he or she is a part: ***Van der Peet*** at para. 55.

[1170] In ***Mitchell*** at para. 12, the Court succinctly summarized the distinctive culture test and what it means to be integral:

> The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in original)).

[1171] Most recently, in ***Sappier; Gray***, the Court discarded the notion that the pre-contact practice must go to the core of a society's identity. Likewise, the Court rejected the idea that the pre-contact practice must be a defining feature of the Aboriginal society, such that the culture would be fundamentally altered without it. The Court described the revised distinctive culture test and the integrality inquiry as follows, at paras. 40 and 45:

> … the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival.
>
> …
>
> The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes Aboriginal peoples" (J. Borrows and L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev*. 9, at p. 36).

[1172] The Court in ***Sappier; Gray*** at para. 38 specifically held that practices undertaken merely for survival purposes can be considered integral to the distinctive culture of an Aboriginal people:

> I can therefore find no jurisprudential authority to support the proposition that a practice undertaken merely for survival purposes cannot be considered integral to the distinctive culture of an aboriginal

> people. Rather, I find that the jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community.

[1173] In ***Sappier; Gray*** the Court also expanded upon another aspect of the distinctive culture or integrality test: the geographic limitation on site-specific rights. The Court emphasized there is a necessary geographic element of site-specific hunting and fishing rights and linked this element to the principle of integrality as follows, at paras. 50-51:

> This Court has imposed a site-specific requirement on the aboriginal hunting and fishing rights it recognized in *Adams*, *Côté*, *Mitchell*, and *Powley*. Lamer C.J. explained in *Adams* at para. 30 that
>
> > 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 on the tract of land in question. [Emphasis in original deleted.]
>
> The characterization of the claimed right in the present cases, as in *Adams*, *Côté* and *Mitchell*, imports a necessary geographical element, and its integrality to the Maliseet and Mi'kmaq cultures should be assessed on this basis: *Mitchell*, at para. 59. I agree with Robertson J.A. in the *Sappier* and *Polchies* decision that "[t]his result is hardly surprising once it is recognized that all harvesting activities are land and water based" (para. 50).

[1174] To date, the Supreme Court of Canada has avoided delineating the precise boundaries of claimed Aboriginal rights. This appears to be possible because the vast majority of Aboriginal rights cases before the courts arise in the context of regulatory prosecutions. In a regulatory prosecution, an Aboriginal right is raised as

a defence by the accused and the court need only determine whether the offence occurred within the general boundaries of the site. As a result, the Court has described the boundaries of site-specific rights very vaguely to date. Examples include:

- ***Côté***: "right to fish for food within the lakes and rivers of the territory of the Z.E.C": para. 56;
- ***Adams***: "right to fish for food in Lake St. Francis": para. 36;
- ***Powley***: "right to hunt for food in the environs of Sault Ste. Marie": para. 19; and
- ***Sappier; Gray***: "right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation": para. 53.

[1175] The case at bar is also about specific areas in the sense that a set of boundaries was selected for the purposes of this action. A declaration of rights within these boundaries does not preclude the existence of similar rights outside the boundaries. I have in mind the obvious fact that no person would suggest that in pre-contact times, Tsilhqot'in people hunted only on one side of the rivers that bound Tachelach'ed. They hunted, gathered and fished both sides of the rivers. However, for the purposes of this action, the Court is confined to a statement of the rights of Tsilhqot'in people within the boundaries of the Claim Areas. To that extent the declaration of rights is specific to particular land masses but not specific sites.

f. Continuity Between Claimed Rights and Pre-Contact Practices

[1176] In order for an activity to qualify as an Aboriginal right, the present practice, custom or tradition must have continuity with the practices, customs and traditions that existed prior to contact. In ***Van der Peet*** at para. 63, the Court stated:

> Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

[1177] The requirement of continuity in this context has two aspects. First, as set out above, the Court has noted the evidentiary difficulties facing Aboriginal rights claimants. The Court stated that evidence of post-contact practices, customs and traditions can be adduced to establish Aboriginal rights, provided that evidence is "directed at" and "rooted in" pre-contact aspects of the Aboriginal society in question: ***Van der Peet*** at para. 62. In other words, claimants must establish continuity between pre-contact and post-contact activities.

[1178] Second, the requirement of continuity ensures that the claimed right or modern manifestation of the pre-contact practice, custom or tradition can "evolve", but within limits. In ***Van der Peet***, the Court rejected the "frozen rights" approach at para. 64:

> The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow*, *supra*, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the

> means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

[1179] As such, pre-contact practices can evolve and establish modern Aboriginal rights, provided continuity between the modern right and pre-contact practices is demonstrated. Evolution, in the context of Aboriginal rights, refers to the same sort of activity, carried on in the modern economy by modern means. The practice is allowed to evolve, but the “activity must be essentially the same”: ***Marshall; Bernard*** at para. 25; ***Mitchell*** at para. 13; ***Sappier; Gray*** at para. 48. In other words, continuity allows the logical evolution of Aboriginal rights but within certain limits.

g. Date of Contact

[1180] In ***Van der Peet*** at para. 60, Lamer C.J.C. articulated the rule and the rationale for the requirement that Aboriginal rights must have their origin in pre-contact Aboriginal societies.

[1181] The Supreme Court of Canada recently re-affirmed the requirement that Aboriginal rights must be rooted in pre-contact practices, customs or traditions. In ***Sappier; Gray***, the Court stated the following at para. 34:

> It is settled law that the time period courts consider in determining whether the *Van der Peet* test has been met is the period prior to contact with the Europeans (see *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43, which modified the *Van der Peet* test insofar as it applies to the Métis although it affirmed it otherwise). As Lamer C.J. explained in *Van der Peet*, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land and prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights" (para. 60) …

[1182] The plaintiff argues that the date of contact should be determined with reference to the onset of sustained or meaningful contact between Europeans and the claimant Aboriginal group. In the plaintiff's submission, this offers a principled alternative to an approach that has the potential to crystallize Aboriginal rights at the moment of first contact. The plaintiff says that particular moment was of negligible cultural significance for many First Nations, including Tsilhqot'in people. In advancing this position, the plaintiff submits that the establishment of the Chilcotin Post in 1829 within the traditional territory of Tsilhqot'in people marks the onset of sustained contact between Tsilhqot'in people and Europeans.

[1183] The plaintiff points out that even this date demonstrates the problems associated with assuming that contact is synonymous with significant cultural change. In the plaintiff's submission, 1829 did not mark a cultural or historical watershed for Tsilhqot'in people. On the contrary, the engagement of Tsilhqot'in people with the fur trade, and Europeans generally, remained casual and conflict ridden for decades following the establishment of the trading post. Indeed, largely for this reason, the Hudson's Bay Company abandoned the Chilcotin Post in 1843. The remoteness of Tsilhqot'in people, by geography and by inclination, was such

that at the time of the Chilcotin War in 1864, Governor Seymour could still profess to the colony's "complete … ignorance" of Tsilhqot'in country and its inhabitants: Dispatch No. 37, Gov. F. Seymour to Colonial Office, 9 September, 1864.

[1184] For the purposes of this litigation the plaintiff is content to accept the date of first contact as 1829 because, in the plaintiff's submission, nothing turns on it. He says the evidence discloses that Tsilhqot'in people engaged in hunting and trapping for both sustenance and trade as an integral feature of their distinctive culture long before any contact with Europeans.

[1185] In ***Van der Peet*** Lamer C.J.C. did not set out the actual date of contact. However, in ***Gladstone*** (decided on the same day as ***Van der Peet***), the Chief Justice did refer to a date that was considered to be pre-contact. In ***Gladstone*** the Court referred to two pieces of historical evidence that recorded the trading of herring spawn. The first was an excerpt from Alexander Mackenzie's diary written in 1793. The second was from William Fraser Tolmie's 1834 diary. The Chief Justice said at para. 28:

> The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in "tons". While this evidence relates to trade post-contact, the diary of Alexander Mackenzie provides the link with pre-contact times …

[1186] It appears that the only cases in which the Supreme Court of Canada has determined a date of contact were ***Adams*** and ***Côté***. In both of those cases the arrival of Samuel de Champlain in 1603 was selected as the date of first contact between First Nations people and Europeans in the Province of Quebec.

[1187] British Columbia says that the date 1603 is a surprisingly specific one. It does not appear to have been selected because it marks a particular incident of actual contact between the ancestors of the modern day rights claimants and Europeans.

[1188] The rights claimant in ***Adams*** was a Mohawk person living on the Akwesasne reserve situated on the St. Lawrence River. The Mohawks were one of the tribes of the Iroquois Confederacy. The evidence suggested that the Iroquois were beginning to move into the portion of the St. Lawrence River upstream from Montreal around 1603. However, there was no evidence that Champlain actually encountered the ancestors of the rights claimant in ***Adams***.

[1189] The Chief Justice selected 1603 as the relevant date of contact because that was the year "when the French began to assume effective control over the territories of New France": ***Côté*** at para. 58; also see ***Adams*** at para. 46. In the submission of the Province, the focus must be on the word "began".

[1190] The Province says that with respect to the relationship between the visit of Champlain in 1603 and the French assumption of "effective control" over New France, the historical record is clear. Champlain was not the first European, or even French visitor to the area that was to become New France. Cartier had followed a very similar route almost 70 years earlier.

[1191] In the submission of British Columbia, Champlain's 1603 visit did not involve contact with the Mohawk people. His first contact with the Iroquois did not come until 1609 when he met them in battle. Nor did Champlain's visit in 1603 bring him

to the vicinity of the Gatineau River Valley which was the homeland of the Algonquin ancestors of the Aboriginal rights claimant in ***Côté*** who currently reside on the Maniwaki Reserve, 90 km north of Ottawa and 200 km east of Montreal. Champlain only reached the mouth of the Gatineau in 1615, during his exploration of the Ottawa River Valley. Champlain did not establish a settlement in New France until 1608. A permanent French settlement was not established on the Island of Montreal until 1642. There was a pre-existing Aboriginal settlement and a French fur trading post at that site for a number of years before the French settlement was officially founded.

[1192] The Province says that while Champlain visited the St. Lawrence River Valley in the interests of the French fur trade monopoly, that monopoly did not actually commence operations in New France until 1608. From 1604 to 1607, the monopoly confined its pursuit of the fur trade to Acadia.

[1193] The Jesuits were the first Christian missionary order to actively seek contact with Aboriginal people in New France. However, they did not arrive in the colony until 1625, twenty-two years after Champlain's initial visit.

[1194] In the submission of the Province, by applying the same date of contact to the ***Adams*** and ***Côté*** cases and relating that date to the beginning of the establishment of French control of New France, Lamer C.J.C. seems to suggest that a single date should be applied to the whole of the colony, without strict regard to the history of European colonization of particular regions.

[1195] Obviously, the “effective control” over New France by the French was virtually non-existent in 1603. Champlain’s first visit could only be seen as the start of a process that gradually led to effective control. He gained familiarity with the country, and as an excellent cartographer and prolific writer, showed the way for others to follow. Arguably, effective control by a European nation was not actually achieved in some of the hinterland areas of the colony until the assertion of British sovereignty over New France in 1763 or later.

[1196] In ***Mitchell*** the rights claimant was, like the claimant in ***Adams***, a Mohawk person living on the Akewsasne reserve. The trial judge appears to have regarded the 1609 battle near Lake Champlain, in which Champlain participated in support of the Iroquois’ enemies, as the decisive contact event. The majority decision written by McLachlin C.J.C. does not refer to the actual date of contact. Binnie J., in his concurring judgment, cites the trial judge’s finding, but makes no explicit comment as to its correctness: see ***Mitchell*** at para. 98.

[1197] In the more recent case of ***R. v. Sappier***, [2004] 4 C.N.L.R. 252, 2004 NBCA 56, the New Brunswick Court of Appeal accepted the common position of the parties that pre-contact activities dated from around 1500. Robertson J.A. took judicial notice of Cartier’s visit to Chaleur Bay between what is now New Brunswick and the Gaspé Peninsula in 1534: see ***Sappier*** (N.B.C.A.) at para. 74. The Supreme Court of Canada in ***Sappier; Gray***, while affirming the importance of the date of contact as part of the test for Aboriginal rights, did not comment on the actual date chosen in the courts below.

[1198] British Columbia submits that in light of the Supreme Court of Canada's treatment of the issue, 1793 is the appropriate date of contact for the entire mainland colony of British Columbia, and is the date that should be applied in this case.

[1199] In 1793, Alexander Mackenzie completed his journey through what is now mainland British Columbia to the Pacific, following the Peace, Fraser, and Blackwater (West Road) Rivers and emerging on the shores of Dean Channel, near present day Bella Coola. That same year Captain George Vancouver completed his survey of the mainland coast of what is now British Columbia as well as the southern Alaskan Panhandle.

[1200] Mackenzie and Vancouver were not the first Europeans to visit what is now British Columbia. Spanish, French, American, and possibly Russian sailors preceded them. However, these visits were mainly to the off-shore islands, and ultimately the Spanish, French, and Americans did not stay. The Russians remained on the northwest coast, but they were confined to what is now Alaska.

[1201] In terms of English visits, first there is the controversial evidence of Sir Francis Drake's alleged visit to the northwest coast in 1579. There is no doubt that Captain James Cook visited Nootka Sound in 1778. He was followed by other British sailors, such as James Hanna, James Strange, Nathaniel Portlock, George Dixon, and John Meares. The attention of these expeditions was concentrated on the islands off of the west coast, rather than what we now know to be the mainland of British Columbia.

[1202] As with Champlain in 1603, neither Mackenzie nor Vancouver established a post during their 1793 expeditions. They did pave the way for others to follow, producing detailed maps of their journeys and readable accounts of what they encountered.

[1203] Simon Fraser crossed the Rocky Mountains and began to establish trading posts in 1805. Fraser encountered Tsilhqot'in people in 1808, and enjoyed a far friendlier communication with them than Champlain did with the Iroquois in 1609. In the submission of the Province, Mackenzie and Vancouver began the process that led to British effective control over British Columbia, just as Champlain did for New France in 1603.

[1204] The Province acknowledges that it is unlikely Vancouver encountered any Tsilhqot'in people during his voyages of exploration. Mackenzie may or may not have encountered Tsilhqot'in people during his expedition. However, in the submission of the Province, the Supreme Court of Canada's analysis of the date of contact for New France indicates that actual contact with the claimant group is not a requirement in the determination of the date of contact.

[1205] Fixing the date of contact at 1829, the opening of Fort Chilcotin, would appear to be inconsistent with Lamer C.J.C.'s observations in ***Gladstone*** at paras. 27-28. I have already noted that the Court in ***Gladstone*** held that the information in Mackenzie's 1793 diary provided "the link with pre-contact times".

[1206] The caution given by Lamer C.J.C. in ***Van der Peet*** at para. 62 concerning the practical application of the date of contact requirement bears repeating:

> That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. 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.

[1207] To select the date of "effective control" would invite the Court to engage in an inquiry of what "effective control" means in the context of each individual Aboriginal group. In this case, on the evidence, I would not be able to conclude that the British had "effective control" of the Claim Area in 1829. As pointed out by the plaintiff, such control did not come until many years later.

[1208] A recent decision of Blair P.C.J. in ***R. v. Deneault et al.***, 2007 BCPC 307, concerned a Secwepemc Aborginal right to fish in the High Bar Area, near Clinton on the Fraser River. The trial judge noted the importance of determining the time of first contact. In setting first contact as a time before 1780, he concluded at para. 86 that "… pre-contact must mean the time before the introduction of the horse."

[1209] I acknowledge that the horse arrived from Europe. However, there is no evidence in this case to connect the arrival of horses in Tsilhqot'in territory with first European contact. I find that horses arrived in this area at a time that preceded the arrival of the first Europeans. Their use and enjoyment by Tsilhqot'in people was well established at the time of first contact.

[1210] ***R. v. Billy and Johnny***, 2006 BCPC 48, [2006] B.C.W.L.D. 2683, was a prosecution where two accused Tsilhqot'in persons sought to establish a Tsilhqot'in Aboriginal right to trade in salmon. Gordon P.C.J. found the date of first contact for the purposes of that case to be 1821, the date of merger of the HBC and the North West Company.

[1211] To be consistent with the approach taken by the Supreme Court of Canada in ***Adams*** and ***Côté***, the logical date of first contact in this case is 1793. While actual first contact did not occur until Simon Fraser met a group of Tsilhqot'in people in 1808, in the end, I do not think that anything turns on the passage of time between 1793 and 1808. The Tsilhqot'in people in the region lived a semi-nomadic life throughout the entire period, surviving by hunting, fishing, trapping, berry picking, root gathering, and trading with neighbouring Aboriginal groups. Consequently, the choice of the actual date of contact, as between these two years, is of no consequence.

[1212] The greater area surrounding Tsilhqot'in traditional territory was named New Caledonia by the fur traders of the HBC. On the evidence and on my reading of the authorities, I would fix the date of contact in New Caledonia at the year 1793.

23. TSILHQOT'IN ABORIGINAL RIGHTS (Excluding Title)

a. The Position of the Parties

[1213] The plaintiff claims Aboriginal rights on behalf of the Xeni Gwet'in people and the Tsilhqot'in Nation. In his final submissions, the plaintiff claims an Aboriginal right

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, inclusive of a right to capture and use horses for transportation and work. The plaintiff also claims an Aboriginal right to trade in furs, pelts and other animal products as a means of securing a moderate livelihood.

[1214] British Columbia argues that any Aboriginal rights to hunt and trap are held by the Xeni Gwet'in people, not the Tsilhqot'in Nation. British Columbia does not contest the right of Xeni Gwet'in people 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. British Columbia admits there is sufficient continuity between the present and pre-contact hunting and trapping practices of the Xeni Gwet'in people. However, British Columbia denies the Xeni Gwet'in people hold any right to capture horses for transportation and work.

[1215] British Columbia also says the plaintiff has failed to prove that hunting and trapping birds and animals for the purpose of trading their skins and pelts was integral to Xeni Gwet'in culture and therefore cannot qualify as an Aboriginal right. British Columbia says that a right to trade skins and pelts only exists under the authority of the provincially granted trapline.

[1216] In Canada's view, the proper rights holder is the Tsilhqot'in Nation. Canada admits the plaintiff's claim, on behalf of the Tsilhqot'in Nation, to hunt and trap throughout the Claim Area. Canada also admits there is sufficient continuity

between pre-contact and present day practices to support this claim. Canada denies the Tsilhqot'in people hold any rights to capture and use horses for work or transportation.

[1217] Canada also says the Court should refuse to declare an Aboriginal right to trade skins and pelts on the grounds that the plaintiff has failed to plead an infringement of that right. In the alternative, if an infringement was pleaded, Canada submits that the Tsilhqot'in people have only established an Aboriginal right to trade the skins and pelts of certain species that are hunted and trapped within the Claim Area for food.

[1218] Canada disagrees that pre-contact Tsilhqot'in trading practices included trade of all animal species hunted and trapped. They also disagree that pre-contact Tsilhqot'in trading practices consistently included trade for products other than food, or that pre-contact Tsilhqot'in trading practices allowed the Tsilhqot'in people to obtain a moderate livelihood. Similarly, Canada disagrees that any trade, other than the trade of skins and pelts of certain species for food, was integral to the distinctive culture of the Tsilhqot'in at the date of contact. As such, Canada submits that there is no basis on which to grant the Tsilhqot'in people a modern right to earn a moderate livelihood from trading in the products of hunting and trapping.

b. Proper Rights Holder

[1219] In the statement of claim, the plaintiff seeks a declaration of Aboriginal rights on behalf of the Xeni Gwet'in. In his final argument, the plaintiff seeks a declaration on behalf of the Xeni Gwet'in and the entire Tsilhqot'in Nation. British Columbia

says that the plaintiff is attempting to amend the statement of claim by widening the scope of any declaration of Aboriginal rights. Canada agrees with the plaintiff that the proper rights holder is the Tsilhqot'in Nation.

[1220] In the section of this judgment titled Ethnography, I discussed the socio-political structure of Tsilhqot'in people. 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.

[1222] I have already concluded the proper rights holder for the purposes of Aboriginal title and any other Aboriginal rights is the Tsilhqot'in Nation. Accordingly, any declarations must be of Tsilhqot'in Aboriginal rights.

c. Tsilhqot'in Right to Hunt and Trap

[1223] The Aboriginal right sought by the plaintiff may be characterized as the right 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. Both defendants admit the existence of this right. The plaintiff argues the right to hunt and trap includes the right to capture horses for

transportation and work. Both defendants say that the Aboriginal right does not extend to this practice.

[1224] The Chilcotin Plateau provides a home to bands of wild horses. The reported numbers vary but it is said that there may be as many as 100 wild horses within Tachelach'ed. Their numbers are said to exceed that in other parts of the plateau.

[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.

[1226] British Columbia argues there is no evidence showing that either the Tsilhqot'in or the Xeni Gwet'in peoples engaged in the capture of wild horses pre-contact. British Columbia also argues there is no evidence that horses were found in a wild state in the Claim Area or elsewhere in Tsilhqot'in traditional territory in pre-contact times. Following their introduction, horses became extremely valuable to Aboriginal cultures. It is submitted that, in pre-contact days, it is unlikely that any Aboriginal people would have allowed a significant number of horses to remain at large for a sufficiently long period of time to have become "wild".

[1227] Canada makes a different argument. Canada points out that the statement of claim alleges trapping and hunting of animals "for their own use". Canada argues this claimed right to hunt and trap animals does not logically encompass the capture and domestication of animals for any purpose. Accordingly, the inclusion of an Aboriginal right to "capture and use horses for transportation and work" is an attempt to improperly amend the statement of claim.

[1228] Tsilhqot'in witnesses acknowledge their ancestors did not enjoy the use of horses from time immemorial. They understand that horses are European in their origin. However, the plaintiff says that the capture and use of wild horses by Tsilhqot'in people occurred well before first contact.

[1229] I reject Canada's submission that the trapping and hunting of animals "for their own use" would not be inclusive of horses. A horse is an animal and the words "for their own use" cannot be limited to consumption. In its broadest sense, this phrase includes the use of animals for transportation and work.

[1230] The capture and use of wild horses by Tsilhqot'in people for transportation and work is an integral part of their present day culture. The real issue is whether the capture of wild horses by Tsilhqot'in people for transportation and work should properly be included in a declaration of Tsilhqot'in Aboriginal rights.

[1231] From the first reference to Tsilhqot'in people in June 1, 1808 and continuing over the subsequent decades, the historical documents mention the use of horses by Tsilhqot'in people. There is no evidence of any alteration or change in lifestyle

between the date of first contact in 1793 and 1808. It is fair to infer that there was pre-contact use of horses.

[1232] Indian Reserve Commissioner P. O'Reilly reported to the Supt. General of Indian Affairs on august 16, 1887, that the Tsilhqot'in "are good hunters and trappers, and living on the confines of a country abounding in game, large and small, they are able to make an easy livelihood." On October 14, 1899, another Reserve Commissioner, A.W. Vowell, reported that "[s]eventy Indians winter in the [Nemiah] valley … They claim to have 150 horses in the valley but own no cattle depending altogether for their living on hunting, trapping and fishing."

[1233] In 1909, James Teit described the existence of horses among the Tsilhqot'in as follows: "Horses were introduced at a much later date than amongst the Shuswap, and probably not before 1870 had they become common": *The Jesup North Pacific Expedition* at p. 783. Teit, at p. 535, noted there was a trade in horses from Canyon Secwepemc (Shuswap) people to Tsilhqot'in people "in later days."

[1234] The historical documents do not refer to *wild* horses. The HBC records and the notes and journals written by missionaries and railway surveyors do not report the presence of *wild* horses in the Claim Area. I did not hear any oral history or oral tradition evidence that relates to *wild* horses. Despite this lack of evidence, it is clear from the observations of Simon Fraser that, in the early nineteenth century, Tsilhqot'in people were already using horses. Teit appears to have overlooked or been unaware of this historical evidence as he makes no reference to it.

[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. As R.P. Bishop noted in a letter dated December 31, 1922 addressed to J.E. Umbach, the Surveyor General "… they [Tsilhqot'in people] are born horsemen and do not like going where they cannot ride."

[1236] If I am wrong in my conclusion that wild horses were in the Claim Area and in use by Tsilhqot'in people in pre-contact times, there remains another reason why their capture and use should be included in any declaration of Tsilhqot'in rights. In pre-contact times, Tsilhqot'in people lived and survived entirely from the plants and animals the land provided. Due to climate change and other environmental factors, the bio-diversity of the region is in constant change. Two examples are worth recording.

[1237] The first is a modern day example of change. The pine forests are currently being devastated by an infestation of mountain pine beetle. When the pine trees are gone, Tsilhqot'in people will no longer be able to use this tree and its products. Some other substitute or substitutes will have to be found. The protection these trees provide to certain animal species may result in further adjustments for Tsilhqot'in people as species are lost or move on, possibly to be replaced by others.

[1238] The second example of change is one that took place in the early part of the twentieth century. Until about the first quarter of that century, Tsilhqot'in people obtained food and clothing by hunting caribou. That animal species has migrated north and is no longer found in the Claim Area. It has been replaced by moose. There is no suggestion that the right to hunt for moose should not be included in any declaration of Tsilhqot'in Aboriginal right merely because moose were apparently not in the Claim Area in abundance in the late eighteenth century.

[1239] If wild horses moved into the Claim Area at some later period, their use by Tsilhqot'in people should be no different than the taking of moose. The horse is an animal provided to the Tsilhqot'in people by the land. The capture of horses for transportation and work is a contemporary extension of the pre-contact right the Tsilhqot'in people had to use plants and hunt and trap animals in the Claim Area for their subsistence and livelihood. It is an example of pre-contact practices evolving to establish a modern right: ***Marshall; Bernard; Sappier; Gray***.

[1240] The proper characterization of the right is: 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.

[1241] I conclude that the ancestors of the Tsilhqot'in people engaged in that right and that it was integral to their distinctive culture.

d. Tsilhqot’in Right to Trade

[1242] In the statement of claim the plaintiff alleges that “[b]efore 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”. The prayer for relief seeks declarations that the Xeni Gwet’in people have an existing Aboriginal right to carry on trapping activities, including trading in skins and pelts, in the Brittany Triangle and Trapline Territories.

[1243] An analysis of the statement of claim leaves me with no doubt that an infringement of all Aboriginal rights claimed by the plaintiff has also been pleaded. See, for example: amended statement of claim at paras. 17-19 and 22-26.

[1244] In his argument, the plaintiff seeks a declaration of an Aboriginal right to trade in furs, pelts and other products of hunting and trapping animals in the Claim Area. The plaintiff says the right is best characterized as a right to obtain a moderate livelihood from trading in the products of hunting and trapping.

[1245] British Columbia says no right to trade has been established. Canada says, if there is a right, it should be delineated in accordance with pre-contact Aboriginal practices and is limited to skins and pelts by the pleadings. If any Aboriginal right to trade exists, Canada says the right must be species specific and, in that regard, relies on the Supreme Court of Canada decision in ***Gladstone***.

[1246] This Aboriginal right is properly characterized as a right to trade skins and pelts as a means to secure a moderate livelihood. In my view, the case law does

not support Canada's argument that this right must be restricted to specific species of animals. I find that such an approach would unduly frustrate the modern expression of this Aboriginal right.

[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.

[1250] Historically, Tsilhqot'in people did not engage in a brisk trade with the HBC. One of the potential reasons for this reluctance was that the Tsilhqot'in people's

principal interest lay in trading for salmon. They could not obtain salmon from the HBC and, in fact, competed with the HBC to find sufficient salmon for survival purposes. The HBC had European goods to offer and when the Tsilhqot'in people required these products, they were willing to trade. The Tsilhqot'in people's primary trading partners were their Aboriginal neighbours to the east and west.

[1251] Tsilhqot'in people had essentially two trading partners, the Canyon Secwepemc (Shuswap) people (and through them to other Secwepemc) and the Nuxalk (Bella Coola) people (and through them to other coastal peoples). To the south and north, there was considerable friction between Tsilhqot'in people and the Stl'atl'imx (Lillooet), Qaju (Homalco) and Dakelh (Carrier) peoples. There may have been isolated incidents of trade with these other nations, but they never reached the same level of trade as with the Nuxalk and Canyon Secwepemc.

[1252] In his ethnography of the Secwepemc published in *The Jesup North Pacific Expedition*, James Teit described the nature and scale of trade between the Tsilhqot'in and the Secwepemc as follows at p. 535:

> The Caňon division were the greatest traders, and acted as middlemen between the other Shuswap bands and the Chilcotin, whom they would not allow to trade directly with one another. They bought the products of both, and exchanged them at a profit. They controlled part of the Chilcotin salmon supply, and the Chilcotin traded extensively with them.
>
> … From the Chilcotin they received large quantities of dentalium-shells, some woven goat's-hair blankets and belts, bales of dressed marmot-skins, a few rabbit-skin robes, a few snowshoes of the best type, and in fact anything of value they had to give. In exchange they gave chiefly dried salmon and salmon-oil, some woven baskets of the best type, paint, and in later days horses.

[1253] It is interesting to note that Tsilhqot'in people were known to their Canyon Secwepemc neighbours as the "dentalia people". Dentalium is a genus of marine mollusk that has a tubular or conical shell. These shells could only be obtained from the coast. They were used in Aboriginal societies as a medium for exchange and as a status or wealth symbol. The trade in dentalium demonstrates how the Tsilhqot'in people were the middle men between the Nuxalk people and Canyon Secwepemc people.

[1254] Teit elaborated on the Tsilhqot'in trade relationships in his "Notes on the Chilcotin Indians" found in *The Jesup North Pacific Expedition* at p. 783:

> Trade was carried on chiefly with the Bella Coola and the Canon Division of the Shuswap … From the Shuswap the tribe obtained dried salmon, said to be superior to that procured from the Bella Coola, salmon-oil, red paint, deer and elk skins some bark thread, and in later days tobacco and horses; also part of the Chilcotin supply of copper and iron seems to have been obtained from the Shuswap. They gave the [Shuswap] in return dentalium-shells, goat's wool blankets, woven rabbit and lynx skin blankets, dressed caribou-skin, raw marmot-skins.

[1255] In his report to the Court, historian Dr. Kenneth Coates, discussed the trade relationships between the Tsilhqot'in and the Nuxalk people. Dr. Coates relied upon the following observations of Dr. David Dinwoodie contained in his book entitled *Reserve Memories: The Power of the Past in a Chilcotin Community* (Lincoln: University of Nebraska Press, 2002) at pp. 13-15:

> An integral dimension of the traditional patterns, it seems involved transporting hides and horns from the high country over the mountains to the Bella Coola. Such journeys were frequently followed by lengthy visits, with people sometimes staying for entire winters. Food, lodging, and goodwill could be purchased with desirables such as mountain goat horns and various assorted hides. In addition, the Chilcotin could

> contribute to Coastal life by serving as enthusiastic and appreciative audience members for winter ceremonies.

[1256] The evidence of Tsilhqot'in people who testified at trial leads me to conclude that trade, particularly with the Nuxalk people, continued well into the last century and to a limited extent continues to this day.

[1257] For Tsilhqot'in people, trade was never about the accumulation of wealth. Trade with their neighbours was motivated by survival. Salmon was and remains a staple of the Tsilhqot'in diet. Salmon runs in the various rivers and streams, upon which Tsilhqot'in people depended, were not consistent, ranging from excellent to none at all. Thus, trade for salmon was vital in those years when the salmon runs failed to produce sufficient quantities. There is historical evidence that entire groups of Tsilhqot'in people left their traditional land and wintered with the people on the coast in those years of salmon drought. The Nuxalk provided both food and permission to lodge with their people. In return, they were paid with furs, root plants, berries and other commodities.

[1258] I note that any movement to the coast was a movement for survival purposes and was never intended as an abandonment of traditional territory. It was a cyclical phenomenon, driven by the strength of the salmon runs. It was as much a part of Tsilhqot'in semi-nomadic existence on the land as was their movement about the Claim Area to acquire whatever nature had to offer them.

[1259] Earlier, I noted that in ***Van der Peet***, the Supreme Court of Canada set out a test for determining whether a particular Aboriginal activity is protected as an Aboriginal right.

[1260] An applicant must satisfy the crucial elements of that test. Lamer C.J.C. in ***Van der Peet*** at para. 46 stated:

> … in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[1261] The defendants acknowledge the importance of coastal trading relations for Tsilhqot'in people as a means of obtaining salmon resources, particularly in times of a low return or even a collapse in the salmon fishery. The plaintiff says the defendants have overstated the reliance of Tsilhqot'in people on this strategy, but does acknowledge that such trade was a key element of the traditional Tsilhqot'in pattern of survival.

[1262] In ***Sappier; Gray***, the Supreme Court of Canada concluded that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture threshold.

[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 twentied century, was more than sufficient to meet the tests of cultural integrality set out by the Supreme Court of Canada.

[1264] In ***Marshall*** (S.C.C.) Binnie J., for the majority, said at para. 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 (*Gladstone*, *supra*, 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.

[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 acestors engaged in that right and that it was integral to their distinctive culture.

e. Continuity

[1266] In ***Marshall; Bernard***, McLachlin C.J.C. said at para. 67:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more

> restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices.

[1267] I am satisfied that the hunting, trapping and trading practices of Tsilhqot'in people represent a modern expression of those activities as practiced by Tsilhqot'in people prior to contact with European people.

[1268] In addition, the evidence leads to but one conclusion, namely that Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day.

24. INFRINGEMENTS OF ABORIGINAL RIGHTS

a. Introduction

[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.

[1271] The question for the Court is whether forest harvesting activities pursuant to the relevant forestry legislation are an infringement on Tsilhqot'in Aboriginal rights to hunt, trap and trade.

b. General Principles

[1272] The legal principles that apply here are found in the section on infringement of Aboriginal tile. Those principles apply equally to other Aboriginal rights.

[1273] It is worth repeating that in ***Sparrow***, Dickson C.J.C. and La Forest J., for the Court, stated at p. 1078:

> 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. Is the limitation unreasonable? Does the regulation impose undue hardship? 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.
>
> Here, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. 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. 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.

[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.

c. Application

[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.

[1277] This depletion in species and abundance is caused primarily by road development and habitat loss. This was the evidence from expert witnesses and lay witnesses. Trappers and hunters report a loss of animals after the occurrence of logging.

[1278] Road building opens up areas to industrial and recreational use. The consequence is an increase in wildlife mortality and species decline. There is also the risk of direct collision with animals and machinery. Roads can lead to increased competition between species and to habitat fragmentation which restricts habitat movements. Some animals are not comfortable moving without cover; others will use the roads placing themselves at increased risk. It can take decades for a road

to disappear as forests have difficulty in regenerating where the soil has been compacted.

[1279] Dry climate and poor soil make regeneration in parts of the Claim Area very difficult. Tree removal directly impacts the size and productivity of wildlife habitats and it can take decades for regeneration to reach a level that is again suitable for wildlife habitat.

[1280] Silviculture activities are designed to increase productivity of selected trees by reducing competition for light, water and soil nutrients. Thinning and other silviculture practices are designed to increase the production of wood fibre. The higher stem densities in natural growth pine forests create a preferred habitat for snowshoe hare. This is a key species that is depended upon by fisher, marten and lynx. Thus, a highly productive pine forest enjoying all the benefits of modern silviculture practices is not an appropriate habitat for some wildlife species.

[1281] Coarse woody debris is the term applied to snags (standing dead trees), logs and stumps that occur naturally in a forest. In the context of forest harvesting, it also refers to the detritus created during harvesting and is thus inclusive of branches, roots and non-merchantable logs. Coarse woody debris is an important component in forest habitat, providing resting and den sites, access points to areas below the snow, and cover from avian predators. Large, standing snags provide den sites for furbearers and bird species.

[1282] There is tension between the economic interests and administrative burdens imposed on the forest industry, and the need to leave sufficient coarse, woody

debris after harvesting to meet the needs of wildlife that require suitable habitat. Fines are imposed when harvesting activities leave too much wood on the ground; foresters are pressured to leave a "clean site".

[1283] Logging also impacts an area's hydrology. Clear cuts change the patterns of snow accumulation and melt. They increase annual water yields, change the timing and amount of peak flows, and increase late summer soil moisture and stream flow due to reduced summer evapotranspiration. Soil compaction from heavy machinery also reduces the infiltration capacity of the soil and increases run-off from rain and snow melt.

[1284] Roads and ditches change the hydrological regime resulting in a faster stream response to snow melt and rainfall. Increased peak flows affect fish-spawning habitat. An increase in sediment deposits in lakes and wetlands can also have a negative impact on aquatic and riparian species that live in these areas.

[1285] The ***Ministry of Forests and Range Act,*** R.S.B.C. 1996, c. 300, s. 4 reads as follows:

> **4** The purposes and functions of the ministry are, under the direction of the minister, to do the following:
>
> (a) encourage maximum productivity of the forest and range resources in British Columbia;
>
> (b) manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long term economic and social benefits they may confer on British Columbia;

> (c) plan the use of the forest and range resources of the government, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the government and with the private sector;
>
> (d) encourage a vigorous, efficient and world competitive
>
> i) timber processing industry, and
>
> ii) ranging sector
>
> in British Columbia;
>
> (e) assert the financial interest of the government in its forest and range resources in a systematic and equitable manner.

[1286] Despite the presence of s. 4 (c), there is no doubt that the Ministry seeks to maximize the economic return from provincial forests. On the evidence I heard during this trial, the protection and preservation of wildlife for the continued well-being of Aboriginal people is very low on the scale of priorities.

[1287] There is wide diversity in the wildlife found in the Claim Area. This diversity creates a demand for differing habitat. Wildlife in the Claim Area includes horses, marten, fisher, wolverine, river otter, mink, long tailed weasel, short tailed weasel (ermine), lynx, bobcat, mountain lion, mule deer, moose, California big sheep, mountain goat, snowshoe hare, red squirrel, northern flying squirrel, beaver, muskrat, grizzly bear, black bear, grey wolf, and voles. All of these species are dependant on forest cover. They are also dependant on each other. For example, marten will feed on voles, mountain lion on ungulates, in particular the mule deer,

and lynx will feed on snowshoe hares. The maintenance and well being of this delicate interdependency rests on sufficient forest habitat.

[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.

25. JUSTIFICATION OF INFRINGEMENTS OF ABORIGINAL RIGHTS

[1289] British Columbia's forestry legislation is constitutionally applicable to land over which the Tsilhqot'in people have Aboriginal rights to hunt, trap and trade. The application of that legislation infringes those rights. I now turn to a consideration of whether that infringement is justified.

[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.

[1292] In ***Gladstone*** the Court offered the following guidance on assessing the reasonableness of government actions at para. 63:

> The content of this priority – something less than exclusivity but which nonetheless gives priority to the aboriginal right – must remain somewhat vague pending consideration of the government's actions in specific cases. … priority under *Sparrow*'s justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights. Under the minimal impairment branch of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), where the government is balancing the interests of competing groups, the court does not scrutinize the government's actions so as to determine whether the government took the least rights-impairing action possible; instead the court considers the reasonableness of the government's actions, taking into account the need to assess "conflicting scientific evidence and differing justified demands on scarce resources" (*Irwin Toy*, *supra*, at p. 993). Similarly, under *Sparrow*'s priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.

[1293] At present, British Columbia does not have a database that provides information on the individual species of wildlife or their numbers in the Claim Area. The Province has not conducted a needs analysis which would inform decision makers on the needs of the Tsilhqot'in people related to their hunting, trapping and trading rights. Such an analysis would ensure those needs are addressed when planning and conducting forestry activities. The absence of a database or a needs

analysis indicates that Tsilhqot'in Aboriginal rights in the Claim Area are not a priority with respect to timber harvesting and other forestry activities.

[1294] Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. 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 siviculture 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.

26. FORESTRY REGIME – SUSTAINABILITY

[1295] While the relief sought relates to Aboriginal rights, including Aboriginal title, this case had its genesis in the forests of the Claim Area. The initial flash point was clear-cut logging in the Western Trapline territory. This was followed by a blockade at Henry's Crossing where a forest company was preparing to log areas of Tachelach'ed (Brittany Triangle). The claims made here were initially launched to stop the logging for essentially three reasons. First, the proposed logging was to take place on land which Tsilhqot'in people believe they hold title and rights. Second, Tsilhqot'in people felt that any logging would be a taking of their property.

Third, any logging would have a severe impact on the wildlife and accordingly, on Tsilhqot'in hunting and trapping activities. Eventually, a claim was added to seek compensation for the timber removed over the past decades.

[1296] Dr. Kimmins provided the court with a helpful report entitled "Sustainability in the Xeni Gwet'in Claim Area" (15 March 2006). Dr. Kimmins stated at p. 17:

> It is an article of faith for most foresters that they are practicing sustainable management. For most of the history of forestry this has mainly meant timber management, although the historical origins of forestry were as much concerned with sustaining wildlife species (mainly game species) or water supplies. …

[1297] The forests of the Claim Area are largely comprised of pine, spruce and Douglas fir species. The most prevalent species is pine. The report noted at p. 36 that "[f]ire has historically been the major disturbance factor over much of the Chilcotin plateau". In the result, there emerged large areas of "relatively pure, even aged lodgepole pine". Dr. Kimmins pointed out at p. 36:

> Fire exclusion or reduction over the past 50 years, coupled with a relaxation of one of the major controls of the mountain pine beetle (MPB) — low winter temperatures — has altered this situation. The largest epidemic of MPB in recorded history or memory has affected many millions of hectares of pine forest in the interior of B.C. This epidemic has grown to the point at which the traditional prime target of the beetle — large old lodgepole pine trees — has been modified to include younger trees, which means that younger forest and regenerating trees are also being attacked.

[1298] It is clear the pine forests will be lost unless there is a return to colder winters, a prospect that seems unlikely in this age of global warming. Thus, the forest cover will be in transition for generations, posing new challenges for those who seek

sustainable management of this resource. Dr. Kimmins pointed out at p. 9 that "[i]n common with many aspects of forest ecosystems — such as ecosystem integrity, health, and biodiversity — there are many dimensions to the concept of sustainability". He elaborated on some of the features of sustainability at pp. 15-17, as follows:

- sustainability does not refer to a lack of change, as humans and the environment are in a constant state of flux;
- the concept of sustainability includes the biological components of ecosystems (i.e. plants, animals, microbes) as well as the physical components of ecosystems (i.e. soil, geology, topography, climate, physical disturbance factors). In addition, the meaning of sustainability encompasses and is affected by ever-changing human social values (i.e. health, standards of living, spirituality, happiness, culture);
- sustainability must reflect the fact that the types of species that live within ecosystems, as well as ecosystem structures, are constantly changing for a variety of reasons;
- sustainability should be assessed at the larger "landscape-level", rather than at the "stand-level" in order to "encompass the spatial scale of the major disturbances that characterize that ecological region";
- sustainability must be assessed on a long-term basis;
- sustainability will be impossible to achieve if the human population continues to grow, and/or there is an ongoing increase in the per capita impact of humans on the environment;
- sustainability cannot occur if we maintain our dependence on non-renewable energy and other resources.

[1299] At p. 39 of his report, Dr. Kimmins stated:

> The approach to biophysical sustainability popular in British Columbia today is dominated by the "coarse filter" approach of managing forest to create a landscape mosaic of stand ages and conditions in a pattern that it is hoped will provide for the habitat needs of native wildlife. The difficulty with this is that it is unlikely that any particular landscape

> pattern is ever repeated over time under the influence of natural disturbance. While repeatable patterns do occur as a result of soil, topography and stand conditions that influence the landscape pattern of average severity future disturbances, under severe fire conditions and major insect epidemics disturbance appears to ignore the existing patterns. Thus, while a particular pattern may persist through a few disturbance cycles, the periodic severe disturbance events that occur, and may occur with increasing frequency as climates change, will reset the landscape pattern. The present MPB outbreak is an example of this.

[1300] Dr. Kimmins also noted at p. 38 that continual change in the western Chilcotin area has "rendered definition of sustainability complex; the values that are to be sustained have changed. Values that the First Nations would have sought included game species for food and furs, fish, medicinal plants, fungi, and other tree-related and non-tree values." With the arrival of European settlers, other values intervened.

[1301] My assessment of the evidence leads me to conclude that provincial foresters do practice sustainable management, within a narrow definition of sustainability. The main focus is on timber management and sustainability of the forest resource. Other government Ministries and agencies focus on other sustainability issues such as environment, land, wildlife and water. There is no single government agency that views sustainability through a broad lens, taking into account the values of the people affected by government decisions. Any model of sustainability that is driven solely by an economic engine is deficient if it is incapable of taking into account social values. This is particularly true where the model of sustainability affects Aboriginal people whose social values are so intricately connected to the land.

27. FIDUCIARY DUTY / HONOUR OF THE CROWN

[1302] Both the plaintiff and British Columbia advanced arguments on the subject of breach of fiduciary duty and the honour of the Crown. In ***Blueberry River Indian Band v. Canada***, [1995] 4 S.C.R. 344, McLachlin J. (as she then was), writing on behalf of the minority, provided the following explanation for the basis of a fiduciary relationship at para. 38:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[1303] In my view, there is no need to consider breach of fiduciary duty based on the facts and context of this case. In ***Wewaykum Indian Band v. Canada***, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 83, the Supreme Court of Canada explained that:

> … not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown has assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[1304] I find that in this case it is sufficient to go no further than a consideration of the duty to consult, grounded in the honour of the Crown. In ***Haida Nation*** McLachlin C.J.C. explained at paras. 16 and 18:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> … .
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interests at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connoate a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > … "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship … overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

[1305] In the pre-proof stage, where Aboriginal rights and title have not yet been proven, the "Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aborignal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title": ***Haida Nation*** at para. 18.

[1306] In ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*** [2005] S.C.R. 338, 2005 SCC 69 the federal government approved a winter road which was to run through the Mikisew reserve. The government did not engage the Mikisew people in direct consultation before approving the road. After the Mikisew people protested, the government altered the road alignment. The alternate road crossed a number of traplines and affected the hunting grounds of approximately 100 Mikisew people. The Mikisew are beneficiaries of Treaty 8 which provides the right to hunt, trap and fish on treaty lands. The Court found that the proposed road would injuriously affect the exercise of those rights. The Treaty contemplated that portions of the surrendered land would be "taken up from time to time for settlement, mining, lumbering, trading or other purposes": ***Mikisew Cree*** at para. 30. However the Court at para. 31 found "the Crown was and is expected to manage the change honourably". Binnie J., for the Court, said at para. 51:

> The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

[1307] For these reasons I decline to consider the issue of a breach of fiduciary duty. My consideration of the duty to consult and honour of the Crown with respect to Aboriginal title is found in Section 21. The duty to consult with respect to Aboriginal rights is discussed in Section 25.

28. LIMITATIONS, LACHES AND CROWN IMMUNITY

[1308] I have found that British Columbia's forest development activities have unjustifiably infringed the plaintiff's Aboriginal title and Aboriginal rights. British Columbia pleads that:

> (a) insofar as those infringements are alleged to have been related to the claimed Aboriginal rights within the Trapline Territory, such causes of action as arose prior to 18 April, 1984 are barred by the passage of time,
>
> (b) insofar as those infringements are alleged to have been related to the claimed Aboriginal title within the Trapline Territory, such causes of action as arose prior to 26 April, 1993 are barred by the passage of time,
>
> (c) insofar as those infringements are alleged to have been related to the claimed Aboriginal title and Aboriginal rights within the Brittany, such causes of action as arose prior to 18 December, 1992 are barred by the passage of time:
>
> and in respect of all such claims enumerated in subparagraphs (a), (b), and (c) the Provincial Defendants plead and rely upon:
>
> (d) the *Statute of Limitations,* R.S.B.C. 1960, c 370, s. 3, 16, 30 and 41; the *Limitation Act,* S.B.C. 1975, c. 37, s. 3, 14 and 18; the *Limitation Act,* R.S.B.C. 1979, c. 236, s. 3, 14; and the *Limitation Act,* R.S.B.C. 1996, c. 266, s. 3, 14; and
>
> (e) in the alternative, upon the legislative provisions enumerated in subparagraph (d) as incorporated by reference into federal law, and made applicable by the *Indian Act,* R.S.C. 1952, c 149, s. 87; the *Indian Act,*

R.S.C. 1970, c. 1-6, s. 88, and the *Indian Act,* R.S.C. 1985, c. 1-5, s.88; and

(f) in the further alternative, upon the *Limitation Act, 1623* (U.K.), 21 Jac. 1, c. 16, s. 3; the *Real Property Limitation Act, 1833* (U.K.) 3 & 4 Will. 4, c. 27, ss. 2, 17 and 34; the *English Law Ordinance, 1867,* S.B.C. 1867, c. 7, s. 2; the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 129; and the *British Columbia Terms of Union,* 1871, s. 10.

[1309] British Columbia also pleads laches in response to the plaintiff's claims of infringement of Aboriginal title and Aboriginal rights, breaches of fiduciary duty and fiduciary obligations and the claim for damages.

[1310] It is important to note that the limitations defence is limited to the plaintiff's claim for infringement of Aboriginal title and rights. The Crown immunity defence is limited to the claims for breach of fiduciary duty and fiduciary obligations. The laches defence is directed to all of the foregoing, as well as the claim for damages.

a. Limitations

[1311] British Columbia argues that provincial limitations legislation is constitutionally applicable to Indians as litigants and relies upon ***M.M. v. Roman Catholic Church of Canada*****,** (2001) 205 D.L.R. (4th) 253, 2001 MBCA 148, clarified (2002) 208 D.L.R. (4th) 190, 2002 MBCA 12, leave to appeal to the Supreme Court of Canada denied October 24, 2002, 184 Man. R. (2d) 319 (note), [2002] S.C.C.A. No. 8; ***Chippewas of Sarnia Band v. Canada (Attorney General)*** (2001), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 (Ont. C.A.), at para. 241, leave to appeal to the Supreme Court of Canada denied [2001] 4 C.N.L.R. iv (note), [2001] S.C.C.A. No. 63; ***Stoney***

Tribal Council v. PanCanadian Petroleum Limited (2000), 2 W.W.R. 442, 2000 ABCA 209.

[1312] The issue here is whether the provincial limitations legislation is constitutionally applicable to a claim for infringement of Aboriginal title and rights. If the infringement can be justified, there is no claim and the limitation period will not apply. For this reason, the issue is narrowed to the application of the provisions of the ***Limitation Act*** to claims for unjustified infringement of Aboriginal rights, including Aboriginal title.

[1313] The four-step analysis set out in ***Morris***, discussed above in Section 19, is applicable to a consideration of the provisions of the ***Limitation Act.*** With respect to step one, the ***Limitation Act*** is valid provincial legislation and is not directed at any federal head of power. With respect to step two, there is no conflicting federal legislation. The real issue is whether the ***Limitation Act*** affects the core of a federal head of power.

[1314] For the reasons I have already discussed in the section on constitutional issues, I conclude that British Columbia's ***Limitation Act*** is constitutionally inapplicable to claims for unjustified infringement of Aboriginal title. To conclude that the ***Limitation Act*** applies to such a claim would mean that with the passage of time and the application of the provisions of the ***Act***, the Province could effectively extinguish Aboriginal title. Granting the Province the ability to extinguish Aboriginal title is contrary to law. Provincial laws that affect Aboriginal title lands go to the core of Indianness and do not apply to those lands. This is true even though the law

purports to be of general application. In ***Delgamuukw*** Lamer C.J.C. said at paras. 177-178:

> The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction — whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a "core" of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.
>
> It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

[1315] In ***Stoney Creek Indian Band v. British Columbia*****,** [1999] 1 C.N.L.R. 192, 61 B.C.L.R. (3d) 131 (B.C.S.C.), Lysyk J. concluded that the ***Limitation Act*** did not apply to a claim for damages made by an Indian band arising out of the construction of a road across reserve land. While acknowledging the law in this area was not settled, Lysyk J. said at para. 69:

> … the right to claim damages for interference with Indian reserve lands not only rests upon the right to possession of those lands, but is sufficiently integral to such possession as to share the same

> characterization for constitutional purposes. Therefore, the provisions of the Act upon which Alcan relies are constitutionally inapplicable.

[1316] An appeal from this decision was allowed on the ground that it was not a proper case for disposition under the provisions of Rule 18A of the Rules of Court.

[1317] The "scope of federal jurisdiction over Indians … encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1)": ***Delgamuukw*** (S.C.C.) at para. 178. It follows that an unjustified infringement of a constitutionally protected Aboriginal right falls under the same protective umbrella. For these reasons, I conclude that but for s. 88 of the ***Indian Act***, the provincial ***Limitation Act*** is constitutionally inapplicable to a claim for unjustified infringement of Aboriginal rights.

[1318] The final step in the ***Morris*** analysis calls for a consideration of s. 88 of the ***Indian Act***. For the reasons I have already discussed in Section 19 of this judgment, s. 88 of the ***Indian Act*** does not apply to Aboriginal title, infringement of Aboriginal title or to compensation for infringement of Aboriginal title.

[1319] Aboriginal rights apart from title are a core federal matter under s. 91(24) of the ***Constitution Act, 1867***. Section 88 of the ***Indian Act*** makes provincial "laws of general application … applicable to and in respect of Indians in the province …". The exceptions referred to in s. 88 do not apply in this instance and accordingly, I conclude that s. 88 does constitutionally invigorate the ***Limitation Act***. As a result, the ***Limitation Act*** applies to claims of unjustified infringement of an Aboriginal right other than Aboriginal title. The principle of discoverability would be applicable and

the limitation period would run only from the date when a party became aware of a cause of action. Accordingly, the period would begin to run from the time of the decision in ***Sparrow,*** namely May 31, 1990.

[1320] Section 3(5) of the ***Limitation Act*** sets out the applicable limitation period as follows:

> Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

[1321] Accordingly, the claims advanced in this case for unjustified infringement of Tsilhqot'in Aboriginal rights in the Trapline Territory are not statute barred because the action with respect to those claims was brought before the expiration of the limitation period. As the Brittany Triangle Action was not commenced until December 18, 1998, any claim for unjustified infringement of Tsilhqot'in Aboriginal rights in Tachelach'ed (Brittany Triangle) that arose prior to December 17, 1992 are statute barred.

[1322] The decisions relied on by British Columbia, ***M.M.*** and ***Stoney Tribal Council***, do not address Aboriginal title or Aboriginal rights. The first was an action for damages, the second, an action for an accounting and judgment for monies found to be due and owing. Neither went to any issues touching on the core of Indianness.

[1323] ***Chippewas of Sarnia*** is not an authority for the general proposition which British Columbia asserts. In ***Chippewas of Sarnia***, the Ontario Court of Appeal

stated in *obiter* that a general limitations statute could bar a claim for damages arising from the loss of Aboriginal or treaty rights, citing ***Blueberry River Indian Band***. The Court went on to hold that the limitations statute at issue did not and could not extinguish the Aboriginal title or treaty rights of the Chippewas because it did not evidence a clear and plain intent to do so.

[1324] I do not agree that the ***Blueberry River Indian Band*** case supports the proposition that the British Columbia ***Limitation Act*** is constitutionally applicable to Tsilhqot'in title lands. Although the Court found the provisions of the ***Limitation Act*** applied to the dispute between the Band and the federal government, that case was brought in Federal Court. There, s. 39 of the ***Federal Courts Act***, R.S.C. 1985, c. F-7, expressly incorporates provincial limitation legislation into actions brought in Federal Court. Section 39(1) reads:

> Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

[1325] In ***Wewaykum Indian Band v. Canada*** (1999), 27 R.P.R. (3d) 157 (F.C.A.), Issac C.J. explained at para. 28:

> … that when Parliament incorporates the law of another legislative jurisdiction by reference in its own legislation, the law so incorporated becomes Federal law and is to be applied as such, provided that all the conditions precedent to incorporation have been satisfied. Thus, in these actions, when subsection 39(1) directs that "the laws relating to prescription and the limitation in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province, the reference here must be to the relevant provisions of the *B.C. Limitation Act*. This Court is

> required to apply the *B.C. Limitation Act*, not as provincial law, but as federal law. This must be so, because the land in respect of which the actions have been brought are situated wholly within the province of British Columbia and the cause of action in each case is alleged to have arisen in that province.
>
> [Footnotes omitted]

[1326] For this reason, the constitutional applicability of the provincial ***Limitation Act*** did not arise in the ***Blueberry River*** case.

[1327] Nor was the question answered in ***Wewaykum***. In that case, the Federal Court of Appeal expressly declined to decide whether a provincial court in British Columbia trying an Aboriginal title claim could properly apply the ***Limitation Act***. In ***Wewaykum*** (S.C.C.) at para. 114, the Court affirmed that:

> Section 39(1) effectively incorporates by reference the applicable British Columbia limitation legislation, but the relevant provisions apply as federal law not as provincial law: *Blueberry River*, supra, at para. 107.

[1328] In response to the Bands' argument that a provincial law could not extinguish an Aboriginal interest, a matter of exclusive federal legislative competence, the Court in ***Wewaykum*** (S.C.C.) stated at paras. 115-116:

> Section 9 of the B.C. *Limitation Act* provides for extinguishment of the cause of action, but, as stated, it applies as federal law.
>
> Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional body, as it may from time to time exist: *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.R. 569 (S.C.C.); *Ontario (Attorney General) v. Scott (1955)*, [1956] S.C.R. 137 (S.C.C.). This is precisely what Parliament did when it enacted what is now s. 39(1) of the *Federal Court Act*.

[1329] In summary, I conclude that the British Columbia ***Limitation Act*** is constitutionally inapplicable to the plaintiff's claims of unjustified infringement of Aboriginal title and to any claim for damages arising out of an unjustified infringement of Aboriginal title. The ***Limitation Act*** does apply to the plaintiff's claims of unjustified infringement of Aboriginal rights by way of s. 88 of the ***Indian Act***. The plaintiff's claims with respect to unjustified infringements of Aboriginal rights in the Trapline Territories are not barred by the passage of time as I find that the limitation period was postponed until the Supreme Court of Canada's decision in ***Sparrow***. The plaintiff's claims with respect to unjustified infringements of Aboriginal rights in Tachelach'ed occurring prior to prior to December 17, 1992 are statute barred.

b. Laches

[1330] British Columbia has pleaded laches in its statement of defence. No argument was advanced by British Columbia in support of that plea at the conclusion of the trial. I conclude that, on the whole of the evidence, a plea of laches cannot succeed. The plaintiff could not reasonably have brought these claims for Aboriginal title, infringement of Aboriginal title, and compensation for infringement of Aboriginal title, if the courts still considered that Aboriginal title throughout British Columbia was extinguished in the Colonial period prior to 1871. That was the view taken by the British Columbia courts and not varied by the Supreme Court of Canada in ***Calder*** through to and including the judgment of the trial judge in ***Delgamuukw***. The tide began to turn with the judgment of the B.C. Court of Appeal in ***Delgamuukw***, overruling the trial judge on this point.

[1331] The plaintiff has not engaged in prolonged, inordinate or inexcusable delay, nor has the plaintiff acquiesced in the abandonment of Aboriginal title, nor given any grounds for belief that he and all Tsilhqot'in people ever abandoned their Aboriginal title. Finally, there is no evidence of prejudice to British Columbia occasioned by anything done or said by the plaintiff or the Tsilhqot'in people in relation to the Aboriginal title they have claimed.

c. Crown Immunity

[1332] British Columbia argues that the Crown was immune from suit in respect of all causes of action in existence prior to August 1, 1974. Prior to 1974, a party seeking a remedy against the Crown was required to file a petition of right under the ***Crown Procedure Act*****,** R.S.B.C. 1960, c. 89. The Lieutenant Governor had discretion to grant a fiat allowing the claim to proceed. British Columbia says that ***Calder*** is authority for the application of this principle to a case like this.

[1333] The pleadings limit the plea of Crown immunity to the claims for breach of fiduciary duty and fiduciary obligations. I have declined to consider the issue of breach of fiduciary duty, favouring instead an analysis of the honour of the Crown and the Crown's duty to consult. In these circumstances the issue of Crown immunity does not arise.

29. DAMAGES

[1334] The plaintiff claims damages against British Columbia under two main heads of compensation:

a) Compensation for infringements of Aboriginal title resulting from the authorization of timber harvesting activities which have taken place in the Claim Area. The plaintiff says that a resource has been removed from Tsilhqot'in Aboriginal title land and he seeks recovery for these pecuniary losses.

b) Compensation for the infringement of Tsilhqot'in Aboriginal title resulting from British Columbia's imposition of a forestry regime on the Claim Area. The plaintiff says this regime is antithetical to the land management vision which Tsilhqot'in people have sought to implement. Further, that scheme has left Tsilhqot'in people under a constant threat of exploitation for which they are entitled to recover non-pecuniary damages.

[1335] Given my inability to make a declaration of Tsilhqot'in Aboriginal title, the damage claim must be dismissed.

[1336] I have found there is land inside and outside the Claim Area over which Tsilhqot'in Aboriginal title would prevail. Thus, any dismissal of the claim for damages is without prejudice to the right to renew these claims specific to Tsilhqot'in Aboriginal title land. The resources on Aboriginal title land belong to the Tsilhqot'in people and the unjustified removal of these resources would be a matter for appropriate compensation. It is not my intention to dismiss a valid claim for compensation where such a claim can be tied to Tsilhqot'in title land.

[1337] Reconciliation must take these claims into account.

30. RECONCILIATION

[1338] Throughout the course of the trial and over the long months of preparing this judgment, my consistent hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot'in people. After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.

[1339] *Black's Law Dictionary*, 8th ed., defines reconciliation as: "Restoration of harmony between persons or things that had been in conflict". The relationship between Aboriginal and non-Aboriginal Canadians has a troubled history. Fuelled by the promise of s. 35(1), the early part of this century has brought significant changes in government policies at both the provincial and federal levels. Thus, there is a kindling of hope and expectation that a just and honourable reconciliation with First Nations people will be achieved by this generation of Canadians.

[1340] Unfortunately, the initial reluctance of governments to acknowledge the full impact of s. 35(1) has placed the question of reconciliation in the courtroom – one of our most adversarial settings. Courts struggle with the meaning of reconciliation when Aboriginal and non-Aboriginal litigants seek a determination regarding the existence and implications of Aboriginal rights. Lloyd Barber, speaking as Commissioner of the Indian Claims Commission, is quoted on this issue in *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,*

vol. 1 (Ottawa: Supply and Services Canada, 1996) at p. 203, quoting *A Report: Statements and Submissions* (Ottawa: Queen's Printer, 1977) at p. 2:

> It is clear that most Indian claims are not simple issues of contractual dispute to be resolved through conventional methods of arbitration and adjudication. They are the most visible part of the much, much more complex question of the relationship between the original inhabitants of this land and the powerful cultures which moved in upon them.

[1341] Courts are obliged to address this complex question in the context of their constitutional obligations. David Stack describes the nature of this obligation in "The Impact of the RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom" (1999) 62 Sask. L. Rev. 471, at para. 44 (QL):

> The courts' opportunity to advance the larger vision of justice [recognition of Aboriginal rights and self-government] comes from their constitutional obligation to interpret and enforce the Constitution, specifically s. 35(1) which reads:
>
> > The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> These words leave the courts with a wide discretion to protect, define, and recognize the rights of Aboriginals. In many cases, this gives courts the unenviable task of determining the kind of relationships that rights-bearing Aboriginals are to have with the larger non-Aboriginal society.

[1342] Some authors have been critical of how Canadian courts have defined the process of reconciliation. For example, John Borrows in "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 (QL) states at para. 64:

> Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation.

> Reconciliation should be embraced as an approach to Aboriginal-Canadian relations that also requires Canada to accede in many areas. Yet both legislatures and courts have been pursuing a course that, by and large, asks change only of Aboriginal peoples. Canadian institutions have been employing domesticating doctrines in their response to the [Royal Commission on Aboriginal Peoples]. This approach hinders Aboriginal choice in the development of their lands and resources, rather than enhancing it.

[1343] In ***Sparrow*** Dickson C.J.C. and La Forest J. introduced the concept of reconciliation between Aboriginal peoples of Canada and the Crown in this way:

> There is no explicit language in the provision [s. 35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). *In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.*
>
> [Emphasis added]

[1344] As addressed elsewhere in these reasons for judgment, the ***Sparrow*** test for justification of infringement of Aboriginal rights requires the Crown to prove both a valid legislative objective and respect for the Crown's fiduciary obligations to Aboriginal peoples: ***Sparrow*** at pp. 1113-1115. In other words, the concept of reconciliation introduced in ***Sparrow*** focused on working out a new relationship between federal power and federal duty as a result of the Crown's fiduciary relationship with Aboriginal peoples.

[1345] The Court revisited its theory of reconciliation in the ***Van der Peet*** trilogy: ***Van der Peet***, ***Gladstone***, and ***Smokehouse***. In defining the scope of Aboriginal rights protected by s. 35(1), Lamer C.J.C. re-interpreted the ***Sparrow*** theory of reconciliation (a means to reconcile constitutional recognition of Aboriginal rights with federal legislative power) as a means to work out the appropriate place of Aboriginal people within the Canadian state.

[1346] In ***Gladstone,*** Lamer C.J.C. considered what kinds of legislative objectives might be sufficiently compelling and substantial to justify infringement. After quoting from ***Van der Peet***, Chief Justice Lamer stated the following in ***Gladstone***, at para. 72:

> In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that their objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or – and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of aboriginal prior occupation with the assertion of sovereignty by the Crown.

[1347] This revised theory of reconciliation provided the rationale for the wide range of legislative objectives that could meet the compelling and substantial requirement laid down in ***Sparrow***. Lamer C.J.C. continued at para. 73:

> Because … distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political

> community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

[1348] The minority opinions of McLachlin J. (as she then was) in ***Van der Peet*** and ***Gladstone*** address some of the more problematic aspects of Lamer C.J.C.'s judgments in the ***Van der Peet*** trilogy. McLachlin J. characterized Lamer C.J.C.'s view of the purpose of s. 35(1) to achieve reconciliation as incomplete. In ***Van der Peet***, McLachlin J. stated at para. 230:

> … s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

McLachlin J. went on to state at para. 310:

> My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the "reconciliation" of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. The desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise …. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the

> aboriginal people, without treaty, and without compensation? I cannot think it does.

[1349] In the view of McLachlin J., reconciliation between Aboriginal and non-Aboriginal peoples could be achieved in a way that was more respectful of constitutional principles. She noted that Aboriginal and non-Aboriginal perspectives have historically been reconciled through treaties. McLachlin J. argued for reconciliation through negotiated settlements. In ***Van der Peet*** at para. 313, she stated:

> It is for the aboriginal peoples and other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process – definition of the rights guaranteed by s. 35(1) followed by negotiated settlements – is the means envisaged in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

[1350] The Court is clearly concerned with developing a theory of reconciliation that accords with Canada's identity as a constitutional democracy. However, the majority's link between it's theory of reconciliation and the justification of infringements test described in ***Van der Peet*** and ***Gladstone*** would appear to effectively place Aboriginal rights under a ***Charter*** s. 1 analysis. As McLachlin J. points out, this is contrary to the constitutional document, and arguably contrary to the objectives behind s. 35(1). The result is that the interests of the broader Canadian community, as opposed to the constitutionally entrenched rights of

Aboriginal peoples, are to be foremost in the consideration of the Court. In that type of analysis, reconciliation does not focus on the historical injustices suffered by Aboriginal peoples. It is reconciliation on terms imposed by the needs of the colonizer.

[1351] Lisa Dufraimont, in "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 U.T. Fac. L. Rev. (QL) explains at para. 24:

> Like the broadening test for justification of infringement it informs, the discussion of reconciliation in *Gladstone* and *Delgamuukw* suggests that Aboriginal rights must give way when they conflict with public goals and interests. This idea of reconciliation is simply not a plausible articulation of the purpose of s. 35(1). Governments do not recognize and affirm minority rights for the benefit of the majority. Rather, the purpose of s. 35(1), as suggested in Sparrow, is remedial. Aboriginal rights have been constitutionalized precisely in order to promote a just settlement for Aboriginal peoples by strengthening and legitimizing their claims against the Crown.

[1352] In ***Delgamuukw***, Lamer C.J.C. affirmed and applied the ***Gladstone*** justification test to infringements of Aboriginal title. La Forest J. and L'Heureux-Dubé J. concurring, arrived at the same result in a separate judgment. McLachlin J. concurred with Lamer C.J.C., adding that she was "also in substantial agreement with the comments of Justice La Forest". In his judgment in ***Delgamuukw,*** Lamer C.J.C. expanded the list of justifiable infringements of Aboriginal title at para. 165:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of those objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown

> sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric 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 those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.

[1353] McLachlin C.J.C. wrote the unanimous judgment in ***Haida Nation***. At para. 20, she revisited her vision of reconciliation through negotiated settlements, stating:

> Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

[1354] McLachlin C.J.C. describes her vision of reconciliation at para. 32:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

[1355] Referring to the Court's earlier ideas on the role of reconciliation, she stated at para. 33:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

[1356] McLachlin C.J.C.'s concerns echo her dissent in ***Van der Peet***, where she disagreed that the goal of reconciliation permits the Crown to require a judicially authorized transfer of an Aboriginal right to non-Aboriginal people without the consent of Aboriginal people, without treaty and without compensation: see ***Van der Peet*** at para. 310. McLachlin C.J.C.'s judgment in ***Haida Nation*** returns the focus to a theory of reconciliation which acknowledges the historical injustices suffered by Aboriginal peoples and places limits on the ability of the Crown to alter the content of the right claimed in the pre-proof stage. It is logical to conclude that, in the post-proof stage, the Crown's ability to alter or infringe upon an Aboriginal right would be faced with severe restrictions.

[1357] In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains:

how can this Court participate in the process of reconciliation between Tsilhqot'in people, Canada and British Columbia in these proceedings?

[1358] Gordon Christie's comments on this issue, in "Aboriginality and Normativity, Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17 No. 2 C.J.L.S. 41 at pp. 69-70, are particularly thought provoking and helpful:

> What role, in particular, should the judiciary be playing in this matter? The way forward is clear enough, if unpalatable to the judiciary. A Section One-like approach to justifying legislative interference with Aboriginal rights should never have been contemplated. The judiciary simply cannot justify this change to the law as it applies to Aboriginal peoples and their rights. Appeals to the need for the application of the rule of law are empty, as are notions that the Court requires such an approach to operate appropriately in a balanced constitutional democracy. As unpleasant as the resulting situation may be, Aboriginal rights, at this point in the process of reconciliation, must be accorded the sort of legal protection they demand – that of 'sure and unavoidable' rights. These would be the sorts of rights which operate to protect essential Aboriginal interests – in living according to the good ways, knowledge of which has been handed down from generation to generation.
>
> The practical outcome of this should be clear – this would bring the governments of Canada to the negotiating table, and would give Aboriginal peoples the sort of strength they need to work out a fair accommodation, a resolution of the ills caused by centuries of colonialism. This is as it should be, for from the perspective of the theory and principles underlying the superstructure of Canadian society and Canadian law there is no other way to work out an appropriate place for Aboriginal peoples in contemporary society. For Canada to advance to maturity, for the social compact to welcome within all those currently living within Canada's geographic boundaries, Aboriginal peoples must be able to bargain their way into a fair constitutional contract. This can only be accomplished with recognition on the Canadian side of the table of the position occupied by Aboriginal peoples: they come to these negotiations in the same state they were in 500 years ago, as organized societies existing 'prior' to the assertion of Crown sovereignty, societies organized according to separate and distinct conceptions of the good and of how to lead good lives.

[1359] In ***Mikisew Cree*** Binnie J. emphasized the importance of reconciliation at para. 1:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

[1360] Courts are not accustomed to taking into account "claims, interests and ambitions" in the process of reconciliation. In the course of a trial, a court will examine an entire body of evidence in an attempt to establish the factual truth in an objective manner. In an adversarial system, claims are dealt with to produce a win/lose result. Interest negotiations, designed to take opposing interests into account, have the potential to achieve a win/win result. Such an approach, in the context of consensual treaty negotiation, would provide the forum for a fair and just reconciliation.

[1361] The inquiry into the modern expression of Aboriginal rights requires a court to look at contemporary practices and land use and then determine how this relates to pre-contact or pre-sovereignty practices. In ***Marshall; Bernard,*** McLachlin C.J.C. suggested that the Court look to the pre-contact practice and then translate that practice into a modern right. Through this approach, some (but not all) of an Aboriginal group's contemporary interests will be considered.

[1362] The Aboriginal interests considered by the courts are necessarily confined to the pleadings. The court must also take into account the interests and needs of the broader society which are not confined to the pleadings. This is what the test of justification requires. Regrettably, the adversarial system restricts the examination of Aboriginal interests that is needed to achieve a fair and just reconciliation.

[1363] Earlier in these Reasons for Judgment, I referred to an article by Professor Brian Slattery entitled "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255. In this article, Professor Slattery argues for the "Principles of Recognition and Reconciliation". He notes at p. 283 that "reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests."

[1364] I agree entirely with the views expressed by Professor Slattery at p. 286:

> In other words, section 35 does not simply recognize a static body of aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances — what we have called historical rights. Rather, the section recognizes a body of generative rights, which bind the Crown to take positive steps to identify aboriginal rights in a contemporary form, with the participation and consent of the Indigenous peoples concerned.

[1365] Professor Slattery points out at p. 281 that reconciliation cannot be achieved by the current process of translating an historical right into one that corresponds with a modern common law right. He writes, "such a process artificially constrains and distorts the true character of aboriginal title and risks compounding the historical injustices visited on Indigenous peoples". This case serves as an example of that conclusion. I fear, as he foretold, that "[f]ar from reconciling Indigenous peoples with

the Crown," the conclusions I am driven to reach seem more "likely to exacerbate existing conflicts and grievances": Slattery at p. 281.

[1366] Professor Slattery further argues that historical title "provides the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial governments and the scope of Indigenous dispossession": Slattery at pp. 281-282. In his view, a number of "*Principles of Reconciliation* govern the legal effect of aboriginal title in modern times." He writes that these principles:

> … take as their starting point the historical title of the Indigenous group, … but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group's contemporary interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a *generative right,* which can be partially implemented by the courts but whose full implementation requires the recognition of modern treaties.

[1367] He continues by suggesting that the actions of courts have the potential to diminish the possibility of reconciliation ever occurring. He concludes at p. 282:

> … the successful settlement of aboriginal claims must involve *the full and unstinting recognition of the historical reality of aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands.* So, for example, to maintain that "nomadic" or "semi-nomadic" peoples had historical aboriginal title to only a fraction of the ancestral hunting territories, or to hold that aboriginal title could be extinguished simply by Crown grant, is to rub salt into open wounds. However, by the same token, *the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors*. So, for example, to suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.

[1368] Courts should not be placed in this invidious position merely because governments at all levels, for successive generations, have failed in the discharge of their constitutional obligations. Inevitably this decision and others like it run the risk of rubbing salt into open wounds.

[1369] The narrow role this court can play in defining Tsilhqot'in Aboriginal rights in the Claim Area lies in an application of the jurisprudence to the facts of this case. I can only hope that it will assist the parties in finding a contemporary solution that will balance Tsilhqot'in interests and needs with the interests and needs of the broader society.

[1370] The application of Professor Slattery's "Principles of Recognition and Reconciliation" may assist in this process. At pp. 283-284, Professor Slattery suggests that the "Principles of Recognition" should have certain basic characteristics:

1) They should acknowledge the historical reality that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries," as Judson J. observed in the *Calder* case. They should not draw arbitrary distinctions between "settled", "nomadic", and "semi-nomadic" peoples but accept that *all* of the Indigenous peoples in Canada had historical rights to their ancestral homelands — the lands from which they drew their material livelihood, social identity, and spiritual nourishment — regardless whether they had developed conceptions of "ownership," "property," of "exclusivity," and without forcing their practices into conceptual boxes derived from English or French law.

2) They should take account of the long history of relations between Indigenous peoples and the British Crown, and the body of inter-societal law that emerged from those relations.

3) They should draw inspiration from fundamental principles of international law and justice, principles that are truly universal, and not grounded simply in rules that European imperial powers formulated to suit their own convenience, such as the supposed "principle of discovery".

4) They should envisage the continuing operation of customary law within the Indigenous group concerned. At the same time, they should explain the way in which the collective title of an Indigenous group relates to the titles of other Indigenous groups and to rights held under the general land system.

[1371] This is, of course, not a task for a court. However, in the context of treaty negotiation, it strikes me as a convenient starting point. Recognition that Aboriginal people have historical rights to their ancestral homelands regardless of whether they had developed conceptions of "ownership," "property," or "exclusivity" quickly moves the debate to the real question: what interests are at stake and how are they to be reconciled?

[1372] Professor Slattery further describes the "Principles of Reconciliation", as follows at pp. 284-285:

1) They should acknowledge the historical rights of Indigenous peoples to their ancestral lands under Principles of Recognition, as the essential starting point for any modern settlement.

2) They should explain how historical aboriginal rights were transformed into generative rights with the passage of time, and explain the rise of third party and other societal interests.

3) They should draw a distinction in principle between the "inner core" of generative aboriginal rights that may be implemented without negotiation in modern times, and a "penumbra" or "outer layer" that needs to be articulated in treaties concluded between the Indigenous people and the Crown.

4) They should provide guidelines governing the accommodation of rights and interests held by third parties within the historical territories of Indigenous peoples.

5) They should create strong incentives for negotiated settlements to be reached within a reasonable period of time.

[1373] I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago.

[1374] At the end of the trial, a concession concerning an Aboriginal hunting and trapping right in the Claim Area was made by both defendants. As I have already noted, that concession brings with it an admission of the presence of Tsilhqot'in people in the Claim Area for over 200 years. This leaves the central question unanswered: what are the consequences of this centuries old occupation in the short term and in the long term, for Tsilhqot'in and Xeni Gwet'in people?

[1375] I have come to see the Court's role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot'in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.

[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.

[1378] Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia.

[1379] As a consequence of colonization and government policy, Tsilhqot'in people can no longer live on the land as their forefathers did. How is a former semi-nomadic existence, one that cannot be replicated in a modern Canada, to be given "cultural security and continuity" in this twenty-first century and beyond? Governments and Tsilhqot'in people must find an accommodation that reconciles the historical Tsilhqot'in place in Canada with the place of their neighbours who come from all corners of the world.

[1380] Land is a critical component in the resolution of this dispute. The Xeni Gwet'in people have found sustenance and continuity in the lands surrounding Xeni (Nemiah Valley). The various Tsilhqot'in Bands are separated by great distances

and it is possible there will be competing interests amongst them that will have to be addressed.

[1381] The land I have described in paragraph 959 may not address the interests of the Xeni Gwet'in and the broader Tsilhqot'in community. There will undoubtedly be a need for adjustments, dependant on the nature of the interests both considered and accommodated leading to what the parties ultimately agree upon in a fair and just resolution of all outstanding claims.

[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.

"D. H. Vickers"
The Honourable Mr. Justice Vickers

APPENDIX A – MAPS

Map 1

Generalized Map of British Columbia showing the Claim Area

Map 2

Locator Base Map

Map 3

Traditional Tsilhqot’in Place Names

APPENDIX B - GLOSSARY OF TERMS

A

/Achig (Tsilhqot'in chief)

Ahan (Tsilhqot'in person)

Alexis (Tsilhqot'in chief)

/Amed (Tsilhqot'in person)

Anaham (Tsilhqot'in chief)

/ash (snowshoes for men that have a point at the front end)

B

ba ts'egudah teghantsilh (bad luck; negatively affecting one's future)

bedz&sh (caribou)

Ben Chuy (Ben Chuny Biny, lake name)

Bendzi Biny (Puntzi Lake)

Bini#ed (cone fish trap)

binlagh (box fish trap)

binlh (snare)

Biny (lake)

Biny Gwechugh (Canoe Crossing)

Biny Gwetsel (crossing of the T@ilhqox, located north of the mouth of T@ilhqox Biny)

bisinchen (tool made of pine used to stretch and soften hides)

Bisqox (Beece Creek)

bixesdah (type of coat or wrap)

bixest'a^ (footwear, shoe that goes halfway over the ankle)

C

Ch'a Biny (Big Lagoon)

chel/ig (coyote)

Chel Lete@gan (gravesite at Naghtaneqed)

chendi (lodgepole pine)

Che^qox (Chilcotin River)

Che^ich’ed Biny (Chezikut or Chilcotin Lake)

Ch’e^qud (creek located near /Edibiny, at the western end of Naghatalhcho^ Biny)

china^ (otter)

Chinilgwan (Churn Creek)

chin@dad (silverweed)

ch’it’uz (birch bark)

D

daden (three pronged spear)

dadzagh (spear)

Dakelh (Carrier)

dan (summer)

dan ch’iz (fall)

Dan Qi Yex (Bidwell Creek)

Dants’ex (pink salmon moon, September)

Dasiqox (Taseko River)

Dasiqox Biny (Taseko Lake)

Dasiqox Tu Tl’az (southern reaches of Dasiqox Biny)

debi (bighorn sheep)

dechen ts’edilhtan (the laws of T@ilhqot’in ancestors, the law of the land)

dediny (groundhog or marmots)

Dediny Qox (Big Creek)

Dehtus (Dehtus of Anaham, Tsilhqot’in chief)

dek’any (rainbow trout)

Delgi Chosh (Big Lake)

delji-yaz (sucker)

Deni Belh Tenalqelh (location where the creek leaves the twin lakes)

Deni De^t@an (Graveyard Valley)

deni gha dats'eyel (spear-like weapon)

den&sh (kinnick kinnick)

deyen (spiritual healer, a person with special healing powers)

deyen nejede/ah (powerful deyen, able to assist in the recovery of a lost soul)

d&g (saskatoon berries)

d&shugh delmid nagwaghi^ed (gathering held at Ts'uni/ad Biny every May)

dl&g (squirrel)

D^elh Ch'ed (Snow Mountains).

E

/Edaz Biny (small high elevation lake)

/Edibiny (?Edi Biny, small lake south of Naghatalhcho^)

/eghulhts'en (spring)

/Elagi @eqan (mountain camping site)

/el bid qungh (lean to, shelter made with trees)

/Elegesi (Eagle Lake Henry)

/Elhghatish (/Elhxatish, area between and including the Twin Lakes)

/Elhghatish Biny (Vedan Lake, one of the Twin Lakes)

/Elhixidlin (Taseko Mouth, confluence of the Dasiqox and T@ilhqox, Whitewater)

/elht&lh (prairie chicken or wild grouse)

/Ena Ch'e^ Nadilin (river in Eastern Trapline Territory)

/Ena Tsel (/Enaycel, Little Shuswap or Little Salishans)

/Enes Biny (small high elevation lake)

/Eniyud (legendary wife of T@'il/os)

/Eniyud D^elh (Niut Mountain)

/eqe/ats'et'in (trapping)

/Esdilagh (Alexandria)

/Esgany ?Anx (place where /Eniyud planted suntiny in Xeni)

/Esggidam (T@ilhqot'in ancestors)

/esghunsh (bear tooth or avalanche lily)

/Esk&sh (Captain George)

/Esqi Dzul Te@e/an (place name)

/Esqi Tintenisdzah (/Esqi Tinteniyah, Child Got Lost)

/Estinlh (Tsilhqot’in person)

?ests'igwel (pine nuts or seeds)

/Et'an Ghintil (underground house site on the south shore of Xeni Biny)

/etaslaz (spruce bark)

/etaslaz ts’i (spruce bark boat)

/Eweni#en (Johnny Setah)

G

gex (rabbit)

gex gej teghetl'un (spring snare)

Gudish Nits’il/in (supreme being, creator, God)

Gughay Ch’ech’ed (place name)

guli (skunk)

Guli D^elh /Elhghenbedaghilhdenz (Sa Ten, where skunk blew out the mountain)

Gwech’az Biny (place name)

Gwedats’&sh (village site located at the north end of T@ilhqox Biny)

Gwedeld’en T’ay (Gwedeldon Dany, Indian Drum, where they drum on both sides)

Gwedzin (lands around Gwedzin Biny)

Gwedzin Biny (Quitzee Lake or Cochin Lake)

Gweq’ez D^elh (Mount Nemiah)

Gwetex Natel/as (Red Mountain)

Gwetsilh (Siwash Bridge)

H

Hanlhdzany (T@ilhqot’in person, Mabel William’s grandmother)

I

/Ighelqe^ (Tsilhqot’in person)

J

Jes Za (Chinook salmon moon, July)

Jidid^ay Biny (Ch’ididzay, Onion Lake)

K

K’anlh Gunlin (mountain camping site)

k’eles (dugout in which cooking took place)

Keogh (Tsilhqot’in chief)

k’i (willow)

L

Lha Ts’as?in (Klattessine, Tsilhqot’in person who fought in the Chilcotin War)

Lhin Desch’osh (Lendix’tcux, a mythical person, also a place name)

Lhiz Bay (location at the western end of Xeni)

Lhiz Bay Biny (small lake south of the Lezbye I.R. #6 boundary)

lhiz qwen yex (circular shaped underground pit house with dirt on top)

lhughembinlh (gill nets)

Lhuy Nachasgwengulin (Little Eagle Lake)

Lhuy Nentsul (Little Fish Lake)

lhu@i@ch'el (whitefish)

Lutas (Tsilhqot’in person)

M

mus (moose)

N

Naba@ (resource gathering area, meadows between Naba@ D^elh and Te^tan)

Naba@ D^elh (Anvil Mountain)

nabi (muskrat)

Nabi T@i Biny (Elkin Lake, one of the Twin Lakes)

Nachent’az D^elh (Boatswain Mountain)

Nadilin Yex (head of Dasiqox)

Naghatalhchoz (area around Naghatalhchoz Biny)

Naghatalhchoz Biny (Chelquoit Biny, Big Eagle Lake)

Naghatalhchoz Gwet’in (people of Naghatalhchoz, later merged with Xeni Gwet’in)

Naghataneqed (location at the east end of Xeni Biny)

Nagwentl'un (Anahim Lake, Nacoontloon, Area around Anahim Lake)

Nanats'eqish (narrows of Dasiqox Biny)

na@lhiny (horse)

Natasewed Biny (Brittany Lake)

Natasewed Yeqox (Brittany Creek)

nat'i (tunulh, duck)

nats'ededah (hunting)

Niba /Elhenenalqelh (near Captain George Town)

nelghes (dwarf blueberry)

nelh (form of sharp rock)

nembay (weasel)

Nemiah (Nemayah, Tsilhqot'in Chief)

nen (land)

Nenatats'ededilh (Four Mile Lake, Little Lagoon)

Nen Nalmelh (D^elh Nalmelh, Bald Mountain)

Nen Nuay Dilex Biny (Mainguy Lake)

nentses (moss)

net'e/ah (lahal, a game played with bones)

Nezulhtsin (Tsilhqot'in person, also known as Jamadis)

nilh&sh (kokanee, landlocked salmon)

Nilht'isiquz (Stikelan Creek Valley)

Nimayah (Nemiah, Tommy Luluha)

Nisewhich&sh (Tsilhqot'in person, father of /Esqw'alyan)

nists'i (deer)

Nits'il/in (leader or chief)

Nistis'i Tsan Gha Nildzi (Sh&shan-qox, Lingfield Creek)

niyah qungh (nenyexqungh, rectangular housing structure, winter dwelling)

Nu Natase/ex (Mountain House)

nundi (lynx)

nundi-chugh (cougar)

Nunsulian (Nentsul /Eyen, father of Jack Lulua)

Nu@ay Bighinlin (Nu@ay Bighilin)

nuwish (soapberries)

Nuxalk (Bella Coola)

Q

Qaq'ez (Kahkul, great-great grandfather of Chief William)

Qaju (Homalco, Kwakiutl)

qat@'ay (basket woven with ts'u ghed spruce roots)

qat@'ay bid (where the water is deep)

qile^mban@ (snowshoes for women)

Quill Quall Yaw (Quillquawyaw, Konkwaglia, Tsilhqot'in Chief)

S

sabay (dolly varden or bull trout)

Sadanx (legendary period of time that took place long ago)

Samadlin (McLean)

Sa Nagwedijan (location on the south side of Naghatalhchoz Biny

Sa Yets'en (Minnie Charley Boy's adoptive grandmother)

@ebay (mountain goat)

Sebay Talgog (place name)

Secwepemc (Shuswap)

@elhchugh (huckleberries)

ses (bear)

Ses-Chi (place name)

Ses Ghen Tach'I (fishing site in Xeni)

sesjiz (marten)

Sh&shan-qox (Sheshanqox, Lingfield Creek or Mayfield Creek)

Sh&san Tl'ad (Mountain Sheep Basin)

Sit'ax (Louis Setah)

Stl'atl'imx (Lillooet)

Sul Gunlin (location near the outlet of T@ilhqox Biny)

sunlh (dry pine needles)

sunt'iny (mountain potato, spring beauty)

T

Tachelach'ed (Brittany Triangle)

Tachi (mouth of Dan Qi Yex)

Tach'i Dilhgwenlh (Huckleberry Mountain)

Tach'idilin (Taghinlin, large creek that feeds into Talhiqox Biny)

Tahpitt (Tsilhqot'in chief)

Talhiqox Biny (Tatlayoko Lake)

Talhjez (Franklin Arm)

T'a@bay @e/an Tl'ad (Mount Moore, also known as Goat Mountain)

Tatl'ah Biny (Tatla Lake)

Tatl'ah Yeqox (Tatla Creek)

tenelh (type of basket used to collect suntiny)

Te^tan (Fish Lake)

Tish Gulhdzinqox (Alexis Creek)

ti@lagh (steelhead salmon)

Ti^lin D^elh (Tullin Mountain)

Tl'ebayi (location at the west end of Xeni Biny)

Tl' ech' id Gunaz (Long Valley)

Tl'egwezben@ (place name)

Tl'egwated (Kigli Holes, village site on the T@ilhqox)

tl'eda^ulh (wild rice)

Tl'esqox (Toosey)

Tl'etate@ (location at the east end of Xeni Biny)

Tl'etinqoxt'in (Anaham Band)

tl'etsen (wild onion)

Tl'ets'inged (location roughly at the centre of the Xeni Biny)

T'ox T'ad (Vic's Mountain)

tsa (beaver)

tsachen (tiger lily)

Tsanlgen Biny (Chaunigan Lake)

Tselakoy (Tsilhqot'in person)

t@elexay (swamp grass, wild hay)

Ts'eman T@'e^chi (Ts'eman T@'e^ location on the western bank of the T@ilhqox)

Ts'eman Za (sockeye salmon moon, August)

T@e@ Nanint'i (camping site in Xeni)

T@i Ch'ed Di^/an (location at the eastern end of Naghatalhchoz Biny)

t@i dek'ay (sharp rock used to chop wood)

T@i Del Del (Redstone)

T@i gheh ne/eten (location south of Naghatalhchoz Biny)

T@ilangh (fishing and winter encampment on the T@ilhqox)

T@i Lhizbed (upriver, over the hill from T@ilangh)

T@ilhqot'in (Chilcotin, People of the T@ilhqox)

T@ilhqox (Chilko River)

T@ilhqox Biny (Chilko Lake)

T@ilhqox D^elh (Chilko Mountain)

T@ilhqox Tu Tl'az (Edmond Creek)

T@'il/o@ D^elh (Mount Tatlow)

T@imol Ch'ed (Potato Mountain)

T@i Nadenisdzay (location on Xeni D^elh where /elht&lh were snared)

T@i Nentsen Tsinsh D^elh (Good Hope Mountain)

T@'i Talh/ad (Rainbow Creek)

T@i Te@e/an (Tchaikazan Valley)

Ts'itse/ex Biny (Augers Lake)

T@i Tex Biny (Murray Taylor Lake)

T@i T'is Gunlin (crossing located upstream from Henry's Crossing)

t@its'ats'elagi (balsam root sunflower)

Ts'i Ts'elhts'&g (where the Dasiqox flows into Dasiqox Biny)

T@iyi (T@i /Ezish D^elh, Cardiff Mountain)

ts'u ghed (spruce roots)

T@ulyu Ts'ilhed (Bull Canyon)

Ts'uni/ad (Tsuniah Valley)

Ts'uni/ad D^elh (Tsuniah Mountain)

Ts'un/iad Yeqox (Tsuniah Creek)

Ts'uni/ad Biny (Tsuniah Lake)

Ts'u Nintil (place name)

Ts'u Talh/ad (small peninsula at the north end of Ts'uni/ad Biny)

tunulh (duck)

t'uz (tree bark)

U

?undidanx (recent history)

X

Xenadi?an (Xenadi?an Nen, Small Graveyard Valley)

Xeni (Nemiah Valley)

Xeni Biny (Konni Lake)

Xeni D^elh (Konni Mountain)

Xeni Gwet'in (people of the Nemiah Valley)

Xeni Yeqox (Nemiah Creek)

xe@tl'un (fencing to bar a creek)

xex (geese)

Xexti (Tsilhqot'in burial place in Xeni)

Xexti Biny (Nemiah Lake)

xi (winter)

Y

Yanats'idlush (Impasse Ridge)

yedanx denilin (long time ago, prior to contact, pre- and post-sovereignty)

Yuhitah (Yohetta Valley)

Yunesit'in (Stone Reserve)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tsilhqot'in Nation v. British Columbia***, 2007 BCSC 1700

Date: 20080602
Docket: 90-0913
Registry: Victoria

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

Plaintiff

And:

Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region and The Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Vickers

Corrigendum to Reasons for Judgment

Counsel for the Plaintiff	J. Woodward, D. Rosenberg, P. Hutchings, P. Rosenberg, M. Browne, D. M. Robbins, G. S. Campo, H. Mahony, M. Couling, S. Nixon, M. Haddock, J. Nelson, G. Reed and D. Mildon
Counsel for British Columbia (Forestry)	P. G. Foy, Q.C., T. Leadem, Q.C., G. J. Underwood, K. J. Tyler, K. E. Gillese, J. G. Penner, E. Christie, S. Lysyk and J. Z. Murray
Counsel for The Attorney General of Canada	G. Donegan, Q.C., B. McLaughlin, M. P. Doherty, J. Chow, C. Cameron, J. Blackhawk and I. Jackson
Date and Place of Trial:	339 Days between November 18, 2002 and April 11, 2007 Victoria and Tl'ebayi, Xeni (Nemiah Valley), B.C.

[1383] This is a Corrigendum to my Reasons for Judgment released on November 20, 2007 and they are hereby amended as follows.

[1384] In the Table of Contents replace the name “Edmonds Creek” with “Edmond Creek”.

[1385] In para. 858 replace “Edmond’s Creek” with “Edmond Creek”.

[1386] In para. 866 replace the name “Edmonds Creek” with “Edmond Creek”.

[1387] In Appendix B, replace “Edmond’s Creek” with “Edmond Creek”.

“D. H. Vickers J.”
The Honourable Mr. Justice Vickers