

Court of Appeal File No. CA035617  
Supreme Court File No. 90 0913  
Supreme Court Registry: Victoria

**COURT OF APPEAL**

ON APPEAL FROM: THE ORDER OF JUSTICE VICKERS OF THE SUPREME  
COURT OF BRITISH COLUMBIA PRONOUNCED NOVEMBER 20, 2007

BETWEEN:

**Roger William, on his own behalf and on behalf of all other members  
of the Xeni Gwet'in First Nations Government and  
on behalf of all other members of the Tsilhqot'in Nation**

Respondent  
(Plaintiff)

AND:

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

Appellant  
(Defendant)

AND:

**The Attorney General of Canada**

Respondent  
(Defendant)

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**FACTUM OF THE RESPONDENT, 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 TSILHQO'TIN NATION**

---

**Roger William**

David M. Rosenberg, Q.C.  
Rosenberg & Rosenberg  
671D Market Hill  
Vancouver, BC V5Z 4B5

Jack Woodward  
Jay Nelson  
Woodward & Company Lawyers LLP  
2<sup>nd</sup> Floor, 844 Courtney Street  
Victoria, BC V8W 1C4

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

Patrick G. Foy, Q.C.  
Kenneth J. Tyler  
Borden Ladner Gervais LLP  
1200 Waterfront Centre  
200 Burrard Street  
Vancouver, BC V7X 1T4

**The Attorney General of Canada**

Brian McLaughlin  
Jennifer Chow  
Department of Justice Canada  
Aboriginal Law Section  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9

## INDEX

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<b>CHRONOLOGY OF RELEVANT DATES IN LITIGATION</b> .....	<b>iv</b>
<b>OPENING STATEMENT</b> .....	<b>vii</b>
<b>PART 1 – STATEMENT OF FACTS</b> .....	<b>1</b>
<b>PART 2 – ISSUES ON APPEAL</b> .....	<b>4</b>
<b>PART 3 – ARGUMENT</b> .....	<b>5</b>
<b>A. The Tsilhqot'in Nation is the proper holder of Aboriginal rights</b> .....	<b>5</b>
1. The Trial Judge correctly decided the pleadings issue.....	5
2. Aboriginal rights and title vest in the Tsilhqot'in Nation .....	9
a. The Tsilhqot'in Nation as a “historic and present community” .....	9
b. The Tsilhqot'in Nation as a unifying social, legal and political institution ....	12
c. British Columbia’s reliance on precedent is inaccurate and misplaced .....	19
d. Precedent in Aboriginal title actions supports the Trial Judge .....	21
e. Enhancing the Survival of Distinctive Aboriginal Cultures .....	23
<b>B. Unjustified Infringement of Tsilhqot'in Aboriginal Rights</b> .....	<b>24</b>
1. The Trial Judge did not define the Aboriginal right as a right to “wildlife” .....	25
2. The Trial Judge’s findings demonstrate infringement of Aboriginal rights .....	26
a. Inevitable and substantial commercial harvesting in the Claim Area.....	27
b. “Severe” impacts on Tsilhqot'in Aboriginal Rights .....	29
c. Alleged reversal of onus .....	33
d. Systemic failure of British Columbia to recognize or accommodate Tsilhqot'in Aboriginal rights claims.....	35
<b>C. Tsilhqot'in Aboriginal Trading Rights</b> .....	<b>40</b>
1. Pre-contact Tsilhqot'in trade was well-established, regular and substantial .....	40
2. Pre-contact Tsilhqot'in trade was an integral cultural practice.....	45
3. Practices undertaken for survival purposes are culturally “integral” .....	47

4. Trade rights are not species-specific in this case .....	48
5. “Moderate Livelihood” .....	50
a. The right to trade as a means of securing a “moderate livelihood” .....	50
b. Pleading for the Aboriginal trade right .....	55
<b>D. Aboriginal right to capture and utilize wild horses in the Claim Area .....</b>	<b>56</b>
a. British Columbia’s complaint about the pleadings .....	56
b. Proof of pre-contact capture and use of wild horses.....	57
<b>PART 4 – NATURE OF ORDER SOUGHT .....</b>	<b>60</b>
<b>LIST OF AUTHORITIES .....</b>	<b>61</b>

## CHRONOLOGY OF RELEVANT DATES IN LITIGATION

Date	Event
December 14, 1989	The Plaintiff commenced Action No. 89/2573 against British Columbia (the “Original Action”). The Original Action was discontinued when Action No. 90/0913 (the “Nemiah Trapline Action” or the “Trapline Action”) was commenced [63]. <sup>1</sup>
April 18, 1990	The Nemiah Trapline Action was commenced in the Supreme Court of British Columbia. At that time, the Plaintiff sought injunctions restraining defendant forest companies from clear-cut logging within the Trapline Territory [64]. (Appeal Record [“AR”] p. 1)
December 17, 1990	Millward J. made a consent order accepting Carrier Lumber Ltd.’s undertaking not to apply to British Columbia for timber cutting permits in the Nemiah Trapline without notice [65]. (AR p. 441)  The proceedings against other forest companies were eventually discontinued [66].
October 11, 1991	The Supreme Court of British Columbia 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 [67]. (AR p. 443)
January 8, 1997	The Xeni Gwet’in filed a notice of intention to proceed with the Nemiah Trapline Action [75].
June 25, 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 [68]. (AR p. 67)  - Following the injunction restraining logging in the Trapline Territory, forest companies indicated interest in logging within Tachelach’ed (Brittany Triangle) [69].
December 18, 1998	The Plaintiff commenced Action No. 98/4847 (the “Brittany Triangle Action”) 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 (or the “Brittany Triangle”) [79]. (AR p. 12)

<sup>1</sup> Numbers in [ ] refer to paragraphs in *Tsilhqot’in Nation v. British Columbia* 2007 BCSC 1700.

Date	Event
October 14, 1999	Order entered by consent to have both actions heard at the same time. (AR p. 447)
November 2, 1999	Vickers J. dismissed an application brought by British Columbia to strike the representative claim for Aboriginal title in both actions: <i>Nemaiah Valley Indian Band v. Riverside Forest Products</i> (1999), C.P.C. (4th) 101, 1999 Carswell BC 2459 (S.C.) [81]. (AR p. 714)
February 21, 2000	A notice of trial was issued setting the trial date in both actions for September 10, 2001 [82].
March 20, 2000	Consent order allowing Province to amend their Statement of Defence, in the Brittany Triangle Action. (AR p. 514)
October 5, 2000	Vickers J. made an order that the Attorney General of Canada be added as a defendant in the Brittany Triangle Action [83]. (AR p. 538)
November 2, 2000	Vickers J. made an order that the Attorney General of Canada be added as a defendant in the Trapline Action [83]. (AR p. 516)
March 19, 2001	The trial of the action was adjourned to March 11, 2002 [86]. (AR p. 567)
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 licenses were issued early in 1997 [87].
April 4, 2002	Vickers J. made an order consolidating the Nemaiah Trapline Action and the Brittany Triangle Action [88]. (AR p. 581)
August 14, 2002	Vickers J. 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: <i>William v. Riverside Forest Products Limited</i> , 2002 BCSC 1199 [89]. (AR p. 785)
November 18, 2002	The trial of the consolidated action began [91].
November 20, 2002	Vickers J. dismissed an application by Canada to be removed as a party: <i>William v. British Columbia</i> , 2002 BCSC 1904 [91]. (AR pp. 616, 789)
January 8, 2003	Vickers J. struck out the claim against <i>Riverside Forest Products Ltd.</i> : <i>William v. British Columbia</i> , 2003 BCSC 2036 [92]. (AR p. 624, 793)

Date	Event
February 14, 2003	Vickers J. 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: <i>William v. British Columbia</i> , 2003 BCSC 249 [93]. (AR p. 797)
June 4, 2001	Consent order allowing Plaintiff to amend Statement of Claim. (AR p. 640)
June 16, 2003	The Plaintiff filed an amended Statement of Claim [94]. (AR p. 387)
June 19, 2003	Canada filed an amended Statement of Defence [94]. (AR p. 399)
June 26, 2003	British Columbia filed a Statement of Defence [94]. (AR p. 402)
June 27, 2003	The Plaintiff filed a reply to British Columbia's Statement of Defence [94]. (AR p. 427)
November 17, 2003	The Supreme Court of British Columbia convened at the Naghataneqed School in Tl'ebayhi in Xeni (Nemiah Valley) [99]. (AR pp. 663, 666)
May 6, 2004	Vickers J. 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 an issue by consent [96]. (AR p. 842 par 50)
July 16, 2004	Following submissions by counsel, Vickers J. concluded that this case or specific issues arising in this case ought not to proceed as a stated case pursuant to Rule 33: <i>William v. British Columbia</i> , 2004 BCSC 964 [96]. (AR p. 849)
November 20, 2007	Judgment was rendered by Vickers J. ( <i>Tsilhqot'in Nation v. British Columbia</i> , 2007 BCSC 1700).
May 14, 2008	Vickers J. dismissed a motion by the Plaintiff to amend the Statement of Claim by adding the words "or portions thereof" throughout the relevant sections of the Statement of Claim. (AR p. 933)

## **OPENING STATEMENT**

In this appeal, British Columbia inappropriately seeks to have this Honourable Court retry the case on Aboriginal rights issues. In presenting the appeal, British Columbia repeatedly mischaracterizes or ignores key findings of fact made by the Trial Judge.

In every instance, the findings of fact made by the Trial Judge which inform the issues have a solid evidentiary foundation. For example, in determining the proper community who holds Aboriginal rights on the facts in this case, the Trial Judge found that all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory in the course of their seasonal rounds. He found that the 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 Tsilhqot'in Nation was and remains the defining social, cultural, political and legal institution for the Tsilhqot'in people.

In considering the scope of the Aboriginal rights in this case, the Trial Judge stated that, "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".

On the evidence in this case, the Trial Judge found that British Columbia had infringed these Aboriginal rights by committing the Claim Area to substantial commercial harvesting. Based in part on the testimony of British Columbia's own forestry experts and officials, he held that there was no economic justification for the planned logging in the Claim Area and that forestry planning did not take Tsilhqot'in Aboriginal rights into account at any stage of planning. Sustaining the Aboriginal rights of the Tsilhqot'in people in the Claim Area was very low on the scale of priorities.

The Trial Judge properly applied the law to the findings of fact and accordingly the appeal should be dismissed in all respects.

## PART 1 – STATEMENT OF FACTS

1. The Province of British Columbia and the Regional Manager of the Cariboo Forest Region (“**British Columbia**”) appeal from the trial judgment of Mr. Justice Vickers (the “**Trial Judge**”), rendered November 11, 2007.<sup>2</sup> This is the response of the Plaintiff-Respondent (the “**Plaintiff**”).

2. The Plaintiff relies on the facts set out by the Plaintiff in his appeal from the Trial Decision, Appeal CA035620 and the following additional material facts. The Plaintiff does not accept British Columbia’s Statement of Facts as it is infused throughout with argument and misrepresentation of the Trial Judge’s findings.

3. After an extensive review of the law and evidence, the Trial Judge concluded that the Tsilhqot’in Nation was the proper holder of Aboriginal rights and title. The Trial Judge declared that the Tsilhqot’in Nation is the proper rights-holder for Aboriginal rights and title and that sub-groups of the Tsilhqot’in Nation, such as the Xení Gwet’in, derive their rights and interests as Tsilhqot’in peoples.<sup>3</sup>

4. The Trial Judge held that the Tsilhqot’in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work.<sup>4</sup> He further affirmed a Tsilhqot’in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.<sup>5</sup>

5. The Trial Judge held that Tsilhqot’in people have continuously exercised these rights throughout the Claim Area from before contact in 1793 to the present day.<sup>6</sup>

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<sup>2</sup> *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700, [2007] B.C.J. No. 2465 (the “Trial Decision”).

<sup>3</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 307, para. 470.

<sup>4</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 566-567, paras. 1239-41.

<sup>5</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 571, para. 1256.

<sup>6</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 574, paras. 1267-68.

6. The Trial Judge held that British Columbia's land use planning and forestry activities have unjustifiably infringed these Tsilhqot'in Aboriginal rights.<sup>7</sup> This conclusion was premised on a number of key factual findings that are not mentioned at any point in British Columbia's factum:

- "... [I]n 1992 Premier Michael Harcourt promised the Xeni Gwet'in people there would be no harvesting of timber in their traditional territory without their consent".<sup>8</sup>
- "... 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".<sup>9</sup>
- Provincial land use planning demonstrated "the Province's determination to open up the Claim Area for logging" and gave the force of law to "timber targets for harvesting that **direct a substantial level of commercial harvesting** in the Claim Area".<sup>10</sup>
- None of this provincial land use planning "took into account any Aboriginal title or Aboriginal rights that might exist in the Claim Area".<sup>11</sup>
- In fact, the Annual Allowable Cut ("**AAC**") was "based on the assumption that all areas contribute to the timber supply within the TSA until the issue of Aboriginal title is finally resolved"<sup>12</sup> and "[t]he former Chief Forester testified that he did not (and believed he could not) adjust his AAC determination on the basis of a claim to Aboriginal rights and title".<sup>13</sup>

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<sup>7</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 576-585, paras. 1276-1301.

<sup>8</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 262, para. 328; see also p. 179, para. 70 and Trial Decision, Joint Appeal Record, v. II(b), p. 527, para. 1126; see also: *Carrier Lumber Ltd. v. British Columbia*, (1999) 47 B.C.L.R. (2d) 50 (S.C.) at paras. 111, 338-340.

<sup>9</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 182, para. 87 [bolding added].

<sup>10</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 529, para. 1132 [bolding added].

<sup>11</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 529, para. 1133.

<sup>12</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 526-527, para. 1125.

<sup>13</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 527-528, para. 1128; see also p. 527, para. 1127.

- “[T]here is no doubt that **the Ministry [of Forests] seeks to maximize the economic return from provincial forests** ... [T]he protection and preservation of wildlife for the continued well-being of Aboriginal people is very low on the scale of priorities”.<sup>14</sup>
- Although the Tsilhqot’in people “have argued for a form of ecosystem management that can sustain the region for generations to come ... [t]heir proposals have not been accepted because ... **the current legislative system in British Columbia does not allow for ecosystem management**”.<sup>15</sup>
- Although forestry management “has the potential to **severely and unnecessarily impact Tsilhqot’in Aboriginal rights**”,<sup>16</sup> “British Columbia does not have a database that provides information on the individual species of wildlife or their numbers in the Claim Area” and “[t]he 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”.<sup>17</sup>
- In short, “[i]nsufficient consideration had been given to sustaining [Tsilhqot’in] communities in the model for sustainability employed by British Columbia”,<sup>18</sup> which was “driven by an economic engine” and focused mainly “on timber management and sustainability of the forest resource”.<sup>19</sup>
- “[T]here is no evidence that logging in the Claim Area is economically viable. The Claim Area has been excluded from the timber harvesting land

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<sup>14</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 579, para. 1286; see also pp. 516, 580, 582, paras. 1099, 1290, 1294.

<sup>15</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 517, para. 1100 [bolding added]; see also p. 516, para. 1098.

<sup>16</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 582, para. 1294 [bolding added]; see also p. 580, 582-583, paras. 1288, 1295.

<sup>17</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 581-582, para. 1293.

<sup>18</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 166, para. 26.

<sup>19</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 585, para. 1301.

base for an extended period of time. Even the Chief Forester acknowledged its more recent inclusion was questionable”.<sup>20</sup>

## PART 2 – ISSUES ON APPEAL

7. British Columbia’s appeal raises the following issues for determination:
- a. ***Did the Trial Judge err in finding that the Tsilhqot’in Nation is the proper holder of Aboriginal rights and Aboriginal title?*** No. The Plaintiff has consistently alleged that the Aboriginal rights were held by the Xenigwet’in as Tsilhqot’in people. The Trial Judge correctly concluded the Tsilhqot’in Nation was the proper rights holder.
  - b. ***Did the Trial Judge err in finding that British Columbia has unjustifiably infringed Tsilhqot’in Aboriginal rights?*** No. British Columbia’s position that the Trial Judge erred by failing to detail “specific and discrete” interferences with Tsilhqot’in Aboriginal rights fails to engage the substance of the Trial Judge’s findings. The Trial Judge properly found that British Columbia unjustifiably infringed Tsilhqot’in Aboriginal rights by committing the Claim Area to substantial commercial harvesting pursuant to a forestry regime that did not, and could not, take into account the Aboriginal rights claims of the Tsilhqot’in people.
  - c. ***Did the Trial Judge err in defining, or finding on the evidence, a Tsilhqot’in Aboriginal right to trade in skins and pelts as a means of obtaining a “moderate livelihood”?*** No. The Trial Judge defined the Aboriginal trading right and its limits in a manner that is grounded in, and provides for the modern expression of, this integral Tsilhqot’in cultural practice. The evidence established that the Tsilhqot’in people engaged in extensive, regularized trade through established markets to secure the necessities of life, as a defining element of their distinctive culture.

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<sup>20</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 508-509, para. 1077 [bolding added].

- d. *Did the Trial Judge err in holding that the Plaintiff had established an Aboriginal right to capture wild horses for work and transportation?* No. The Trial Judge's findings and inferences are fully supported by the record before him.

### PART 3 – ARGUMENT

#### A. The Tsilhqot'in Nation is the proper holder of Aboriginal rights

##### 1. The Trial Judge correctly decided the pleadings issue

8. British Columbia contends that the Trial Judge erred by identifying the Tsilhqot'in Nation as the appropriate holder of Aboriginal rights. It argues that the pleadings identified the Xeni Gwet'in as the rights holders and British Columbia was prejudiced by the "late change".<sup>21</sup>

9. This contention is without merit. The Plaintiff sought a declaration that the Xeni Gwet'in hold Aboriginal rights in the Claim Area, but it was clear from the pleadings that the Xeni Gwet'in hold these Aboriginal rights **as Tsilhqot'in people**. For example, the Plaintiff pleaded,

The Tsilhqot'in Nation (the "Tsilhqot'in") is an aboriginal group itself comprised of several aboriginal groups including the Xeni Gwet'in.<sup>22</sup>

...

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.<sup>23</sup>

...

As part of the lands exclusively occupied by the Tsilhqot'in before and at the time the British Crown assumed sovereignty, the Tsilhqot'in exclusively occupied the whole of the lands within the boundary of Trapline Licence #0504T003 issued by British Columbia (the "Trapline Territory"). The Tsilhqot'in continues to have exclusive occupation of the Trapline Territory today.<sup>24</sup>

<sup>21</sup> BC Appeal Factum, para. 34.

<sup>22</sup> Amended Statement of Claim, para. 2.

<sup>23</sup> Amended Statement of Claim, para. 10 [underscore added].

<sup>24</sup> Amended Statement of Claim, para. 12 [underscore added].

...

... The Xeni Gwet'in are recognized by the Tsilhqot'in as being caretakers of the Brittany and Trapline Territory and as having rights to carry on a range of activities in the Brittany and the Trapline Territory.<sup>25</sup>

10. If the Tsilhqot'in exclusively controlled the Claim Area, the rights of the Xeni Gwet'in could only arise from their status as a Tsilhqot'in community. This position is confirmed by the pleaded fact that the Xeni Gwet'in status as "caretakers" of the Claim Area and their "rights to carry on a range of activities" in the Claim Area were based on recognition by the Tsilhqot'in.

11. The fact that the Aboriginal rights of Xeni Gwet'in members were held **as Tsilhqot'in people** was further confirmed by the Plaintiff in response to demands for particulars. As early as March 1999, the Plaintiff particularized the relationship as follows:

- (a) the caretaker function of the Xeni Gwet'in is the responsibility held by the Xeni Gwet'in on behalf of and for the benefit of the Tsilhqot'in as a whole, to be knowledgeable and aware of events occurring within the Brittany Triangle and to take such action as may be appropriate in accordance with the customs and traditions of the Tsilhqot'in ...
- (b) the rights of the Xeni Gwet'in include the whole range of rights enjoyed by every member of the Tsilhqot'in incident upon holding aboriginal title and rights in the Brittany, including the right to use [and] enjoy Tsilhqot'in aboriginal title, the right to trap, including the right to hunt the animals found in the Brittany, as well as other rights, particulars of which need not be pleaded herein as no relief is sought in this proceeding in relation to these rights ..<sup>26</sup>

12. These particulars leave no doubt that the Xeni Gwet'in held the claimed Aboriginal rights as Tsilhqot'in people, in common with all other Tsilhqot'in people. As characterized by the Trial Judge, this was clearly "an action for declarations of

<sup>25</sup> Amended Statement of Claim, para. 13 [underscore added].

<sup>26</sup> Plaintiff's Reply to British Columbia's Demand for Particulars, dated, March 24, 1999, para. 15 [underscore added]; British Columbia's Demand for Particulars, dated March 4, 1999, p. 1. See also: Plaintiff's Reply to Demand For Particulars of the Statement of Claim, dated March 14, 2003, para. 17; British Columbia's Demand for Particulars, dated March 5, 2003, para. 8(b); British Columbia's *Identification of Deficiencies in Plaintiff's Reply to Demand for Particulars*, dated April 2, 2003, p. 38.

Tsilhqot'in Aboriginal title and certain defined **Tsilhqot'in Aboriginal rights** relating to land in the central region of British Columbia".<sup>27</sup> It was understood that "[t]he plaintiff claims Aboriginal rights [other than Aboriginal title] on behalf of the Xenigwet'in people **and the Tsilhqot'in Nation**".<sup>28</sup>

13. The Trial Judge's findings accord with the Plaintiff's pleadings and confirm that British Columbia was neither surprised nor prejudiced by the Plaintiff's framing of Xenigwet'in rights as Tsilhqot'in Aboriginal rights:

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 Xenigwet'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.

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.<sup>29</sup>

14. In its submissions, British Columbia complains that if the pleadings had disclosed a Tsilhqot'in Aboriginal right claim, the Province would have explored the potential conflict between such rights and Xenigwet'in commercial trapping rights issued by the Province. This argument is without merit for several reasons.

15. First, as described above, British Columbia had clear notice of the Plaintiff's position from at least March 1999 and was neither surprised nor prejudiced.

16. Second, provincially granted trap-lines confer **statutory** rights. Aboriginal rights are "upstream"<sup>30</sup> of statutory rights granted by the Province. British Columbia's grant of statutory rights to the Xenigwet'in cannot and does not alter the proper Aboriginal rights holder for constitutional purposes. For example, the fact that British Columbia

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<sup>27</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 167, para. 28 [bolding added].

<sup>28</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 559, para. 1213.

<sup>29</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 561, paras. 1220-21 [underscore added].

<sup>30</sup> By analogy to *Skeetchestn Indian Band and Secwepemc Aboriginal Nation v. Registrar of Land Titles, Kamloops*, [2001] 1 C.N.L.R. 310, 2000 BCCA 525, para. 4.

previously granted trap-lines to individual members of the Xeni Gwet'in<sup>31</sup> would not mean that those members, and not the Tsilhqot'in, were the proper rights holders for Aboriginal trapping rights or affect the identification of the proper rights holding group.

17. Third, even British Columbia does not contest the fact that the Plaintiff claimed Aboriginal title on behalf of the Tsilhqot'in Nation. Such title gives rise, if anything, to a much greater potential conflict with the statutory trap-line rights granted by the Province to the Xeni Gwet'in. British Columbia had every opportunity to explore that potential conflict through the course of the trial. British Columbia did not argue at trial, and the evidence did not point to, any actual conflict in practice between Tsilhqot'in and Xeni Gwet'in interests. The Tsilhqot'in and Xeni Gwet'in have regulated, and continue to regulate, Tsilhqot'in trapping activities in the Claim Area pursuant to their internal governance, law and tradition.

18. Finally, in British Columbia's own submissions, it argues that Aboriginal rights and Aboriginal title must both vest in the same community.<sup>32</sup> At trial, British Columbia vigorously contested the Tsilhqot'in Nation as the proper rights-holder for Aboriginal title and it continues to do so on this appeal. British Columbia has had the opportunity to fully test the Plaintiff's case for the Tsilhqot'in Nation as the proper rights holder and cannot be said to be prejudiced by a finding that the Tsilhqot'in Nation is the proper holder of Aboriginal rights.

19. There are no grounds to interfere with the Trial Judge's clear conclusion that British Columbia was neither surprised nor prejudiced by the pleadings. By this stage of the trial, the Trial Judge was familiar with British Columbia's tactic of raising specious pleadings complaints despite years of notice of the Plaintiff's case. He had already rejected a motion raising similar complaints, finding that British Columbia had years of clear notice of particulars of the Plaintiff's claim that it now alleged came as a surprise.<sup>33</sup> As another example, in the Trial Decision, the Trial Judge confessed to "some difficulty in understanding" British Columbia's position that the pleadings did not claim Aboriginal

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<sup>31</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 260, para. 319.

<sup>32</sup> BC Appeal Factum, paras. 102-3.

<sup>33</sup> *William et al v. British Columbia et al*, [2006] B.C.J. No. 1759, 2006 BCSC 399, para. 19.

title to private lands, when British Columbia had brought a motion five years earlier based on the potential impacts of the litigation on private land owners.<sup>34</sup>

20. This ground of appeal is yet another example of the same tactic and the Trial Judge's holding should be maintained.

## 2. Aboriginal rights and title vest in the Tsilhqot'in Nation

21. British Columbia argues that the Xeni Gwet'in, and not the Tsilhqot'in Nation, is the proper holder of Aboriginal rights and title. At trial, Canada properly acknowledged the Tsilhqot'in Nation as the appropriate rights holder.<sup>35</sup> As described below, both the governing law and the findings of the Trial Judge overwhelmingly point to the Tsilhqot'in Nation as the appropriate holder of Aboriginal rights and title.

### a. The Tsilhqot'in Nation as a "historic and present community"

22. Aboriginal rights are communal rights. By definition, such rights "must be grounded in the existence of a historic and present community".<sup>36</sup> The Supreme Court of Canada has used different terms interchangeably to describe the "historic and present communities" that hold Aboriginal title under s. 35(1), including: "Aboriginal nations",<sup>37</sup> "Aboriginal groups";<sup>38</sup> "Aboriginal communities";<sup>39</sup> and "Aboriginal societies".<sup>40</sup>

23. As these terms suggest, Aboriginal rights and Aboriginal title are grounded in the "**distinctive societies**" that lived on the land with their own practices, customs, and traditions. The stated purpose of s. 35(1) is to protect and reconcile "the interests that arise from the fact that prior to the arrival of Europeans in North America aboriginal

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<sup>34</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 477-478, para. 987. Note, however, that the application of Aboriginal title to private lands is not at issue in these appeals: Trial Decision, Joint Appeal Record, v. II(b), p. 482, para. 1000.

<sup>35</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 297, para. 437 and v. II(b), p. 561, para. 1219.

<sup>36</sup> *R. v. Powley* [2003] 2 S.C.R. 207 at para. 24; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 115, 143.

<sup>37</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 115, 155, 157-58, 168.

<sup>38</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 124, 128, 140, 143-45.

<sup>39</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 115, 126-29; 144, 155.

<sup>40</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 83-84, 111, 136, 145, 148, 156, 161, 165.

peoples lived on the land in distinctive societies, with their own practices, customs and traditions”.<sup>41</sup>

24. In *R. v. Powley*, the Supreme Court of Canada offered guidance on identifying and defining the “distinctive societies” that hold Aboriginal rights. In this decision, the Court considered for the first time a claim to Métis rights under s. 35(1). The Court in *Powley* held that a “Métis community can be defined as a group of Métis with a **distinctive collective identity, living together in the same geographic area and sharing a common way of life**”.<sup>42</sup> This test involves “demographic evidence, **proof of shared customs, traditions, and a collective identity**”.<sup>43</sup>

25. The Court did not distinguish between Aboriginal and Métis rights on this point, emphasizing instead that “Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community”.<sup>44</sup> The Trial Judge properly relied on the *Powley* factors to identify the appropriate rights holder in the present case.<sup>45</sup> As noted in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, the factors set out in *Powley* offer “helpful guidance”<sup>46</sup> in identifying the proper Aboriginal claimant group for Aboriginal rights and title.

26. *Powley*’s emphasis on a “historic and present community” also shares similarities with the approach advocated by the Royal Commission on Aboriginal Peoples for identifying the “Aboriginal nations” in which rights of self-determination vest. The Commission defined an “Aboriginal nation” as “a sizeable body of Aboriginal peoples with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories ...”<sup>47</sup>

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<sup>41</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 44; see also: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 150-51.

<sup>42</sup> *R. v. Powley* [2003] 2 S.C.R. 207 at para. 12 (bolding added).

<sup>43</sup> *R. v. Powley* [2003] 2 S.C.R. 207 at para. 23 (bolding added).

<sup>44</sup> *R. v. Powley* [2003] 2 S.C.R. 207 at para. 24.

<sup>45</sup> See Trial Decision, Joint Appeal Record, v. II(a), pp. 298-300, paras. 441-445.

<sup>46</sup> *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 1, 2009 BCSC 1494, para. 290.

<sup>47</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services Canada, 1996) at 166, 178.

27. Reviewing the voluminous record before him, the Trial Judge had little difficulty concluding that Aboriginal rights and title vest in the Tsilhqot'in Nation:

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.<sup>48</sup>

28. The Trial Judge's factual findings fully support this conclusion; in particular:

- The Tsilhqot'in people are a distinctive Aboriginal group with a shared language, customs, traditions, historical experience, territory and resources from a time before first contact (in 1793)<sup>49</sup> and sovereignty assertion (1846).<sup>50,51</sup>
- Neighbouring First Nations<sup>52</sup> and European explorers, traders and settlers<sup>53</sup> have consistently recognized the Tsilhqot'in people as a distinctive Aboriginal group.
- The Tsilhqot'in people share a creation story, called Lhin Desch'osh, which documents their origins as a distinctive Tsilhqot'in people and the creation of their shared homeland.<sup>54</sup>
- The Tsilhqot'in people share an expansive canon of ancestral legends and stories that "set out the rules of conduct" and function as "a value system passed from generation to generation".<sup>55</sup>

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<sup>48</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 307, para. 470 [underscore added].

<sup>49</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 558, paras. 1211-12.

<sup>50</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 354, paras. 601-02.

<sup>51</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 307, para. 470.

<sup>52</sup> E.g., Trial Decision, Joint Appeal Record, v. II(a) p. 216 and v. II(b), p. 454-455, paras. 920-21.

<sup>53</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 304-305, paras. 460-62.

<sup>54</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 211-212, 213, 373-375, 378, paras. 170, 175, 654-58, 666.

- The Tsilhqot'in Nation was a rule ordered society, governed by dechen ts'edilhtan ("the laws of our ancestors").<sup>56</sup> These laws are expressed through the oral traditions, stories and legends passed down from generation to generation.<sup>57</sup>
- Although the Tsilhqot'in people organized themselves along various "loose and flexible"<sup>58</sup> subdivisions (e.g. families, encampments, bands),<sup>59</sup> they were and remain unified as Tsilhqot'in people by "the common threads of language, customs, traditions and a shared history".<sup>60</sup>
- Tsilhqot'in people consider themselves a distinct Aboriginal group.<sup>61</sup> Individuals identify as Tsilhqot'in people first, rather than as band members.<sup>62</sup>
- All Tsilhqot'in people were and are entitled to utilize the entire Tsilhqot'in territory.<sup>63</sup> To this day, Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources.<sup>64</sup> The right to harvest resides in the collective Tsilhqot'in community.<sup>65</sup>

These facts point overwhelmingly to the Tsilhqot'in Nation as the proper rights holder.

#### **b. The Tsilhqot'in Nation as a unifying social, legal and political institution**

29. Nonetheless, British Columbia argues that Aboriginal rights vest in the Xeni Gwet'in, and not the Tsilhqot'in Nation. In its view, the search for the proper rights

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<sup>55</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 295-296, paras. 433-34; see also p. 274-275, 378-379, paras. 363, 668.

<sup>56</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 295, 296-297, paras. 431-32, 436.

<sup>57</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 195, 199, 295-296, paras. 131, 137, 433-34; see also p. 274-275, 378-379, paras. 363, 668.

<sup>58</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 274, para. 362.

<sup>59</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 272-275, paras. 356-63.

<sup>60</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 303, para. 457.

<sup>61</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 270, 304, paras. 346, 459.

<sup>62</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 304, para. 459.

<sup>63</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 273, para. 360.

<sup>64</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 304, para. 459.

<sup>65</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 304, para. 459.

holder begins with the community that “makes decisions with respect to the land” and argues that such decision-making was at the local band level.<sup>66</sup> British Columbia notes in particular that the Trial Judge cited “no examples of Nation-lead decision-making on the part of the Tsilhqot’in with respect to question of land or resource use” [*sic*].<sup>67</sup>

30. British Columbia’s argument is flawed in both law and fact. First, it effectively ignores numerous other factors in a highly contextual inquiry to argue that one, single factor should be decisive: *i.e.* which community made day-to-day decisions about lands and resources? As the Trial Judge observed, the inquiry into the proper rights holder is “primarily a matter of fact to be determined on the whole of the evidence relating to the specific society or culture”.<sup>68</sup>

31. This inquiry cannot be reduced to a single factor. It does not lend itself to strict *a priori* rules. First Nations are remarkably diverse in their social relationships, systems of governance and relationships to the land. Indeed, in *Powley*, the Court expressly found that the fact that “different groups of Métis have often lacked political structures” did not preclude these groups from holding rights under s. 35(1).<sup>69</sup>

32. In this case, the Trial Judge found that, despite the absence of centralized political structures, the Tsilhqot’in people were bound together as a distinctive society by “the common threads of language, customs, traditions and a shared history that form the central ‘self’ of a Tsilhqot’in person”.<sup>70</sup>

33. Second, British Columbia defines community “decision-making with respect to land” in a way that is improperly biased towards European norms. As the Trial Judge observed, British Columbia places too much emphasis on the notion of a single decision-making body<sup>71</sup> (“no one leader of all Tsilhqot’in speaking people was

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<sup>66</sup> BC Appeal Factum, paras. 79, 91, 97.

<sup>67</sup> BC Appeal Factum, para. 97.

<sup>68</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 297-298, para. 439.

<sup>69</sup> *R. v. Powley* [2003] 2 S.C.R. 207 at para. 23. See also: *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, [2008] 3 C.N.L.R. 158, 2008 BCSC 447, paras. 159-63, aff’d 2009 BCCA 593.

<sup>70</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 303, para. 457.

<sup>71</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 301-302, para. 451.

recognized”;<sup>72</sup> “no examples of Nation-lead decision-making”<sup>73</sup>). In fact, although it did not have a single leader or governing body, the Tsilhqot’in Nation **did** make its decisions about land and resource use **as a collective**, pursuant to a shared body of law, a collective identity, and its own distinctive socio-political organization.

34. In this respect, it is important to recall the fundamental purpose of the doctrine of Aboriginal rights. Section 35 is directed at reconciling the Crown’s acquisition of sovereignty with the fact that “aboriginal peoples were already here, living in communities on the land, and **participating in distinctive cultures, as they had done for centuries**”.<sup>74</sup> As a starting proposition, then, Aboriginal rights should operate in a manner that recognizes and facilitates the participation of First Nations “in their distinctive cultures, as they had done for centuries”.

35. As noted, Aboriginal rights find their source in the prior presence of Aboriginal peoples on the land in distinctive societies, governed by their own laws and traditions. As Lamer C.J. stated in *Delgamuukw*, “s. 35(1) must recognize and affirm both aspects of that prior presence – first, the occupation of land, and second, **the prior social organization and distinctive cultures** of aboriginal peoples on that land”.<sup>75</sup> Aboriginal rights should recognize and affirm the distinctive ways in which Aboriginal peoples organized themselves at sovereignty and occupied the land.

36. Aboriginal title is grounded, in part, in the Aboriginal perspective on land, including their systems of law. In *Delgamuukw*, Lamer C.J. held that the Aboriginal perspective on their occupation of lands can be gleaned, in part, from their “traditional laws”.<sup>76</sup> Consequently, a First Nation’s “laws in relation to land” (including “a land tenure system” or “laws governing land use”)<sup>77</sup> provide direct evidence of occupation in support of a claim to Aboriginal title. This indicates that Aboriginal title typically resides

<sup>72</sup> BC Appeal Factum, para. 88(a).

<sup>73</sup> BC Appeal Factum, para. 97.

<sup>74</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 30 [underscore in original, bolding added]. See also: *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313 at 328 (per Judson J.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 189 (per La Forest J.); *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, paras. 9-10.

<sup>75</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 141 [underscore added]; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 74; *R. v. Powley* [2003] 2 S.C.R. 207 at para. 13; B. Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can. Bar Rev. 196, p. 215.

<sup>76</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 148.

<sup>77</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 148.

in the Aboriginal community whose laws and traditions govern the use and occupation of the lands in question.<sup>78</sup>

37. The Trial Judge's identification of the Tsilhqot'in Nation as the proper rights-holder resonates with the distinctive culture, social organization, laws and collective identity of the Tsilhqot'in people. In particular, as noted by the Trial Judge, the Tsilhqot'in people were "less stratified and more egalitarian than many neighbouring First Nations"<sup>79</sup> and had a "loose and flexible group organization"<sup>80</sup> in part because the "mobility of Tsilhqot'in groups ... made ... rigid organizational structures unwieldy".<sup>81</sup>

38. Despite this loose group organization, and considerable autonomy at the individual and local group levels,<sup>82</sup> decisions with respect to lands and resources were clearly grounded in, and legitimated by, collective Tsilhqot'in laws and identity. The Tsilhqot'in Nation was a rule ordered society.<sup>83</sup> All Tsilhqot'in people were and are entitled to utilize the entire Tsilhqot'in territory under Tsilhqot'in law.<sup>84</sup> In the words of the Trial Judge, "[t]he right to harvest resides in the collective Tsilhqot'in community".<sup>85</sup>

39. The Trial Judge's findings confirm that, pursuant to their "prior social organization and distinctive culture",<sup>86</sup> the Tsilhqot'in people shared a single Tsilhqot'in territory,<sup>87</sup> validated by their laws and their shared origins as Tsilhqot'in people,<sup>88</sup> and that the rights of the Tsilhqot'in people to lands and resources vested in the Tsilhqot'in people as a collective, despite internal subdivisions, e.g.:

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<sup>78</sup> See also: *Mabo and Others v. Queensland (No. 2)* (1992), 175 CLR 1 (H.C.A.) at para. 68 (*per* Brennan J.) ["...so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed"].

<sup>79</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 272, para. 356.

<sup>80</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 274, para. 362.

<sup>81</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 272, para. 356.

<sup>82</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 272, para. 357.

<sup>83</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 295, 296-297, paras. 431-32, 436.

<sup>84</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 273, para. 360.

<sup>85</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 304, para. 459.

<sup>86</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 141.

<sup>87</sup> See, e.g., Trial Decision, Joint Appeal Record, v. II(a), pp. 211-212, 273, 304, 307, 361-362, 363, paras. 170, 360, 459, 470, 621-23, 626.

<sup>88</sup> See, e.g., Trial Decision, Joint Appeal Record, v. II(a), p. 211-212, 273, 304, para. 170, 360, 459.

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.<sup>89</sup>

...

The Xenigwet'in community of Tsilhqot'in people is the most remote and is clearly situated on historical Tsilhqot'in territory.<sup>90</sup>

...

... [A]ll Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory.<sup>91</sup>

...

In the modern Tsilhqot'in political structure, Xenigwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xenigwet'in, 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.<sup>92</sup>

...

"... there was no accommodation for the forest management proposals made by Xenigwet'in people on behalf of Tsilhqot'in people".<sup>93</sup>

...

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.<sup>94</sup>

...

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.<sup>95</sup>

<sup>89</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 166, para. 24 [underscore added].

<sup>90</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 167-168, para. 31 [underscore added].

<sup>91</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 273, para. 360 [underscore added].

<sup>92</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 306, para. 468 [underscore added].

<sup>93</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 531, para. 1139.

<sup>94</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 304, para. 459 [underscore added].

<sup>95</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 307, para. 470 [underscore added].

40. The expert evidence before the Trial Judge confirmed that “the Tsilhqot’in were an organized society and maintained internal control over their territories, resources and people”<sup>96</sup> and that the Tsilhqot’in “managed their affairs in a systematic manner”.<sup>97</sup>

41. Critically, it was the Tsilhqot’in people as a whole that exercised exclusive control over their Aboriginal title lands and defended their territorial boundaries from external threats. All Tsilhqot’in people held harvesting rights throughout Tsilhqot’in territory. The vast evidentiary record presented at trial did not disclose a single incident of conflict between Tsilhqot’in communities.<sup>98</sup> By contrast, non-Tsilhqot’in people “were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot’in people”.<sup>99</sup> In the words of the Trial Judge, “**Tsilhqot’in people were in exclusive control of that area** [the Proven Title Area] at the time of sovereignty assertion”.<sup>100</sup>

42. This is important because *Delgamuukw* states that “[e]xclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title”.<sup>101</sup> Exclusivity is the hallmark of Aboriginal title. The Trial Judge’s findings confirm that the Tsilhqot’in Nation,<sup>102</sup> and not its internal sub-groups,<sup>103</sup> exercised exclusive control over core Tsilhqot’in lands. This is yet another clear indicator that the Tsilhqot’in Nation is the proper rights holder for Aboriginal rights and title.

43. Ultimately, the Trial Judge’s decision recognizes and respects the distinctive socio-political organization and culture of the Tsilhqot’in Nation. By contrast, British Columbia’s insistence on a distinct decision-making body reflects “facile assumptions based on Eurocentric traditions”<sup>104</sup> of governance and fails to appreciate the

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<sup>96</sup> Exhibit 0407, Expert Report of Ken Coates, February 2005, at 20.

<sup>97</sup> Exhibit 0407, Expert Report of Ken Coates, February 2005, at 98-99.

<sup>98</sup> To the contrary, Exhibit 0437, Affidavit #1 of Patrick Alphonse, sworn April 15, 2005, para. 27.

<sup>99</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 460, para. 938.

<sup>100</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 461, para. 943 [bolding added].

<sup>101</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 155.

<sup>102</sup> See, e.g., Trial Decision, Joint Appeal Record, v. II(b), pp. 459, 461-462, paras. 935, 943-44.

<sup>103</sup> See, e.g., Trial Decision, Joint Appeal Record, v. II(a), pp. 166, 272-273, 273-274, 304, 306, paras. 24, 359, 361, 459, 468.

<sup>104</sup> By analogy to *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 68.

decentralized – **but nonetheless collective** – political, legal and social organization of the Tsilhqot'in people at contact and sovereignty.

44. As the Trial Judge observed, British Columbia's approach resembles the "organized society" test implicitly rejected by the Supreme Court of Canada in *Delgamuukw*.<sup>105</sup> This approach risks denying and subordinating the distinctive political and legal systems of Aboriginal peoples to the extent that these differ from the institutions of "civilized society".<sup>106</sup> As the High Court of Australia stated, when it excised the organized society test from Australian law, "an unjust and discriminatory doctrine of that kind can no longer be accepted".<sup>107</sup>

45. British Columbia's argument is also factually inaccurate. Even the findings cited by British Columbia contradict its central assertion that local bands were the decision-makers with respect to land and resource use. For example, British Columbia concedes that "conformity to behavioural norms occurred, if at all, at the family or at encampment level, rather than the band or nation level"<sup>108</sup> and "the band was a functioning unit only upon a few special occasions such as feasts or celebrations".<sup>109</sup>

46. It is clear that internal Tsilhqot'in groupings were highly fluid. The band itself was simply "a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes".<sup>110</sup> In the course of each year, Tsilhqot'in people dispersed and gathered for months at a time as family units, encampments, mixed bands and semi-bands.<sup>111</sup> The entire band "rarely gathered at one site".<sup>112</sup> There were "no explicitly defined band territories".<sup>113</sup>

47. On these facts, the "band" is hardly a compelling candidate as a rights holder. British Columbia's own proposed test (the community that "makes decisions" with

<sup>105</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 302, paras. 453-54.

<sup>106</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 302, para. 453.

<sup>107</sup> *Mabo and Others v. Queensland (No. 2)* (1992), 175 CLR 1 (H.C.A.) (per Brennan J.) at para. 42, quoted with approval in *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 53.

<sup>108</sup> BC Appeal Factum, para. 88(b), paraphrasing Trial Decision, Joint Appeal Record, v. II(a), p. 272, para. 357.

<sup>109</sup> BC Appeal Factum, para. 88(f), paraphrasing Trial Decision, Joint Appeal Record, v. II(a), pp. 273-274, para. 361.

<sup>110</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 272, para. 358.

<sup>111</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 273-274, para. 361.

<sup>112</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 273-274, para. 361.

<sup>113</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 272-273, para. 359.

respect to title lands)<sup>114</sup> does not describe historical Tsilhqot'in bands. Day to day decisions were made by individuals, families and perhaps encampments comprised of several families, depending on the time of year. Membership in encampments fluctuated – “[p]robably most families had constituted parts of several different local groups in the course of their existence”.<sup>115</sup> Bands themselves were fluid over time: bands shifted their territorial range and altered in composition.<sup>116</sup>

48. Put simply, the band-level community was not a decision-making body or a prominent socio-political unit in traditional Tsilhqot'in life.

49. In fact, the fluidity of camps, encampments and bands underscores the importance of the Tsilhqot'in collective that transcends these various subdivisions. Self-identity as *Tsilhqot'in* was reinforced by family ties that ran across band divisions, and by the gathering of families from several bands in the summer months in the mountains and at salmon fishing sites.<sup>117</sup> The Tsilhqot'in Nation was and remains the defining social, cultural, political and legal institution in Tsilhqot'in life.

### **c. British Columbia's reliance on precedent is inaccurate and misplaced**

50. British Columbia claims that “most of the Aboriginal rights decisions identify the band level community as the relevant grouping”.<sup>118</sup> However, because the determination of the proper rights holder is a fact-driven inquiry, specific to the particular Aboriginal group in question,<sup>119</sup> the results of other Aboriginal rights cases involving different First Nations are irrelevant. The facts of this case do not support the band level community as the proper rights holder, regardless of the outcome of other decisions.

<sup>114</sup> BC Appeal factum, para. 79.

<sup>115</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 272-273, para. 359.

<sup>116</sup> Exhibit 0175, Robert Lane, *Cultural Relations of the Chilcotin Indians of West Central British Columbia*, March 1953, at 166 to 167; Exhibit 0176, Robert Lane, “The Chilcotin”, 1981, at 407.

<sup>117</sup> Exhibit 0224, Expert Report of David Dinwoodie, at 5; Exhibit 0175, Robert Lane, *Cultural Relations of the Chilcotin Indians of West Central British Columbia*, March 1953, at 164, 171-72; Exhibit 0176, Robert Lane, “The Chilcotin”, 1981, at 407; Exhibit 0443, Expert Report of John Dewhirst, at para. 24; Exhibit 0167, Tab 9, Livingston Farrand, “Traditions of the Chilcotin Indians”, at 3; Exhibit 0437, Affidavit #1 of Patrick Alphonse, April 2005, at paras. 18, 22, 24.

<sup>118</sup> BC Appeal Factum, para. 97.

<sup>119</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 297-298, para. 439.

51. Further, as the Trial Judge observed, most cases that have addressed Aboriginal rights involve regulatory prosecutions; consequently, “[i]n many of these circumstances it is not necessary to identify with precision the appropriate collective”.<sup>120</sup> The cases cited by British Columbia simply do not establish a considered, blanket rule about the appropriate community to hold Aboriginal rights in all circumstances.

52. At any rate, the authorities cited by British Columbia largely **support** the Trial Judge’s conclusion that Aboriginal title vests in the Tsilhqot’in Nation. For example, British Columbia argues that in *R. v. Sparrow*, the Supreme Court of Canada found that Aboriginal fishing rights vested in the Musqueam Band.<sup>121</sup> However, it is clear from the judgment that the Musqueam share the defining characteristics of the Tsilhqot’in Nation, and not its internal bands: “the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group **with their own name, territory and resources**”.<sup>122</sup>

53. It is surprising that British Columbia cites *R. v. Billy and Johnny* in support of its position.<sup>123</sup> In that case and others, the courts have characterized Aboriginal rights claimed by members of various Tsilhqot’in communities as **Tsilhqot’in** Aboriginal rights claims.<sup>124</sup>

54. Madam Justice Garson’s finding in *Ahousaht* that the evidence did not establish “one single Nuu-chah-nulth Nation”<sup>125</sup> is specific to the facts of that case. As found in her judgment, the ancestral Nuu-chah-nulth groups at contact and sovereignty, unlike those comprising the Tsilhqot’in Nation, were distinct political entities, controlled their own respective territories, and occasionally warred against each other to extend their

<sup>120</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 297, para. 438. See also *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, para. 288 [appeal pending].

<sup>121</sup> BC Appeal Factum, paras. 81, 97.

<sup>122</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1094 [bolding added].

<sup>123</sup> BC Appeal Factum, paras. 84, 97.

<sup>124</sup> *R. v. Billy and Johnny*, [2006] 2 C.N.L.R. 123, 2006 BCPC 48, paras. 14, 16-18, 21, 27; *R. v. Bones*, 1990 CarswellBC 1489, [1990] 4 C.N.L.R. 37 (Prov. Ct.), aff’d 1993 CarswellBC 2646 (S.C.); *Haines v. R.* (1978), 8 B.C.L.R. 211 (Prov. Ct.), rev’d (but not on this point) [1980] 5 W.W.R. 421, 20 B.C.L.R. 260 (Co. Ct.), aff’d [1981] 6 W.W.R. 664, 34 B.C.L.R. 148 (C.A.); *R. v. Stump*, [1998] B.C.J. No. 1890 (Prov. Ct.); *R. v. Stump*, 1999 CarswellBC 3091, [2000] 4 C.N.L.R. 260 (Prov. Ct.).

<sup>125</sup> *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 1, 2009 BCSC 1494, para. 8.

territorial control.<sup>126</sup> Unlike the Tsilhqot'in bands, each of the constituent bands in *Ahousaht* self-identifies as an autonomous nation with its own rights and title.<sup>127</sup>

55. British Columbia refers to ***R. v. Marshall; R. v. Bernard*** where the Chief Justice approved of the provincial court judge's finding in *Marshall* that "the Mi'kmaq of the 18<sup>th</sup> century on mainland Nova Scotia probably had Aboriginal title to lands around their local communities".<sup>128</sup> This is, at best, ambiguous, since the first part of the statement suggests that such title vests in the Mi'kmaq of mainland Nova Scotia. Indeed, the provincial court judge in *Marshall* repeatedly identified the rights holder group as the "Mi'kmaq of Nova Scotia", as noted by the Trial Judge in this case.<sup>129</sup>

#### **d. Precedent in Aboriginal title actions supports the Trial Judge**

56. More helpful guidance is provided by judgments in actions brought by First Nations claiming Aboriginal title. A review of these decisions supports the Trial Judge's conclusion that Aboriginal title vests in the Tsilhqot'in Nation.

57. British Columbia says ***Delgamuukw v. British Columbia*** identifies the "band level community" as the appropriate group to hold Aboriginal title,<sup>130</sup> but this case stands for the opposite proposition. At trial, 51 Chiefs representing most of the Houses of the Gitksan and Wet'suwet'en Nations, advanced 51 individual claims on their own behalf and on behalf of their Houses. Notably, the trial judge cautioned that "the law cannot conveniently recognize discrete claims by small or sub groups within an aboriginal community" and held that "any judgment to which they are entitled must be for the benefit of these peoples generally, and not piecemeal for the Hereditary Chiefs, their Houses, or their members".<sup>131</sup>

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<sup>126</sup> See, e.g., *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 1, 2009 BCSC 1494, paras. 313-14, 319, 326, 334, 346-47, 353, 356, 363-64.

<sup>127</sup> *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 1, 2009 BCSC 1494, paras. 7, 299.

<sup>128</sup> BC Appeal Factum, para. 97.

<sup>129</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 300-301, paras. 447-449.

<sup>130</sup> BC Appeal Factum, para. 97.

<sup>131</sup> *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4<sup>th</sup>) 185 (B.C.S.C.) at 436.

58. On appeal to the Supreme Court of Canada, the plaintiffs amalgamated the individual claims into two collective claims, one by each nation. The Court ordered a new trial in part because this was not consistent with the pleadings. However, Lamer C.J. emphasized that “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”.<sup>132</sup>

59. In ***Calder v. British Columbia***, the Supreme Court of Canada considered the claim to Aboriginal title on the basis that it vested in **the Nishga as a collective nation**.<sup>133</sup> On the facts, the Nishga consisted of four bands, each having its own exclusive territory that it defended against others.<sup>134</sup> However, members of all bands considered themselves to be Nishga, spoke the same language, shared a “whole way of life”<sup>135</sup> and considered the whole of their territory to be Nishga lands, even though certain sub-groups would have privileged or even exclusive rights in relation to portions of this territory.<sup>136</sup> Based on this evidence, Hall J. concluded that “the Nishgas in fact are and were from time immemorial a **distinctive cultural entity** with concepts of ownership indigenous to their culture and capable of articulation under the common law”.<sup>137</sup>

60. In ***Baker Lake v. Minister of Indian Affairs and Northern Development***, Mahoney J. found that a vast expanse of land in the North West Territories was subject “to the aboriginal right and title of the Inuit to hunt and fish thereon”.<sup>138</sup> These rights vested in the **Inuit** generally, despite the existence of highly autonomous and politically self-directing camps, which were themselves organized into bands. From the perspective of the Inuit, even this broader band affiliation was subsumed within their collective identity. As Mahoney J. noted, “to them, Inuit were Inuit”.<sup>139</sup>

<sup>132</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 115.

<sup>133</sup> See, e.g., *Calder v. Attorney-General of British Columbia*, (1969), 8 D.L.R. (3d) 59 (B.C.S.C.) at 61, per Gould J.; *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313 at 317, per Judson J.; at p. 375, per Hall J.

<sup>134</sup> *Calder v. Attorney-General of British Columbia*, (1969), 8 D.L.R. (3d) 59 (B.C.S.C.) at 61; *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313 at 373.

<sup>135</sup> *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313 at 355-56, 360.

<sup>136</sup> *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313 at 362, 363, 364, 368, 373, 374.

<sup>137</sup> *Calder v. A.G. (B.C.)*, [1973] S.C.R. 313 at 375.

<sup>138</sup> *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.), para. 139; see also para. 95.

<sup>139</sup> *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.), paras. 34, 36.

61. Courts in Australia have considered this issue at length. Their jurisprudence entrenches the view that, at common law, native title vests in the community whose laws and customs govern entitlement to the land, with members and sub-groups deriving their interests through this overarching title.<sup>140</sup>

#### e. Enhancing the Survival of Distinctive Aboriginal Cultures

62. As noted, s. 35 is directed at recognizing and affirming “the prior social organization and distinctive cultures of aboriginal peoples”.<sup>141</sup> The Plaintiff respectfully submits that the Aboriginal perspective as to how their communities are identified and defined – under their own laws, customs and traditions – must be at the forefront of the inquiry into the proper holder of their rights.<sup>142</sup>

63. British Columbia’s argument that Aboriginal rights, including Aboriginal title, should vest in the Xeni Gwet’in runs counter to Tsilhqot’in law, identity, culture and history. It would vest Aboriginal rights in statutory *Indian Act* bands that hold no meaning or relevance to the Tsilhqot’in under their own law and culture. As the Trial Judge noted,

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.<sup>143</sup>

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<sup>140</sup> *Mabo and Others v. Queensland (No. 2)* (1992), 175 CLR 1 (H.C.A.) at para. 2 (*per* Mason and McHugh JJ.); paras. 54, 66-69 (*per* Brennan J.); *Ward v. Western Australia* (1999) 159 A.L.R. 483 (F.C.) at 529, 540-42; *aff’d* [2000] FCA 191 (C.A.), *rev’d* (on another point) [2002] HCA 28; *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v. Northern Territory of Australia*, [2004] FCA 472 (23 April 2004), paras. 2, 11, 55, 72-73, 132; *Dieri People v. State of South Australia* [2003] FCA 187 (F.C.), paras. 55-56; *Tilmouth v. Northern Territory of Australia* [2001] FCA 820 (12 April 2001).

<sup>141</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 141 (emphasis added).

<sup>142</sup> See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1112; Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services Canada, 1996) at 181-82.

<sup>143</sup> Trial Decision, Joint Appeal Record, v. II(a), pp. 306-307, para. 469.

64. British Columbia argues that Aboriginal rights should be held by *Indian Act* bands to provide certainty in Crown consultation processes.<sup>144</sup> However, British Columbia can and does engage with the Tsilhqot'in Nation through its representatives.<sup>145</sup> As British Columbia is well aware, the Tsilhqot'in National Government now represents all six Tsilhqot'in communities.<sup>146</sup>

65. More importantly, the distinctive identity, culture and social organization of First Nations cannot be sacrificed for administrative convenience. Section 35 seeks to "provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples".<sup>147</sup> It represents a commitment to "enhancing their survival as distinctive communities".<sup>148</sup>

66. Disregard for Aboriginal systems of governance and land-use has proven devastating historically for First Nations.<sup>149</sup> It is hard to imagine a more damaging blow to the relationship between the Crown and First Nations than an approach to recognizing Aboriginal title that denies the Aboriginal perspective on who they are as a people.

67. The law should strive to implement Aboriginal rights and title in a manner that facilitates – rather than frustrates – traditional systems of land use and governance. British Columbia's approach is wrong in law, wrong on the facts, and contrary to the founding principles of s. 35. With respect, the Trial Judge's holding should be affirmed.

## **B. Unjustified Infringement of Tsilhqot'in Aboriginal Rights**

68. British Columbia alleges a number of errors in the Trial Judge's approach to assessing the infringement of Tsilhqot'in Aboriginal rights (other than Aboriginal title).

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<sup>144</sup> BC Factum, paras. 100-101.

<sup>145</sup> See, e.g., Exhibit 0397.034, Memorandum of Understanding between the Tsilhqot'in Nation and the Government of British Columbia, see Recital "A".

<sup>146</sup> See *Report of the Federal Review Panel established by the Minister Of The Environment[:] Taseko Mines Limited's Prosperity Gold-Copper Mine Project* (July 2, 2010), p. 22.

<sup>147</sup> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, para. 22.

<sup>148</sup> *R. v. Powley* [2003] 2 S.C.R. 207 at para. 13.

<sup>149</sup> See: Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, Vol. 1 (Ottawa: Supply and Services Canada, 1996) at 274-276, 281. Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, Vol. 2 (Ottawa: Supply and Services Canada, 1996) at 561.

As described below, British Columbia's argument repeatedly fastens on selective comments from the Trial Judge, and omits significant findings of fact, in a manner that wholly misrepresents the Trial Judge's considered and thorough analysis of this issue.

### 1. The Trial Judge did not define the Aboriginal right as a right to "wildlife"

69. British Columbia says that the Trial Judge accepted the Plaintiff's claim that his Aboriginal rights entitled him to a "harvestable surplus of all species, sufficient to meet the needs of the Tsilhqot'in".<sup>150</sup> On its face, this seems uncontroversial – if forestry activities will reduce a species below the level needed to support the exercise of Tsilhqot'in Aboriginal rights, certainly this would represent a *prima facie* infringement of the Aboriginal right.<sup>151</sup> At any rate, contrary to British Columbia's assertion, at no point in the judgment does the Trial Judge endorse the Plaintiff's characterization.

70. Proceeding from this mischaracterization of the Trial Judge's reasons, British Columbia then asserts that the Trial Judge "transformed the claimed activity right into a right to an undiminished diversity and number of each species of wildlife whether actively hunted or not".<sup>152</sup> In its view, the Trial Judge improperly characterized the right, not as a protected activity, but as a right to "wildlife".<sup>153</sup>

71. This is simply incorrect. The Trial Judge explicitly cautioned that "a claim for an Aboriginal right must be founded upon an actual practice, custom or tradition" and "[t]he right cannot be characterized as a right to a particular resource".<sup>154</sup> He also expressly set out the requirements for establishing an infringement of Aboriginal rights (undue hardship, unreasonable limitation, denial of preferred means),<sup>155</sup> in terms that leave no doubt that the focus is on impacts on the exercise of the Aboriginal rights:

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<sup>150</sup> BC Appeal Factum, para. 109.

<sup>151</sup> See, e.g., *Westbank First Nation v. British Columbia*, [1996] B.C.J. No. 307 (S.C.) at para. 16.

<sup>152</sup> BC Appeal Factum, para. 110.

<sup>153</sup> BC Appeal Factum, Part 3, Section 3, p. 31, "Vickers J. Erred in Characterizing a Hunting Right As a Right to Wildlife".

<sup>154</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 541-542, para. 1162, citing the same authority as British Columbia, *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, para. 21.

<sup>155</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 502-503, 575, paras. 1058-59, 1273-74.

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.<sup>156</sup>

## 2. The Trial Judge's findings demonstrate infringement of Aboriginal rights

72. Contrary to British Columbia's assertions, the Trial Judge correctly described the tests for both proving an Aboriginal right and establishing an infringement. The substance of British Columbia's argument is really that the Trial Judge misapplied the infringement test.

73. British Columbia says that the Trial Judge came to the conclusion that "any forest harvesting activities would infringe the plaintiffs [*sic*] Aboriginal hunting and trapping rights without an examination of the type, amount, or location of the specific wildlife harvesting activities".<sup>157</sup> From here, British Columbia contends that the Trial Judge's failure to find specific, discrete interferences with hunting and trapping practices leads to absurd results; for example, the building of a road on the fringe of the Claim Area would be found to infringe Aboriginal title, even if the road enhanced hunting opportunities.<sup>158</sup>

74. British Columbia's submissions misrepresent the considered and thorough analysis of the Trial Judge. British Columbia's suggestion that forestry activities in the Claim Area could be minimal, might only have negligible impacts on Tsilhqot'in rights (if any), and could in fact *enhance* habitat and hunting opportunities completely contradicts the clear findings of the Trial Judge.

75. Put simply, British Columbia fails to acknowledge or address in any way the substance of the Trial Judge's findings: namely, that British Columbia through a series of land use decisions targeted the Claim Area for inevitable clear cut logging on a scale that that would severely impact the exercise of Tsilhqot'in Aboriginal rights, notwithstanding such logging would be economically marginal at best. British Columbia not only lacked the credible information required to assess impacts on wildlife and thus

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<sup>156</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 576, para. 1275.

<sup>157</sup> BC Appeal Factum, para. 120; see also para. 110.

<sup>158</sup> BC Appeal Factum, para. 120; see also para. 110.

Aboriginal rights, according to its own experts the forestry regime left “no room” to accommodate Aboriginal rights claims in any meaningful way because it was structured to maximize economic returns.

**a. Inevitable and substantial commercial harvesting in the Claim Area**

76. A Ministry of Forests official confirmed in 2001 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”.<sup>159</sup>

77. Contrary to British Columbia’s suggestion, commercial logging in the Claim Area would not be limited to a minor logging road on its border. The Tsilhqot’in people faced the prospect of **extensive and substantial clear-cut harvesting** throughout the Claim Area based on legally binding targets arising from provincial land use planning:

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.

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.<sup>160</sup>

78. The uncontested evidence before the Trial Judge was that the CCLUP entrenched legally binding targets that committed the timber in the Claim Area to commercial harvesting on a massive scale.<sup>161</sup>

<sup>159</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 182, para. 87 [bolding added].

<sup>160</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 529, paras. 1132-33 [underscore added].

<sup>161</sup> See, e.g., Exhibit 0464, Expert Report of David M. Carson, August 12, 2005; Exhibit 0506, Tab 90, Letter from Chris Schmid, MOE, to Yvonne Parkinson, Planning Officer, MOF, March 13, 1997, MOE Initial Evaluation of Alternate Wood Supply for FL A20016 (RFP) as Prepared by the Ministry of Forests, at 7.

79. The CCLUP dedicates 80 percent of its included area, within which the Claim Area falls, to the commercial resource land base. Those guarantees include specific targets for the subunits of the CCLUP. These subunit targets were set at 70 percent access to productive forestland in Special Resource Development Zones (“**SRDZs**”) and 81 percent in the Integrated Resource Management Zones (“**IRMZs**”).<sup>162</sup>

80. As an example, approximately 90 percent of the Brittany Triangle SRDZ is in the Claim Area; according to the *Cariboo-Chilcotin Land Use Plan Integration Report*, the contribution, or harvest availability, of productive area required of this subzone to meet CCLUP targets is 86 percent.<sup>163</sup> Clearly this target cannot be met without substantial commercial harvesting in the Brittany Triangle.

81. The Chilcotin Sustainable Resource Management Plan guides those preparing and approving operational plans in order to meet the CCLUP higher level plan targets for the Claim Area.<sup>164</sup> It was in draft form at the time of the Trial Decision. Map 1 of the Draft Chilcotin Sustainable Resource Management Plan (produced in January 2006) represented the best evidence of an area-based spatial representation as to how to meet the timber targets set out in the CCLUP process.<sup>165</sup>

82. This Map demonstrates the extent of access for timber harvesting required in the Claim Area to meet the CCLUP timber targets. Timber harvesting access is defined as the portion of the productive forest land base that is accessible for timber harvesting within or beyond what is considered normal timber harvesting rotation ages.<sup>166</sup> The Map shows virtually all of the forestlands in the Claim Area, outside of parks, dedicated to timber harvesting access, virtually all of it over the course of a single normal rotation (80 years for pine and deciduous stands, 120 years for other species).

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<sup>162</sup> Exhibit 0464, Expert Report of David M. Carson, August 12, 2005, at ii; Map of CCLUP Zones, at 34.

<sup>163</sup> Exhibit 0464, Expert Report of David M. Carson, August 12, 2005, at ii-iii.

<sup>164</sup> Transcript, v. 122, p. 21316, line 35 – p. 21317, line 1.

<sup>165</sup> Exhibit 0557, Tab 10, January 2006, Draft 2, Cariboo-Chilcotin Land Use-Plan, Chilcotin Sustainable Resource Management Plan, para. 3; Transcript, v. 122, p. 21293, line 23 – p. 21296, line 30.

<sup>166</sup> Exhibit 0557, Tab 10, January 2006, Draft 2, Cariboo-Chilcotin Land Use-Plan, Chilcotin Sustainable Resource Management Plan, p. 69, Map 1.

83. The record before the Trial Judge also documented British Columbia's increasing difficulties attempting to satisfy volumes of timber that it had committed in forest licenses; as the rest of the Chilcotin was "logged out", there was increasing pressure to direct substantial harvesting in the Claim Area to satisfy timber volume commitments.<sup>167</sup> At the same time, the Claim Area had become even more crucial to the cultural survival of the Xení Gwet'in and Tsilhqot'in as traditional lands outside the Claim Area were extensively clearcut.<sup>168</sup>

**b. "Severe" impacts on Tsilhqot'in Aboriginal Rights**

84. In essence, the Trial Judge described a head-on collision between British Columbia's commitment to "substantial commercial harvesting" of the Claim Area and the sustainability of Tsilhqot'in Aboriginal rights over those same lands. Critically, British Columbia's forestry regime could not temper or avoid this collision because it was structurally incapable of responding to Aboriginal rights claims: there was "simply no room to take into account the claims of Tsilhqot'in title and rights".<sup>169</sup>

85. In this respect, the Trial Judge relied on the "candid"<sup>170</sup> expert opinion of British Columbia's own forestry expert, Dr. Hamish Kimmins:

As Dr. Kimmins explained ... 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.<sup>171</sup>

...

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

<sup>167</sup> See, e.g., Exhibit 0467, Expert Report of John Fuller; Exhibit 506, Tab 090, Letter from Chris Schmid, MOE, to Yvonne Parkinson, Planning Officer, MOF, March 13, 1997, MOE Initial Evaluation of Alternate Wood Supply for FL A20016 (RFP) as Prepared by the Ministry of Forests; Exhibit 0364, Satellite image; Exhibit 0523, Memorandum of Chris Schmid to six addressees in Ministry of Environment and Ministry of Forests, May 8, 1998; Transcript, v. 115, p. 20101, line 14 – p. 20103, line 8.

<sup>168</sup> See, e.g., Exhibit 0025, Tab 48, HMTQ-2064326; Exhibit 0026, Tab 62, HMTQ-2053859; Transcript, v. 19, p. 3113, lines 6-15; Transcript, v. 20, p. 3267, line 9 – p. 3269, line 2 and p. 3301, line 30 – p. 3306, line 29; Transcript, v. 75, p. 12944, lines 22-36.

<sup>169</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 531-532, para. 1139.

<sup>170</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 515, para. 1097.

<sup>171</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 516, para. 1098 [underscore added].

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.<sup>172</sup>

86. In these circumstances, British Columbia's complaint that the Trial Judge did not find "specific and discrete interference with hunting activities"<sup>173</sup> misses the larger picture completely.

87. The Trial Judge held in no uncertain terms that the Tsilhqot'in people continue to exercise their Aboriginal rights "throughout the Claim Area".<sup>174</sup> At the same time, he found that commercial harvesting in the Claim Area would be "inevitable",<sup>175</sup> "substantial"<sup>176</sup> and left "no room to take into account the claims of Tsilhqot'in title and rights",<sup>177</sup> because the forestry regime was structured to "maximize the economic return from provincial forests" as its overriding objective.<sup>178</sup>

88. It is in this context that the Trial Judge's findings concerning impacts on Aboriginal rights are properly understood:

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.<sup>179</sup>

...

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.<sup>180</sup>

...

<sup>172</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 517, para. 1100 [underscore added].

<sup>173</sup> BC Appeal Factum, para. 110.

<sup>174</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 574, paras. 1267-68. See also: pp. 418, 428, 462, paras. 792, 825, 945.

<sup>175</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 182, para. 87.

<sup>176</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 529, para. 1133.

<sup>177</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 531-532, para. 1139.

<sup>178</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 579, 580, paras. 1286, 1290.

<sup>179</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 166, para. 26 [underscore added].

<sup>180</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 580, para. 1288 [underscore added].

Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights ... This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.<sup>181</sup>

...

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.<sup>182</sup>

89. The Trial Judge did not conclude, as British Columbia asserts, that **any** forestry activity, no matter how minor, would automatically infringe Tsilhqot'in Aboriginal rights. The Trial Judge was well aware of the need for the Plaintiff to demonstrate an actual interference with the exercise of Tsilhqot'in Aboriginal rights.<sup>183</sup> Rather, the Trial Judge concluded that, without intervention, British Columbia's forest management scheme would "severely and unnecessarily impact Tsilhqot'in Aboriginal rights" and "injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area".

90. The Trial Judge's conclusion was premised on an extensive record detailing the nature, location and extent of Tsilhqot'in hunting and trapping in the Claim Area; the structural inflexibility of the forestry regime to accommodate these activities; the focus of the management scheme on maximizing economic returns; the succession of land-use planning processes targeting the Claim Area for substantial commercial harvesting without any accommodation of Aboriginal rights claims; the heightening pressures to open up the Claim Area to satisfy timber volumes committed by the Province to licensees; and numerous operational plans premised on significant clear-cut logging throughout the Claim Area. The Trial Judge was well situated to make this determination of *prima facie* infringement and it is abundantly supported by the evidence that was before him.

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<sup>181</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 580-581, paras. 1290-91 [underscore added].

<sup>182</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 582, paras. 1294 [underscore added].

<sup>183</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 502-503, 575-576, paras. 1058-59, 1273-75.

91. British Columbia focuses on the testimony of select Tsilhqot'in elders to suggest that "Tsilhqot'in had largely ceased trapping furbearers".<sup>184</sup> This is yet another improper attempt to retry the facts of the case.<sup>185</sup> The Trial Judge found as a fact that the Tsilhqot'in have continuously hunted and trapped to the present day.<sup>186</sup> This finding is supported by abundant evidence, such as former Chief Ervin Charleyboy's testimony that Tsilhqot'in people are still trapping and that "even some of my elders do a lot of trapping".<sup>187</sup> Further, British Columbia does not appear to question the extensive hunting by Tsilhqot'in people throughout the Claim Area.

92. In these circumstances, the Tsilhqot'in people are not required to wait to challenge each individual cutting permit authorized by British Columbia as a separate and discrete infringement of Aboriginal rights. It would be impracticable and unjust to put the Tsilhqot'in people to the burden of challenging each of the innumerable operational decisions that implement an overarching strategic plan that they have demonstrated commits substantial portions of the Claim Area to timber harvesting, in direct conflict with the sustainability of their Aboriginal rights.

93. On interlocutory motions, the Trial Judge consistently rejected British Columbia's argument that "specific and discrete infringements are required for the plaintiff's action to proceed" and confirmed that the Plaintiff's action "raises live issues between the parties that must be resolved".<sup>188</sup> The Trial Judge specifically endorsed the comments of Madam Justice Rowles, writing for a unanimous Court on the appeal from the advance costs order:

... it makes no sense to describe the Xeni Gwet'in's actions as being a means to gain a strategic bargaining advantage. It seems to me that a description more consistent with events and the steps they have taken is that the Xeni Gwet'in are simply attempting to protect what they see as their interests, and, in view of the history, it is unsurprising that the Xeni Gwet'in would fear that decisions have or will be made that will impact their asserted aboriginal rights and title. The Xeni

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<sup>184</sup> BC Appeal Factum, paras. 124-25.

<sup>185</sup> See *Manjit International Development Ltd. v. Ng* (2009), 85 C.L.R. (3d) 182, 2009 BCCA 429, para. 10.

<sup>186</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 462, 574, paras. 945, 1267-68.

<sup>187</sup> Transcript, v. 82, p. 14256, lines 2-5.

<sup>188</sup> See, e.g.: *Nemah Valley Indian Band v. Riverside Forest Products* (2003), 121 A.C.W.S. (3d) 1030, 2003 BCSC 249, para. 66; *William et al v. HMTQ et al*, [2004] 3 C.N.L.R. 356, 2004 BCSC 610, para. 34.

Gwet'in are not required to wait until irreparable harm has been done to their trapping area before commencing an action.<sup>189</sup>

94. The speed at which forest harvesting destroys wildlife habitat over an area many times the size of the Claim Area is swift and shocking, even to those who have spent their career in government Ministries that oversee the forest industry. This reality is succinctly captured by the journal entries of Chris Schmid, a Habitat Protection Office with the Ministry of Environment, and an avid outdoorsman familiar with the Chilcotin region:

December 7, 1992 – Down to Nemiah Valley to listen to Ray Travers tell us the gospel on the Brittany Triangle – to say I was pissed off is a understatement. As far as I am concerned we wasted lots of tax payer bucks for a useless piece of trash. Back home around 6:30.

Nov. 2002 – I'm involved in the Xeni Gwet'in (Nemiah) court case and have gone through thousands of documents inc. the Travers Report. Its funny how one[']s perspective changes with time. I never thought that logging would change the Chilcotin the way it has in 10 short years ...<sup>190</sup>

### c. Alleged reversal of onus

95. British Columbia argues that the Trial Judge improperly reversed the onus for proof of an infringement of Aboriginal rights by imposing this burden on the Province. In support, British Columbia points to the following passage from the Trial Decision:

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.<sup>191</sup>

<sup>189</sup> See, e.g.: *Nemiah Valley Indian Band v. Riverside Forest Products* (2003), 121 A.C.W.S. (3d) 1030, 2003 BCSC 249, para. 66 and *William et al v. HMTQ et al*, [2004] 3 C.N.L.R. 356, 2004 BCSC 610, para. 34, quoting from *Xeni Gwet'in First Nations v. British Columbia*, [2002] 4 C.N.L.R. 306, 2002 BCCA 434 (CanLII), 2002 BCCA 434, para. 133 [underscore added].

<sup>190</sup> Exhibit 0509, Journal of Chris Schmid [underscore added].

<sup>191</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 517-518, para. 1103 [underscore added]; BC Appeal Factum, paras. 115-16.

96. British Columbia is fastening on one statement taken out of context. It is clear from the context that the Trial Judge was describing the burden on British Columbia to prove that any “future harvesting of timber will not [*unjustifiably*] infringe Tsilhqot’in Aboriginal rights”. This passage, for example, is taken from a section of the Trial Decision entitled “**Justification of Infringement of Aboriginal title**” that specifically addressed whether British Columbia could **justify** the established infringements of Aboriginal title and rights. The concluding sentence of this passage refers to the need for British Columbia to consult with the Tsilhqot’in, which is a requirement of justification.

97. Moreover, on several occasions, including this one, the Trial Judge referred to the “new model of sustainability” that was required by British Columbia to **justify** infringements of Aboriginal rights in the Claim Area (discussed in more detail below).<sup>192</sup>

98. The Trial Judge clearly understood, and explicitly stated, the respective burdens of proving infringement and justification:

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.<sup>193</sup>

See also:

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.<sup>194</sup>

99. Reading the judgment as a whole, it is clear that the Trial Judge understood the proper burden for proof of infringement and he applied that burden correctly.

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<sup>192</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 515-518 para. 1103; see also Trial Decision, Joint Appeal Record, v. II(a), p. 166, para. 26 and v. II(b), p. 585, para. 1301.

<sup>193</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 502, para. 1058; see also p. 575, para. 1272.

<sup>194</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 503-504, para. 1062 [underscore added].

**d. Systemic failure of British Columbia to recognize or accommodate Tsilhqot'in Aboriginal rights claims**

100. The Trial Judge concluded that British Columbia's infringement of Tsilhqot'in Aboriginal rights was unjustified. As he correctly observed, the test for justification has two parts, **both** of which must be satisfied:

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.<sup>195</sup>

The latter inquiry involves consideration of whether adequate priority has been accorded to the Aboriginal right; whether the right has been impaired as minimally as reasonably possible; whether proper consultation has occurred; and whether appropriate compensation has been made available.<sup>196</sup>

101. The Trial Judge held that British Columbia failed both branches of this test. With respect to whether the infringement was pursuant to a "compelling and substantial legislative objective", he expressly rejected all of the rationales advanced by British Columbia in support of timber harvesting in the Claim Area:

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.

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.<sup>197</sup>

<sup>195</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 511, para. 1083.

<sup>196</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 519-522, paras. 1109-1114.

<sup>197</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 519, paras. 1107-8 [underscore added]; see also: *Carrier Lumber Ltd. v. British Columbia*, (1999) 47 B.C.L.R. (2d) 50 (S.C.) at para. 8.

It is important to note that proof of a compelling and substantial objective is an essential requirement for justification, failing which an infringement cannot be justified.

102. The Trial Judge proceeded to find that British Columbia failed to meet the second branch of the test as well. He was clearly concerned that the substantial commercial harvesting targeted for the Claim Area threatened the very sustainability of Tsilhqot'in Aboriginal rights over those same lands:

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.<sup>198</sup>

103. The Trial Judge held that British Columbia lacked the basic information required to assess or manage the potential impacts of substantial commercial harvesting in the Claim Area on the sustainability of Tsilhqot'in Aboriginal rights. Accordingly, British Columbia had failed to show that it had accorded these Aboriginal rights adequate priority in its planning:

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.

Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. ... To justify harvesting activities in the Claim Area, including siculture 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 ...<sup>199</sup>

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<sup>198</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 580-581, para. 1291 [underscore added].

<sup>199</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 581-582, paras. 1293-94 [underscore added].

104. British Columbia's wildlife expert testified that as more and more forest harvesting occurs, there is a point at which the population of a species will fall below recovery levels.<sup>200</sup> In the absence of a database of wildlife populations in the area, or credible information about forestry impacts, British Columbia cannot be said to be adequately prioritizing, or minimally impairing, Tsilhqot'in Aboriginal rights that intimately depend on these wildlife populations.

105. British Columbia argues that the Trial Judge's justification analysis wrongly failed to examine the consultation record. In support, British Columbia relies on the following statement from the Trial Decision:

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.<sup>201</sup>

British Columbia argues that there is no requirement on the Crown to "acknowledge" rights as a precondition to meaningful consultation.

106. This position is flawed in two respects. First, British Columbia's failure to establish a "compelling and substantial" legislative objective is, in itself, fatal to its attempts to justify its infringements of Aboriginal rights. No amount of consultation, in any form, can justify infringements of Aboriginal rights that are not in furtherance of a compelling and substantial objective.<sup>202</sup>

107. Second, British Columbia's assertion that the Trial Judge "declined to examine the consultation record"<sup>203</sup> is simply false. The Trial Judge examined the consultation record at length and in detail. When he states that British Columbia failed to "acknowledge" Tsilhqot'in Aboriginal rights, this is based on numerous factual findings

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<sup>200</sup> Transcript, v. 115, p. 20196, lines 16-20; Transcript, v. 116, p. 20217, lines 23-34.

<sup>201</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 582, para. 1294 [underscore added]; BC Appeal Factum, para. 131.

<sup>202</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, p. 1079 ["If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue"].

<sup>203</sup> BC Appeal Factum, para. 131.

demonstrating that **the Province failed to consider or accommodate Tsilhqot'in Aboriginal rights claims in any meaningful way.** For example:

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.<sup>204</sup>

...

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.<sup>205</sup>

...

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 ...<sup>206</sup>

...

I do not propose to review these land use plans [including the CCLUP] 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.<sup>207</sup>

...

Pursuant to the CCLUP, the Province determined how the Claim Area lands were to be used ... 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.<sup>208</sup>

<sup>204</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 521, para. 1113 [underscore added].

<sup>205</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 527, para. 1127 [underscore added].

<sup>206</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 527-528, para. 1128 [underscore added].

<sup>207</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 529, para. 1133 [underscore added].

<sup>208</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 530, para. 1135 [underscore added].

...

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.<sup>209</sup>

...

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 Xenigwet'in people on behalf of Tsilhqot'in people. Forestry proposals that concerned timber assets in the Claim Area were usually addressed by representatives of Xenigwet'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.<sup>210</sup>

108. The Trial Judge did not discount the consultation record simply because British Columbia did not "acknowledge" Tsilhqot'in Aboriginal rights in the sense of admitting the existence or validity of these Aboriginal rights. British Columbia is again fastening on a single statement ("this consultation did not acknowledge Tsilhqot'in Aboriginal rights") in a manner that misrepresents the considered and extensive analysis conducted by the Trial Judge.

109. Rather, the Trial Judge held that no genuine consultation had occurred because the Province excluded from the outset any real consideration or accommodation of Tsilhqot'in Aboriginal rights claims. His statement that British Columbia did not "acknowledge" Tsilhqot'in Aboriginal rights reflects his detailed account of British Columbia's failure, at every stage of land use planning, to "consider",<sup>211</sup> "acknowledge or address",<sup>212</sup> take "into account"<sup>213</sup> or "accommodate"<sup>214</sup> the Aboriginal rights claims of

<sup>209</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 531, para. 1137 [underscore added].

<sup>210</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 531-532, para. 1139 [underscore added].

<sup>211</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 521, para. 1113.

<sup>212</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 530, para. 1135.

<sup>213</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 529, 531, 539-532, paras. 1133, 1137, 1139.

<sup>214</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 529, 531, paras. 1133, 1137.

the Tsilhqot'in people. Instead, these claims were "ignore[d]"<sup>215</sup> and systematically excluded at every stage by a forestry regime that left "simply no room to take into account the claims of Tsilhqot'in title and rights".<sup>216</sup>

110. British Columbia argues that *Haida Nation v. British Columbia (Minister of Forests)* only requires that the Crown take claims seriously, not that rights are acknowledged".<sup>217</sup> The Trial Judge's findings, as reviewed above, clearly show that the Province did not "take claims seriously" at any stage of land use planning. His findings were based in no small part on candid testimony from British Columbia's own forestry expert (Dr. Kimmins) and provincial forestry officials (including the former Chief Forester and Ministry of Forests employees).

111. Based on these findings, the Trial Judge held that British Columbia's consultation efforts were fundamentally deficient, whether considered from the perspective of justifying an infringement under the *Sparrow* test or complying with the honour of the Crown pursuant to *Haida Nation*. The Trial Judge was best situated to make this determination based on a vast and complex record of forestry planning and economics that spanned decades. There are no grounds to disturb his clear factual findings.

### **C. Tsilhqot'in Aboriginal Trading Rights**

#### **1. Pre-contact Tsilhqot'in trade was well-established, regular and substantial**

112. British Columbia argues that Tsilhqot'in trade in skins and pelts was not integral to their distinctive culture, because "Tsilhqot'in trade in furs was low-volume, opportunistic, irregular and for food purposes".<sup>218</sup>

113. This position directly contradicts the Trial Judge's conclusion that, for the Tsilhqot'in people,

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<sup>215</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 527, para. 1127; see also p. 529, para. 1133.

<sup>216</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 531-532, para. 1139.

<sup>217</sup> BC Appeal Factum, para. 134.

<sup>218</sup> BC Appeal Factum, para. 140.

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 necessities of life; it was not trade to accumulate wealth. In my view, the trading practice of the Tsilhqot'in people, at the time of first contact and continuing well into the twentieth [sic] century, was more than sufficient to meet the tests of cultural integrity set out by the Supreme Court of Canada.<sup>219</sup>

114. These findings are fully supported by the record. On the expert and oral history evidence before the Trial Judge, it is clear that the Tsilhqot'in people harvested large volumes of resources on a regular basis specifically for the purpose of trade, as a defining element of their culture and survival.

115. Tsilhqot'in trade was driven by the realities of life on the Chilcotin Plateau. While Tsilhqot'in traditional lands provided some resources in abundance (such as skins and pelts), it also suffered from cyclical and potentially disastrous salmon shortages. As the Trial Judge observed, the Tsilhqot'in traded the resources that their lands provided as a crucial survival strategy

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.

The practice of trade for salmon and accommodations was an integral part of Tsilhqot'in society that cannot be ignored ...<sup>220</sup>

116. The Tsilhqot'in were strategically situated as "middle men" in the vibrant coast-interior trade.<sup>221</sup> From a period long before and after contact, the Tsilhqot'in controlled trade from the interior to the coast in an area stretching from Bute Inlet in the south-east to Bella Coola in the northwest.<sup>222</sup>

<sup>219</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 572-573, para. 1263.

<sup>220</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 568, paras. 1247-48; see also pp. 569, 571, 572-573, paras. 1250, 1257, 1263.

<sup>221</sup> Exhibit 0166, Expert Report of Dr. Doug Hudson, December 20, 2003, at 10.

<sup>222</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 151.

117. The Tsilhqot'in exploited this strategic advantage as "middle men" to secure access to substantial trade, in particular with the Bella Coola (Nuxalk) on the coast and the Canyon Shuswap (Secwepemc) in the interior. Writing in the early 1900s, Diamond Jenness, Canada's foremost ethnologist in his day, described the Tsilhqot'in trade strategy in the following terms:

Their country was rich in game – caribou, bears, goats, sheep, marmots, and rabbits – and yielded many edible roots and berries, but salmon ascended their rivers so irregularly that the Chilcotin bought much of their supply from the Shuswap of the Fraser river and from the Bella Coola across the mountains ...<sup>223</sup>

118. Tsilhqot'in trade with the Canyon Shuswap was both in domestic products (including furs and pelts) and in products imported by the Tsilhqot'in from the coast, particularly in trade with the Bella Coola (such as dentalium shells). Based on his considerable first-hand knowledge,<sup>224</sup> early ethnographer James Teit described this trade as "**extensive**":

The Cañon 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.<sup>225</sup>

119. Teit observed that "because of their frequent trading [with the Tsilhqot'in] and profit-making, the Cañon Indians were a wealthy people ... They gave all their energies to salmon-fishing, the preparation of oil, and trading ...".<sup>226</sup> Indeed, the Tsilhqot'in

<sup>223</sup> Exhibit 0253, Jenness, "The Indians of Canada", 1932, at 361 to 62 [underscore added]; Exhibit 0224, Expert Report of Dr. David Dinwoodie, December, 2004 at 50.

<sup>224</sup> *R. v. Billy and Johnny*, [2006] 2 C.N.L.R. 123, 2006 BCPC 48, para. 24; see generally paras. 21-29.

<sup>225</sup> As reproduced in the Trial Decision, Joint Appeal Record, v. II(b), p. 569-570, para. 1252.

<sup>226</sup> Exhibit 167.006, James Teit, "The Shuswap", 1909, at 535.

people were known to the Canyon Shuswap as the “dentalia people”, based on their trade in this item as “middle men” between the Bella Coola and the Shuswap.<sup>227</sup>

120. Teit also described Tsilhqot'in trade relations with the Bella Coola:

Trade was carried on chiefly with the Bella Coola and the Canon Division of the Shuswap. From the former the tribe procured principally dried salmon, salmon and olachen oil, dentalium and abalone shells, paint, some copper, a few goat's wool blankets, a little cedar-bark, and occasionally cedar-wood boxes and dishes. In later days they also received iron and iron tools. In exchange, they gave cakes of service-berries, cakes of soap-berries, snowshoes, dressed caribou and deer skins, goat-skins and furs ...<sup>228</sup>

121. The volume and regularity of pre-contact Tsilhqot'in trade with the Bella Coola and Canyon Shuswap is underscored by Teit's assessment that the Tsilhqot'in obtained the “**bulk of their [salmon] supply**” from these two trading partners.<sup>229</sup>

122. Robert Tyhurst, one of the foremost anthropologists to study the Tsilhqot'in, similarly described the Tsilhqot'in and Canyon Shuswap as “allies in trade”, noting that the Tsilhqot'in had a “**large assured and protected market**”<sup>230</sup> with the Canyon Shuswap and that the latter “were the recipients of **considerable Chilcotin trade**”.<sup>231</sup> He speaks of the pre-contact Tsilhqot'in trade in terms of “**trade profitability**”.<sup>232</sup>

123. The Plaintiff's expert witnesses confirmed these accounts. Dr. Hudson noted that the Tsilhqot'in were “engaged in **extensive trade** with neighbouring coastal and interior First Nations, in an indigenous trading network that facilitated the flow of items throughout the region” dating back at least to the late 1700s.<sup>233</sup> Dr. Dinwoodie described the Tsilhqot'in as “well known” for trading pelts to neighbouring First Nations.<sup>234</sup> He testified that the Tsilhqot'in, prior to the arrival of Europeans, “were in

<sup>227</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 570, para. 1253.

<sup>228</sup> Exhibit 0156-1900/00/00.001, Teit, “Notes of the Chilcotin Indians”, 1909, at 783 (emphasis added).

<sup>229</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 142; Exhibit 0156-1900/00/00.001, Teit, “Notes of the Chilcotin Indians”, 1909 at 779; Exhibit 0253, Jenness, “The Indians of Canada”, 1932, 361 to 362.

<sup>230</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 168 (emphasis added).

<sup>231</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 155-56 (emphasis added).

<sup>232</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 196.

<sup>233</sup> Exhibit 0166, Expert Report of Dr. Doug Hudson, December 20, 2003, at 22 (emphasis added).

<sup>234</sup> Exhibit 0224, Expert Report of Dr. David Dinwoodie, December, 2004 at 52

extensive contact with coastal and other communities ... they were involved in **elaborate trade**".<sup>235</sup>

124. These expert opinions were sustained through cross-examination. The Defendants did not lead any contradictory expert evidence on the issue of trade. Indeed, while cross-examining Dr. Hudson, counsel for British Columbia stated that he had "no quarrel" with the characterization of the routes to Bella Coola and Shuswap territory as "**main trading routes**".<sup>236</sup>

125. Oral history evidence confirmed the importance, regularity and scale of pre-contact Tsilhqot'in trade. Two examples will suffice. Ubill Hunlin stated that the Tsilhqot'in traded "all types"<sup>237</sup> of furs with the Bella Coola from the time of the ?Esggidam [distant ancestors] and that they would go to trade "**every fall time** after the animal pelts were in good condition" and they would do this "**all the time**" and "**each year ... each spring**".<sup>238</sup> Elizabeth Jeff, born in 1922, deposed:

Grandmother's family could not preserve enough food for the winter. So they would sometimes go down towards Bella Coola in the late fall for trading ... Each fall there would be some Tsilhqot'ins doing this. It wasn't everybody though. It was Tsilhqot'ins who did not have enough food preserved for the winter. Trading was part of their survival. They came from all over Tsilhqot'in country. This had been going on since the time of the ?esggidam (Tsilhqot'in ancestors).<sup>239</sup>

126. In short, the evidentiary record amply supports the Trial Judge's rejection of British Columbia's view that "Tsilhqot'in trade in furs was low-volume, opportunistic, irregular and for food purposes".<sup>240</sup> It certainly contradicts British Columbia's assertions that Tsilhqot'in trades were "few and far between".<sup>241</sup> British Columbia's improper attempt to re-argue the facts and evidence of this case on appeal cannot stand.

<sup>235</sup> Transcript, v. 64, p. 11018, lines 9-13; v. 67, p. 11582, line 40 – p. 11583, line 24 (emphasis added).

<sup>236</sup> Transcript, v. 52, p. 8814, lines 1 and 15.

<sup>237</sup> Transcript v. 75, p. 13095, line 16 to p. 13096, line 12; v. 76, p. 13193, lines 1-18.

<sup>238</sup> Transcript, v. 75, p. 13096, lines 11-28 (emphasis added).

<sup>239</sup> Exhibit 0432, Affidavit #2 of Elizabeth Jeff, para. 49 (emphasis added).

<sup>240</sup> BC Appeal Factum, para. 140.

<sup>241</sup> BC Appeal Factum, para. 149.

## 2. Pre-contact Tsilhqot'in trade was an integral cultural practice

127. The same can be said of British Columbia's argument that trade is not integral to Tsilhqot'in culture because "the Xeni Gwet'in have not shown a strong cultural attachment" to trade.<sup>242</sup> The evidence reviewed above fully supports the Trial Judge's conclusion that Tsilhqot'in trading practices were "more than sufficient to meet the tests of cultural integrality set out by the Supreme Court of Canada".<sup>243</sup>

128. In the face of this clear record, British Columbia attempts to undermine the Trial Judge's conclusions by opportunistically selecting three quotes from a voluminous record. Selectively referring to pieces of evidence while ignoring the clear findings of fact made by the Trial Judge on the complete record is inappropriate and misleading.

129. For example, British Columbia quotes Robert Tyhurst as stating that "an economy based principally on fur trading seems never to have become a dominant feature of the Chilcotin people's patterns of social life or subsistence".<sup>244</sup> However, in context, this statement refers to the fact that, relative to other First Nations, the Tsilhqot'in were not drawn as heavily into post-contact commercial trade with the Hudson's Bay Company ("**HBC**"). In the same paragraph, Tyhurst notes that "[a]nimal furs ... were almost certainly a significant item in the Chilcotin pre-contact economy" and "of some importance in pre-contact Chilcotin trade ...".<sup>245</sup>

130. Moreover, British Columbia fails to reference numerous statements by Tyhurst to the effect that "[t]rade, or transportation of goods, emerges as a **central fact in the economic history** of the Chilcotin"<sup>246</sup> and that "trade was, and has remained, **central to the continuing survival of the Chilcotin** on the Chilcotin Plateau".<sup>247</sup>

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<sup>242</sup> BC Appeal Factum, para. 139.

<sup>243</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 572-573, para. 1263.

<sup>244</sup> BC Appeal Factum, para. 142.

<sup>245</sup> BC Appeal Factum, para. 142.

<sup>246</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 142 [bolding added].

<sup>247</sup> Exhibit 0177, Tyhurst thesis, 1984, at 142 [bolding added].

131. British Columbia's selective quote from Dr. Dinwoodie similarly does nothing to advance its case.<sup>248</sup> In this quote, Dr. Dinwoodie simply acknowledges that for the Tsilhqot'in people, "the idea of trapping is not inherently linked to the commercial marketing of furs". In the preceding line, he notes that the Tsilhqot'in are "well known" for trading pelts with their neighbours and, in other evidence, he testified that the Tsilhqot'in engaged in "**elaborate trade**".<sup>249</sup>

132. Finally, British Columbia suggests that the failure of the HBC trading post in Tsilhqot'in territory somehow demonstrates that trade was not culturally important for the Tsilhqot'in people.<sup>250</sup> However, as the Trial Judge observed, Tsilhqot'in engagement with the HBC was limited in part because the HBC could not trade for the salmon that the Tsilhqot'in people required:

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.<sup>251</sup>

133. As Tyhurst noted, part of "the indifference of the Chilcotin to trade with the Hudson's Bay Company" was due to the fact that "[t]he Chilcotin had already established **important and valuable trade relations** with the Bella Coola and Canyon Shuswap which were in place when the Hudson's Bay Company arrived on the scene".<sup>252</sup> In his view, "Chilcotin resistance to the Hudson's Bay Company fur trade may thus be seen as an attempt to **maintain long standing trade relationships** which the successful intervention of the Hudson's Bay Company might have irreparably impaired ..."<sup>253</sup>

<sup>248</sup> BC Appeal Factum, para. 143.

<sup>249</sup> Transcript, v. 64, p. 11018, lines 9-13; v. 67, p. 11582, line 40 – p. 11583, line 24 [bolding added].

<sup>250</sup> BC Appeal Factum, para. 145.

<sup>251</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 569, para. 1250 [underscore added].

<sup>252</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 195 [bolding added].

<sup>253</sup> Exhibit 0177, Tyhurst thesis, July 1984, at 147 to 148 [bolding added]. See also Trial Decision, para. 247.

### 3. Practices undertaken for survival purposes are culturally “integral”

134. In *R. v. Sappier; R. v. Gray*, the Supreme Court of Canada clarified that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture test and that the jurisprudence favours “protecting the traditional means of survival of an aboriginal community”.<sup>254</sup> There can be no question, on the evidence and as found by the Trial Judge, that trade was a traditional means of survival for the Tsilhqot’in people.<sup>255</sup>

135. British Columbia argues that the Trial Judge erred by applying this principle, stated in a harvesting rights case, in the context of trading rights.<sup>256</sup> This argument is specious. The Court in *Sappier* clarified the “distinctive to the integral culture” standard for proving an Aboriginal right; the clarification of this standard is equally applicable to *all* Aboriginal rights. Indeed, the Court’s discussion of this point considered two of its Aboriginal trading rights cases (*Van der Peet* and *Mitchell*) in detail.

136. It is important to note, however, that the Tsilhqot’in did not trade in skins and pelts **exclusively** for survival purposes. As the Trial Judge confirmed, “[t]rade was not restricted to years of poor salmon runs”.<sup>257</sup> Tsilhqot’in people traded to secure a wide range of goods and items (e.g. eulachon oil, dentalium and abalone shells, paint, copper, wool blankets, cedar-bark, cedar-wood boxes and dishes),<sup>258</sup> and to purchase food, lodging and goodwill from neighbouring First Nations.<sup>259</sup> Trade also maintained peaceful relations with the Bella Coola and Canyon Shuswap.<sup>260</sup> In the words of the Trial Judge, “[Trade] was not limited to times of need. It was a way of life ...”<sup>261</sup>

<sup>254</sup> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, paras. 35-40, 46; Trial Decision, para. 1249.

<sup>255</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 568, 571, 572-573, paras. 1247-49, 1257, 1263.

<sup>256</sup> BC Appeal Factum, para. 150.

<sup>257</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 568, para. 1247.

<sup>258</sup> Exhibit 0156-1900/00/00.001, Teit, “Notes of the Chilcotin Indians”, 1909, at 783.

<sup>259</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 570-571, para. 1255.

<sup>260</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 459, 569, paras. 936, 1251.

<sup>261</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 572-573, para. 1263.

#### 4. Trade rights are not species-specific in this case

137. British Columbia argues that Aboriginal trading rights, unlike subsistence hunting rights, are “species” and “transaction” specific.<sup>262</sup> This statement of the law is inaccurate and overly simplistic. As Madam Justice Newbury recently stated for this Court in ***Lax Kw’alaams Indian Band v. Canada (Attorney General)***, in relation to the same issue,

It seems to me axiomatic that the facts of each case will determine the nature and breadth of the practice, custom or tradition in question and at the end of the analysis, of the right to be accorded constitutional status ... In some cases, the practice by its very nature will refer only to one species: most notably, in *Galdstone*, it involved only herring spawn on kelp and the resulting right was so delineated. In other instances, the practice will be a wider one ...<sup>263</sup>

138. The Supreme Court of Canada has refused to define Aboriginal hunting and trapping rights in terms of specific species, and instead has confirmed that where hunting and trapping at contact was opportunistic and diverse, in the sense that the claimant group took what the land had to offer, it should be expressed in the same terms in modern times.<sup>264</sup> As the Ontario Court of Appeal noted in *Powley*, “the Supreme Court of Canada has with striking regularity characterized claims as the right to hunt or fish for food, without reference to a specific species”.<sup>265</sup>

139. The Supreme Court of Canada has taken the same approach to Aboriginal trading rights. As noted by the Trial Judge, in two of the Court’s prominent Aboriginal trade rights cases, ***R. v. Van Der Peet*** and ***R. v. N.T.C. Smokehouse***, the Court characterized the claimed Aboriginal right as a right to trade or sell “fish” generally,

<sup>262</sup> BC Appeal Factum, para. 157.

<sup>263</sup> *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 278, 2009 BCCA 593, para. 35 [underscore added]; see also para. 40.

<sup>264</sup> *R. v. Powley*, [2001] 2 C.N.L.R. 291 (Ont. C.A.) at paras. 106-115; *R. v. Powley* [2003] 2 S.C.R. 207 at para. 20; Trial Decision, Joint Appeal Record, v. II(b), p. 542, para. 1163.

<sup>265</sup> *R. v. Powley*, [2001] 2 C.N.L.R. 291 (Ont. C.A.) at para. 114; aff’d *R. v. Powley* [2003] 2 S.C.R. 207 at para. 20.

notwithstanding both cases specifically involved the sale of salmon.<sup>266</sup> Trading rights were defined in similarly general terms in *R. v. Marshall* and *Mitchell v. M.N.R.*<sup>267</sup>

140. British Columbia relies on *R. v. Gladstone* and *Lax Kw'alaams*. Each of these cases turned on its specific facts. *Gladstone* related exclusively to Aboriginal practices and a specialized market associated with the sale of herring roe on kelp. This is a unique and distinct practice, necessarily targeted at a single species, which cannot be characterized as a generalized practice of trading in all fish species.<sup>268</sup> The right claimed and all the evidence was about herring roe on kelp.<sup>269</sup> Similarly, the fact that the evidence in *Lax Kw'alaams* suggested a pre-contact, large-scale trade in eulachon could not be generalized into a broad right to trade all fish products, especially when the evidence did not establish pre-contact trade in any other species as an integral cultural practice.<sup>270</sup>

141. By contrast, on the evidence before the Trial Judge in this case, the Tsilhqot'in were generalized traders at contact, exporting a diverse range of goods that held value to others in the moment, according to the fluctuations of supply and demand.<sup>271</sup> The record before the Trial Judge documented Tsilhqot'in trade to other First Nations of bear,<sup>272</sup> beaver,<sup>273</sup> goat skins,<sup>274</sup> marmot skins,<sup>275</sup> mountain goats,<sup>276</sup> mountain sheep,<sup>277</sup> caribou,<sup>278</sup> deer meat and hides,<sup>279</sup> moose and moose skins,<sup>280</sup> muskrats,<sup>281</sup>

<sup>266</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 542-543, para. 1165; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 76; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, paras. 2, 21.

<sup>267</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456, paras. 58-62; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, para. 19. See also: *Ahousht Indian Band and Nation v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 1, 2009 BCSC 1494, paras. 366-83.

<sup>268</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723.

<sup>269</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 542-543, para. 1165.

<sup>270</sup> *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 278, 2009 BCCA 593, paras. 36-38.

<sup>271</sup> See: Trial Decision, paras. 1247, 1252, 1254-55, 1257, 1263.

<sup>272</sup> Exhibit 0177, Tyhurst thesis, p. 25.

<sup>273</sup> Exhibit 0177, Tyhurst thesis, p. 25.

<sup>274</sup> Exhibit 0156-1900/00/00.001, Teit, "Notes of the Chilcotin Indians", 1909, at 783.

<sup>275</sup> Transcript, v. 59, p. 10185, line 13 – p. 10189, line 27; Exhibit 0177, Tyhurst thesis, p. 25; Transcript, v. 61, p. 10379, lines 1-46.

<sup>276</sup> Exhibit 0156-1900/00/00.001, Teit, "Notes on the Chilcotin", 1909, at 779; Transcript, v. 61, p. 10379, lines 1-46.

<sup>277</sup> Transcript, v. 61, p. 10379, lines 1-46.

<sup>278</sup> Exhibit 0156-1900/00/00.001, Teit, "Notes on the Chilcotin", 1909, at 779; Exhibit 0177, Tyhurst thesis, p. 25.

<sup>279</sup> Transcript, v. 57, p. 9698, lines 20-21; v. 61, p. 10379, lines 37-46; v. 82, p. 14256, line 28 – p. 14257, line 30; v. 57, p. 9698, lines 40-46; v. 61, p. 10379, lines 1-46.

<sup>280</sup> Exhibit 0156-1793/06/04.001 at p. 113645, Mackenzie's Journal July 15, 1793; Transcript, v. 57, p. 9698, lines 40-46; v. 82, p. 14256, line 28 – p. 14257, line 30.

<sup>281</sup> Exhibit 0177, Tyhurst thesis, p. 25.

lynx skins<sup>282</sup> and rabbits and rabbit skins,<sup>283</sup> in addition to clothes, gloves and blankets made from animal skins,<sup>284</sup> and references to furs and skins generally,<sup>285</sup> among other trade items. With the onset of the fur trade, Tsilhqot'in trading expanded to include an even more diverse range of skins and pelts.

142. The trading right should be described in equally broad and adaptive terms today. Restricting trade exclusively to the species traded at contact would ignore the substance of the trading practice and improperly “freeze” this practice in time as an anthropological relic rather than permitting its evolution to meet changing needs and circumstances.<sup>286</sup> In the words of the Trial Judge “such an approach would unduly frustrate the modern expression of this Aboriginal right”.<sup>287</sup>

### 5. “Moderate Livelihood”

143. Finally, British Columbia objects to the Trial Judge’s characterization of the Aboriginal right as a right to trade in skins and pelts as a means of securing a “moderate livelihood”. British Columbia argues that: (i) an Aboriginal right to trade for a “moderate livelihood” was rejected in *Van der Peet* and has no application outside treaty rights cases; and (ii) this right was not pleaded and therefore should not have been considered. With respect, neither argument is correct.

#### a. The right to trade as a means of securing a “moderate livelihood”

144. Courts have struggled, and continue to struggle, with the challenges of characterizing Aboriginal trading rights. As one commentator has observed, the Aboriginal trading right claimed in *Van der Peet* was characterized five different ways by seven different judges of this Court and the Supreme Court of Canada.<sup>288</sup>

<sup>282</sup> Exhibit 0156-1900/00/00.001, Teit, “Notes on the Chilcotin”, 1909, at 779.

<sup>283</sup> Exhibit 0177, Tyhurst thesis, p. 25; Exhibit 0156-1900/00/00.001, Teit, “Notes on the Chilcotin”, 1909, at 779.

<sup>284</sup> Transcript, v. 55, p. 9399, line 43 – p. 9400, line 11; v. 57, p. 9698, lines 20-21; v. 61, p. 10379, lines 1-46.

<sup>285</sup> Exhibit 0177, Tyhurst thesis, at 25; Transcript, v. 75, p. 13095, line 1 – p. 13096, line 12; v. 76, p. 13193, lines 1-18; v. 57, p. 9698, lines 20-21.

<sup>286</sup> See: *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, paras. 42-46; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 1, 2009 BCSC 1494, para. 383.

<sup>287</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 568, para. 1246.

<sup>288</sup> D.W. Elliott, “Fifty Dollars of Fish: A Comment On *R. v. Van Der Peet*” (1996) 35 Alta. L. Rev. (No. 3) 759, p. 772.

145. In the *Van der Peet* trilogy, the majority of the Supreme Court of Canada held that pre-contact Aboriginal reliance on fisheries for subsistence did not translate into a general right to earn a “moderate livelihood” from the sale of fish resources. McLachlin J. (as she then was) strongly endorsed this “moderate livelihood” approach in her dissenting opinion in *Van der Peet*,<sup>289</sup> as did Lambert J.A. in the court below.<sup>290</sup>

146. The majority of the Court, by contrast, held that Aboriginal rights must be characterized in terms of “**activities**” rather than their “**social significance**” at contact.<sup>291</sup> To this end, the Court distinguished between two broad categories of trading rights: (a) rights of exchange for money or other goods; and (b) commercial trading rights.<sup>292</sup>

147. Thus, in *Van der Peet*, the majority of the Court drew a sharp distinction between Aboriginal rights to fish for **sustenance** and Aboriginal rights to fish for **trade**. An Aboriginal right to fish for food does not include the right to *sell* fish to acquire money for food.<sup>293</sup> Trading rights must be established above and beyond the right to exploit a resource for food purposes.

148. The Court has since refined its approach to allow some variation from the two categories of Aboriginal trading rights considered in the *Van der Peet* trilogy, where appropriate on the facts of a particular case. For example, at trial in *Mitchell*, the judge relied on these two categories to characterize the claimed right as involving “an exchange of goods for money and other goods” or “small, non-commercial scale trade”.<sup>294</sup>

149. On appeal before the Supreme Court of Canada, McLachlin C.J. questioned the value of this characterization. She noted “without comment the practical difficulties inherent in defining ‘small, non-commercial scale trade’ and the obvious fact that many small acts of trade may add up to more major trade”. McLachlin C.J. concluded that the

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<sup>289</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 279.

<sup>290</sup> As reviewed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, paras. 11, 79.

<sup>291</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, paras. 52, 79.

<sup>292</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 77.

<sup>293</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 79.

<sup>294</sup> *Mitchell v. M.N.R.*, [1997] 4 C.N.L.R. 103 (F.C.T.D.), at 117.

claimed right was better characterized as “a right to trade *simpliciter*”.<sup>295</sup> The B.C. Supreme Court recently arrived at the same characterization in *Ahousaht*, after an extensive review of the jurisprudence.<sup>296</sup>

150. The Chief Justice’s comments in *Mitchell* echo her earlier position in *Van der Peet*, where she opined,

I see little point in labelling Mrs. Van der Peet's sale of fish something other than commerce. When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains. On the view I take of the case, the critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.<sup>297</sup>

151. This focus on defining trading rights in a manner that resonates with “the aboriginal people’s historic use of the resource” is consistent with the direction of the Court in *Sappier*. In *Sappier*, the Court stated that, when defining Aboriginal rights, “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”.<sup>298</sup> It is only in this way that s. 35 can promote its goal of “ensuring the continued existence of” and “provide cultural security and continuity for the particular aboriginal society”.<sup>299</sup>

152. The objective in each case is to define the trading right of the particular First Nation in a manner that truly captures and protects the traditional practice. This is not, as British Columbia argues, a revival of the “social significance” approach rejected in *Van der Peet*. Pursuant to that approach, historical reliance by First Nations on the fisheries **for subsistence** was argued to support a modern right to sell fisheries resources to sustain the community, whether or not the First Nation had actually engaged in trading at contact. That is not what the Plaintiff is arguing here nor what the Trial Judge found in the decision below.

<sup>295</sup> *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, para. 21 [bolding added].

<sup>296</sup> *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494, paras. 486-87.

<sup>297</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 236 [underscore added].

<sup>298</sup> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, para. 40.

<sup>299</sup> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, paras. 26, 33.

153. Rather, the Plaintiff’s position is that where, as here, **trade itself** played a central role in an Aboriginal group’s distinctive culture, the trading right should be characterized in terms that capture its true **purpose** and **scale**. This respects the fundamental principle that Aboriginal rights are defined as activities, rather than by their “social significance”, while at the same time ensuring that these rights truly capture “the aboriginal people’s historic use of the resource”.<sup>300</sup>

154. Although Madam Justice Newbury, speaking *in obiter* in *Lax Kw’alaams*, rejected the notion that Aboriginal trading rights should be defined in terms of the “standard of life” that they supported,<sup>301</sup> she did confirm the need to categorize Aboriginal rights in terms that capture the purpose and cultural role of the practice:

I see the categorization of trade, or any other activity in question, according to whether it is aimed at feeding oneself or one’s people, aimed at obtaining items to be used for ceremonial occasions, aimed at accumulating private or communal wealth, or aimed at participation in a large-scale market, as concerned with purpose, and as consistent with a principled approach to Aboriginal culture.<sup>302</sup>

In other words, the proper characterization of an Aboriginal trading right is a function of the particular purpose and cultural context of the practice in question.

155. The Trial Judge’s findings in the present case firmly support his characterization of the claimed right as a right to trade skins and pelts as a means of securing a “moderate livelihood”:

For Tsilhqot’in people, trade was never about the accumulation of wealth. Trade with their neighbours was motivated by survival ...<sup>303</sup>

...

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

<sup>300</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 236 [underscore added].

<sup>301</sup> *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 278, 2009 BCCA 593, paras. 66-70.

<sup>302</sup> *Lax Kw’alaams Indian Band v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 278, 2009 BCCA 593, para. 70 [underscore added].

<sup>303</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 571, para. 1257.

was always undertaken for the necessities of life; it was not trade to accumulate wealth ...<sup>304</sup>

...

The right may be properly characterized as a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. The evidence shows that the Tsilhqot'in ancestors [sic] engaged in that right and that it was integral to their distinctive culture.<sup>305</sup>

156. The Trial Judge's characterization of the Aboriginal trading right is principled and accurately reflects the historical practice. By contrast, neither of the two strict *Van der Peet* categories of trading rights would capture the Tsilhqot'in trading practice without distorting this practice unacceptably. The Tsilhqot'in did not trade for commercial purposes, in the sense of accumulating wealth. At the same time, there was a commercial element to this practice (elaborate and extensive trade pursuant to a regularized market) such that it cannot be considered mere barter or small scale exchange. And neither of these characterizations captures the main cultural purpose of the trade: *i.e.* securing goods and resources for survival – that is, the necessities of life.

157. It is worth noting that even if this trading right *were* uncomfortably forced into the conventional *Van der Peet* category of “exchange for money or other goods”, it would still be necessary to define the limit of this trading right. As the Chief Justice noted in *Mitchell*, “many small acts of trade may add up to more major trade”.<sup>306</sup> The same need to define the limits of the right would arise if the Aboriginal right were defined as “a right to trade *simpliciter*” (as in *Mitchell* and *Ahousaht*).

158. Here, the Trial Judge has defined the limits of the trading right in a manner that is grounded in this specific cultural practice. In this respect, his reliance on *Marshall* was not an improper importation of treaty rights law into the Aboriginal rights context (as British Columbia contends). Rather, he drew on the definition provided in *Marshall* of a “moderate livelihood” to assist in defining the limits of this Aboriginal right:

<sup>304</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 572-573, para. 1263 [underscore added].

<sup>305</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 573, para. 1265 [underscore added].

<sup>306</sup> *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, para. 21

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* ... 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 ...<sup>307</sup>

159. As the Trial Judge held, trade for this purpose was a defining element of Tsilhqot’in culture at contact. It is a core feature of Tsilhqot’in culture. The Trial Judge appropriately characterized this Aboriginal right in terms that reflect the historic practice, its purpose and its principled limits. There are no grounds in law or fact to interfere with this ruling.

#### **b. Pleading for the Aboriginal trade right**

160. British Columbia argues that the right to trade for a “moderate livelihood” should not have been considered because it was not specifically pleaded. However, the Plaintiff pleaded a right to “trading in skins and pelts”,<sup>308</sup> and despite several demands for particulars, and motions argued on the sufficiency of particulars, British Columbia never sought particulars of the trade right.

161. Tsilhqot’in trading rights were clearly put in issue. The Plaintiff’s argument on these rights, and the Trial Judge’s ruling, only provide additional detail and nuance to this claim – they do not change the claim in any material way.

162. Notably, in its submissions at the conclusion of trial, British Columbia never took issue with the sufficiency of the Plaintiff’s pleadings regarding a right to trade for a “moderate livelihood”. British Columbia has improperly raised the issue for the first time before the Court of Appeal, when the Trial Judge was in the best and likely only position

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<sup>307</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 573, para. 1264 [underscore added].

<sup>308</sup> Amended Statement of Claim, para. 14.

to assess the Parties' understanding of the claim and any relative prejudice. British Columbia's belated complaint should not be entertained on appeal.

#### **D. Aboriginal right to capture and utilize wild horses in the Claim Area**

163. 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.<sup>309</sup> The capture and use of wild horses by Tsilhqot'in people for transportation and work is an integral part of their present day culture.<sup>310</sup>

164. On this appeal, British Columbia takes issue with the Trial Judge's findings of a Tsilhqot'in Aboriginal right to capture and use wild horses, on a number of grounds.

##### **a. British Columbia's complaint about the pleadings**

165. British Columbia contends that the right to capture horses for transportation purposes was not pleaded and therefore should not have been considered.<sup>311</sup> This complaint is wholly specious, and illustrates yet again British Columbia's unfortunate and cynical resort to pleadings issues that are demonstrably lacking in substance.

166. The Plaintiff pleaded an Aboriginal right to trap animals "for their own use".<sup>312</sup> In particulars provided in March 2003, the Plaintiff clarified that this included, among other animals, "wild horses"<sup>313</sup> and specifically included "the use of horses for transportation and work".<sup>314</sup> In a subsequent demand for further and better particulars, British Columbia specifically stated that it did not object to these responses.<sup>315</sup> In fact, British

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<sup>309</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 562, para. 1224.

<sup>310</sup> Trial Decision, Joint Appeal Record, v. II(b), pp. 563-564, para. 1230.

<sup>311</sup> Trial Decision, Joint Appeal Record, v. II(a), p. 208, para. 159.

<sup>312</sup> Amended Statement of Claim, para. 14.

<sup>313</sup> Plaintiff's Reply to Demand For Particulars of the Statement of Claim, dated March 14, 2003, para. 20; British Columbia's Demand for Particulars, dated March 5, 2003, p. 4.

<sup>314</sup> Plaintiff's Reply to Demand For Particulars of the Statement of Claim, dated March 14, 2003, para. 19(a); British Columbia's Demand for Particulars, dated March 5, 2003, p. 4.

<sup>315</sup> British Columbia's *Identification of Deficiencies in Plaintiff's Reply to Demand for Particulars*, dated April 2, 2003, pp. 40-41.

Columbia brought a motion for further and better particulars in April 2003, but did not object at that time to the response now impugned.<sup>316</sup>

167. Finally, in March 2006, the Defendants brought a motion to strike various particulars as vexatious or as improperly amending the pleadings. In particular, British Columbia complained that the Plaintiff had extended the claim to non-furbearing animals. In response, the Trial Judge noted that the Plaintiff's claim was never limited to furbearing animals.<sup>317</sup> He also emphasized the impropriety of the Defendants waiting **three years** without complaint (indeed, in British Columbia's case, express approval) before challenging the pleadings and particulars:

I am unable to find the words complained of in the March 14, 2003 Reply to Demand for Particulars to be frivolous and vexatious within the meaning given to those words in *Lang Michener Lash Johnston v. Fabian* 1987 CanLII 172 (ON S.C.), (1987), 59 O.R. (2d) 353 at 358-359 (H.C.). On the contrary, those words have placed the defendants on notice for the past three years and there cannot now be an assertion that they are taken by surprise as to what animals (and birds) the plaintiff says were used and traded by the Xeni Gwet'in. The allegations set forth in this paragraph of the statement of claim as amplified by the particulars does not raise any new allegations, assertions or prayers for relief against either defendant. That portion of both motions is dismissed.<sup>318</sup>

168. British Columbia's attempt to revive this baseless complaint about the pleadings should be rejected again for the same reasons.

#### **b. Proof of pre-contact capture and use of wild horses**

169. British Columbia argues that the evidence did not establish a pre-contact Aboriginal practice of capturing horses. Once again, this is an improper attempt to retry the facts of the case on appeal. There are no grounds to interfere with the Trial Judge's findings of fact or his inferences from those facts:

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

<sup>316</sup> *William et al v. British Columbia et al* (2003), 122 A.C.W.S. (3d) 843, 2003 BCSC 735.

<sup>317</sup> *William et al v. British Columbia et al*, [2006] B.C.J. No. 1759, 2006 BCSC 399, para. 16. See also Trial Decision, para. 1229.

<sup>318</sup> *William et al v. British Columbia et al*, 2006 BCSC 399, para. 19 [underscore added].

between the date of first contact in 1793 and 1808. It is fair to infer that there was pre-contact use of horses.<sup>319</sup>

...

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."<sup>320</sup>

170. The Trial Judge was well situated to make these findings and draw the relevant inferences. With respect to the latter, the direction of the Supreme Court of Canada in *Sappier* is particularly apt. In that decision, the Court was prepared to find an Aboriginal timber harvesting right despite the lack of evidence of actual harvesting practices:

... I infer from this evidence that the practice of harvesting wood for domestic uses was also significant, though undertaken primarily for survival purposes. Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrity of a practice when direct evidence is not available ...

...

Flexibility is also important in the present cases with regard to the relevant time frame during which the practice must be found to have been integral to the distinctive culture of the aboriginal society in question. 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 ... I need only repeat what was said in *Van der Peet*, and reiterated more recently in *Mitchell* at para. 29, about the adapted rules of evidence applicable in aboriginal rights litigation and the use of post-contact evidence to prove the existence and integrity of pre-contact practices:

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

<sup>319</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 564, para. 1231 [underscore added].

<sup>320</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 565, para. 1235 [underscore added].

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.<sup>321</sup>

171. The Trial Judge's decision on this issue is supported by the evidentiary record, including documentation at contact and over the following years and decades. The inferences drawn from this record are reasonable and consistent with the direction in *Sappier*. There are no "palpable and overriding" grounds to interfere with these findings on appeal.

172. The Trial Judge also found an alternative basis for recognition of a Tsilhqot'in Aboriginal right to capture wild horses for work and transportation:

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 [a post-contact arrival in the Claim Area]. 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*.<sup>322</sup>

173. As reviewed above, this conclusion is consistent with the direction of this Court that the species-specificity or generality of an Aboriginal right depends on the facts of each case and should be defined in a manner that permits the modern expression of the historical practice.<sup>323</sup> This is a separate and distinct ground supporting the Trial Judge's affirmation of a Tsilhqot'in Aboriginal right to capture wild horses for transportation and work.

<sup>321</sup> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, para. 34 [underscore added].

<sup>322</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 565, para. 1236 [underscore added].

<sup>323</sup> *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2010] 1 C.N.L.R. 278, 2009 BCCA 593, para. 70.

174. Finally, British Columbia argues that the Plaintiff has not identified any governmental legislation or action which he alleged had infringed a horse capturing right.<sup>324</sup> This is contrary to the Trial Judge's express finding that "[a]n 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".<sup>325</sup> As reviewed above, there are no grounds to interfere with the Trial Judge's fully supported findings that the substantial clear-cut logging targeted for the Claim Area would infringe the Aboriginal trapping rights held by the Tsilhqot'in people.

#### **PART 4 – NATURE OF ORDER SOUGHT**

175. The Plaintiff respectfully requests that this appeal be dismissed, with costs, and seeks the relief requested in the Plaintiff's Appeal.

**All of which is respectfully submitted this \_\_\_\_ day of October, 2010.**

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**David Rosenberg, Q.C.**

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**Jack Woodward**

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**Jay Nelson**

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<sup>324</sup> BC Appeal Factum.

<sup>325</sup> Trial Decision, Joint Appeal Record, v. II(b), p. 567, para. 1243 [underscore added].

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<i>Baker Lake v. Minister of Indian Affairs and Northern Development</i> , [1980] 1 F.C. 518 (T.D.) .....	22
<i>Calder v. A.G. (B.C.)</i> , [1973] S.C.R. 313 .....	14, 22
<i>Calder v. Attorney-General of British Columbia</i> , (1969), 8 D.L.R. (3d) 59 (B.C.S.C.)....	22
<i>Carrier Lumber Ltd. v. British Columbia</i> , (1999) 47 B.C.L.R. (2d) 50 (S.C.) .....	2, 35
<i>Delgamuukw v. British Columbia</i> (1991), 79 D.L.R. (4 <sup>th</sup> ) 185 (B.C.S.C.) .....	21
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010 .....	9, 10, 14, 15, 17, 22, 23
<i>Dieri People v. State of South Australia</i> [2003] FCA 187 (F.C.) .....	23
<i>Haines v. R.</i> (1978), 8 B.C.L.R. 211 (Prov. Ct.), rev'd (but not on this point) [1980] 5 W.W.R. 421, 20 B.C.L.R. 260 (Co. Ct.), aff'd [1981] 6 W.W.R. 664, 34 B.C.L.R. 148 (C.A) .....	20
<i>Lax Kw'alaams Indian Band v. Canada (Attorney General)</i> , [2010] 1 C.N.L.R. 278, 2009 BCCA 593 .....	48, 49, 53, 59
<i>Lax Kw'alaams Indian Band v. Canada (Attorney General)</i> , [2008] 3 C.N.L.R. 158, 2008 BCSC 447 .....	13
<i>Mabo and Others v. Queensland (No. 2)</i> (1992), 175 CLR 1 (H.C.A.) .....	15, 18, 23
<i>Manjit International Development Ltd. v. Ng</i> (2009), 85 C.L.R. (3d) 182, 2009 BCCA 429 .....	32
<i>Mitchell v. M.N.R.</i> , [1997] 4 C.N.L.R. 103 (F.C.T.D.) .....	51
<i>Mitchell v. M.N.R.</i> , 2001 SCC 33, [2001] 1 S.C.R. 911 .....	14, 49, 52, 54
<i>Nemiah Valley Indian Band v. Riverside Forest Products</i> (2003), 121 A.C.W.S. (3d) 1030, 2003 BCSC 249 .....	32, 33
<i>R. v. Bernard</i> , [2005] 2 S.C.R. 220, 2005 SCC 43 .....	17
<i>R. v. Billy and Johnny</i> , [2006] 2 C.N.L.R. 123, 2006 BCPC 48 .....	20, 42

<i>R. v. Bones</i> , 1990 CarswellBC 1489, [1990] 4 C.N.L.R. 37 (Prov. Ct.), aff'd 1993 CarswellBC 2646 (S.C.).....	20
<i>R. v. Gladstone</i> , [1996] 2 S.C.R. 723 .....	49
<i>R. v. Marshall</i> , [1999] 3 S.C.R. 456.....	49
<i>R. v. N.T.C. Smokehouse Ltd.</i> , [1996] 2 S.C.R. 672 .....	49
<i>R. v. Powley</i> [2003] 2 S.C.R. 207 .....	9, 10, 13, 14, 24, 48
<i>R. v. Powley</i> , [2001] 2 C.N.L.R. 291 (Ont. C.A.).....	48
<i>R. v. Sappier; R. v. Gray</i> , [2006] 2 S.C.R. 686, 2006 SCC 54.....	24, 25, 47, 50, 52, 59
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075 .....	20, 23, 37
<i>R. v. Stump</i> , [1998] B.C.J. No. 1890 (Prov. Ct.) .....	20
<i>R. v. Stump</i> , 1999 CarswellBC 3091, [2000] 4 C.N.L.R. 260 (Prov. Ct.) .....	20
<i>Skeetchestn Indian Band and Secwepemc Aboriginal Nation v. Registrar of Land Titles, Kamloops</i> , [2001] 1 C.N.L.R. 310, 2000 BCCA 525.....	7
<i>The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v. Northern Territory of Australia</i> , [2004] FCA 472 (23 April 2004) .....	23
<i>Tilmouth v. Northern Territory of Australia</i> [2001] FCA 820 (12 April 2001) .....	23
<i>Tsilhqot'in Nation v. British Columbia</i> , 2007 BCSC 1700, [2007] B.C.J. No. 2465 .....	1
<i>Ward v. Western Australia</i> (1999) 159 A.L.R. 483 (F.C.) at 529, 540-42; aff'd [2000] FCA 191 (C.A.), rev'd (on another point) [2002] HCA 28.....	23
<i>Westbank First Nation v. British Columbia</i> , [1996] B.C.J. No. 307 (S.C.).....	25
<i>William et al v. British Columbia et al</i> (2003), 122 A.C.W.S. (3d) 843, 2003 BCSC 73557	
<i>William et al v. British Columbia et al</i> , [2006] B.C.J. No. 1759, 2006 BCSC 399 .....	8, 57
<i>William et al v. HMTQ et al</i> , [2004] 3 C.N.L.R. 356, 2004 BCSC 610 .....	32, 33
<i>Xeni Gwet'in First Nations v. British Columbia</i> , [2002] 4 C.N.L.R. 306, 2002 BCCA 434 .....	33

**Other Authorities**

B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196.....	15
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Canada, <i>Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship</i> , Vol. 2 (Ottawa: Supply and Services Canada, 1996) .....	12, 24, 25
D.W. Elliott, "Fifty Dollars of Fish: A Comment On <i>R. v. Van Der Peet</i> " (1996) 35 Alta. L. Rev. (No. 3) 759.....	52
<i>Report of the Federal Review Panel established by the Minister Of The Environment[:] Taseko Mines Limited's Prosperity Gold-Copper Mine Project</i> (July 2, 2010) .....	25