Court of Appeal File No. CA035620
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

Appellant
(Plaintiff)

AND:

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

Respondents
(Defendants)

APPELLANT'S FACTUM

Roger William

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

Jack Woodward
Jay Nelson
Woodward & Company Lawyers LLP
2nd 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

I N D E X

***Roger William* et al. v. *British Columbia* et al.**

Litigation Chronology

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].[1]
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].

[1] Numbers in [ ] refer to paragraphs in *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700.

Date	Event
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)
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: *Nemaiah Valley Indian Band v. Riverside Forest Products* (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 Nemiah 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: *William v. Riverside Forest Products Limited*, 2002 BCSC 1199 [89]. (AR p. 785)
November 18, 2002	The trial of the consolidated action began [91].

Date	Event
November 20, 2002	Vickers J. dismissed an application by Canada to be removed as a party: *William v. British Columbia*, 2002 BCSC 1904 [91]. (AR pp. 616, 789)
January 8, 2003	Vickers J. struck out the claim against *Riverside Forest Products Ltd.: William v. British Columbia*, 2003 BCSC 2036 [92]. (AR p. 624, 793)
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: William v. British Columbia, 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: *William v. British Columbia*, 2004 BCSC 964 [96]. (AR p. 849)
November 20, 2007	Judgment was rendered by Vickers J. (*Tsilhqot'in Nation v. British Columbia*, 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

1. The Tsilhqot'in Nation seeks a declaration of Aboriginal Title to the heartland of its traditional territory.

2. The Tsilhqot'in people have always defended their homeland. From pre-contact times to the present they have challenged those who threatened their territory. The present litigation was provoked by threatened forestry activity. Those who stood in the way of bridge construction at Henry's Crossing, and those who came before Mr. Justice Vickers to give evidence about their continued protection of their land, see themselves engaged in another historic struggle to protect their lands and culture.

3. The land which is the subject matter of this litigation is in one of the most remote parts of British Columbia. Many of its inhabitants still speak Tsilhqot'in as their first language. It is precisely because of this remoteness, and the steadfast protection by the Tsilhqot'in of their traditional lands, that a vibrant Tsilhqot'in culture survives to this day.

4. In this case, on an impressive evidentiary record, the Tsilhqot'in people proved that they hold Aboriginal title to the heartland of their traditional territory. This proven title area represents only about 2% of their larger traditional territory. The proven title area represents about forty per cent of the area claimed at trial.[2]

5. Although the Chilcotin War took place 146 years ago, the Tsilhqot'in people, including the witnesses who gave evidence at trial, speak of the events surrounding that war as if they were current. The mistreatment of their ancestors who were protecting their territory has caused deep wounds that remain fresh in the hearts and minds of the Tsilhqot'in.

[2] For reference, see the visual aid attached as Appendix "B".

6. In 1999, at the gravesite of Lha Ts'as?in and the other Tsilhqot'in Chiefs who were executed for their participation in the Chilcotin War, the Province unveiled a plaque which includes the following words:

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

7. For several years of trial, the Parties thoroughly litigated the existence and extent of Aboriginal title throughout every portion of the Claim Area. Applying the law to factual findings supported by a voluminous record, the Trial Judge was satisfied that the Tsilhqot'in people held Aboriginal title to a substantial, defined tract of the Claim Area. He emphasized that these lands have provided "cultural security and continuity to the Tsilhqot'in people for better than two centuries"[3] and that these lands "ultimately defined and sustained them as a people".[4] There could not be a more compelling case for Aboriginal title.

8. Unfortunately, the Trial Judge denied the Tsilhqot'in Nation legal affirmation of the lands to which they had proven Aboriginal title on a technical pleadings issue. His ruling rests on a mischaracterization of the Plaintiff's claim and reliance on judicial authority that has long been rejected in favour of a more flexible approach to pleading. This ruling cannot be correct, not least because it imposes an impossible burden on Aboriginal claimants and would render Aboriginal title claims non-justiciable.

9. With respect, it would be tragic and unjust to deny the Tsilhqot'in Nation the long overdue recognition of their Aboriginal title to the core of their traditional lands on such a technical pleadings issue based on clear errors of law. The Tsilhqot'in people have struggled for generations to steadfastly protect their traditional lands and the culture that these lands sustain. The Appellant respectfully asks the Court to grant the Tsilhqot'in people legal recognition of their Aboriginal title lands.

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[3] Trial Decision, para. 1376.
[4] Trial Decision, para. 1377.

PART 1 – STATEMENT OF FACTS

A. History of the Proceedings

1. This is an appeal from the trial judgment of Mr. Justice Vickers (the "**Trial Judge**") dated November 20, 2007,[5] concerning the Aboriginal title of the Tsilhqot'in Nation.

2. In his Reasons for Judgment, the Trial Judge reviewed the extensive history of this litigation, dating back to the 1980s.[6]

3. This litigation was "provoked by proposed forestry activities" in two regions of Tsilhqot'in traditional territory, known as the Trapline Territory and Tachelach'ed (or the Brittany Triangle).[7] The "initial flashpoint" was clear-cut logging proposed for the Trapline Territory in the early 1980s.[8]

4. The proposed logging was to take place in an area that the Xeni Gwet'in[9] community of the Tsilhqot'in Nation, in particular, had declared its "spiritual and economic homeland".[10] As the Trial Judge noted, "logging would have a severe impact on the wildlife and accordingly, on Tsilhqot'in hunting and trapping activities".[11]

5. The Tsilhqot'in people responded with a blockade at Henry's Crossing in May 1992[12] and two separate legal actions in B.C. Supreme Court asserting Aboriginal rights in the Trapline Territory and Tachelach'ed, respectively.[13] The Plaintiff Roger William,

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[5] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2007] B.C.J. No. 2465 (the "**Trial Decision**").
[6] Trial Decision, paras. 60 *et seq.*
[7] Trial Decision, Executive Summary.
[8] Trial Decision, para. 1295.
[9] Formerly the Nemiah Valley Indian Band, a.k.a. the Xeni Gwet'in First Nations Government.
[10] Trial Decision, para. 59.
[11] Trial Decision, para. 1295. See also para. 26 ["The forecasted logging was expected to interfere with Aboriginal rights to hunt and trap"].
[12] Trial Decision, paras. 22-27, 70.
[13] Trial Decision, paras. 64, 79.

then Chief of the Xeni Gwet'in, commenced the "Trapline Action" on April 18, 1990 and the "Brittany Triangle Action" on December 18, 1998.[14]

6. On May 13, 1992, Premier Harcourt promised the Tsilhqot'in people that there would be no further logging in their traditional territory without their consent.[15] However, starting on January 1, 1997, the Province issued several forest licenses to various forest companies permitting logging within the Trapline Territory and Tachelach'ed.[16]

7. In 2001, a Ministry of Forests official confirmed that logging and road building in the Claim Area were inevitable, as the decision to permit harvesting in the disputed area was made at the time the licences were issued early in 1997.[17]

8. These actions were consolidated by consent into the present action.[18] In this action, the Plaintiff, as representative of the Xeni Gwet'in and Tsilhqot'in Nation, sought declarations of Aboriginal title, Aboriginal rights to hunt and trap, and an Aboriginal right to trade in animal skins and pelts. The Plaintiff also sought associated relief, including compensation for past infringements of Aboriginal title.

B. The Trial

9. The trial commenced on November 18, 2002 and proceeded for a total of 339 trial days.[19] Twenty-four Tsilhqot'in witnesses testified before the Court, and five additional Tsilhqot'in witnesses provided evidence by affidavit alone. The Trial Judge established a procedure to test the qualifications of witnesses proposing to give oral history or oral tradition evidence.[20] Each of the Tsilhqot'in witnesses satisfied this test, subject to very limited exceptions on particular points of testimony. The Trial Judge

[14] Trial Decision, paras. 64, 79.
[15] Trial Decision, paras. 70, 328.
[16] Trial Decision, paras. 69-70, 75-78.
[17] Trial Decision, para. 87.
[18] Trial Decision, para. 82.
[19] Trial Decision, Executive Summary.
[20] Trial Decision, para. 139.

concluded that "all of the witnesses who related oral tradition and oral history evidence at trial did so to the best of their abilities".[21]

10. The Trial Judge affirmed that "many of the Tsilhqot'in personal narratives or oral traditions are rich in detail and internally consistent with each other".[22] In his view, Tsilhqot'in oral tradition evidence was "reliable as a record of certain traditional fishing or hunting practices" and assisted in "the construction of a reasonably reliable historical record of the actual use of some portions of the Claim Area at or prior to 1846".[23]

11. The Trial Judge also considered a vast number of historical documents and expert evidence tendered from a wide range of disciplines.[24]

12. After 339 trial days, with the benefit of extensive oral history evidence, a voluminous documentary record and expert opinion across a range of disciplines, the Trial Judge was well situated to make factual findings. The Plaintiff's summary of the material facts for this appeal, set out below, is based entirely upon the findings of fact made by the Trial Judge.

C. The Tsilhqot'in Nation

13. 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)[25] and sovereignty assertion (1846).[26,27] Neighbouring First Nations[28] and European explorers, traders and settlers[29] have consistently recognized the Tsilhqot'in people as a distinctive Aboriginal group.

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[21] Trial Decision, para. 196.
[22] Trial Decision, para. 168.
[23] Trial Decision, para. 168.
[24] Trial Decision, Executive Summary.
[25] Trial Decision, paras. 1211-12.
[26] Trial Decision, paras. 601-02.
[27] Trial Decision, para. 470.
[28] *E.g.*, Trial Decision, paras. 182, 920-21.
[29] Trial Decision, paras. 460-62.

14. The Tsilhqot'in people inhabit an area in the west central portion of British Columbia. They are the southern-most Athapaskan speaking people in Canada.[30] Although a variant of the Athapaskan language, Tsilhqot'in has been a truly distinct language for more than 500 years.[31] The number of proficient Tsilhqot'in speakers remains "very high" to this day.[32]

15. 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.[33] Tsilhqot'in elders recounted the Lhin Desch'osh legend before contact with Europeans (in 1793) and continue to do so to the present day.[34]

16. In addition to Lhin Desch'osh, 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".[35] Numerous geographic landmarks, many in the Claim Area, play a prominent part in these stories and legends.[36]

17. The Tsilhqot'in Nation was a rule ordered society, governed by dechen ts'edilhtan ("the laws of our ancestors").[37] These laws are expressed through the oral traditions, stories and legends passed down from generation to generation.[38]

18. Although the Tsilhqot'in people organized themselves along various "loose and flexible"[39] subdivisions (*e.g.* families, encampments, bands),[40] they were and remain unified as Tsilhqot'in people by "the common threads of language, customs, traditions

[30] Trial Decision, para. 332.
[31] Trial Decision, paras. 340, 343, 349.
[32] Trial Decision, para. 340.
[33] Trial Decision, paras. 170, 175, 654-58, 666.
[34] Trial Decision, paras. 170, 175, 654.
[35] Trial Decision, paras. 433-34. See also paras. 363, 668.
[36] Trial Decision, para. 653.
[37] Trial Decision, paras. 431-32, 436.
[38] Trial Decision, paras. 131, 137, 433-34. See also paras. 363, 668.
[39] Trial Decision, para. 362.
[40] Trial Decision, paras. 356-63.

and a shared history".[41] Tsilhqot'in people consider themselves a distinct Aboriginal group.[42] Individuals identify as Tsilhqot'in people first, rather than as band members.[43]

19. All Tsilhqot'in people were and are entitled to utilize the entire Tsilhqot'in territory.[44] To this day, Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources.[45] The right to harvest resides in the collective Tsilhqot'in community.[46]

20. The Tsilhqot'in Nation is presently comprised of six communities: Xeni Gwet'in, Tl'esqox (Toosey), Tsi Del Del (Redstone),[47] Tletinqox-t'in (Anahim),?Esdilagh (Alexandria) and Yunesit'in (Stone).[48] A seventh group resides with Ulkatcho Dakelh (Carrier) people on the Ulkatcho reserves located around Anahim Lake.[49] There are approximately 3,000 Tsilhqot'in people.[50]

21. The setting aside of reserves and the establishment of bands was for the convenience of the provincial and federal governments.[51] As observed by the Trial Judge, the creation of bands did not alter the identity of Tsilhqot'in people: "[t]heir true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences".[52] Reverence for the land that supports and nourishes them continues to the present generation.[53]

22. Based on the above facts, the Trial Judge concluded:

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[41] Trial Decision, para. 457.
[42] Trial Decision, paras. 346, 459.
[43] Trial Decision, para. 459.
[44] Trial Decision, para. 360.
[45] Trial Decision, para. 459.
[46] Trial Decision, para. 459.
[47] A.k.a. the Alexis Creek Indian Band.
[48] Trial Decision, para. 30.
[49] Trial Decision, para. 332.
[50] Trial Decision, para. 31.
[51] Trial Decision, para. 469.
[52] Trial Decision, para. 469.
[53] Trial Decision, para. 436. See also para. 418.

> … [T]he 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.[54]

D. The Xeni Gwet'in

23. The Xeni Gwet'in community of Tsilhqot'in people is the most remote and is clearly situated on historical Tsilhqot'in territory.[55]

24. The Xeni Gwet'in are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni (the Nemiah Valley), including Tachelach'ed.[56] As noted by the Trial Judge, "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".[57]

25. The anthropologist Livingston Farrand, and others, referred to the ancestors of the Xeni Gwet'in as the "Stone Chilcotin".[58] The Stone Chilcotin lived in communities around various lakes, including Tsilhqox Biny (Chilko Lake). At the time of sovereignty, the Stone Chilcotin made their winter headquarters along both sides of the Tsilhqox (Chilko River) corridor up to and including Tsilhqox Biny, and extending through the lakes, rivers and streams to the south, east and west (including the Nemiah Valley).[59]

26. Even today, the community of Xeni Gwet'in can be characterized as remote. It was not until 1973 that the Xeni Gwet'in region of Tsilhqot'in territory was finally connected by road to the outside world. Installation of the first telephone system in the

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[54] Trial Decision, para. 470 [underscore added].
[55] Trial Decision, para. 31.
[56] Trial Decision, para. 468.
[57] Trial Decision, para. 24.
[58] Trial Decision, paras. 337, 446. The "Stone Chilcotin" were also referred to as "Stick Chilcotin".
[59] Trial Decision, para. 337.

Nemiah Valley began in December 2000. Electricity from the public grid has not arrived in the Valley and the entire community relies upon generators for power.[60]

E. The Claim Area

27. The Claim Area consists of Tachelach'ed and the Trapline Territory. These two areas are delineated on Map 2, included in Appendix A to the Reasons for Judgment.[61] Map 3 locates Tsilhqot'in sites inside and outside the Claim Area.[62]

28. The Claim Area excludes Indian Reserves.[63] The Trial Judge further excluded private lands and submerged lands from the relief sought by the Plaintiff, on the grounds that no infringements to private or submerged lands had been pleaded.[64] The Plaintiff/Appellant does not appeal from that ruling. Accordingly, private lands and submerged lands in the Claim Area are not at issue in this proceeding.

29. The boundaries of the Claim Area are "artificial" in the sense that, for example, "[n]o one would suggest that the resource harvesting activities of Tsilhqot'in people ever stopped at the rivers" that mark the defined boundaries of Tachelach'ed.[65] Tsilhqot'in people used some lands as intensively outside the Claim Area boundaries as inside.[66]

30. However, as recognized by the Trial Judge, the Plaintiff was required to postulate artificial boundaries to advance his claim, even if these boundaries carried little relevance for the Tsilhqot'in.[67] The boundaries of the Claim Area crystallized in response to the threat of logging; first in the Trapline Territory and then in Tachelach'ed. Defined in this manner, the Claim Area offered "convenient boundaries" of relevance to contemporary survival.[68]

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[60] Trial Decision, para. 339.
[61] Trial Decision, para. 46, Appendix A, Map 2.
[62] Trial Decision, paras. 46, 650, Appendix A, Map 3.
[63] Trial Decision, paras. 44-45.
[64] Trial Decision, paras. 991-93, 1000, 1051-52.
[65] Trial Decision, para. 641.
[66] Trial Decision, para. 642, 643-44, 950, 958.
[67] Trial Decision, para. 645-46, 648-49.
[68] Trial Decision, para. 645.

F. Tsilhqot'in Territory and the Claim Area

31. The Claim Area is at the heart of a larger Tsilhqot'in traditional territory. It represents a small but critical portion of the lands traditionally used and occupied by the Tsilhqot'in Nation.[69] The Claim Area comprises about five percent of what is considered Tsilhqot'in traditional territory.[70]

32. The Claim Area is situated in the core of traditional Tsilhqot'in territory. As held by the Trial Judge, "the Claim Area lands, from the time prior to contact and through to the assertion of Crown sovereignty and beyond, fall well within the much broader area described as Tsilhqot'in traditional territory".[71] Both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory.[72]

G. Tsilhqot'in Occupation of the Claim Area from at least 1645-1660 A.D.

33. Athapaskan people have populated the Chilcotin Region for hundreds of years.[73] The Trial Judge found that people of the Plateau Pithouse Tradition (PPT) occupied this region prior to the arrival of Athapaskan people, but moved out of the region prior to 1500 A.D., before or as Tsilhqot'in people moved into the area.[74]

34. The archaeological record places Tsilhqot'in people in Tachelach'ed since at least 1645-1660 A.D. and in the Trapline Territory at the same time or a little later.[75]

35. The Tsilhqot'in connection to the lands and waters of the Claim Area finds expression in the abundant Tsilhqot'in place names that blanket the landscape.[76] An

[69] Trial Decision, para. 626.
[70] Trial Decision, para. 623.
[71] Trial Decision, para. 621.
[72] Trial Decision, para. 622.
[73] Trial Decision, para. 218.
[74] Trial Decision, paras. 208, 216, 625.
[75] Trial Decision, para. 625.
[76] Trial Decision, paras. 672-674.

obvious example is the Chilcotin (Tsilhqot'in) plateau.[77] Indeed, the "Chilcotin Region" of British Columbia takes its name from the Tsilhqot'in people.[78]

36. Place names in the Chilcotin Region are a testament to Tsilhqot'in occupation. Upon the arrival of the European fur traders and settlers, many Tsilhqot'in place names were anglicized. Examples include Tsilhqox (Chilko River and Lake), Dasiqox (Taseko River), Yuhitah (Yohetta Valley and Lake), Ts'uni?ad Biny (Tsuniah Lake).[79]

37. Tsilhqot'in place names in and about the Claim Area include prominent mountain peaks, prime resource areas, archaeological sites, sites that relate to specific oral traditions and other significant sites for Tsilhqot'in people.[80] These place names indicate "Tsilhqot'in people have been in the area for a very lengthy period of time".[81]

38. This time depth of Tsilhqot'in occupation is also reflected in Tsilhqot'in knowledge of plant resources in the Claim Area.[82] The Trial Judge had "no difficulty" accepting the expert opinion of Dr. Nancy Turner, a distinguished ethnobotanist and ethnoecologist, to the effect that Tsilhqot'in people have been present in the Claim Area for at least 250 years based on the length of time required to develop the names and knowledge of the Claim Area plants used for food and medicine.[83]

H. The Claim Area in Tsilhqot'in Legends

39. For Tsilhqot'in people, legends imbue the Claim Area landscape with meaning.[84] Key Tsilhqot'in legends are anchored to the dominant geographic features found in and

[77] Trial Decision, para. 673.
[78] Trial Decision, paras. 29-30.
[79] Trial Decision, para. 673.
[80] Trial Decision, para. 674.
[81] Trial Decision, para. 674.
[82] Trial Decision, para. 676.
[83] Trial Decision, paras. 676-77.
[84] Trial Decision, paras. 105, 131, 146, 169, 653-71, 866-67, 872.

bounding the Claim Area. For them, these legends originate in the time of *sadanx* (legendary period of time long ago).[85]

40. As mentioned above, the Tsilhqot'in creation story of Lhin Desch'osh describes the journey of mythical ancestors through the "Chilcotin country" and specifically references a number of distinctive landmarks in or near the Claim Area, including: the Tsilhqox (Chilko River), Tsilhqox Biny (Chilko Lake), the Dasiqox (Taseko River), Gwetsilh (Siwash Bridge), Nadilin Yex (the mouth of Taseko Lake), Tsulyu Ts'ilhed (Bull Canyon, also known as Tobacco Jump), and the "Snow Mountains", a reference to the mountains above Tsi Tese?an (Tchaikazan Valley), Yuhitah (Yohetta Valley) and Tl' ech' id Gunaz (Long Valley).[86]

41. The Lhin Desch'osh legend contained these references to distinctive geographical landmarks prior to contact with Europeans (in 1793).[87]

42. This legend of Ts'il?os and ?Eniyud explains the origins of key mountains, valleys and geographic landmarks in the transitional mountain-plateau zone.[88] After Ts'il?os separated from his wife, ?Eniyud, he transmogrified into the mountain that now dominates the Claim Area (Mount Tatlow).[89] ?Eniyud travelled to the area around Naghatalhchoz Biny (Big Eagle Lake) before changing into the mountain known as ?Eniyud Dzelh (Niut Mountain). As ?Eniyud travelled, she sculpted the land to create Xeni (Nemiah) and Ts'uni?ad (Tsuniah Valley) and seeded specific areas above Xeni as well as Tsimol Ch'ed (Potato Mountain) with the wild potatoes that grow there now.[90] In

[85] Trial Decision, para. 351. For Tsilhqot'in concepts of time, see Trial Decision, paras. 350-55. For Tsilhqot'in people, *sadanx* is "a time when legends began and when the ancestors, land and animals were transforming according to supernatural powers" (para. 351).
[86] Trial Decision, paras. 654-58.
[87] Trial Decision, para. 175.
[88] Trial Decision, paras. 174, 667.
[89] Trial Decision, paras. 659-60.
[90] Trial Decision, paras. 660-62.

Tsilhqot'in belief to this day, Ts'il?os and ?Eniyud are charged with the responsibility of protecting and watching over Tsilhqot'in people forever.[91]

43. The legend of Salmon Boy explains the origins of the salmon that return annually to the Tsilhqox (Chilko River) and specifically identifies the spawning grounds on the Tsilhqox and the spawning beds near the mouth of Tsilhqox Biny (Chilko Lake) and Tizlin Dzelh (Tullin Mountain).[92]

44. Other legends contain similar references to geographic sites within the Claim Area.[93] The Trial Judge confirmed that the "references to lakes, rivers and other landmarks formed a part of these legends for Tsilhqot'in people at the time of sovereignty assertion".[94]

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

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

> In addition, the evidence leads to but one conclusion, namely that Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day.[95]
>
> …
>
> My consideration of the evidence is over a period of time extending from pre-sovereignty assertion into the period post-sovereignty assertion. It is evident that the presence of Tsilhqot'in people in the Claim Area has been uninterrupted and continuous throughout and up to the present time.[96]

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[91] Trial Decision, para. 669. See also para. 669 ["Ts'il?os and ?Eniyud are persons to be respected. Tsilhqot'in people are taught that they are charged with the responsibility of respecting all of the land, no less than these two mountain peaks"].
[92] Trial Decision, paras. 663, 668.
[93] See *e.g.*, Trial Decision, para. 664.
[94] Trial Decision, para. 665.
[95] Trial Decision, para. 1268 [underscore added].
[96] Trial Decision, para. 651 [underscore added].

> …
>
> I am satisfied Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion. There has been a "substantial maintenance of the connection" between the people and the land" throughout this entire period …[97]

46. At the end of the trial, the Defendants both conceded this incontrovertible fact and admitted that the Tsilhqot'in people held Aboriginal rights to hunt and trap throughout the Claim Area.[98] Such Aboriginal rights, by definition, require proof of continuous hunting and trapping by Tsilhqot'in people throughout the Claim Area from before contact with Europeans (1793) to the present day.[99] Accordingly, that the Defendants' concession "brings with it an admission of the presence of Tsilhqot'in people in the Claim Area for over 200 years".[100]

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

47. At contact and the subsequent assertion of sovereignty, the Tsilhqot'in people lived a "semi-nomadic" life, surviving by hunting, fishing, trapping, berry picking, root gathering, and trading with neighbouring Aboriginal groups.[101] Tsilhqot'in people used a well-defined network of foot trails, horse trails and water courses to access hunting, fishing and plant-harvesting grounds, pursuant to a "clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area".[102]

48. The "harsh environment"[103] of the Chilcotin plateau demanded a high degree of territorial mobility for survival.[104] Although he described the Tsilhqot'in way of life as "semi-nomadic", the Trial Judge cautioned that this should not be interpreted as "haphazard":

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[97] Trial Decision, para. 945 [underscore added]. See also paras. 792, 825.
[98] Trial Decision, paras. 1223, 1374.
[99] Trial Decision, paras. 1154, 1173-74 and authorities cited therein.
[100] Trial Decision, para. 1374. See also para. 681.
[101] Trial Decision, para. 1211.
[102] Trial Decision, para. 948.
[103] Trial Decision, paras. 364, 436.
[104] Trial Decision, para. 647.

> While the term 'nomadism' generally implies a high degree of territorial mobility and little or no reliance on 'cultivation' in the Lockean sense, it does not mean 'haphazard' or 'unorganized'. Rather, nomadism is properly conceived as a 'way of living' in which individuals or groups are occasionally compelled to alter movements on short notice when conditions demand it, but beyond that inhabit recognizable spaces, know where they can and or cannot go, and whose daily or seasonal patterns of land use tend to follow the same cyclical trajectories over time. Put alternately, nomadism is a form of territoriality … that accommodates the need of kinship based societies having a relatively low level of technological 'development' and operating in physiographic or climatic environments that often yield their resources grudgingly.[105]

49. Tsilhqot'in people tended to follow the same seasonal patterns each year.[106] They were "semi"-nomadic in the sense that there was a collective regrouping in winter village sites for a portion of each year as a respite from the dark and cold.[107] In the spring, Tsilhqot'in people would disperse again along well-defined trail networks and water courses to harvest resources throughout the Claim Area and beyond.[108]

50. Two kinds of winter dwellings were used throughout Tsilhqot'in territory. The niyah qungh (or nenyexqungh) is a structure of Tsilhqot'in design and origin, distinguished by its rectangular structure. The lhiz qwen yex (or pit house or kigli hole) is a circular shaped structure dug well into the ground.[109]

51. The oral tradition evidence of Tsilhqot'in witnesses was that lhiz qwen yex were used going back to the time of the ?Esggidam (Tsilhqot'in ancestors before contact).[110] Tsilhqot'in people living today observed the fresh construction of such structures and lived in these dwellings.[111] As detailed below, the historical record documents Tsilhqot'in communities centred in winter villages of lhiz qwen yex in and around the Claim Area before and at the assertion of sovereignty by the Crown.[112]

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[105] Trial Decision, para. 646, quoting with approval from the expert report of Dr. Brealey [underscore added].
[106] Trial Decision, para. 647.
[107] Trial Decision, paras..
[108] Trial Decision, paras. 380, 679-80, 733, 798, 848, 874, 897, 959-60.
[109] Trial Decision, paras. 365-78.
[110] Trial Decision, para. 375.
[111] Trial Decision, paras. 365-78.
[112] *E.g.* Trial Decision, paras. 633, 708, 712, 714, 719-23, 727, 761-62, 783, 793, 820, 861-63.

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

> At the time of sovereignty assertion, Tsilhqot'in people living in the Claim Area were semi-nomadic. They moved up and down the main salmon bearing river, the Tsilhqox (Chilko River), in season. They fished the smaller lakes to the east and west of the Tsilhqox, particularly in the spring season. They gathered berries, medicines and root plants in the valleys and on the slopes of the surrounding mountains. They hunted and trapped across the Claim Area, taking what nature had to offer. Then, for the most part, they returned on a regular basis to winter at Xeni (Nemiah Valley), on the eastern shore of Tsilhqox Biny (Chilko Lake), on the high ground above the banks of the Tsilhqox, and on the shores of adjacent streams and lakes, from Naghatalhchoz Biny (Big Eagle Lake) and eastward into Tachelach'ed.
>
> In Tachelach'ed, the area of more permanent use and occupation was from the Tsilhqox corridor east to Natasewed Biny (Brittany Lake) and from there, south to Ts'uni?ad Biny (Tsuniah Lake) and east past Tsanlgen Biny (Chaunigan Lake) and over to the twin lakes, ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake).
>
> The areas that provided a greater degree of permanency and regular use are the sites where abandoned lhiz qwen yex and niyah qungh are found. The majority of these dwelling sites are not on the reserves set aside for Xeni Gwet'in people at the turn of the twentieth century.
>
> In early spring, Tsilhqot'in people would disperse again across the area that is, in part, defined in these proceedings as the Claim Area.[113]

53. Tsilhqot'in elders "vividly described" this seasonal semi-nomadic round at trial.[114] The elders traced the seasonal rounds and the activities undertaken on those rounds back to the ?Esggidam (Tsilhqot'in ancestors) in yedanx (the time before contact) and sadanx (legendary period of time long ago).[115]

54. Historical patterns of seasonal resource gathering in various locations in the Claim Area have continued over time.[116] Tsilhqot'in people have continued to gather

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[113] Trial Decision, paras. 953-56. See also paras. 380 to 397.
[114] Trial Decision, para. 381.
[115] Trial Decision, para. 355.
[116] Trial Decision, paras. 397, 949.

resources and otherwise reside in the areas their ancestors have used for generations, whether these areas are on reserve or not.[117]

K. Extensive Transportation Network in the Claim Area

55. From a time prior to contact and at the time of sovereignty assertion there was an extensive transportation network (including rivers, trails, routes, creeks and portages) forged and used by Tsilhqot'in people within and adjacent to the Claim Area.[118] This trail network assisted with hunting, fishing, trapping and resource gathering throughout the Claim Area.[119]

L. Exclusive Tsilhqot'in Control of the Claim Area

56. Upon the assertion of Crown sovereignty, and long after, the Tsilhqot'in people exercised exclusive control over their traditional lands, including the Claim Area.[120]

57. The historical evidence and oral evidence in this case revealed a litany of conflicts between the Tsilhqot'in and other Aboriginal peoples in areas outside the Claim Area.[121] Aboriginal groups constantly pushed the limits of their territories and this often resulted in fighting. These conflicts helped define areas that everyone accepted as "belonging" to a particular Aboriginal group. It was understood that one did not venture into that area without permission. The absence of permission placed lives at risk.[122]

58. Tsilhqot'in witnesses testified to their ancestors' use of scouts and runners to check for intruders and warn their communities. This was supported by the historical record.[123] Tsilhqot'in military practices were particularly fierce and "worked to instill fear of Tsilhqot'in people in all who might venture into Tsilhqot'in territory".[124] The historical

[117] Trial Decision, paras. 612-13, 949, 1268.
[118] Trial Decision, para. 679.
[119] Trial Decision, para. 680. See also: paras. 380, 679-80, 733, 798, 848, 874, 897, 959-60.
[120] Trial Decision, paras. 931, 935, 937.
[121] Trial Decision, para. 931.
[122] Trial Decision, para. 937.
[123] Trial Decision, para. 916.
[124] Trial Decision, para. 920.

records document numerous situations where non-Tsilhqot'in Aboriginal guides refused to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in people.[125]

59. The archival records show that "[t]o be safe" in Tsilhqot'in country, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down".[126] From the early explorers onwards, Europeans made such payments for precisely this reason.[127]

60. The record demonstrates that "both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within the much larger traditional Tsilhqot'in territory".[128] Reviewing the voluminous historical record, the Trial Judge found only two references to potential incursions into the Claim Area by other First Nations:

a. Tsilhqot'in oral tradition recounts the killing of several Tsilhqot'in women by Qaju (Homalco) people at Tsimol Ch'ed (Potato Mountain) in the Western Trapline, before Tsilhqot'in warriors killed and drove off the Qaju.[129] This conflict, if anything, reinforces Tsilhqot'in control over the Claim Area. At any rate, this skirmish predated sovereignty assertion.[130]

b. An anthropological study of the Tsilhqot'in posits a temporary and unsuccessful Homalco encampment at the lower part of Tsilhqox Biny (Chilko Lake).[131] This reference is unattributed and unsubstantiated by Tsilhqot'in witnesses at trial.[132] There was no supporting archaeological or historical

[125] Trial Decision, para. 921.
[126] Trial Decision, para. 917, quoting from Exhibit 0391, Expert Report of Hamar Foster.
[127] Trial Decision, paras. 918-19.
[128] Trial Decision, para. 622, quoting from Exhibit 0240, Expert Report of Ken Brealey, at 20-21.
[129] Trial Decision, paras. 933, 935.
[130] Trial Decision, para. 933.
[131] Trial Decision, para. 932, 934. The Trial Judge noted that this area is inside the Claim Area, but outside the Proven Title Area: para. 934.
[132] Trial Decision, para. 942.

> evidence at trial.[133] The Trial Judge did not rule on whether this alleged encampment occurred or not.[134]

61. The Trial Judge concluded that "[a]side from these two instances, it appears that others respected the territorial integrity of the lands included in the Claim Area".[135] It is noteworthy that both purported instances concerned the Homalco, in that the Trial Judge held that "[b]y the time Alfred Waddington began the construction of his failed overland route to the gold fields [c. 1863], the historical record leads to but one conclusion: the Homalco people living at Bute Inlet feared the Tsilhqot'in and were reluctant to venture into Tsilhqot'in territory".[136]

62. Based on his review of "the entirety of the evidence", the Trial Judge concluded that this vast record "does not reveal to me the presence of any other Aboriginal group in the Claim Area in the late eighteenth or early nineteenth century". He specifically confirmed, "I am not able to conclude that relevant oral traditions were kept from me during the course of this trial. I heard what was available to be heard".[137]

63. In 1994, the Province designated Ts'il?os Provincial Park (in the Claim Area) and erected a sign which states, in part:

> The Tsilhqot'in have steadfastly protected their remote territory through the centuries and because of their sustained presence the land has remained relatively unaltered.[138]

64. Tsilhqot'in defence of territory is vividly depicted by the events of the Chilcotin War of 1864.[139] In 1864, Tsilhqot'in warriors led by Lha Ts'as?in attacked and killed most of a crew of road-builders attempting to construct a road from Bute Inlet into the Cariboo Region through Tsilhqot'in territory, to service the gold rush.[140] In the ensuing

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[133] Trial Decision, para. 942.
[134] Trial Decision, para. 934, 942.
[135] Trial Decision, para. 935.
[136] Trial Decision, para. 182.
[137] Trial Decision, para. 187.
[138] Trial Decision, para. 330.
[139] See, in particular, Trial Decision, paras. 269-86.
[140] Trial Decision, paras. 271.

days, Tsilhqot'in warriors also attacked a pack-train and a settler living in the region with a Tsilhqot'in woman, effectively removing all white people from Tsilhqot'in territory.[141]

65. The causes of these events have been variously described, and it is likely not possible to ascribe the conflict to any one factor.[142] However,

> The entire body of historical evidence reveals a statement by the Tsilhqot'in people that the road would go no farther and that there would be no further European presence in their territory. The use of their land was clearly an issue.[143]

66. Militia forces were unsuccessful in pursuit of the Tsilhqot'in warriors in "Chilcoten country", a region described by Governor Seymour as "almost unknown to white men until recent events".[144] In August 1864, Tsilhqot'in war chiefs "surrendered under circumstances that remain to this day the subject of disagreement and debate" and were subsequently tried, convicted and hanged.[145] Lha Ts'as?in's final words were reported to be "We meant war, not murder!"[146]

67. In 1993 Judge Sarich's Report on the Cariboo-Chilcotin Justice Inquiry recommended that a posthumous pardon be granted to the Tsilhqot'in chiefs sentenced to their deaths as a consequence of the Tsilhqot'in War. The Attorney General for British Columbia subsequently apologized to the Tsilhqot'in people for wrongs done to them during and after the War.[147]

68. In 1999, the Province unveiled a memorial plaque marking the gravesite of five Tsilhqot'in chiefs who were executed in the aftermath of the Chilcotin War. In part the plaque reads:

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[141] Trial Decision, paras. 271-73, 277, 279.
[142] Trial Decision, paras. 281-83.
[143] Trial Decision, para. 284. See also paras. 281, 286.
[144] Trial Decision, para. 602.
[145] Trial Decision, para. 278.
[146] Trial Decision, para. 278.
[147] Trial Decision, para. 329.

> This commemorative plaque has been raised to honour those who lost their lives in defence of the territory and the traditional way of life of the Tsilhqot'in and to express the inconsolable grief that has been collectively experienced at the injustice the Tsilhqot'in perceive was done to their chiefs.[148]

M. The Trial Decision – Overview

69. The Trial Judge rendered his decision on November 20, 2007.

70. The Trial Judge found that the Tsilhqot'in people are a distinct Aboriginal group that has occupied the Claim Area for centuries.[149] He held that the Tsilhqot'in Nation is the proper rights-holder for Aboriginal rights and Aboriginal title and that sub-groups of the Tsilhqot'in Nation derive their rights and interests as Tsilhqot'in peoples.[150]

71. 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.[151] He further affirmed a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.[152]

72. 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.[153]

73. The Trial Judge held that land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal rights.[154]

74. The Trial Judge further opined that the evidence established Aboriginal title to certain portions of the Claim Area, but held that he was not able to make a formal

[148] Trial Decision, para. 331 [underscore added].
[149] Trial Decision, paras. 218, 437-72, 625, 1267-68.
[150] Trial Decision, para. 470 [underscore added].
[151] Trial Decision, paras. 1239-41.
[152] Trial Decision, para. 1256.
[153] Trial Decision, paras. 1267-68.
[154] Trial Decision, paras. 1276-1301.

declaration because of the manner in which the action had been pleaded. The Trial Judge addressed this matter as a "preliminary issue", described below.

75. The Trial Judge dismissed the Plaintiff's claim for damages for past infringements of Aboriginal title without prejudice to the right to renew these claims.[155]

N. The "Preliminary Issue"

76. In the final days of trial, the Defendants argued that the Plaintiff had advanced an "all or nothing" claim, such that the Court could find Aboriginal title only to Tachelach'ed or the Trapline Territory as a whole, but not to smaller, component portions.[156] In response, the Plaintiff argued that he had not brought an "all or nothing" claim and that, in any event, the Court had jurisdiction to find that component portions of the Claim Area qualified for a declaration of Aboriginal title.[157]

77. The Trial Judge noted that the Plaintiff's Amended Statement of Claim sought declarations to Tachelach'ed and the Trapline Territory but did not explicitly seek a declaration to "*any portions thereof*".[158] On this basis, the Trial Judge concluded that the Plaintiff had framed an "all or nothing" claim and that he could not grant declarations over portions of the Claim Area.[159]

78. In the result, the Trial Judge held that the evidence established Aboriginal title to substantial portions of the Claim Area, but not to Tachelach'ed or the Trapline Territory as a whole.[160] Because of his determination of the preliminary issue, he considered himself precluded from granting <u>any</u> declaration of Aboriginal title.[161]

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[155] Trial Decision, para. 1336.
[156] Trial Decision, para. 106.
[157] Trial Decision, para. 107.
[158] Trial Decision, para. 120.
[159] Trial Decision, para. 129.
[160] Trial Decision, para. 957.
[161] Trial Decision, para. 957.

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

79. Nonetheless, on the invitation of the parties,[162] the Court provided a non-binding opinion as to the existence and extent of Tsilhqot'in Aboriginal title in the Claim Area, to assist the parties in future negotiations.[163]

80. The Trial Judge concluded that the evidence before him sufficed to establish Aboriginal title to a substantial portion of lands in and around the Claim Area:

> The entire body of evidence in this case reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot'in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds.[164]

He continued:

> These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title as follows:
>
> - The Tsilhqox (Chilko River) Corridor from its outlet at Tsilhqox Biny (Chilko Lake) including a corridor of at least 1 kilometre on both sides of the river and inclusive of the river up to Gwetsilh (Siwash Bridge);
>
> - Xeni, inclusive of the entire north slope of Ts'il?os. This slope of Ts'il?os provides the southern boundary, while the eastern shore of Tsilhqox Biny marks the western boundary. Gweqez Dzelh and Xeni Dwelh combine to provide the northern boundary, while Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.
>
> - North from Xeni into Tachelach'ed to a line drawn east to west from the points where Elkin Creek joins the Dasiqox (Taseko River) over to Nu Natase?ex on the Tsilhqox. Elkin Creek is that water course draining Nabi Tsi Biny (Elkin Lake), flowing northeast to the Dasiqox;

[162] Trial Decision, paras. 130, 686, 765, 825, 958.
[163] Trial Decision, paras. 958-62.
[164] Trial Decision, para. 959 [underscore added].

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

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

- With a northern boundary from Gwedzin Biny in a straight line to include the area north of Naghatalhchoz Biny (Big Eagle Lake or Chelquoit Lake) to Nu Natase?ex on the Tsilhqox where it joins the northern boundary of Tachelach'ed over to the Dasiqox at Elkin Creek.[165]

(collectively, the "**Proven Title Area**")

81. The Trial Judge described the core importance of the Proven Title Area for the "cultural security and continuity"[166] of the Tsilhqot'in people:

> The foregoing describes a tract of land mostly within the Claim Area but not entirely. It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. <u>This is the land over which they held exclusionary rights of control</u>: *Marshall; Bernard* at para. 77. <u>This was the land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion.</u>[167]

82. The Trial Judge confirmed that the Proven Title Area does not include overlapping territory with any other First Nations.[168]

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[165] Trial Decision, para. 959 [underscore added].
[166] Trial Decision, para. 960.
[167] Trial Decision, para. 960.
[168] Trial Decision, para. 938.

83. He further confirmed that the Proven Title Area was "effectively controlled" by Tsilhqot'in people:

> Tsilhqot'in people were there in sufficient numbers to monitor European traders, missionaries, settlers and railway surveyors on their arrival. There is evidence that each of these groups of new arrivals were aware that Tsilhqot'in people considered this to be their land. Others were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people.[169]
>
> …
>
> In summary, there is no evidence of adverse claimants at the time of sovereignty assertion in the area I describe in my conclusions on Tsilhqot'in Aboriginal title. I conclude that Tsilhqot'in people were in exclusive control of that area at the time of sovereignty assertion.[170]

84. The Trial Judge held that Tsilhqot'in people have continuously occupied the Claim Area from prior to sovereignty assertion to the present day and substantially maintained their connection to these lands throughout that entire period.[171]

85. The Trial Judge explicitly stated that if he was wrong on the preliminary pleadings issue, and he did have the discretion to find Aboriginal title to portions of the Claim Area, then his findings of Aboriginal title in the Claim Area would bind the parties.[172]

P. Balance of the Claim Area

86. With respect to the balance of the Claim Area, the Trial Judge expressly affirmed active Tsilhqot'in use throughout these areas, but opined that such use and occupation was not sufficient to establish Aboriginal title. Describing Tachelach'ed, he stated:

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

[169] Trial Decision, para. 938 [underscore added].
[170] Trial Decision, para. 943 [underscore added].
[171] Trial Decision, para. 945.
[172] Trial Decision, para. 961.

> part of their oral traditions, providing strength and continuity to their lives as Tsilhqot'in people …[173]
>
> …
>
> … [T]here are areas within Tachelach'ed where I consider the use and occupation by Tsilhqot'in people at the time of sovereignty assertion to be sufficient to warrant a finding of Aboriginal title. The evidence does not lead to a finding of sufficient use and occupation throughout Tachelach'ed.[174]

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

> The Western Trapline Territory overlaps with areas in Tachelach'ed. The entire area of the Western Trapline does not qualify for a declaration of Tsilhqot'in Aboriginal title. While there is no doubt that there was a Tsilhqot'in presence in the entire area at the time of sovereignty assertion, much of the area was not occupied to the extent required to ground a declaration of Tsilhqot'in Aboriginal title ...[175]
>
> …
>
> I am satisfied Tsilhqot'in people were present in the Eastern Trapline Territory at the time of first contact. The area has been used by Tsilhqot'in people since that time for hunting, trapping, fishing and gathering of roots and berries. I am not able to find that any portion of the Eastern Trapline Territory was occupied at the time of sovereignty assertion to the extent necessary to ground a finding of Tsilhqot'in Aboriginal title.[176]

88. The Trial Judge expressly declined to consider the exclusivity of Tsilhqot'in use and occupation of those parts of the Claim Area lying outside of the Proven Title Area. His exclusivity findings were directed at the lands inside and outside the Claim Area demonstrating a sufficient degree of occupation to ground Aboriginal title.[177] However, as noted above, "both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory".[178]

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[173] Trial Decision, para. 792 [underscore added].
[174] Trial Decision, para. 794.
[175] Trial Decision, para. 825 [underscore added].
[176] Trial Decision, para. 893 [emphasis added].
[177] Trial Decision, para. 928.
[178] Trial Decision, para. 622, quoting from Exhibit 0240, Expert Report of Ken Brealey, at 20-21.

Q. Reconciliation

89. The Trial Judge concluded his Reasons for Judgment with an extensive discussion of the founding principle of Aboriginal rights jurisprudence – reconciliation – and its application in the present case.[179]

90. The Trial Judge reiterated that the "centuries old occupation"[180] and the "long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact".[181] He further emphasized that he had described tracts of Aboriginal title lands that provided "cultural security and continuity to the Tsilhqot'in people for better than two centuries"[182] and such lands "ultimately defined and sustained them as a people".[183]

91. Finally, the Trial Judge expressed his "consistent hope" that his judgment would contribute to an early and honourable reconciliation with Tsilhqot'in people:

> After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.[184]

R. Plaintiff's Motion to Amend the Pleadings

92. After the Trial Decision, the Plaintiff brought an application to amend his Statement of Claim by adding the words "or portions thereof" throughout the relevant sections. The Trial Judge denied the Plaintiff's application, stating:

> I have concluded that to allow the amendment to take place at this point would be unfair and prejudicial to the defendants. If I am wrong in my earlier conclusions relating to an "all or nothing" claim, then no amendment of the pleadings is required. It would be open to the Court of Appeal to grant a

[179] Trial Decision, paras. 1338 *et seq.*
[180] Trial Decision, para. 1374.
[181] Trial Decision, para. 1377.
[182] Trial Decision, para. 1376.
[183] Trial Decision, para. 1377.
[184] Trial Decision, para. 1338. See also para. 1382.

declaration of title in accordance with the findings of fact set out in the reasons for judgment.[185]

PART 2 – ERRORS IN JUDGMENT

Error #1 – Declaration of Aboriginal Title in the Proven Title Area

93. The Trial Judge erred by denying the Tsilhqot'in Nation a declaration of Aboriginal title to the Proven Title Area within the Claim Area. In particular:

a. the Trial Judge mischaracterized the Plaintiff's action as an "all or nothing" claim when the Plaintiff's action clearly centred on the existence and extent of Aboriginal title throughout the Claim Area; and,

b. in the alternative, the Trial Judge erred by failing to grant declarations of Aboriginal title to lesser, included portions of the Claim Area.

Error #2 – Exclusive Physical Control of the Claim Area

94. On the facts as found by the Trial Judge, he erred in law by not finding Aboriginal title to the entire Claim Area. The learned Trial Judge found a high degree of exclusive physical control by the Tsilhqot'in people over the Claim Area at sovereignty. That finding of fact, coupled with his finding that the Tsilhqot'in people used and occupied the entire Claim Area at sovereignty, should have led the Trial Judge to the conclusion that the Tsilhqot'in people hold Aboriginal title to the entire Claim Area.

PART 3 – ARGUMENT

Error #1 – Declaration of Aboriginal Title in the Proven Title Area

A. Trial Judge's Reasons on the Preliminary Issue

95. As described above, after 339 days of trial, the Trial Judge found that the evidence before him established Aboriginal title to defined portions of the Claim Area.

[185] *Tsilhqot'in Nation v. British Columbia*, 2008 BCSC 600, [2008] B.C.J. No. 871, para. 13.

He described and delineated these areas of proven Aboriginal title. He supported his conclusion with abundant findings of fact and legal analysis.

96. Nonetheless, he determined, as a preliminary issue, that he could not grant declarations in support of these findings. He offered the following rationale:

a. On a "plain reading" of the Plaintiff's pleadings, the Plaintiff had brought an "all or nothing" claim. In his pleadings, the Plaintiff sought declarations of Aboriginal title to the Brittany (Tachelach'ed) and the Trapline Territory, but did not "explicitly" claim Aboriginal title to "*any portions thereof*".[186]

b. Relying on the judgment of the English Court of Appeal in ***Biss v. Smallburgh Rural District Council***,[187] the Trial Judge stated that "the plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks".[188] If the Plaintiff sought Aboriginal title to smaller tracts within the Claim Area, "notice of such tracts should have been set out in the pleadings".[189]

c. The Trial Judge considered himself bound by ***Delgamuukw v. British Columbia***,[190] in which the Plaintiffs were barred from "re-framing" their claim on appeal to the prejudice of the Defendants.[191]

d. In his view, prejudice to the Defendants arose from the Plaintiff's failure to define smaller tracts of land within the Claim Area to which Aboriginal title was sought explicitly in the pleadings.[192] He relied on the Defendants' assertion that if the Plaintiff had identified smaller tracts in the pleadings, they

[186] Trial Decision, para. 120 [italics in original].
[187] *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (C.A.).
[188] Trial Decision, paras. 124-28.
[189] Trial Decision, para. 111.
[190] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
[191] Trial Decision, para. 129.
[192] Trial Decision, paras. 111, 122.

> would have cross-examined witnesses differently on the boundaries of these smaller tracts[193] and taken a different approach to the evidence.[194]

97. With respect, the Trial Judge's reasoning, above, rests on a mischaracterization of the Plaintiff's claim and serious errors of law and principle.

98. First, the Trial Judge erred by characterizing the Plaintiff's claim as "all or nothing". Second, and in any event, the Trial Judge was wrong to require the Plaintiff to plead, from the outset of litigation, the precise smaller portions of the Claim Area to which the Trial Judge would find Aboriginal title at the conclusion of trial. This would effectively require Aboriginal claimants to correctly predict the outcome of the litigation from its start or forfeit their right to declaratory relief. As described below, this imposes an impossible burden and is a clear misapprehension of the law of declaratory relief.

B. The Plaintiff's claim included Aboriginal title to portions of the Claim Area

99. The Plaintiff did not advance an "all or nothing" claim. The central issue at trial was "the existence and extent"[195] of Tsilhqot'in Aboriginal title in the Claim Area. This issue was rigorously contested by the parties for over 300 trial days. The Plaintiff sought to establish Aboriginal title to the whole of Tachelach'ed and the Trapline Territory, but also sought Aboriginal title to such portions of the Claim Area as the evidence supported at the conclusion of trial.

100. It is worth recalling that the Plaintiff's action was "provoked by proposed forestry activities" [196] in the Trapline Territory and Tachelach'ed and that the boundaries of the litigation, while necessarily artificial,[197] were shaped by those immediate exigencies.

101. It is simply not plausible that the Plaintiff, or any litigant in the circumstances, would take the "all or nothing" position described by the Trial Judge. This proceeding is

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[193] Trial Decision, para. 111.
[194] Trial Decision, para. 122.
[195] *William v. British Columbia*, 2002 BCSC 1904, [2002] B.C.J. No. 3366, para. 30 [underscore added].
[196] Trial Decision, Executive Summary.
[197] Trial Decision, paras. 641, 645.

widely recognized as a publicly important test-case on the nature and extent of Aboriginal title.[198] The consequences for the Xeni Gwet'in and the Tsilhqot'in people are profound. No advantage could be gained by the Plaintiff insisting that he would rather have the Aboriginal title claims of the Tsilhqot'in people rejected outright than accept declarations of Aboriginal title to anything less than the entire Claim Area.

102. For his part, the Plaintiff never described his claim as "all or nothing", nor did he indicate at any point that he was adverse to findings of Aboriginal title to portions of the Claim Area. In fact, it was the Defendants that described the Plaintiff's claim as "all or nothing", in a motion brought in the final days of trial, after several years rigorously litigating the extent of Tsilhqot'in use, occupation and control of every part of the Claim Area.

103. With respect, the Trial Judge placed undue emphasis on a narrow and untenable interpretation of the Plaintiff's pleadings. In his Amended Statement of Claim, the Plaintiff asserted exclusive Tsilhqot'in occupation of the Brittany (Tachelach'ed) and the Trapline Territory[199] and sought the following relief:

a) A declaration that the Tsilhqot'in have existing Aboriginal title to the Brittany;

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

…

n) Such further, other, equitable, and related relief, and such costs, as to this Honourable Court may seem meet and just. [200]

104. The Plaintiff did not "explicitly"[201] claim Aboriginal title to portions of Tachelach'ed or the Trapline Territory but such lesser included relief is clearly implicit in the

[198] See e.g.: *William v. Riverside Forest Products Ltd.*, 2001 BCSC 1641, 95 B.C.L.R. (3d) 371; *Xeni Gwet'in First Nations v. British Columbia*, 2002 BCCA 434, 3 B.C.L.R. (4th) 231, para. 128; *Xeni Gwet'in First Nations v. British Columbia*, 2004 BCSC 610, 240 D.L.R. (4th) 547, para. 49; *William v. British Columbia (HMTQ)*, 2009 BCCA 83, [2009] B.C.J. No. 338, para. 6.
[199] Amended Statement of Claim, paras. 10-11; Trial Decision, paras. 117-18.
[200] Amended Statement of Claim, Prayer for Relief [underscore added]; Trial Decision, para. 119.
[201] Trial Decision, para. 120.

circumstances of the case, which centred on litigating the nature and extent of Aboriginal title in the Claim Area.

105. Moreover, such relief is captured by paragraph n) of the Plaintiff's Prayer for Relief, which the Trial Judge failed to mention or consider in his reasons. Declarations of Aboriginal title to lesser included portions of the Claim Area fall squarely within the "further, other, equitable, and related relief" to the primary declarations sought by the Plaintiff. As stated by the Supreme Court of Canada in ***Native Women's Association of Canada v. Canada***:

> Although … the respondents did not specifically include a request for a declaration in their pleadings, they did include a "basket clause" requesting "[s]uch other relief as to this Honourable Court may seem just". It has been held that a "basket clause" in the prayer for relief permits a court to exercise its discretion to grant a declaration even though it was not specifically pleaded.[202]

If the "basket clause" in the Plaintiff's pleadings supports declaratory relief even when no declarations were sought, it clearly permits the court to issue a declaration on narrower terms than those specifically pleaded in the prayer for relief.

106. Properly considered, the Plaintiff sought declarations of Aboriginal title to Tachelach'ed and the Trapline Territory and "further, other, equitable, and related relief"[203] as demanded by the circumstances of the case, including declarations of Aboriginal title to portions of Tachelach'ed and the Trapline Territory.

107. As the Trial Judge observed, "[i]t appears that British Columbia was aware of the potential for this alternative claim to title over portions of these defined areas".[204] This is

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[202] *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, para. 34 [underscore added]; see also: Lazar Sarna, *The Law of Declaratory Judgments,* 3rd ed. (Toronto: Carswell, 2007), p. 101-102; *Hulton v. Hulton,* [1916] 2 K.B. 642, aff'd [1917] 1 K.B. 813 (C.A.) p. 656; *Re Lewis's Declaration of Trust; Lewis v. Lewis; Lewis v. Ryder,* [1953] 1 All E.R. 1005*, (sub nom. Loudon v. Ryder (No. 2)),* [1953] 1 All E.R. 1005, [1953] Ch. 423 (Ch. D.); at 1008; *Meisner* v. *Mason*, [1931] 2 D.L.R. 156, 1931 CarswellNS 39 (N.S.C.A.); *R v. Bales; Ex parte Meaford General Hospital* (1970)*,* [1971] 2 O.R. 305, 17 D.L.R. (3d) 641 (Ont. H.C.) ; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 1841, 157 A.C.W.S. (3d) 460 (Ont. Sup. Ct.), para. 175; *Phillips v. 707739 Alberta Ltd*., 2000 ABQB 139, 259 A.R. 201 paras. 241-46.

[203] Amended Statement of Claim, Prayer for Relief, n) [underscore added]

[204] Trial Decision, para. 121.

clear from British Columbia's Amended Statement of Defence. After denying that the Tsilhqot'in Nation exclusively occupied Tachelach'ed or the Trapline Territory, British Columbia pleaded in the alternative:

> … if the Aboriginal activities that may have been practiced by the Ancestral Tsilhqot'in Groups constituted occupation establishing Aboriginal title to any portions of the Brittany or Trapline Territory, such occupation did not extend to the whole of the Brittany or the Trapline Territory, but only to limited portions thereof and put the Plaintiff to the strict proof of the location and extent of such limited portions; …[205]

108. In Response to Demands for Particulars, British Columbia confirmed its view that "the details of the actual occupation of portions of the Brittany and the Trapline Territory are matters of evidence"[206] and that the Plaintiff bore the burden of proving "the allegation that the Tsilhqot'in occupied lands as alleged or at all".[207]

109. The trial was conducted for over 300 days on this basis. The Plaintiff led numerous witnesses to establish the nature, extent and intensity of Tsilhqot'in occupation and control of the lands in the Claim Area – and the Defendants rigorously cross-examined on these same issues.

110. The Trial Judge himself repeatedly described the nature of the litigation in these exact terms. For example, on an interlocutory motion decided shortly after the start of trial, he noted that "these proceedings raise for determination the existence and extent of [Aboriginal] title in the claim areas".[208]

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[205] British Columbia, Amended Statement of Defence, para. 12(c) [underscore added]; Trial Decision, para. 121. Canada filed a *pro forma* Statement of Defence and Amended Statement of Defence.

[206] Reply of the Defendants, Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region to the Plaintiff's Demand for Particulars dated 14 November 2002, Response to Demand #3.

[207] Reply of the Defendants, Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region to the Plaintiff's Demand for Particulars dated July 4, 2003, Response to Demand #5.

[208] *William v. British Columbia*, 2002 BCSC 1904, [2002] B.C.J. No. 3366, para. 30 [underscore added].

111. In a subsequent motion, the Trial Judge ruled that the Plaintiff's claims were not amenable to resolution by stated case under Rule 33. He again affirmed the fundamental nature of the litigation, as understood by all Parties:

> Initially the plaintiff made a proposal of a special case that was rejected by both Canada and British Columbia. The defendants were unable to agree on the facts proposed by the plaintiff. They say acceptance of the proposed facts would have amounted to a complete abandonment of defences raised in these proceedings concerning the nature and extent of aboriginal title in the claim area.[209]

Turning to British Columbia's proposal to litigate the constitutional applicability of provincial forestry legislation by special case on the assumption that there are Crown lands in British Columbia subject to Aboriginal title, the Trial Judge stated:

> … [I] have concluded that it would not be helpful to have that issue determined without an answer to the central question, namely, do aboriginal rights and aboriginal title exist for Tsilhqot'in people anywhere in the claim area …[210]

112. The Parties clearly understood the nature of the litigation from the outset. Lesser, included relief was always an issue in these proceedings and, with respect, declarations should issue to those portions of the Claim Area where the Trial Judge found Aboriginal title was established on the evidence.

113. This conclusion is amply supported by the general principle that courts should take all reasonable measures to promote the full and final resolution of litigated disputes.[211] This principle finds expression in s. 10 of the *Law and Equity Act*:

> In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be

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[209] *William v. British Columbia*, 2004 BCSC 964, 30 B.C.L.R. (4th) 382, para. 3 [underscore added].
[210] *William v. British Columbia*, 2004 BCSC 964, 30 B.C.L.R. (4th) 382, para. 5 [underscore added].
[211] *Great Canadian Casino Co. v. Surrey (City)*, [1998] B.C.J. No. 1188,79 A.C.W.S. (3d) 1049 (B.C.S.C.)

> completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.[212]

C. Alternative Argument: The Trial Judge was not barred from declaring Aboriginal title to lesser, included areas in the Claim Area.

114. Even if the Plaintiff's prayer for relief did not include declarations of Aboriginal title to lesser, included portions of the Claim Area, the Trial Judge nonetheless had a broad discretion to grant such declarations. His refusal to do so rests on a misunderstanding of the law and reliance on authority that has been roundly rejected as a general statement of the law. Contrary to his conclusions, there was no impediment to granting declaratory relief shaped by his findings of fact at the conclusion of trial.

1. Broad discretion to grant declaratory relief

115. The courts' discretion to grant declaratory relief is not limited to the terms specifically requested by the plaintiff. A court may grant a declaration upon the facts proven at trial, even if the plaintiff did not request a declaration in those specific terms, or did not request any declaration at all.[213] As part of this discretion, the court may grant a declaration in narrower terms than those requested.[214]

116. In ***Delgamuukw***, Mr. Justice Lambert of this Honourable Court, in dissent but not on this point of law, expressed the governing principle as follows:

> The power to make such declaratory orders is contained in Rule 5(22) of the *Supreme Court Rules.* And, of course, it is self-evident that if the prayer for relief asks for a declaration of rights in wider terms than the Court considers justified

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[212] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 10 [underscore added].

[213] See, *e.g.*: *Native Women's Assn. of Canada* v. *Canada*, [1994] 3 S.C.R. 627, paras. 36-37; *Meisner* v. *Mason*, [1931] 2 D.L.R. 156, 1931 CarswellNS 39 (N.S.C.A.); *Harrison-Broadley v. Smith,* [1964] 1 All E.R. 867 (C.A.); *Hulton v. Hulton,* [1916] 2 K.B. 642, aff'd [1917] 1 K.B. 813 (C.A.); Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002), p.283.

[214] *Attorney-General v. Guardians of the Poor of the Merthyr Tydfil Union,* [1900] 1 Ch. 516 (C.A.), pp. 550-551; *Re Lewis's Declaration of Trust; Lewis v. Lewis; Lewis v. Ryder,* [1953] 1 All E.R. 1005*, (sub nom. Loudon v. Ryder (No. 2)),* [1953] 1 All E.R. 1005, [1953] Ch. 423 (Ch. D.); *Nicholls v. Tavistock Urban District Council* [1923] 2 Ch. 18 (Ch.D.); *R v. Bales; Ex parte Meaford General Hospital* (1970)*,* [1971] 2 O.R. 305, 17 D.L.R. (3d) 641 (Ont. H.C.); Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002) at 284; Frederick M. Irvine, *McLachlin & Taylor, British Columbia Practice*, 3rd ed., looseleaf (Markham: LexisNexis, 2005), at 5-66.

> by the evidence, then the Court can make a declaration of rights in narrower terms than those requested.
>
> Indeed a court may grant a declaration, even if no declaration is requested in the statement of claim. If a court has that power, then clearly a court can grant a declaration in narrower terms than those requested.[215]

2. The Trial Judge's reliance on *Biss*

117. Notwithstanding this broad discretion to grant declaratory relief, the Trial Judge relied on the English Court of Appeal's judgment in ***Biss*** for the proposition that "the plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks".[216] This statement was made by Harman L.J. in the ***Biss*** decision.[217]

118. The plaintiffs in ***Biss*** sought declarations that 72 acres or alternatively 35 acres of a property were eligible for a caravan site licence as an "existing site" for the purposes of the governing legislation. The trial judge held that 9 acres constituted an "existing site", but this was overturned on appeal as an invention of the trial judge.[218] The English Court of Appeal held that there was no evidence to support finding 9 acres, or any other portion of the property, qualified as an "existing site".[219] The appeal was decided on this basis.

119. Harman L.J. proceeded to suggest that the plaintiff would have been barred from declaratory relief to any portion of the property other than the pleaded 35 or 72 acres because "he who seeks a declaration must make up his mind and set out in his pleading what the declaration is".[220] These comments were *obiter*.

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[215] *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.), paras. 872-73 [underscore added] and authorities cited therein; see also Macfarlane J.A. (Taggart J.A. concurring) for the majority, para. 27 ["This is not a case in which the plaintiffs seek a declaration narrower in terms than those requested at trial …"].

[216] Trial Decision, para. 128 [underscore added].

[217] Quoted in the Trial Decision, at para. 127.

[218] *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (C.A.).

[219] *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (C.A.) at pp. 552-54 (*per* Harman L.J.), pp. 558-59 (*per* Davies L.J.), p. 560 (*per* Russell L.J.).

[220] *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (C.A.) at 553-554.

120. More importantly, Harman L.J. was alone in expressing this view. In a concurring opinion, Davies L.J. concluded:

> Whether the plaintiffs could have brought evidence satisfactorily to establish any lesser or different claim or claims, had they set out to do so, I do not know; but they clearly and admittedly failed to prove the claim which they did make. In my judgment they were equally unable on the evidence in this action to establish any lesser claim.
>
> Had the evidence proved that the plaintiffs were entitled to something less than their full claim, it would, I think, have been unfortunate if their failure to make, either originally or by amendment, the appropriate alternative claim should have deprived them of their right to a declaration; but the question does not in the event arise.[221]

121. Both of these judges were on the panel that issued judgment in ***Harrison-Broadley and Others v. Smith***,[222] an appeal heard the same month as ***Biss***. The English Court of Appeal in this decision granted a declaration notwithstanding no declaration was asked for in the claim. Harman L.J. himself stated that "[t]he Rules of the Supreme Court … entitle us to grant declaratory relief if that be the right thing to do" and "it is, if necessary, within the power of the court, although a declaration be not asked for, to grant one".[223] In a concurring opinion, Pearson L.J. stated "[i]t is not necessary in this case to consider exactly what the strictly correct practice should be, because it is perfectly plain that the court ought to make some declaratory order on the main issue which has been raised and argued and decided at all stages of this case".[224]

122. ***Harrison-Broadley*** was cited with approval by the Supreme Court of Canada in ***Native Women's Association of Canada v. Canada***[225] in support of the broad judicial discretion to grant declaratory relief, even where no declaration was specifically sought.

123. The Trial Judge fell into error by relying on Harman L.J.'s *obiter* comments in ***Biss*** to conclude that "the plaintiff must make up his mind and set out in his pleadings

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[221] *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (C.A.) at 559 [underscore added].
[222] *Harrison-Broadley v. Smith,* [1964] 1 All E.R. 867 (C.A.)
[223] *Harrison-Broadley v. Smith,* [1964] 1 All E.R. 867 (C.A.) at 873.
[224] *Harrison-Broadley v. Smith,* [1964] 1 All E.R. 867 (C.A.) at 875 [underscore added].
[225] *Native Women's Assn. of Canada* v. *Canada*, [1994] 3 S.C.R. 627, at para 34.

exactly what declaration he seeks"[226] as a precondition to declaratory relief. It is doubtful whether this was ever an accurate general statement of the law.

124. In fact, aside from the trial decision in this case, there does not appear to be a single reported judgment by an English or Canadian court relying on Harman L.J.'s *dicta* in ***Biss*** for this proposition. To the contrary, ***Biss*** has been explicitly rejected as a general statement of the law by courts and commentators throughout the Commonwealth, as described below.

3. The proper approach to declaratory relief: *Biss* rejected

125. The law has developed a flexible and pragmatic approach to declaratory relief. The authors of the leading English text on declaratory remedies conclude that ***Biss*** cannot be regarded as a statement of general application,[227] noting:

> In practice it frequently happens that it is only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted. As long as the parties are given an opportunity to address the court on any proposed declaration it is highly desirable that it should retain as wide a discretion as possible as to the precise terms in which a declaration is granted. It may grant a declaration in terms that are more limited than those claimed or are subject to conditions …[228]

126. The rationale for this approach is well expressed by the Hong Kong Court of First Instance in ***Lau Wing Hong & Others v. Wong Wor Hung & Another***.[229] In this adverse possession case, the claimant made five alternative prayers as to the terms of the declaration,[230] none of which precisely matched the boundaries of adverse possession ultimately found by the Court. The opposing party relied on ***Biss*** to argue that the Court could grant only "specifically the relief or remedy … claimed" and was

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[226] Trial Decision, para. 128 [underscore added].
[227] Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002) p.284.
[228] Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002)p.284 [underscore added]. See also: PW Young, *Declaratory Orders,* 2nd ed. (Sydney: Butterworths, 1984) p. 54.
[229] *Lau Wing Hong & Others v. Wong Wor Hung & Another,* [2006] 4 HKLRD 671.
[230] *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671, at para. 144

therefore precluded from making any declaration as to a lesser amount of land, even if the findings of fact supported this conclusion.[231]

127. The Court variously referred to Harman L.J.'s comments in ***Biss*** as "*obiter*"[232] "astringent"[233] and "too austere".[234] The Court cited several cases for the proposition that "[t]he fact a Declaration is not specifically sought in the prayer for relief does not prevent one from being granted".[235] The Court proceeded:

> It cannot be overlooked that, in an adverse possession case, the pleaded factual issues may permit of several possible variations and permutations as to the edges or boundaries of the disputed land at the material time. <u>It would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved</u>. It would be like pleading all the results of the peeling of an onion - in which every single layer generates a slightly different and smaller variation of the one before it. <u>The real test is whether there is genuine prejudice caused by this ambulatory approach</u>. Here there was none. It will always be a matter of degree; but the Court should not indulge pedantry as being the same thing as prejudice.[236]

The Court concluded that this approach represents the law in Hong Kong, Australia, England, New Zealand and Canada, based on a review of leading authorities.[237]

4. Application to Aboriginal title claims

128. These pragmatic considerations are especially forceful in the context of Aboriginal title claims. It is hard to imagine a clearer example of a situation where "only after the court has determined the facts … will [it] be possible to decide in what terms a

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[231] Above at para. 140.
[232] Above at para. 144.
[233] Above.
[234] Above at para. 147.
[235] Above at para. 145. Authorities cited: *Hulton v. Hulton,* [1916] 2 K.B. 642, aff'd [1917] 1 K.B. 813 (C.A.), *Re Lewis's Declaration of Trust; Lewis v. Lewis; Lewis v. Ryder,* [1953] 1 All E.R. 1005*, (sub nom. Loudon v. Ryder (No. 2)),* [1953] 1 All E.R. 1005, [1953] Ch. 423 (Ch. D.) at p.429 and *Harrison-Broadley v. Smith,* [1964] 1 All E.R. 867 (C.A.).
[236] Above [underscore added].
[237] Above at paras. 147-48.

declaration should be granted".[238] For a number of reasons, set out below, it is practically impossible for the plaintiff to plead "every precise possible variation"[239] on the boundaries of Aboriginal title that might ultimately be proved after several years of trial.

129. Yet this was the burden imposed by the Trial Judge in the court below, *e.g.*:

> If smaller definite tracts of land are to be considered, notice of such tracts should have been set out in the pleadings.[240]
>
> …
>
> Although British Columbia may have been aware of an alternate claim to portions of the Claim Area, any mention of this in the statement of defence is not a *de facto* amendment of the plaintiff's pleadings. More importantly, such a plea does not define the smaller tracts of land said to be contained within the two component parts of the Claim Area".[241]

130. With respect, the law cannot be that the Plaintiff is required to anticipate the outcome of 300+ days of trial and precisely delineate, in his pleadings, the "smaller definite tracts of land" to which Aboriginal title will ultimately be proved. Even with the benefit of a full trial and his own findings of fact, the Trial Judge expressed discomfort describing the boundaries of the Proven Title Area notwithstanding these boundaries were "shaped by the evidence".[242] Requiring the Plaintiff to define tracts of Aboriginal title land with the same precision, *at the pleadings stage*, would impose an impossible burden as a precondition to declaratory relief.

131. This reality is underscored by the Trial Judge's own remarks about the inherent challenges, even with the benefit of a full trial, of drawing boundaries in Aboriginal title claims:

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[238] Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf, The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002), p. 284.
[239] *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671, at para. 145.
[240] Trial Decision, para. 111 [underscore added].
[241] Trial Decision, para. 122 [underscore added]. See also para. 128 ["In my view, the plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks"].
[242] Trial Decision, para. 958 ["I acknowledge that in expressing this opinion, I am doing precisely what I was uncomfortable with in the course of the trial, namely setting boundaries that are ill defined and not contained within usual metes and bounds. They are, however, boundaries that are shaped by the evidence"]

> As the evidence unfolded it became apparent that in order to assert his claim, the plaintiff had to conform to the Eurocentric need to define boundaries. Traditional boundaries, surveyed with proper metes and bounds were not a possibility; some boundaries simply had to be found.
>
> …
>
> In Tsilhqot'in semi-nomadic society there were no boundaries in the sense that a boundary is currently understood with reference to set metes and bounds. In his discussion of Tsilhqot'in boundaries on p. 6 of his report, Dr. Brealey said:
>
> > Reconstructing boundaries of oral, relatively nomadic, societies in a cartographic register is an exceedingly hazardous undertaking, and never the more so than in the Chilcotin country …[243]

132. In ***Delgamuukw***, La Forest J. cautioned that the inherent challenges of defining Aboriginal boundaries should prompt negotiation, not the rejection of Aboriginal title claims:

> … [I]t is self-evident that an aboriginal society asserting the right to live on its ancestral lands must specify the area which has been continuously used and occupied. *That is, the general boundaries of the occupied territory should be identified.* I recognize, however, that when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between the aboriginal claimants and the government.[244]

Note that La Forest J. called upon Aboriginal claimants to identify only the "general boundaries of the occupied territory".

133. The test for proving Aboriginal title makes it impracticable to predict the outcome of trial with precision. The inquiry into whether an Aboriginal claimant has satisfied the threshold of occupation sufficient to establish Aboriginal title draws on a host of factors:

> Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether

[243] Trial Decision, paras. 645, 648 [underscore added].
[244] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 195 [underscore in original, italics added].

> occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" …[245]

134. Further complicating matters is the nascent state of the law of Aboriginal title. A central issue at trial was how to properly define or interpret the "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources"[246] that suffices to establish Aboriginal title. The Defendants advanced a "postage stamp" approach that would recognize Aboriginal title only to very specific sites, such as "a salt lick or a narrow defile between mountains or cliffs".[247] The Trial Judge agreed with the Plaintiff that Aboriginal title extends more broadly to the lands "over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people".[248]

135. This issue remains unresolved. As a result, it is simply not realistic to expect the Plaintiff to have pleaded, in the alternative, every possible variation on the "definite tracts" of the Claim Area to which Aboriginal title might be established at trial, or after appeals. Such a requirement would have compelled the Plaintiff to plead alternative Aboriginal title claims to everything from individual salt licks and hunting blinds in the Claim Area to the broader hunting and trapping grounds – and everything in between.

136. Fortunately, the law of declaratory relief does not demand this absurd result. Respectfully, the Trial Judge's reliance on ***Biss*** for this proposition was misplaced. As reviewed above, courts have a broad discretion to grant declarations on different or narrower terms than those specifically pleaded by the plaintiff. This is particularly appropriate where, as here, the proper terms of declaratory relief cannot be decided until the facts are determined at trial.

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[245] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 149 [quotation from Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar. Rev. 727, at p. 758].
[246] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 149.
[247] Trial Decision, paras. 608-10.
[248] Trial Decision, para. 1377.

137. These are well established tenets of declaratory relief. There is no reason to impose a different and impossible burden on Aboriginal claimants. To the contrary, Aboriginal title claims call for the same flexibility and pragmatism that the courts bring to declaratory relief in other contexts.

5. No Prejudice to the Defendants

138. The Trial Judge's concerns about prejudice to the Defendants rest on a clear misapprehension of the law. Properly considered, there is no possibility of prejudice to the Defendants.

139. In the Trial Judge's view, because the Plaintiff had not pleaded the bounds of individual "definite tracts of land" in his Statement of Claim, the Defendants were deprived of the opportunity to cross-examine witnesses based on these boundaries:

> By way of example, counsel for both defendants point out that the southern boundary of Tachelach'ed was described differently by three Aboriginal witnesses. At the time the evidence was heard, they did not consider the southern boundary of Tachelach'ed to be an issue in the case. If it were an issue, they say it would have prompted a different cross examination of the witnesses. In their submission there is a resulting prejudice. If smaller definite tracts of land are to be considered, notice of such tracts should have been set out in the pleadings. The defendants say this would have triggered a different approach to the evidence in the course of the trial.[249]

140. As described below, the Trial Judge's concerns about prejudice rest on three errors of law: (a) the Plaintiff was not required at law to provide notice of "smaller definite tracts of land" in his pleadings; (b) there is no legal requirement that Aboriginal witnesses agree on the internal boundaries of "definite tracts of land" to which Aboriginal title is proved; and (c) the Trial Judge wrongly considered himself bound by findings of prejudice in ***Delgamuukw*** that have no application to the present case.

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[249] Trial Decision, para. 111 [underscore added]. See also: *Tsilhqot'in Nation v. British Columbia*, 2008 BCSC 600, [2008] B.C.J. No. 871, para. 9. The example of Tachelach'ed is puzzling in itself, since there is no question, on any interpretation of the Plaintiff's Statement of Claim, that the Plaintiff claimed Aboriginal title to Tachelach'ed (the Brittany). Aboriginal title to Tachelach'ed was always explicitly an issue in the case, and the boundaries of Tachelach'ed were specifically pleaded: see Amended Statement of Claim, paras. 10-11; Trial Decision, paras. 40, 42, 117-118.

(a) The Plaintiff was not required to plead boundaries of individual "definite tracts"

141. The Plaintiff was not required to plead alternative claims to every possible variation of the individual "definite tracts" of land to which Aboriginal title might be proved at trial. The Trial Judge was wrong in law to require "notice of such tracts"[250] to the Defendants in the pleadings. This error was reviewed in the preceding section.

142. The important point here is that the Defendants had clear and unequivocal notice that the Plaintiff claimed exclusive Tsilhqot'in occupation throughout the Claim Area. The nature and extent of Tsilhqot'in occupation was the central issue at trial. The Parties rigorously contested the location, extent and intensity of Tsilhqot'in occupation throughout the Claim Area. Ultimately, the Trial Judge delineated the Proven Title Area based on the "boundaries that are shaped by the evidence".[251]

143. This is the proper approach at law, and the only practical and workable approach in cases of this scale and complexity. This is particularly the case given the Trial Judge's findings that the Tsilhqot'in people continuously occupied <u>all of the Claim Area</u> from a time before contact and sovereignty assertion to the present.[252] The Trial Judge distinguished the Proven Trial Area from the remainder of the Claim Area based solely on his assessment of the <u>sufficiency</u> of occupation at sovereignty.[253] He delineated the boundaries, on his view of the evidence, where sufficient occupation shaded into something less.

144. Only the Trial Judge can delineate the boundaries of Aboriginal title in this manner, at the conclusion of trial, informed by factual findings drawn from the full evidentiary record. It is self-evident that Aboriginal claimants are not in a position to plead these boundaries from the earliest stages of litigation.

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[250] Trial Decision, para. 111.
[251] Trial Decision, para. 958.
[252] See, *e.g.*, Trial Decision, paras. 792, 825, 1268.
[253] See, *e.g.*, Trial Decision, paras. 614, 616, 793-94, 928, 938, 960.

145. After an extensive trial in which the location, extent and intensity of Tsilhqot'in occupation throughout the Claim Area was thoroughly litigated, the Defendants cannot be said to be prejudiced by declarations of Aboriginal title that are shaped by the resulting evidentiary record.

146. This is underscored by the fact that British Columbia, in its Statement of Defence, "put the Plaintiff to the strict proof of the location and extent of such limited portions" of the Claim Area where Tsilhqot'in occupation supports Aboriginal title.[254] While the Trial Judge correctly observed that this "is not a *de facto* amendment of the plaintiff's pleadings",[255] it certainly demonstrates that there is no surprise or prejudice to the Defendants from declaratory relief granted on exactly those terms.

(b) Aboriginal title is shaped by the evidence, not arbitrary boundaries

147. The Defendants argued that they were prejudiced by the lack of opportunity to cross-examine witnesses on the boundaries of any individual definite tracts of land to which Aboriginal title might be established. As an example, they pointed to the fact that the southern boundary of Tachelach'ed was described differently by three Aboriginal witnesses.[256]

148. The Defendants' concern with testing the exact boundaries of "smaller definite tracts of land" is misconceived. Aboriginal title arises from actual use and occupation of the land at sovereignty. It is established by proof of exclusive, physical occupation sufficient to ground Aboriginal title to the land.[257] There is no super-added requirement that members of the Aboriginal group had a shared understanding of the precise boundaries of individual, defined tracts.

149. It is irrelevant whether Aboriginal witnesses agree on the precise boundaries of tracts of land within the Claim Area. These boundaries are the product of the trial

[254] British Columbia, Amended Statement of Defence, para. 12; Trial Decision, para. 121.
[255] Trial Decision, para. 121.
[256] Trial Decision, para. 111 [underscore added]. See also: *Tsilhqot'in Nation v. British Columbia*, 2008 BCSC 600, [2008] B.C.J. No. 871, para. 9.
[257] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, paras. 56, 61-62.

process and the legal requirements of proving Aboriginal title. These artificial boundaries hold no particular cultural significance or relevance from the Tsilhqot'in perspective. In fact, most if not all of the Tsilhqot'in witnesses say that the entire Claim Area and lands beyond the Claim Area are subject to Tsilhqot'in Aboriginal title. The Tsilhqot'in did not divide up the Claim Area in this way.

150. Indeed, as the Trial Judge observed, "[i]n Tsilhqot'in semi-nomadic society there were no boundaries in the sense that a boundary is currently understood with reference to set metes and bounds".[258] He specifically noted that the boundaries of Tachelach'ed were "entirely artificial"[259] but that "in order to assert his claim, the plaintiff had to conform to the Eurocentric need to define boundaries".[260] It is not surprising that Tsilhqot'in witnesses might differ in their description of boundaries that are "entirely artificial" to them.

151. The error of the Trial Judge's reasoning is clear from its application. On his approach, to avoid prejudice to the Defendants, the Plaintiff was required to: (a) anticipate with precision the "definite tracts" of land over which the Trial Judge would ultimately find Aboriginal title; (b) plead these specific tracts in his Statement of Claim; and then (c) prove at trial that Tsilhqot'in people universally recognized and agreed on the boundaries of these specific tracts of land. With respect, this approach compounds impossibilities and is clearly wrong in law. The result of such a proposition would be that no Aboriginal title claim could ever be proved.

(c) *Delgamuukw* is not binding or applicable

152. Finally, the Trial Judge improperly considered himself bound by ***Delgamuukw*** to find prejudice to the Defendants.[261]

153. At trial in ***Delgamuukw***, 51 Chiefs representing most of the Houses of the Gitksan and Wet'suwet'en nations, advanced 51 individual claims on their own behalf

[258] Trial Decision, para. 648.
[259] Trial Decision, para. 641.
[260] Trial Decision, para. 645.
[261] Trial Decision, para. 129.

and on behalf of their houses for "ownership" and "jurisdiction" over 133 distinct territories.[262]

154. By the time the case reached the Supreme Court of Canada, the original claim had been altered in two different ways:

a. the individual claims by each House had been amalgamated into two communal claims, one advanced on behalf of each nation; and

b. the claims for ownership and jurisdiction had been replaced with claims for Aboriginal title and self-government.[263]

155. The Trial Judge in the present case considered himself bound by Lamer C.J.'s rejection of the first attempted alteration; *i.e.* the amalgamation of individual into communal claims:

> The [First Nations] appellants argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case … This defect in the pleadings prevents the Court from considering the merits of this appeal …[264]

156. With respect, ***Delgamuukw*** is wholly distinguishable on this point. The Plaintiffs in ***Delgamuukw*** sought to reframe several key elements of their claim on appeal, after litigating their claims on an entirely different basis. For example, the shift from 51 communal claims to 2 national claims represents a radical change in the claimant Aboriginal groups.

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[262] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 73.
[263] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 73.
[264] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 76-77 [underscore added]; quoted in Trial Decision, para. 113.

157. Proof of an ancestral and modern rights-bearing Aboriginal community is a central element of proving Aboriginal title. In the present case, the Parties devoted considerable efforts litigating the appropriate Aboriginal group to hold Aboriginal title and rights. The Trial Judge directed a significant portion of his Reasons for Judgment to deciding this issue, explaining his conclusion that Aboriginal title vested in the Tsilhqot'in Nation and not sub-groups, and reviewing the underlying factual support for this conclusion. Substituting a new claimant group on appeal, as the Plaintiffs attempted in ***Delgamuukw***, retroactively denies the Defendants the opportunity to respond to or test the supporting evidence at trial.

158. It also has serious ramifications for other elements of the claim. Aboriginal title demands proof of exclusive occupation. By definition, exclusivity of occupation depends on the Aboriginal group alleged to have exerted control over the lands in question, to the exclusion of others.[265] Changing the Aboriginal groups said to have exercised exclusive control over the land again changes the nature of the litigation, and retroactively denies the Defendants the opportunity to test this new theory of exclusivity at trial.

159. These serious concerns about prejudice do not arise in the present case. The trial was fully litigated on the Plaintiff's assertion that the Tsilhqot'in Nation holds Aboriginal title. The Plaintiff's position still stands. It is firmly supported by the Trial Judge's extensive findings. There are no changes on the key issues of who holds Aboriginal title and exercised exclusive control over the land. The sole "alteration" alleged by the Defendants relates to the <u>extent</u> of Aboriginal title throughout the Claim Area. As this issue was thoroughly litigated at trial, it can hardly give rise to prejudice.

160. Further, Lamer C.J.'s discussion of the second alteration to the pleadings in ***Delgamuukw*** is instructive for the present case. Lamer C.J. held that the trial judge was correct to "allow a *de facto* amendment" of the plaintiffs' pleadings from claims of ownership and jurisdiction to claims for Aboriginal title and self-government:

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[265] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 155.

> … [I]n my opinion, that ruling was correct because it was made against the background of considerable legal uncertainty surrounding the nature and content of aboriginal rights, under both the common law and s. 35(1). The content of common law aboriginal title, for example, has not been authoritatively determined by this Court and has been described by some as a form of "ownership". As well, this case was pleaded prior to this Court's decision in *Sparrow*, *supra*, which was the first statement from this Court on the types of rights that come within the scope of s. 35(1). The law has rapidly evolved since then. Accordingly, it was just and appropriate for the trial judge to allow for an amendment to pleadings which were framed when the jurisprudence was in its infancy.[266]

161. The same considerations govern here. The Plaintiff pleaded his claim when ***Delgamuukw*** was the only guidance from the Supreme Court of Canada on the modern law of Aboriginal title. That decision describes "regular use of definite tracts of land" as an example of the type of physical occupation that could support Aboriginal title, but it does not set out this degree of occupation as a minimum threshold.[267]

162. Indeed, ***Delgamuukw*** states in plain terms that "occupation" at sovereignty suffices to support Aboriginal title.[268] It bears repeating that the Trial Judge confirmed Tsilhqot'in occupation throughout Tachelach'ed and the Trapline Territory.[269] Accordingly, the Plaintiff's Aboriginal title claims, as pleaded, to Tachelach'ed and the Trapline Territory are entirely consistent with the law as expressed in ***Delgamuukw***.

163. The Supreme Court of Canada decided ***R. v. Marshall; R. v. Bernard*** on July 20, 2005, well over two years after the trial in this case commenced.[270] With this decision, the Court provided additional comment on the elements of proof for Aboriginal title but again made no comment about appropriate pleading.[271]

164. As in ***Delgamuukw***, the Plaintiff's pleadings were "framed when the jurisprudence was in its infancy", "[t]he law has rapidly evolved since then" and the Plaintiff's claim is still being decided against a "background of considerable legal

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[266] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 75 [underscore added].
[267] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 149.
[268] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 144-51.
[269] See, *e.g.*, Trial Decision, para. 1268.
[270] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.
[271] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 46.

uncertainty".[272] The meaning of "regular use of definite tracts of land" remains unresolved and highly contested . There is no guidance to this day as to how such tracts should be delineated or pleaded.

165. Aboriginal rights claims are frequently determined on appeal on a different basis than they were presented at trial. For example, the lower courts in the ***R. v. Côté*** litigation rendered judgment before the ***Van der Peet*** trilogy was decided. The Supreme Court of Canada, on appeal, frankly conceded that "the courts below did not consider the possibility that the appellants may have enjoyed a free-standing aboriginal right to fish independent of title".[273] No such claim was advanced by the appellants.[274] Nonetheless, the Court applied the factual findings at trial to conclude that the appellants had established an Aboriginal right to fish for food, notwithstanding no such right had been claimed or litigated in the courts below.[275]

166. Flexibility is demanded in the face of considerable legal uncertainty to ensure that the Tsilhqot'in people are not unjustly penalized for prevailing uncertainty in the law. After a full trial in which Tsilhqot'in occupation throughout the Claim Area was fully canvassed, the proper recourse is recognition of Aboriginal title along the "boundaries that are shaped by the evidence".[276]

167. It is also noteworthy that in ***Delgamuukw***, the trial judge and this Court considered claims to Aboriginal sustenance rights, even though they were not pleaded by the plaintiffs.[277] In fact, in ***Delgamuukw*** (unlike here), plaintiffs' counsel explicitly assured the trial judge that their claim was "all or nothing"; that is, "the claim was for ownership and jurisdiction, and the plaintiffs were not seeking any lesser relief".[278] Lambert J.A., dissenting, and ultimately the Supreme Court of Canada, nonetheless

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[272] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 75.
[273] *R. v. Côté*, [1996] 3 S.C.R. 139, para. 11.
[274] *R. v. Côté*, [1996] 3 S.C.R. 139, paras. 35-36.
[275] *R. v. Côté*, [1996] 3 S.C.R. 139, para. 37.
[276] Trial Decision, para. 958.
[277] *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.), paras. 23-25, 263, 278-79 (*per* Macfarlane J.A.); paras. 462-68, 519 (*per* Wallace J.A.), paras. 1031, 1071 (*per* Lambert J.A.).
[278] *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.), para. 24 (*per* Macfarlane J.A.); see also para. 429 (*per* Wallace J.A.).

approved the *de facto* amendment of this explicit "all or nothing" claim for ownership and jurisdiction into claims for Aboriginal title and Aboriginal self-government.[279]

168. The Trial Judge misapplied ***Delgamuukw***. In fact, ***Delgamuukw*** supports the view that, even if a *de facto* amendment were required (which the Plaintiff denies), "it was just and appropriate for the trial judge to allow for [a *de facto*] amendment to pleadings which were framed when the jurisprudence was in its infancy".[280]

6. If amendments were required, the Trial Judge should have granted leave to amend

169. Even if amendments were required, either formal or *de facto*, then the Trial Judge erred by refusing to permit such amendments.

170. In ***Dempster v. Fairbanks***, Chief Justice McDonald of the Nova Scotia Court of Appeal considered whether a trial judge was correct in denying a plaintiff's claim, notwithstanding the plaintiff's success on the merits, simply because the pleadings failed to include a necessary averment. Chief Justice McDonald stated:

> It is to be regretted, I think, that the learned Judge did not, before delivering judgment, make the amendment on the record necessary to enable him to give a judgment according to the law and the facts as found by him. And, I think, now, the duty of this court, as it has the power, is to make such amendment, and to interrupt the judgment that should have been entered in the court below. See Or. 38, R. 12, and Or. 57, R. 5 *Clack v. Wood*, 9 Q.B.D. 276, appears to be clear authority as to the power of the court to the make any amendment necessary or requisite to secure justice in the cause or matter before it, when the facts justify the exercise of the court's authority. Here, the learned judge has declared his opinion to be in favour of the plaintiff on the facts and merits, and I concur with his opinion in that regard. An undue regard to a nice technical objection, however, prevents doing justice between these parties. It appears to me, to be clearly a case where the authority of this court should properly interpose. I am,

[279] *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.), paras. 871-76, 906, 1087 (*per* Lambert J.A., dissenting); aff'd [1997] 3 S.C.R. 1010, paras. 74-75.
[280] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 75.

> therefore, of opinion, that all necessary amendments should be made to the plaintiff's statement of claim.[281]

171. This approach is consistent with the trend over the last several decades for courts to promote justice rather than defeat meritorious claims on technical grounds. To deny a finding of Aboriginal title in this case because the Plaintiff claimed title to certain defined lands but did not include the words "or portions thereof" would be unjust, even if these words were technically required. It would be an unfortunate throwback to times when technical, procedural rules designed for different kinds of cases were applied unjustly. As Mr. Justice Spence stated in ***Koury v. The Queen***,

> To give effect to this submission would be to ignore the common sense of the trial. Courts of Appeal do not now operate under 19th-century procedural limitations.[282]

172. It is respectfully submitted that this Honourable Court should make the declaration that the learned Trial Judge failed to make in the Court below.

7. Fairness and justice demand recognition of Tsilhqot'in Aboriginal title

173. With respect, after the full trial of this action, it would be tragic and unjust to deprive the Tsilhqot'in people of judicial recognition of their proven Aboriginal title in the Claim Area.

174. There could not be a more compelling case for judicial recognition of Aboriginal title. As found by the Trial Judge:

- From before contact to the present day, the Tsilhqot'in people have continuously existed as a distinctive Aboriginal group, unified by their shared language, customs, traditions, history, territory and resources;[283]

- The Claim Area is situated "well within"[284] the boundaries of the broader Tsilhqot'in territory and these boundaries were recognized and defended;[285]

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[281] *Dempster v. Fairbanks* (1897), 29 N.S.R. 456 (N.S.C.A.). See also: *Flinn v. Canadian Surety Co.,* [1935] 2 D.L.R. 771 (N.S.C.A.), at p. 772.
[282] *Koury v. The Queen*, [1964] S.C.R. 212, p. 218, cited with approval in *R. v. Guimond*, [1979] 1 S.C.R. 960, at p. 972
[283] Trial Decision, paras. 437-72.

- Both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory;[286]

- The very names of the "Chilcotin Plateau" and the "Chilcotin Region" reflect the ancient and enduring connection of the Tsilhqot'in people to these lands, and the Claim Area itself is blanketed with Tsilhqot'in place names;

- From a time before sovereignty assertion, many ancient Tsilhqot'in legends, including the central Tsilhqot'in creation legend,[287] have been anchored in distinctive geographical landmarks located throughout the Claim Area;[288]

- The archaeological record establishes well over three centuries of continuous Tsilhqot'in use and occupation of the Claim Area;[289]

- 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"[290] and there has been a "substantial maintenance of the connection between the people and the land" throughout this entire period;[291]

- Even the Defendants conceded this fact and admitted that the Tsilhqot'in held Aboriginal rights to hunt and trap throughout the Claim Area;[292]

- Portions of the Claim Area were "occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title", including village sites, cultivated fields and definite tracts of

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[284] Trial Decision, para. 621.
[285] Trial Decision, paras. 622, 930-37.
[286] Trial Decision, para. 622.
[287] Trial Decision, paras. 175, 654-58.
[288] Trial Decision, paras. 105, 131, 146, 169, 653-71, 866-67, 872.
[289] Trial Decision, para. 625.
[290] Trial Decision, para. 1268 [underscore added].
[291] Trial Decision, para. 945.
[292] Trial Decision, paras. 1223, 1374.

land regularly used by the Tsilhqot'in for hunting, trapping and fishing pursuant to a "well defined network of trails and waterways"[293] that was well-established at the time of European contact;[294]

- These lands did not include overlaps with any other First Nations;[295]

- There was "no evidence of adverse claimants at the time of sovereignty assertion" in the area of proven Tsilhqot'in Aboriginal title and "Tsilhqot'in people were in exclusive control of that area at the time of sovereignty assertion";[296] and

- The lands subject to proven Aboriginal title have provided "cultural security and continuity to the Tsilhqot'in people for better than two centuries"[297] and such lands "ultimately defined and sustained them as a people".[298]

175. On the facts found by the Trial Judge, in clear and unequivocal terms, the Tsilhqot'in people established Aboriginal title to portions of their traditional lands that provide cultural security and continuity for the Tsilhqot'in and Xeni Gwet'in people. As the Trial Judge stated, if he was wrong in law on the preliminary issue, these findings bind the Parties, in accordance with his explicit direction.[299]

176. The Plaintiff/Appellant respectfully submits that declarations should issue to support the Trial Judge's findings of Aboriginal title with the force of law.

Error #2 – Assessing Occupation in Isolation from Exclusive Control

177. For the reasons set out above, the Trial Judge erred by failing to declare Aboriginal title to those portions of the Claim Area where Aboriginal title was proven. In

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[293] Trial Decision, para. 960.
[294] Trial Decision, para. 679.
[295] Trial Decision, para. 938.
[296] Trial Decision, para. 943 [underscore added]. See also para. 960.
[297] Trial Decision, para. 1376.
[298] Trial Decision, para. 1377.
[299] Trial Decision, para. 961; *Tsilhqot'in Nation v. British Columbia*, 2008 BCSC 600, [2008] B.C.J. No. 871, para. 13.

relation to the Proven Title Area, the Trial Judge applied the correct law to factual findings supported by the voluminous record and properly identified Aboriginal title lands within the Claim Area. His findings of fact overwhelmingly demonstrate both Tsilhqot'in occupation and exclusive control of the Proven Title Area. Declarations of Aboriginal title should be granted, at the very least, to those portions of the Claim Area.

178. However, the Trial Judge erred by assessing the sufficiency of occupation throughout the remainder of the Claim Area without also considering the degree of exclusive control exercised by the Tsilhqot'in people over these lands at sovereignty. Unlike the Proven Title Area, where he applied the correct law, the Trial Judge fundamentally erred in his legal approach to the balance of the Claim Area.

179. Issues of exclusivity and sufficiency of occupation are intertwined and necessarily inform each other. This is evident from both the common law and the leading authorities on Aboriginal title.

180. ***Delgamuukw*** confirmed that Aboriginal title finds its source in the convergence between the common law and the Aboriginal perspective on land, and therefore "both should be taken into account in establishing the proof of occupancy".[300] In ***Bernard***, McLachlin C.J. described the proper inquiry as "translating" pre-sovereignty Aboriginal practices into the equivalent rights at common law. In her words, "[t]he Court's task … is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right".[301]

181. Applying this approach in ***Bernard***, the Chief Justice explained that Aboriginal title "is established by aboriginal practices that indicate possession similar to that associated with title at common law".[302] Speaking specifically to the question of whether nomadic or semi-nomadic peoples can establish Aboriginal title to land, she

[300] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 , para. 147.
[301] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 48.
[302] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 54 [underscore added].

stated that it depends on the facts: "[i]n each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out".[303]

182. The Chief Justice's comments throughout her opinion underscore the importance of the "usual indicia of title at common law — possession of the land in the sense of exclusive right to control".[304] For example:

> As discussed, the task of the court is to sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams* and *Côté*.[305]

183. As this passage suggests, "exclusionary rights of control" are of paramount significance in determining whether Aboriginal title is established. The degree of exclusionary control directly informs the assessment of whether occupation was sufficiently regular at sovereignty to support Aboriginal title. In a critical passage, the Chief Justice provides this guidance:

> Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.[306]

184. As the Chief Justice notes, even at common law, "possession … is a contextual, nuanced concept".[307] Sufficiency of occupation cannot be assessed by looking at acts in isolation from the surrounding context. The common law jurisprudence abundantly

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[303] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 66 [underscore added].
[304] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 77 [underscore added]. See also para. 64.
[305] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 77 [underscore added].
[306] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 62 [underscore added].
[307] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 66.

supports this proposition. The House of Lords, for example, has described common law possession in terms that resonate with McLachlin C.J.'s comments in *Bernard*:

> Factual possession signifies an appropriate degree of physical control ... The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."[308]

Thus, when assessing possession at common law "[e]verything must depend on the particular circumstances".[309] The question is whether the acts in relation to the land, viewed in context, demonstrate exclusive physical control and custody over the land.

185. The Chief Justice similarly stated:

> [Aboriginal title to land] is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A.[310]

186. As this passage makes clear, the degree of occupation required to establish title (whether common law or Aboriginal title) depends on the degree of physical control over

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[308] *J.A. Pye (Oxford) Ltd.* v. *Graham*, [2002] 3 W.L.R. 221 (H.L.), para. 41 [underscore added].

[309] See also: *Lord Advocate* v. *Lord Lovat*, (1880) 5 A.C. 273 (H.L.) at p. 288; R. D. C. Stewart, "Differences Between Possession of Land and Chattels" (1933) 11 C.B.R. 651 at pp. 655-56.

[310] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 66. See also para. 54.

the lands in question. At common law, even "intermittent" or "sporadic" use of land supports title provided the person is in adequate possession.[311]

187. Thus, in a decision of the Nova Scotia Court of Appeal, the use of blazed lines to mark property on timberland was considered sufficient to establish possession, because such blazing (rather than enclosure or cultivation) was the customary mode of asserting ownership to standing timber.[312] Similarly, the Privy Council found that the payment of taxes on a tract of wild land for two decades, without any further acts in relation to this land, established possession to the tract, because this was "the only act of possession of which it appeared capable".[313]

188. It is evident from the Supreme Court of Canada in ***Bernard***, and the common law authorities that guide the inquiry into Aboriginal title, that occupation for the purposes of establishing Aboriginal title cannot be assessed without regard to the degree of exclusive control exercised over the land. These two factors inform each other.

189. With respect to the Proven Title Area, the Trial Judge appropriately considered both occupation and exclusive control. He applied the law correctly to find Aboriginal title in the Proven Title Area. However, the Trial Judge expressly declined to consider the exclusivity of specific parcels of land outside of the Proven Title Area but within the Claim Area. Instead, he determined that there was insufficient Tsilhqot'in occupation of these areas at sovereignty to establish Aboriginal title without regard to Tsilhqot'in exclusive physical control over these areas.

190. In the Trial Judge's view, having found insufficient occupation, there was no need to decide issues of exclusivity:

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

[311] See also: *Wuta-Ofei v. Danquah,* [1961] 3 All E.R. 596 (P.C.), at 600; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 198-204 and authorities cited therein.
[312] *Halifax Power Co.* v. *Christie* (1915), 48 N.S.R. 264 (N.S.C.A.) at 267.
[313] *Kirby* v. *Cowderoy*, [1912] A.C. 599 (P.C.).

> Claim Area. British Columbia also says that the plaintiff has approached the question of exclusivity from a territorial, rather than a site-specific, perspective.
>
> In his reply, the plaintiff argues that exclusivity does not require site-specific evidence of control directed at "each marsh meadow and berry patch". What is required is effective control over the land in question.
>
> It is fair to say that the argument made by the plaintiff was directed towards a conclusion that Tsilhqot'in people had vigorously defended their territory and had closely monitored and controlled its use by others. British Columbia's position is consistent with the view that site-specific definite tracts are required in the proof of Aboriginal title and thus proof of site-specific exclusivity is also required.
>
> There is merit in both arguments. However, I took the plaintiff's argument to be a review of the evidence that would lead not just to a defence of territory but to an exclusive use of the Claim Area. I am unable to conclude there was sufficient occupation of the Claim Area as a whole. Therefore, my focus on exclusivity will be directed to those parts of the land, inside and outside the Claim Area, that in my view do demonstrate a sufficient degree of exclusive occupation to support a finding of Aboriginal title.[314]

191. With respect, the Trial Judge proceeded on the wrong legal principle by assessing occupation in isolation from, and without regard to, the degree of physical control exercised over the land. This fundamental legal error obviates his findings of insufficient Tsilhqot'in occupation outside the Proven Title Area. Had the Trial Judge properly assessed occupation in light of the high degree of exclusive physical control exercised by the Tsilhqot'in people over the Claim Area, he would have arrived at a different result based on his findings of fact.

192. It is important to recall that Tsilhqot'in occupation of the lands throughout the Claim Area at sovereignty is not in question. The Trial Judge explicitly found that Tsilhqot'in people have "continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day".[315]

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[314] Trial Decision, paras. 925-28 [underscore added].
[315] Trial Decision, para. 1268 [underscore added].

193. Moreover, the Trial Judge's findings reinforce the exclusive physical control exercised by the Tsilhqot'in people over the Claim Area in its entirety at sovereignty. The Trial Judge held:

- "[T]he struggle, if any, between different Aboriginal groups came at the margins of their territories";[316]

- "both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory"[317] and the outer boundaries of Tsilhqot'in territory were recognized and defended;[318]

- The Trial Judge described numerous examples of Tsilhqot'in "conflict with other Aboriginal people in areas outside of the Claim Area";[319]

- In a voluminous trial record, the Trial Judge could identify only two potential incursions into the Claim Area by other First Nations: the first (a Homalco raid at Potato Mountain) resulted in a forceful show of Tsilhqot'in control over the area and pre-dated sovereignty in any event,[320] and the second (an alleged temporary Homalco encampment near Tsilhqox Biny)[321] was of dubious reliability and the Trial Judge did not determine whether it had in fact occurred or not.[322]

- "Aside from these two instances [concerning the Homalco], it appears that others respected the territorial integrity of the lands included in the Claim Area"; and[323]

[316] Trial Decision, para. 930.
[317] Trial Decision, para. 622, quoting from Exhibit 0240, Expert Report of Ken Brealey, at 20-21.
[318] Trial Decision, paras. 622, 930-37
[319] Trial Decision, para. 931.
[320] Trial Decision, paras. 933, 935.
[321] Trial Decision, para. 932, 934.
[322] Trial Decision, para. 934, 942.
[323] Trial Decision, para. 935.

- "By the time Alfred Waddington began the construction of his failed overland route to the gold fields [1863], the historical record leads to but one conclusion: the Homalco people living at Bute Inlet feared the Tsilhqot'in and were reluctant to venture into Tsilhqot'in territory".[324]

- To be safe in Tsilhqot'in territory, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down";[325] in fact, the historical record furnishes numerous examples where non-Tsilhqot'in Aboriginal guides refused to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in people.[326]

194. These findings demonstrate that Tsilhqot'in people not only occupied the Claim Area at sovereignty, but also exercised the "exclusive right to control"[327] these lands that is the hallmark of title at common law. In other words, the facts as found by the Trial Judge establish that the Tsilhqot'in people, as "the alleged possessor [have] been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."[328]

195. Had the Trial Judge properly directed himself on the law, and assessed occupation and exclusivity together, he could only have concluded that Tsilhqot'in occupation of the Claim Area at sovereignty, coupled with the exclusive physical control exercised over the Claim Area, demonstrated exclusive possession sufficient to establish Aboriginal title. The Appellant respectfully submits that this Honourable Court should apply the correct law to the facts as found by the Trial Judge and declare Aboriginal title to the Claim Area in its entirety.

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[324] Trial Decision, para. 182.
[325] Trial Decision, para. 917, quoting from Exhibit 0391, Expert Report of Hamar Foster. See also paras. 919, 938-40.
[326] Trial Decision, para. 921.
[327] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 77 [underscore added]. See also para. 64.
[328] *J.A. Pye (Oxford) Ltd.* v. *Graham*, [2002] 3 W.L.R. 221 (H.L.), para. 41, quoting with express approval from *Powell*'s case at pp 470-471 [underscore added]. See also: Carol Rose, "Possession as the Origin of Property" (1985) 52 U. of. Chic. L. R. 73 at 77-82; William Blackstone, *Commentaries on the Laws of England*, (London: Cavendish Publishing Ltd., 2001), vol. 2, pp. 9, 258.

PART 4 – NATURE OF THE ORDER SOUGHT

196. The Appellant seeks the following orders:

a. an order allowing the appeal;

b. a declaration that the Tsilhqot'in Nation has existing Aboriginal title to the Trapline Territory and the Brittany;

c. alternatively, a declaration that the Tsilhqot'in Nation has existing Aboriginal title to the Proven Title Area within the Claim Area;

d. In the further alternative, and if this Honourable Court finds an amendment to the pleadings is necessary, then an order amending the Amended Statement of Claim to add the words "or portions thereof" in the appropriate paragraphs as set out in the draft Statement of Claim attached to the Notice of Motion dated March 25, 2008, or as otherwise deemed necessary and appropriate by this Honourable Court;

e. costs in this Court; and

f. such further relief as this Honourable Court may deem just.

All of which is respectfully submitted this 4th day of June 2010.

David Rosenberg, Q.C.

"Jack Woodward"

Jack Woodward

"Jay Nelson"

Jay Nelson

LIST OF AUTHORITIES

Cases

Statutes

Other Authorities

Current to May 4, 2010

R.S.B.C. 1996, c. 253, s. 1

[eff since April 21, 1997](Current Version)

LAW AND EQUITY ACT

RSBC 1996, CHAPTER 253
SECTION 1

Application of Act

1 The rules of law enacted and declared by this Act are part of the law of British Columbia and must be applied in all courts in British Columbia.

RSBC 1979-224-1.

SECTION 2

Application of English law in British Columbia

2 Subject to section 3, the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

RSBC 1979-224-2.

SECTION 3

Laws not in force in British Columbia

3 Section 28 of the Offences Against the Person Act, 1828 and all sections of the Real Property Act, 1845 are not in force in British Columbia.

RSBC 1979-224-3.

SECTION 4

Equitable relief for plaintiff

4 If a plaintiff or petitioner claims to be entitled to an equitable estate or right or to relief on an equitable ground against a deed, instrument or contract, or against any right, title or claim asserted by a defendant or respondent in a cause or matter, or to relief founded on a legal right that, before April 29, 1879, could only have been given by the court as a court of equity, the court, either as a court of law or equity, and every judge of it, must give the plaintiff or petitioner the relief that ought to have been given by the court in a suit or proceeding in equity for the same or similar purpose properly commenced before April 29, 1879.

RSBC 1979-224-8.

SECTION 9

Judicial notice of legal and statutory rights, claims and liabilities

9 Subject to this Act, the court and every judge of it must recognize and give effect to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law or by any custom or created by any statute, in the same manner as they would have been recognized and given effect to in the court if this Act had not been enacted.

RSBC 1979-224-9.

SECTION 10

Avoidance of multiplicity of proceedings

10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

RSBC 1979-224-10.

SECTION 11

Equitable waste

11 An estate for life without impeachment of waste does not confer and is deemed not to have conferred on the tenant for life a legal right to commit equitable waste, unless an intention to confer that right expressly appears by the instrument creating the estate.

RSBC 1979-224-12.

SECTION 12

Merger

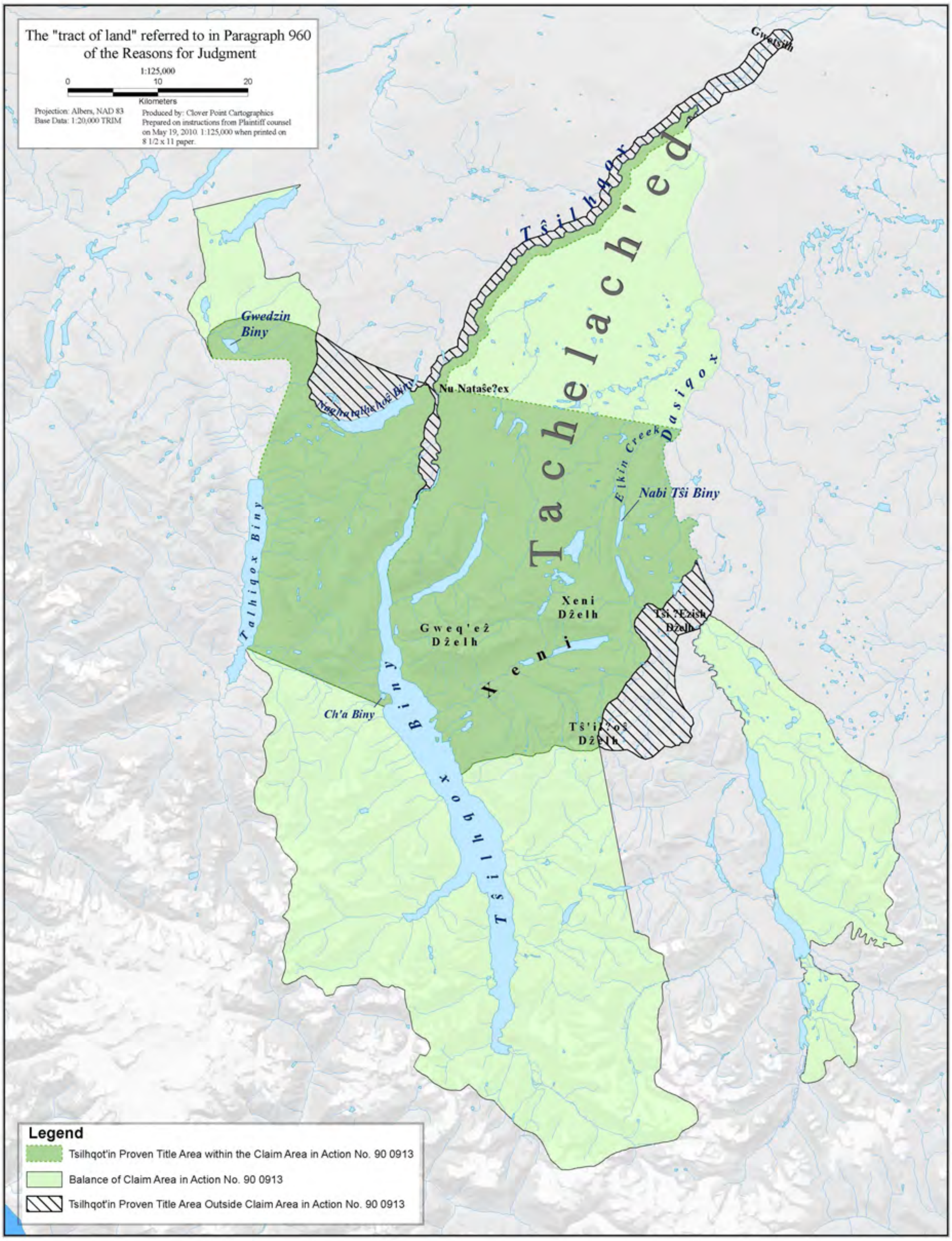
12 There is not any merger, by operation of law only, of an estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

RSBC 1979-224-13.

SECTION 13

Mortgagor may sue in respect of mortgaged land

13 A mortgagor entitled to the possession or receipt of the rents and profits of land, as to which a notice of the mortgagee's intention to take possession or to enter into the receipt of those rents and profits has not been given by the mortgagee, may sue for possession or for the recovery of the rents or profits, or to



The "tract of land" referred to in Paragraph 960
of the Reasons for Judgment
1:125,000
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Kilometers
Projection: Albers, NAD 83
Base Data: 1:20,000 TRIM
Produced by: Clover Point Cartographics
Prepared on instructions from Plaintiff counsel
on May 19, 2010. 1:125,000 when printed on
8 1/2 x 11 paper.
Tachelach'ed
Tŝilhqox
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Gwedzin Biny
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Dasiqox
Elkin Creek
Nabi Tŝi Biny
Talhiqox Biny
Xeni Dželh
Gweq'ež Dželh
Xeni
Ch'a Biny
Tŝilhqox Biny
Legend
Tsilhqot'in Proven Title Area within the Claim Area in Action No. 90 0913
Balance of Claim Area in Action No. 90 0913
Tsilhqot'in Proven Title Area Outside Claim Area in Action No. 90 0913