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 REPLY

to HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION

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APPELLANT'S REPLY SUBMISSIONS TO BRITISH COLUMBIA

A. Facts relating to Tsilhqot'in exclusive control

1. British Columbia contends that the Trial Judge confused the test of "exclusive control" with the mere "absence of non-Tsilhqot'in", but this assertion cannot stand in the face of the Trial Judge's considered analysis of Tsilhqot'in exclusive control.[1] As in its own appeal, British Columbia invites this Court to overrule the Trial Judge's findings by selectively picking evidence from a voluminous record in support of its position.

2. For example, British Columbia refers to a Lillooet raid at Chilko Lake, but fails to mention that the Tsilhqot'in responded immediately with overwhelming force to repel the raiders, an event that in fact *reinforces* Tsilhqot'in exclusive control.[2] British Columbia also asserts that HBC employees freely used and occupied Tsilhqot'in territory "without interference from the Tsilhqot'in, making no reference to paying the Tsilhqot'in for the privilege".[3] British Columbia omits reference to the Trial Judge's finding that HBC traders gave frequent presents to the Tsilhqot'in *precisely* to secure safe "passage through or use of Tsilhqot'in lands".[4] Nor does British Columbia mention the numerous references in the historical record to the effect that the Chilcotin Post existed at the sufferance of the Tsilhqot'in and that its employees were "little better than slaves to the Indians, being unable to keep them in check".[5]

3. Similarly, other First Nations were well aware of Tsilhqot'in territory and feared transgressing on Tsilhqot'in lands without permission.[6] The fact that HBC traders and

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[1] BC Response Factum (Plaintiff's Appeal), para. 194; Trial Decision, Joint Appeal Record, v. II(b), p. 452-462, paras. 912-44, esp. para. 938.
[2] BC Response Factum (Plaintiff's Appeal), para. 36; Trial Decision, Joint Appeal Record, v. II(a), p. 234-235, para. 246; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 57; Exhibit 0443, Expert Report of John Dewhirst, at paras. 25-26.
[3] BC Response Factum (Plaintiff's Appeal), para. 36.
[4] Trial Decision, Joint Appeal Record, v. II(b), p. 453-454, paras. 917-19.
[5] Trial Decision, Joint Appeal Record, v. II(a), p. 236, para. 250 and v. II(b), p. 460, para. 938; see also Trial Decision, Joint Appeal Record, v. II(a) p. 233-234, 235-236, paras. 241-45, 247-48.
[6] Trial Decision, Joint Appeal Record, v. II(a), p. 362, para. 622 and v. II(b), p. 455, 457, 459, paras. 921, 930, 935.

other First Nations were permitted by the Tsilhqot'in people to use and access the Chilcotin Post at their sufferance *reinforces* Tsilhqot'in exclusive control of the area.[7]

B. The Preliminary Issue

4. British Columbia says that the Plaintiff has not "identified any error in principle" in the Trial Judge's decision not to declare Aboriginal title to the Proven Title Area. In fact, the Plaintiff has explicitly identified the Trial Judge's legal error: The Trial Judge's findings of prejudice to the Defendants rest solely on his mistaken belief that the Plaintiff was required to plead the exact boundaries of the lesser, included tracts of the Claim Area to which Aboriginal title would be established at the conclusion of a lengthy trial.[8]

5. This view of the law cannot be correct, as it would impose an impossible burden on claimants to Aboriginal title. For example, British Columbia complains that the Plaintiff did not plead an "alternate claim to Vickers J.'s Opinion Areas"[9] but at the same time disagrees with the Trial Judge's findings of Aboriginal title and advocates for a narrower, "postage stamp" approach. It cannot be that a claimant First Nation is required to plead every conceivable variation of the potential outcome (at trial and through appeals) of the innumerable factual and legal disputes underlying an Aboriginal title action to avoid prejudice to the Defendants.

6. On a proper understanding of the law, the Trial Judge's concerns about prejudice to the Defendants fall away. After an extensive trial in which the location, extent and intensity of Tsilhqot'in occupation throughout the Claim Area were thoroughly litigated, the Defendants cannot be said to be prejudiced by declarations of Aboriginal title based on the "boundaries that are shaped by the evidence".[10]

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[7] Trial Decision, Joint Appeal Record, v. II(b), p. 460, para. 938; Exhibit 0224, Dinwoodie, December 2004 Report, at 36; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 156.
[8] Plaintiff's Appeal Factum, paras. 138-68; Plaintiff's Response Factum (Canada's Appeal), paras. 25-42.
[9] BC Response Factum (Plaintiff's Appeal), para. 85.
[10] Trial Decision, Joint Appeal Record, v. II(b), p. 466, para. 958.

7. British Columbia relies on an adverse possession case (*Spicer*) as an example of a definite tract of land used for hunting that supports common law title.[11] This proposed approach is flawed in a number of respects, discussed below. It is noteworthy, however, that the court in *Spicer* said "it is **virtually impossible to define the area which they claim** with any precision" and "no lines or other demarcation established the specific area which they have occupied".[12] Nonetheless, the Court declared title to a discrete area based on the evidence heard at trial (to an area established by triangulating the hunting camp, outhouse and fire-pit "with a ten foot perimeter around it" plus two separate easements – neither of which was claimed by the plaintiffs).[13]

8. As the Plaintiff has argued, especially in Aboriginal title trials, demarcating title based on the evidence as reviewed by the trial judge is the only practical approach.[14]

C. The Plaintiff did not advance a "territorial" claim

9. British Columbia contends that the Plaintiff advanced a "territorial claim" of the nature rejected in *Marshall; Bernard*. However, as the Plaintiff argued in response to Canada's appeal, the Plaintiff's claim could not be more different from the "territorial claims" advanced in *Marshall* and *Bernard*. Both of those cases involved sweeping claims to entire traditional territories (many times larger than the Claim Area in this case)[15] with no persuasive evidence of actual use or occupation. By contrast, the Plaintiff led extensive and detailed evidence documenting the nature, extent, intensity and location of Tsilhqot'in use and occupation throughout the Claim Area.[16]

10. British Columbia strains to mischaracterize the Plaintiff's claim as "territorial". For example, it quotes the Plaintiff's reference to "over-arching title", but this was in the completely different context of explaining that sub-groups of the Tsilhqot'in Nation derive their rights and interests from their over-arching title as a Tsilhqot'in Nation – a

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[11] BC Response Factum (Plaintiff's Appeal), para. 182-84.
[12] *Spicer v. Bowater Mersey Paper Co.*, [2004] N.S.J. No. 104, 2004 NSCA 39, para. 23, 51; see also para. 1.
[13] *Spicer v. Bowater Mersey Paper Co.*, [2004] N.S.J. No. 104, 2004 NSCA 39, para. 23. See also: *Kanary v. Nova Scotia (Attorney General)* (1985), 70 N.S.R. (2d) 1, [1985] N.S.J. No. 162, paras. 49-54; *Re Ellie*, (1997) 154 Nfld. & P.E.I.R. 271, [1997] N.J. No. 211, esp. paras. 1-2, 256-63.
[14] See, *e.g.*, Plaintiff's Response (Canada's Appeal), paras. 28-39.
[15] As British Columbia concedes: BC Response Factum (Plaintiff's Appeal), paras. 145, 155.
[16] See Plaintiff-Respondent's Factum (Canada's Appeal), paras. 4-8, 74-108.

position accepted by the Trial Judge.[17] Similarly, British Columbia says that the Plaintiff conceived of Aboriginal title as existing "throughout the traditional territory of the Tsilhqot'in Nation", but cites nothing more in support than Tsilhqot'in elders stating (unsurprisingly) that they consider the Claim Area to be "Tsilhqot'in land".[18]

D. British Columbia's flawed approach to *Marshall; Bernard*

11. British Columbia repeatedly asserts that the Trial Judge ignored, relaxed or contradicted *Marshall; Bernard*, but it is the Defendants' extreme "postage stamp" view of Aboriginal title that cannot be squared with *Marshall; Bernard*. In this respect, the Plaintiff relies on his submissions in response to Canada's appeal.[19] Here, the Plaintiff will briefly review the fundamental errors in British Columbia's approach.

12. In essence, British Columbia argues that the Court in *Marshall; Bernard* held that Aboriginal title cannot be established by seasonal use of land and cannot extend to hunting grounds generally (as opposed to discrete physical sites such as a hunting camp).[20] This position directly contradicts the clear direction of the Supreme Court of Canada in *Marshall; Bernard*. Briefly stated:

a. The Court confirmed that "regular use of **definite tracts of land for hunting**, fishing or otherwise exploiting its resources"[21] can support Aboriginal title, a phrase that in itself rebuts British Columbia's position that Aboriginal title is restricted to pinpoint sites and not hunting grounds more generally.

b. The same is true of the Court's express affirmation that "**exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into Aboriginal title** to the land if the activity was sufficiently regular and exclusive to comport with title at common law".[22]

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[17] BC Response Factum (Plaintiff's Appeal), para. 63; Plaintiff's Argument, paras. 488(b), 730; Trial Decision, Joint Appeal Record, v. II(a), p. 307-308, paras. 470-72.
[18] BC Response Factum (Plaintiff's Appeal), para. 63; Plaintiff's Argument, para. 934.
[19] Plaintiff's Response Factum (Canada's Appeal), paras. 116-167.
[20] BC Response Factum (Plaintiff's Appeal), para. 67; see also paras. 178-79.
[21] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 66 [bolding added].
[22] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 58 [emphasis added].

c. Even the Court's statement that "more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right"[23] contradicts British Columbia's categorical position that seasonal use can *never* establish Aboriginal title[24] and means that, in some circumstances, seasonal hunting or fishing will translate into Aboriginal title.

d. Such circumstances relate primarily to the degree of exclusive control exercised over the land: as the Court noted, "Aboriginal societies … 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".[25] This is yet another statement directly contradicting British Columbia's assertion that Aboriginal title is limited to pinpoint sites and does not extend to "larger areas of land" exploited for hunting or other pursuits.

e. If, as British Columbia asserts, Aboriginal title cannot be established by seasonal use, and does not extend to hunting grounds, the Court in *Marshall; Bernard* had the opportunity to say so directly. Instead, the Court could not have been clearer in directing that it was a matter of evidence on the particular facts of each case.[26]

13. British Columbia's fundamental error is its insistence on exact conformity with the common law, to the complete exclusion of the Aboriginal perspective. It repeatedly invokes the Court's direction that the hallmark of Aboriginal title is "exclusive physical possession equivalent to common law notions of title".[27] However, British Columbia fails to heed or even note the Court's equally critical direction that courts "should take a generous view of the aboriginal practice and **should not insist on exact conformity** to the precise legal parameters of the common law right".[28] The key question is "whether

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[23] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 58.
[24] BC Response Factum (Plaintiff's Appeal), para. 67.
[25] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 62.
[26] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 62, 66.
[27] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 62, 66, 77.
[28] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 48 [bolding added]. See also para. 50.

the practice corresponds to the **core concepts** of the legal right claimed" or "correspond[s] **in some broad sense** to the modern right claimed".[29]

14. In making this assessment, the Court stated that "one looks to aboriginal practices rather than imposing a European template: In considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'". Most importantly, "when dealing with a claim of 'aboriginal title', the court will focus on the occupation and use of the land as part of the aboriginal society's *traditional way of life*".[30] In this way, "[t]he aboriginal perspective grounds the analysis and imbues its every step".[31]

15. By contrast, British Columbia reduces this contextual inquiry to a singular focus on whether occupation was sufficiently intensive to leave "visible signs of labour" in the form of "physical remains". British Columbia goes so far as to suggest that in most cases the boundaries of Aboriginal title will be defined by the extent of archaeological evidence of occupation.[32] This test renders completely irrelevant the Aboriginal perspective and their traditional way of life. It is precisely the "European template" that the Court in *Marshall; Bernard* cautioned was unacceptable.[33]

16. This is the fundamental problem with British Columbia's reliance on an adverse possession case (*Spicer*) as the model for assessing Aboriginal title claims. The Court in *Marshall; Bernard* did not direct courts to apply the common law test for title. It said to look for Aboriginal practices, considered generously, that resonate with the core concepts of common law title. And it expressly said to do so by considering "occupation and use of the land as part of the aboriginal society's *traditional way of life*".[34] It is not simply a matter of strictly applying the standards that govern an adverse possession

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[29] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 50.
[30] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 49.
[31] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 50.
[32] BC Response Factum (Plaintiff's Appeal), para. 69.
[33] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 49.
[34] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 49.

claim by non-Aboriginal hunters for title to a hunting camp. The Court in *Marshall; Bernard* did not confine the title of Aboriginal peoples to fire pits and outhouses.

17. There are other problems with British Columbia's reliance on *Spicer*. Occupation sufficient to establish title at common law is a matter of degree. Occupation sufficient to acquire title by adverse possession is the most demanding standard. By contrast, establishing title to lands that are not in the possession of any other person is a far less demanding standard.[35] The Plaintiff's Aboriginal title claim, based on pre-sovereignty occupation, is akin to the latter. Contrary to British Columbia's theory, there are numerous common law cases in which claimants have established title based on minimal acts of occupation, without leaving "physical remains" throughout the tract.[36]

E. Alleged Errors in the Trial Judge's reasoning

18. British Columbia frequently accuses the Trial Judge of rejecting or departing from the common law test or from *Marshall; Bernard*. What British Columbia really means is that the Trial Judge rejected the Defendants' incorrect theory of Aboriginal title. For example, British Columbia claims that "[i]n Vickers J.'s view, **the existing jurisprudence** should not be 'allowed to pervade and inhibit genuine negotiations'".[37] However, in the actual quote, it is the Defendants' "**impoverished view of Aboriginal title**" that the Trial Judge says should not inhibit genuine negotiations.[38] Throughout its factum, British Columbia conflates *Marshall; Bernard* and the common law with its own impoverished view of Aboriginal title.

19. For this reason, British Columbia's constant assertions that the Trial Judge "rejected"[39] or "relaxed"[40] the test for Aboriginal title as described in *Marshall; Bernard*

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[35] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 201; B. Ziff, *Principles of Property Law* (4th ed.) (Thomson Carswell: Toronto, 2006), pp. 117-18, 126, 176-77; Megarry, R. and Wade, W., *The Law of Real Property* (6th ed.) (London: Sweet & Maxwell, 2000), p. 1309.

[36] See, *e.g.*, *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, para. 66, citing *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.), *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.). See also: *Wuta-Ofei v. Danquah,* [1961] 3 All E.R. 596 (P.C.), at 600; *Halifax Power Co.* v. *Christie* (1915), 48 N.S.R. 264 (N.S.C.A.) at 267; *Kirby* v. *Cowderoy*, [1912] A.C. 599 (P.C.); K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 198-204.

[37] BC Response Factum (Plaintiff's Appeal), para. 114 [bolding added].

[38] Trial Decision, Joint Appeal Record, p. 616, para. 1376 [bolding added].

[39] See, *e.g.*, BC Response Factum (Plaintiff's Appeal), paras. 102(a), 117.

are misleading. At no point did the Trial Judge do either. To the contrary, the Trial Judge carefully articulated and applied *Marshall; Bernard*.[41] He acknowledged that the Court in *Marshall; Bernard* set a "high standard" for proof of Aboriginal title.[42]

20. It is British Columbia's approach that is inconsistent with *Marshall; Bernard*. For example, the Trial Judge found that the Tsilhqot'in held Aboriginal title to certain "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 …"[43] British Columbia says the Trial Judge "relaxed" the test because title requires proof of cultivated fields where crops are planted and tended.[44] The Trial Judge, however, correctly applied an analysis informed by the Tsilhqot'in way of life.

21. Similarly, British Columbia complains that the Trial Judge "rejected" the application of "proof of physical occupation equivalent to common law title" because he found the test inconsistent with the semi-nomadic lifestyle of the Tsilhqot'in.[45] At no point did the Trial Judge reject this test, expressly or implicitly. Rather, the Trial Judge heeded the direction, which British Columbia ignores, that this test must be informed by the Tsilhqot'in way of life and is "entirely dependant on the evidence".[46]

22. The Trial Judge did not apply a "proximity" test for proving Aboriginal title, as British Columbia contends.[47] The Supreme Court of Canada in *Bernard* overruled the appellate court's finding of Aboriginal title based on the proximity of the site to an ancestral village without actual evidence of use and occupation of the site. The trial judge in *Bernard* had also found that Mi'kmaq use of the area for hunting and fishing was "occasional at best" and lacked both the intent and capacity to control the lands exclusively.[48] By contrast, the Trial Judge in this case based his findings of Aboriginal

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[40] See, *e.g.*, BC Response Factum (Plaintiff's Appeal), para. 74.
[41] Trial Decision, Joint Appeal Record, v. II(a) p. 333-346, 358-359, 384, paras. 554-84, 614-16, 682 and v. II(b), p. 468, para. 960.
[42] Trial Decision, Joint Appeal Record, v. II(a), p. 346, para. 583.
[43] Trial Decision, Joint Appeal Record, v. II(b), p. 468, para. 960; see also, p. 466-468, para. 959.
[44] BC Response Factum (Plaintiff's Appeal), paras. 34, 74.
[45] See, *e.g.*, BC Response Factum (Plaintiff's Appeal), paras. 102(a), 117.
[46] Trial Decision, Joint Appeal Record, v. II(a), p. 344, para. 578.
[47] BC Response Factum (Plaintiff's Appeal), paras.170, 177.
[48] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, paras. 81-82.

title on a detailed evidentiary record demonstrating regular use and exclusive control of core lands by the Tsilhqot'in people, to the standard demanded by *Marshall; Bernard*.[49]

23. British Columbia argues that the Trial Judge applied a "cultural security" test that is applicable only to Aboriginal harvesting rights, and thus conflated proof of Aboriginal rights and Aboriginal title. This argument is wrong in several respects.

24. First, the Trial Judge did not apply a "cultural security" test – he explicitly articulated and applied the *Marshall; Bernard* test of occupation sufficient to establish Aboriginal title and his findings are premised on that "high standard".[50] Second, the guiding principle that Aboriginal rights are directed at providing "cultural security and continuity for the particular aboriginal society"[51] is as applicable to Aboriginal title as any other Aboriginal right. The Court in *Delgamuukw* explained that Aboriginal title arises where a First Nation's connection to the land itself is of "central significance to their distinctive culture".[52]

25. It is clear that the Trial Judge's application of *Marshall; Bernard* comports with the foundational principles of Aboriginal title when the result protects core Tsilhqot'in lands that provided "cultural security and continuity to the Tsilhqot'in people for better than two centuries"[53] and "ultimately defined and sustained them as a people".[54] It is British Columbia's "postage stamp" approach to Aboriginal title that fails to reflect the purpose and intent of Aboriginal title.

26. Further, the claim that the Trial Judge "conflated" the tests for Aboriginal title and Aboriginal rights is simply wrong, as is British Columbia's suggestion that the Trial Judge misinterpreted its admission of Tsilhqot'in Aboriginal rights throughout the Claim Area as sufficient for proof of Aboriginal title.[55] Again, this ignores the Trial Judge's

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[49] Trial Decision, Joint Appeal Record, v. II(b), p. 466-468, paras. 959-60.
[50] Trial Decision, Joint Appeal Record, v. II(a), p. 346, para. 583; see also, p. 333-346, 358-359, 384, paras. 554-84, 614-16, 682 and v. II(b), p. 468, para. 960.
[51] *R.* v. *Sappier; R.* v. *Gray***,** [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33.
[52] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 137, 150. See also para. 126.
[53] Trial Decision, Joint Appeal Record, v. II(b), p. 616, para. 1376.
[54] Trial Decision, Joint Appeal Record, v. II(b), p. 616, para. 1377.
[55] BC Response Factum (Plaintiff's Appeal), paras. 102(b), 107-8, 119, 123, 143.

rigorous application of the *Marshall; Bernard* test. If the Trial Judge had indeed conflated the appropriate tests in the manner alleged by British Columbia, then it is hard to explain why he found Aboriginal title to only 40% of the area over which he found Aboriginal rights. As directed by the Supreme Court of Canada, he properly distinguished between Aboriginal title and Aboriginal rights based on the regularity of use and occupation and the exclusiveness of control.[56]

27. British Columbia claims that the Trial Judge based his views on the academic criticism of *Marshall; Bernard* by "First Nations advocates" rather than applying the existing test.[57] However, the commentator impugned by British Columbia (Professor Slattery) has been cited with approval by the Supreme Court of Canada on several occasions, including in setting out the test of occupation for proof of Aboriginal title.[58] More importantly, far from applying the views of academic commentators, the Trial Judge concluded his review by affirming that "[t]he narrow role this court can play in defining Tsilhqot'in Aboriginal rights in the Claim Area lies in **an application of the jurisprudence to the facts of this case**".[59] This is exactly what the Trial Judge did.

28. This is also a complete response to British Columbia's unwarranted and unsupported attacks on the integrity of the Trial Judge. British Columbia alleges that the Trial Judge "considered himself free to ignore the legal requirements of the Supreme Court of Canada tests in order to strengthen the Tsilhqot'in position at the negotiating table" but offers nothing of substance to support this accusation.[60]

29. British Columbia says that the Trial Judge "stepped outside the confines of a 'usual judgment'" in an inappropriate attempt to effect reconciliation.[61] It goes so far as to accuse the Trial Judge of lacking impartiality. In its view, the Trial Judge failed to

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[56] Trial Decision, Joint Appeal Record, v. II(a), p. 358-359, 384, paras. 614, 682 and v. II(b), p. 418-420, 428, 446-447, 465-466, paras. 792-94, 825, 893, 957. Although the Trial Judge applied the correct test for the Proven Title Area, he erred in his application of the test to the balance of the Claim Area, as set out in the Plaintiff's Appeal.
[57] BC Response Factum (Plaintiff's Appeal), paras.102(c), 109-11.
[58] See, *e.g.*, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 123, 135, 145, 149, 198, 203; *R. v. Van der Peet,* [1996] 2 S.C.R. 507, paras, 19, 35, 42; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, paras. 16, 62.
[59] Trial Decision, Joint Appeal Record, v. II(b), p. 613, para. 1369 [bolding added].
[60] BC Response Factum (Plaintiff's Appeal), para. 114.
[61] BC Response Factum (Plaintiff's Appeal), para. 115.

heed the admonition, *per* Satanove J. in *Lax Kw'alaams*, that the court is "not a political forum" and Aboriginal rights claims must "receive an impartial adjudication that resolves their dispute by application of the laws of Canada".[62]

30. British Columbia omits reference to the Trial Judge's statements to exactly this effect:

> In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process …
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> …
>
> In the course of a trial, a court will examine an entire body of evidence in an attempt to establish the factual truth in an objective manner. In an adversarial system, claims are dealt with to produce a win/lose result.
>
> …
>
> The narrow role this court can play in defining Tsilhqot'in Aboriginal rights in the Claim Area lies in an application of the jurisprudence to the facts of this case.[63]

31. The Trial Judge fully understood and recognized his "narrow role" as a trial court. The simple fact that British Columbia does not agree with the resulting judgment is not grounds to impugn the integrity or impartiality of the Trial Judge.

F. Boundaries of the Proven Title Area

32. British Columbia contends that there is no "underlying basis" or "logical test" for the boundaries of the Proven Title Area described by the Trial Judge.[64] This ignores the clear rationale provided by the Trial Judge:

> First, I considered the use and occupation of the Claim Area by locating those sites that would have a measure of permanency attached to them so that they

[62] BC Response Factum (Plaintiff's Appeal), para. 115.
[63] Trial Decision, Joint Appeal Record, v. II(b), p. 608-609, 610, 613, paras. 1357, 1360, 1369 [underscore added].
[64] BC Response Factum (Plaintiff's Appeal), paras. 191-95.

> could be characterized as possible villages, dwelling sites, cultivated fields, camping sites, resource gathering sites and the like ...
>
> Second, I considered the use and occupation of the Claim Area from a land use perspective. What emerged from that analysis was a clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area.
>
> Third, I considered the evidence of post-sovereignty use and occupation of the various sites within the Claim Area. What emerged from that analysis was that the historical pattern of seasonal resource gathering in various locations in the Claim Area has continued over time.
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> …
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> … [C]ultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds. These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title …[65]

33. The Trial Judge elaborated this general picture of use and occupation at length, throughout his reasons, including over 300 paragraphs devoted to a site-by-site review of Tsilhqot'in occupation of the Claim Area.[66] He had the benefit of the Plaintiff's detailed and "helpful" presentation of "the evidence associated with each of the various tracts of land that comprise the Claim Area".[67]

34. The Proven Title Area is a single, contiguous area that encompasses and extends from the Claim Area's "transition zone" between the mountains of the southern Claim Area and the plateau lands of Tachelach'ed.[68] As described in detail by the Trial Judge, Tsilhqot'in settlements were centred in the transition zone, which served as the core of a systematic pattern of occupation that extended south into the mountains and north into the plateau with the seasons:

> 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,

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[65] Trial Decision, Joint Appeal Record, v. II(b), p. 462-463, 466-468, paras. 947-49, 959 [underscore added].
[66] See, *e.g.*, Trial Decision, Joint Appeal Record, v. II(b) and v. II(a), p. 464-465, 386-451, paras. 953-56, 688-911.
[67] Trial Decision, Joint Appeal Record, v. II(a), p. 187-188, 194-195, paras. 108,130. See Plaintiff's Trial Reply Submissions, Appendices 1A and 1B.
[68] For reference, see the visual aid attached as Appendix "B" to the Plaintiff's Appeal Factum.

> 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.
>
> …
>
> 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 …In early spring, Tsilhqot'in people would disperse again ….[69]

35. British Columbia argues that there is no discernable basis for the northern boundary of the Proven Title Area, drawn in a straight line through the southern portion of Tachelach'ed.[70] This boundary, however, tracks the edge of the transition zone into the plateau lands that define the Brittany.[71] It also approximates the main pre-contact ancestral trail across Tachelach'ed.[72]

36. The Trial Judge specifically found that "[o]ccupation of a more permanent nature during the winter season was confined to **the lakes and rivers at the southern end of Tachelach'ed** and towards the Tsilhqox", resulting in "much wider use at the southern end of the triangle".[73] The northern boundary drawn by the Trial Judge captures the major fish-bearing lakes and associated rivers that supported Tsilhqot'in occupation in Tachelach'ed (*e.g.* Natasewed Biny,[74] Ts'uni?ad Biny,[75] Tsanlgen Biny[76] and the twin lakes, ?Elhghatish Biny and Nabi Tsi Biny).[77] This accords with the Trial Judge's finding

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[69] Trial Decision, Joint Appeal Record, v. II(b), p. 464-465, paras. 953-56 [underscore added].
[70] BC Response Factum (Plaintiff's Appeal), para. 191.
[71] Trial Decision, Joint Appeal Record, v. II(a), p. 167, 170, paras. 29, 41.
[72] See Plaintiff's Trial Submissions, Appendix 6, Map C, Trail 23.
[73] Trial Decision, Joint Appeal Record, v. II(b), p. 418-419, para. 793 [bolding added].
[74] Trial Decision, Joint Appeal Record, v. II(a), p. 173-174, para. 54 and v. II(b), p. 407-408, 417-418, 422, 465, paras. 753, 791, 804-5, 954.
[75] Trial Decision, Joint Appeal Record, v. II(a), p. 380, para. 673 and v. II(b), p. 417-418, 425-426, 434-435, 465, paras. 791, 813-18, 848, 954.
[76] Trial Decision, Joint Appeal Record, v. II(b), p. 446-447, 465, paras. 893-94, 954.
[77] Trial Decision, Joint Appeal Record, v. II(a), p. 173-174, para. 54 and v. II(b), p. 427, 465, paras. 819-20, 954.

that "[t]he areas that provided a greater degree of permanency and regular use are the sites where abandoned lhiz qwen yex and niyah qungh are found".[78]

37. The Trial Judge applied the correct law, supported his findings with sound reasoning, and provided extensive detail on Tsilhqot'in use and occupation. There is no basis, on this appeal, to retry the boundaries found by the Trial Judge on the evidence.

G. Consequences of Aboriginal title

38. The Plaintiff agrees with the Trial Judge's conclusions as to the consequences of a declaration of Tsilhqot'in Aboriginal title: (a) British Columbia does not have **statutory** authority under *Forest Act* to authorize timber harvesting on Aboriginal title lands; (b) British Columbia does not have **constitutional** authority to infringe Aboriginal title pursuant to the *Forest Act*; and (c) alternatively, British Columbia's actions under the *Forest Act*, even if otherwise valid and applicable, nonetheless unjustifiably infringed Tsilhqot'in Aboriginal title.

1. No statutory authority under the *Forest Act*

39. British Columbia maintains that Aboriginal title lands remain "Crown lands" in the sense that British Columbia retains the underlying title to such lands. The Plaintiff has no quarrel with this well-established principle.

40. What British Columbia fails to address is whether Aboriginal title lands are "Crown lands" **as defined by the *Forest Act***. For the purposes of the *Forest Act*, "Crown timber" has always been defined to capture, in essence, **public forest resources** in which the Crown, on behalf of the Province, holds an immediate beneficial interest and associated rights to the economic benefit of such resources. By contrast, the beneficial interest and economic benefit of Aboriginal title lands, like privately held *fee simple* lands, vests in the title holder and not the general public.

[78] Trial Decision, Joint Appeal Record, v. II(b), p. 465, para. 955.

41. If the Province's underlying title to the land sufficed to bring lands within the operation of the *Forest Act*, **all** land in the Province would be "Crown land" under the *Forest Act*, since the underlying title to all provincial lands "vests" in the provincial Crown, even lands held in fee simple. Such an interpretation would undermine the clear legislative intent of the *Forest Act* as a statute regulating the use of **public** lands.

42. As set out below, the Plaintiff agrees with the Trial Judge's reasoning on this point, as supplemented with additional supporting authority referenced below:

a. Aboriginal title is a right to the land itself. Tsilhqot'in Aboriginal title encompasses the right to the exclusive possession, occupation, use and enjoyment of the land and its resources.[79]

b. British Columbia has no present interest by way of possession, nor does it have any beneficial interest in Aboriginal title lands or the resources on those lands. British Columbia's ownership of the lands and resources in the Province is qualified by and subject to the burden of Aboriginal title, pursuant to s. 109 of the *Constitution Act, 1867.* Because Aboriginal title includes the exclusive right to the possession, occupation, use and enjoyment of its subject lands, the Province's interest is reduced to its underlying title, which does not vest in possession until Aboriginal title is surrendered.[80]

c. The Province is not entitled to demand any revenue or royalties with respect to such timber while Aboriginal title persists. Similarly, such timber is not situated on "Crown lands". Tsilhqot'in Aboriginal title lands vest in the exclusive possession of the Tsilhqot'in people and not the Crown.[81]

d. The primary purpose of the *Forest Act*, is the management and allocation of interests in public forestry resources on public lands.[82] The *Forest Act* was never intended as an expropriation statute for granting interests to third parties in timber already held in the possession of a party other than the Crown. In the rare circumstances that the *Forest Act imbues* forestry officials with powers of

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[79] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 110, 114-15, 119, 122, 140, 149, 155, 158, 166, 168; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, paras. 62, 70, 77.

[80] *Constitution Act, 1867*, s. 109; *British Columbia Terms of Union* (reprinted in R.S.C., 1985, App. II, No. 10), Term 10; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 175; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 59; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.), p. 59; *Amodu Tijani* v. *Southern Nigeria* [1921] 2 AC 399 (P.C.), pp. 409-10; *Ontario (Attorney-General) v. Francis et al.* (1889), 2 C.N.L.C. 6 (Ont. H.C.) at para. 49; K. McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L.R. 679 at 693; K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?", (1997) 36 Alta. L. Rev. 117.

[81] See above and *Black's Law Dictionary* (7th ed.), p. 1557, "vested"; *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 59.

[82] See *e.g.*, *Ministry of Forests Act*, R.S.B.C. 1996, c. 300, s. 4; *Timber Rights and Forest Policy in British Columbia*, Volume 1. Report of the Royal Commission on Forest Resources. 1976, pp. 1, 22, 68, 83, 140, 205.

expropriation (for example, to facilitate the creation of logging roads), it sets this authority out explicitly, and imposes strict guidelines on its use.[83]

e. If the *Forest Act* were to authorize the appropriation of property rights vested in Tsilhqot'in people pursuant to Aboriginal title, it would have to do so in clear and unequivocal language that is not found in that statute.[84]

f. Finally, if the *Forest Act* were intended to apply to Aboriginal title lands, it would be discriminatory in its effect, such that it could not be characterized as a law of general application.[85] Accordingly, it would be *ultra vires* for the Province to enact.[86]

2. No constitutional authority to infringe Aboriginal title

43. For the reasons articulated by the Trial Judge, the *Forest Act* cannot constitutionally apply to authorize the management, acquisition, removal or sale of timber from Tsilhqot'in Aboriginal title lands.[87]

44. This conclusion rests on incontrovertible principles of constitutional law, namely: (a) Aboriginal title lies at the core of federal jurisdiction under s. 91(24);[88] (b) pursuant to the doctrine of interjurisdictional immunity, the Provinces cannot regulate or impair the core of federal jurisdiction even through the incidental effects of otherwise valid laws of general application;[89] (c) a substantial body of law holds that Provinces cannot interfere with the use or possession of "Lands reserved for the Indians",[90] which category

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[83] See, *e.g.*, *Forest Act*, RSBC 1996, c. 157, s. 121.

[84] *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638; R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at 370-76; P. A. Côté, *The Interpretation of Legislation in Canada* (3rd ed.), pp. 482-83, 486; *Nowegijick* v. *the Queen*, [1983] 1 S.C.R. 29, at 36; *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 142-43; *Semiahmoo Indian Band* v. *Canada*, [1998] 1 F.C. 3 (C.A.), at 25; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85, para. 68.

[85] *Dick v. The Queen,* [1985] 2 S.C.R. 309 at para. 35; *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, para. 70; *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, at para. 6*; Law* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 1 S.C.R. 497, para. 36.

[86] Trial Decision, Joint Appeal Record, v. II(b), p. 471-472, para. 971 [emphasis in original] (footnoted references added by Plaintiff).

[87] Trial Decision, Joint Appeal Record, v. II(b), p. 484-499, paras. 1007-49.

[88] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 178, 181; *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, para. 33.

[89] *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, paras. 6, 12, 15, 17-19, 33; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 178, 181; *Bell Canada* v. *Quebec*, [1988] 1 S.C.R. 749, at pp. 762, 855-56, 859-60; *Ordon Estate* v. *Grail*, [1998] 3 S.C.R. 437, para. 83; *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, paras. 12, 19; *Natural Parents* v. *Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, at 762-63.

[90] *Derrickson* v. *Derrickson* (1984), 51 B.C.L.R. 42 (C.A.), aff'd [1986] 1 S.C.R. 285, esp. 295-96; *Roberts* v. *Canada*, [1989] 1 S.C.R. 322, at 338 (*per* Wilson J.); *Paul* v. *Paul*, [1985] 2 C.N.L.R. 93 at 97 (B.C.C.A.), aff'd [1986] 1 S.C.R. 306; *Surrey (District)* v. *Peace Arch Enterprises Ltd*., [1970] B.C.J. No. 538 (C.A.), paras. 13, 25, 30; *R.* v. *Isaac*,

includes both reserve lands and Aboriginal title lands;[91] (d) s. 88 of the *Indian Act* does not referentially incorporate provincial laws to the extent that they affect "Lands reserved for the Indians".[92]

45. The Supreme Court of Canada has not squarely considered whether provincial laws can apply of their own force to infringe Aboriginal rights. British Columbia argues that the Court has decided the issue, but the authorities that it provides are either comments made in passing (such as *Delgamuukw*) or concern situations where provincial laws are given force through constitutional or federal enactments like the *Natural Resources Transfer Agreement* (*e.g. Badger*)[93] or s. 88 of the *Indian Act.* At most, these cases recognize that the provinces can infringe Aboriginal rights, where there is a constitutional basis for this infringement, such as the *NRTA* or s. 88.[94] The Court has not held that provincial laws can apply of their own force to infringe Aboriginal title, and considerable authority weighs against that conclusion.

46. British Columbia's reliance on Lambert J.A.'s *dicta* in *Haida Nation* must be read in light of his conclusion that provincial laws may be inapplicable to Aboriginal title lands

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[1975] N.S.J. No. 412, 13 N.S.R. (2d) 460 (S.C.A.D.), paras. 15, 19-20, 30; *Stoney Tribal Council* v. *PanCanadian Petroleum Ltd*, 1998 CarswellAlta 310 at para 94 (Q.B.); *Anderson* v. *Triple Creek Estates*, 1990 CarswellBC 1048 (B.C.S.C.) at para. 26; *Chippewas of Sarnia Band* v. *Canada (Attorney General)*, [1999] O.J. No. 1406 (S.C.J.), paras. 459-60, 477, varied (but not on this point) [2001] 1 C.N.L.R. 56 (Ont. C.A.), para. 222; *Stoney Creek Indian Band v British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.), rev'd 1999 BCCA 527, esp. para. 47, 51, rev'd 1999 BCCA 527 (but not on this point)

[91] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 116-21, 129, 174-76; *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 379; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85, para. 41.

[92] *Park Mobile Home Sales Ltd. v. Le Greely* (1978), 85 D.L.R. 618 (B.C.C.A.); *Derrickson* v. *Derrickson* (1984), 51 B.C.L.R. 42 (C.A.), para. 15; aff'd (but this point left unaddressed) [1986] 1 S.C.R. 285; *Paul v. Forest Appeal Commission*, (2001), 201 D.L.R. (4th) 251, 2001 BCCA 411, paras. 75-78 (*per* Lambert J.A.), para. 92 (*per* Donald J.A.), rev'd (but not on this point) [2003] 2 S.C.R. 585; *Stoney Creek Indian Band v British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.), rev'd 1999 BCCA 527; *R. v. Isaac*, [1975] N.S.J. No. 412, 13 N.S.R. (2d) 460 (S.C.A.D.), *Palm Dairies Ltd* v. *R*., 1978 CarswellNat 105 (F.C.T.D.), *The Queen v Smith* (1980), 113 D.L.R. (3d) 522 (F.C.A.), para. 103; K. McNeil: "Aboriginal Title and s. 88 of the Indian Act" (2000), 34 U.B.C.L. Rev. 159, and B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 779 – 81. See also: P. Hogg, *Constitutional Law of Canada* (5th ed., supp.) (looseleaf) (Thompson Reuters Canada Limited: Toronto, 2007), at 15-28 to 15-29, 28-2 to 28-6, 28-10 to 28-52; N. Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317, at 350; K. Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185; K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998), 61 Sask. Law Rev. 431.

[93] *R.* v. *Badger*, [1996] 1 S.C.R. 771, para. 70.

[94] These are separate inquiries: see *Reference re* Firearms Act *(Can.)*, [2000] 1 S.C.R. 783, para. 56; *R.* v. *Alphonse* (1993), 80 B.C.L.R. (2d) 17 (C.A.), p. 35; *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, paras. 14-15, 55.

"as a matter of constitutional analysis" and that the Supreme Court of Canada has not resolved this issue.[95]

47. British Columbia argues that the Supreme Court of Canada in two recent decisions (*Western Banks* and *LaFarge*) has limited interjurisdictional immunity to situations already covered by precedent.[96] To the contrary, the Court affirmed the continued vitality of this doctrine in relation to s. 91(24) and explained that "[i]n *Kitkatla Band*, our Court held that a provincial law relating to the preservation of heritage objects applied **because its application did not affect aboriginal rights or title**".[97]

48. The constitutional limits to provincial jurisdiction on Aboriginal title lands do not immunize such lands from regulation. Parliament can and has acted, through mechanisms like modern treaty agreements, the NRTA and s. 88, to facilitate the application of provincial laws. As the Trial Judge observed, this "reaffirm[s] the central role of Parliament in matters relating to Aboriginal Canadians" by compelling Parliament to end its "denial or avoidance of this constitutional responsibility" and assume its historic and paramount responsibility for the protection of Aboriginal lands.[98]

3. Infringement of Aboriginal title

49. The Trial Judge correctly concluded that, by its very nature, there is potential for substantial infringement of Aboriginal title at every stage of government land use planning.

50. British Columbia improperly invites this Court to retry the Trial Judge's findings of infringement on appeal and his conclusions drawn from an extensive and complex record. For example, British Columbia argues that the *Forest Act* is not restricted solely to timber values, but the Trial Judge based his findings not only on the words of the *Act*,

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[95] *Haida Nation v. British Columbia (Minister of Forests)* (2002), 216 D.L.R. (4th) 1, 2002 BCCA 462, paras. 78-79.
[96] BC Response Factum (Plaintiff's Appeal), para. 208.
[97] *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, para. 60 [bolding added]; see paras. 61, 77.
[98] Trial Decision, Joint Appeal Record, v. II(b), p. 498, para. 1046; see also, p.484-485, para. 1008; B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727, at 753; *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 133, *per* La Forest J.

but also its overall operation and considerable expert testimony, including the "candid" opinions offered by British Columbia's own forestry expert.[99]

51. Similarly, British Columbia implies that inclusion of the Claim Area in the Timber Supply Area (TSA) was of no significance, but there was ample evidence before the Trial Judge to support his conclusion that this was an important administrative step on the road to timber removal and sale.[100] The Chief Forester set the Annual Allowable Cut (AAC) for the TSA on the express understanding that he could not vary or adjust these levels to accommodate Aboriginal rights claims – despite his own belief that the Tsilhqot'in had a strong claim.[101] Where, as in this case, forest stands are included in the timber harvesting land base, it is with the expectation that *they will be harvested*.[102]

52. British Columbia makes a number of other claims (much of which is bare assertion with no supporting evidence) concerning protective measures or consultation policies that could allegedly mitigate or avoid forestry impacts. This fails to address the Trial Judge's findings, based on the evidence, that: (a) in practice, such measures were essentially window-dressing for a forestry regime that prioritized maximizing economic returns; (b) British Columbia through its forestry planning had targeted the Claim Area for a "substantial level of commercial harvesting";[103] (c) "at every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people";[104] and (d) forestry proposals advanced by the Tsilhqot'in were rejected because "there was simply no room to take into account the

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[99] Trial Decision, Joint Appeal Record, v. II(b), p. 515-516, paras. 1097-98.
[100] Trial Decision, Joint Appeal Record, v. II(b), p. 508, para. 1075.
[101] Transcript, v. 111, p. 19429, lines 33-42; p. 19439, lines 25-39; v. 112, p. 19476, lines 7-18; p. 19479, lines 25-42; p. 19490, line 11 – 19491, line 16; p. 19495, line 17 to p. 19499, line 11; Exhibit 0450, Volume 39, Tab 101, HMTQ-2303283 – Letter dated July 28, 1994 from Andrew Petter, Minister of Forests to John Cuthbert, Chief Forester; Exhibit 0450, Volume 39, Tab 102, HMTQ-0119494 – Letter dated February 26, 1996 from Andrew Petter, Minister of Forests to Larry Pedersen, Chief Forester.
[102] Transcript, v. 112, p. 19493, line 35 – p. 19495, line 1; Exhibit 0464, Expert Report of David Carson, 6, paras. 5-7; Transcript, v. 105, p. 18262, line 18 – p. 18263, line 6; Exhibit 0450, Volume 38, Tab 79, Timber Supply Analysis in British Columbia, see Steps in Timber Supply Analysis to Support AAC determination, under headings 'Categorize the landbase' and 'Model timber supply based on current management'; Exhibit 0450, Volume 39, Tab 92, Williams Lake TSA Timber Supply Review, Data Package, see section 5.1, Identification of the timber harvesting land base, HMTQ-0101079 at HMTQ-0101095.
[103] Trial Decision, Joint Appeal Record, v. II(b), p. 529, para. 1132.
[104] Trial Decision, Joint Appeal Record, v. II(b), p. 531, para. 1137.

claims of Tsilhqot'in title and rights".[105] The Plaintiff relies on his submissions in response to British Columbia's appeal on each of these points.[106]

53. British Columbia argues that the Trial Judge erred by "ignoring" provincial consultation policies.[107] In fact, the Trial Judge considered these policies and concluded that they failed to prevent an infringement.[108] In light of the above findings, no other conclusion is possible.

54. Most fundamentally, it is the Tsilhqot'in Nation that holds the exclusive right to forestry resources on its Aboriginal title lands, including the economic benefit, and the right to choose how these resources will be used. British Columbia's position that provincial forestry planning on these same lands is essentially "business as usual", from strategic management down to cutting permits, is completely inconsistent with the basic nature of Aboriginal title as a right of exclusive possession.

All of which is respectfully submitted this _____ day of October 2010.

_____
David Rosenberg, Q.C.

_____
Jack Woodward

_____
Jay Nelson

[105] Trial Decision, Joint Appeal Record, v. II(b), p. 531-532, para. 1139.
[106] Plaintiff's Response Factum (British Columbia's Appeal), paras. 100-111.
[107] BC Response Factum (Plaintiff's Appeal), paras. 225, 227.
[108] Trial Decision, Joint Appeal Record, v. II(b), p. 511, para. 1081.

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