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

COURT OF APPEAL

Between:

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

Respondent (Plaintiff)

and:

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

Appellant (Defendant)

and:

The Attorney General of Canada

Respondent (Defendant)

FACTUM OF THE APPELLANTS, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION

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

Patrick G. Foy, Q.C.

BORDEN LADNER GERVAIS LLP
Lawyers – Patent & Trade-mark Agents
1200 Waterfront Centre, 200 Burrard Street,
Vancouver, British Columbia V7X 1T2

The Attorney General of Canada

Brian McLaughlin

DEPARTMENT OF JUSTICE
Aboriginal Law Section
900 – 840 Howe Street
Vancouver, BC V6Z 2S9

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

David M. Rosenberg

ROSENBERG & ROSENBERG
Barristers & Solicitors
671D Market Hill
Vancouver, BC V5Z 4B5

Chronology of Relevant Dates in the Litigation

18 April 1990	Writ and Statement of Claim filed in *Nemiah Valley Indian Band, Chief Annie Williams, and Councillors Benny Williams and Roger William v. Fletcher Challenge Canada Limited, Pinette & Therrien Mills Limited; Carrier Lumber Ltd. and Her Majesty the Queen in right of the Province of British Columbia* (the "Province") in the Victoria Registry #900913 (the "Trapline Action").
4 February 1991	Trapline Action discontinued against Fletcher Challenge Canada Limited.
8 January 1997	Plaintiffs' Notice of Intention to Proceed in the Trapline Action.
3 February 1997	Trapline Action discontinued against Carrier Lumber Ltd.
25 June 1998	Master's Order removed Annie Williams and Benny Williams, Fletcher Challenge Limited, Pinette & Therrien Mills Limited, and Carrier Lumber Ltd. as parties, and added Riverside Forest Products Limited ("Riverside"), Riverside Forest Products (Soda Creek) Limited, and the Regional Manager of the Cariboo Forest Region (the "Regional Manager") as Defendants to the Trapline Action.
18 December 1998	Writ and Statement of Claim filed in *Council of Xeni Gwet'in First Nations Government v. The Province, the Regional Manager, Riverside, Riverside Forest Products (Soda Creek) Limited, Jackpine Forest Products Limited, and Lignum Ltd.*, Victoria Registry #984847 (the "Brittany Action").
28 January 1999	Amended Writ and Statement of Claim filed in Brittany Action.
5 March 1999	Province and Regional Manager filed Defence in Brittany Action.
30 March 1999	Brittany Action discontinued against Riverside Forest Products (Soda Creek) Limited.
14 April 1999	Riverside filed Defence in Brittany Action.
26 April 1999	Plaintiffs filed Amended Statement of Claim in Trapline Action.
19 August 1999	Province and Regional Manager filed Defence in Trapline Action.
14 October 1999	Trapline Action discontinued against Riverside Forest Products (Soda Creek) Limited.
14 October 1999	Registrar's Order by consent that the Trapline and Brittany Actions be tried together.
17 February 2000	Brittany Action discontinued against Jackpine Forest Products Limited.
5 October 2000	Order of Case Management Judge adding Canada as Defendant in Brittany Action.

2 November 2000	Order of Case Management Judge adding Canada as Defendant in Trapline Action.
19 February 2001	Plaintiff filed Fresh Writs and Statements of Claim in the two Actions.
9 March 2001	Fresh Statements of Defence filed by Province and Regional Manager in the two Actions.
12 March 2001	Statements of Defence filed by Canada in the two Actions.
20 March 2001	Brittany Action discontinued against Lignum Ltd.
4 April 2001	Riverside filed Fresh Statements of Defence in the two Actions.
30 April 2001	Plaintiff filed Replies in the two Actions.
10 October 2001	Plaintiff filed Notice of Motion in B.C. Supreme Court claiming a constitutional entitlement to funding or, in the alternative, for an order for costs in advance.
27 November 2001	Order of Vickers J. dismissed application for funding, but ordered costs in advance in any event of the cause (the "Costs Order").
8 May 2002	Court of Appeal dismissed Appeal from the Costs Order, and reserved on Plaintiff's Cross-Appeal of the dismissal of the application for funding.
5 July – 29 August 2002	Deposition of Plaintiff's witness Martin Quilt.
19 July 2002	Vickers J. ordered consolidation of the Trapline Action and the Brittany Action.
6 August 2002	The Province applies for leave to Appeal the Court of Appeal's order upholding the Costs Order.
14 August 2002	Vickers J. dismissed Application by the Province to require the Plaintiffs to give notice to persons holding tenures within the areas claimed by the Plaintiff in the Trapline Action and the Brittany Action.
12 September 2002	Canada applies for leave to appeal the Court of Appeal's order upholding the Costs Order.
13 September 2002	Plaintiff files Consolidated Fresh Statement of Claim.
14 November 2002	The Supreme Court of Canada granted leave to appeal the Court of Appeal's order upholding the Costs Order.
22 October 2002	The Province filed its Consolidated Fresh Statement of Defence.
18 November 2002	The trial opens for the purpose of hearing the videotaped deposition evidence of Martin Quilt.
20 November 2002	Vickers J. dismisses an application by Canada to have the Action and the Costs Order discontinued against it.

10 December 2002	The Plaintiff issued a Notice under the *Constitutional Questions Act* challenging the constitutional applicability of the Province's *Forest Act, Forest Practices Code of British Columbia Act, Heritage Conservation Act, Park Act*, and *Wildlife Act*.
11 December 2002	Trial adjourned following completion of receipt of videotaped deposition evidence.
8 January 2003	Vickers J. struck the Plaintiff's claim against Riverside Forest Products Limited.
15 January 2003	Vickers J. dismissed an application by Canada that the consolidated actions no longer continue as a representative actions, and further dismissed an application by the Plaintiff that the trial be severed to separate and postpone the hearing of issues related to infringement and justification until after the issues of proof of Aboriginal rights and title were determined.
14 February 2003	Vickers J. allowed amendments to the Statement of Claim adding claims of constitutional and inapplicability, lack of statutory authority, breach of fiduciary duty, and additional infringements. Vickers J. also dismissed an application by the Province to strike the Statement of Claim for lack of specificity in identifying infringements.
22 May 2003	Plaintiff filed a new Statement of Claim, pursuant to the Court's ruling on 14 February 2003.
16 June 2003	Plaintiffs filed an Amended Statement of Claim by consent.
19 June 2003	Canada filed an Amended Statement of Defence.
26 June 2003	The Province filed an amended Statement of Defence.
7 July 2003	The Plaintiff issued a further Notice under the *Constitutional Questions Act*, challenging the constitutional applicability of the *Limitation Act*, the *Crown Proceedings Act* and other related provincial legislation.
8 September 2003	Trial resumed with Opening Statements by the Parties.
16 September 2003	Vickers J. allowed the evidence of two witnesses to be introduced at trial by affidavit, one of whom was deceased and whose affidavit was not objected to, and one whose affidavit was objected to, on the condition that the affiant be made available for cross-examination.
12 January 2004	The Supreme Court of Canada remanded the appeal of the Costs Order to the B.C. Supreme Court.
6 February 2004	Vickers J. ruled that witnesses called upon to give hearsay evidence of oral history should undergo a preliminary examination to test the reliability of their proposed evidence.

27 February 2004	The Court of Appeal dismissed the Plaintiff's Cross Appeal from the judgment of Vickers J. dismissing the application for a constitutional entitlement to funding.
6 May 2004	Vickers J. orders the Cost Order to be continued without variation, but requires counsel to frame an issue of law or fact, or of mixed law and fact that might proceed as a special case in place of the Action as pleaded.
16 July 2004	Vickers J. determined that as the parties were unable to propose a special case that did not depend upon assumed or disputed facts, the trial of the Action should proceed.
16 July 2004	Vickers J. varied the Costs Order to permit the Plaintiff to recover his costs as Special Costs.
24 October 2004	Vickers J. held that drawings made by an artist of items the artist had never seen, but based upon verbal descriptions of those items by Tsilhqot'in elders were admissible in evidence, including drawings of items that the elder providing the description had also never seen.
3 January 2006	The Court of Appeal reversed the Order of Vickers J. permitting the Plaintiff to recover his costs as Special Costs, and re-instated the original Costs Order permitting recovery on the basis of 50% of Special Costs.
17 October 2006	Plaintiff issues Notice under the *Constitutional Questions Act* consolidating and amending earlier Notices of constitutional questions.
20 November 2007	Vickers J. delivered judgment finding for the Defendants on Aboriginal title issues and for the Plaintiff on Aboriginal rights issues.
14 December 2007	All parties filed Notices of Appeal.
8 December 2008	Frankel J.A. approved a Consent Order staying all proceedings in the three appeals until the further order of a Justice of this Court and providing for the appointment of a Justice to convene a pre-hearing conference on a date convenient to the parties to consider the next steps in the orderly prosecution of the appeals.
26 February 2009	Newbury J.A. ordered the lifting of the stay and extended the date for the filing of the Appeal Record to 27 April 2009.
24 April 2009	Appeal Record Filed.
24 March 2010	At a pre-appeal conference, Finch C.J.B.C. directed that the hearing dates for the Appeals commencing on 15 November 2010 continue to be reserved, that the Appellants factums in all three appeals be filed by 4 June 2010, and that a further pre-Appeal Conference be held on 9 June 2010.

Opening Statement

1. This is one of three appeals brought by each of the parties from the Order of Vickers J. in *Roger William v. British Columbia and the Attorney General of Canada*, 2007 B.C.S.C 1700. In his Order (Joint Appeal Record, p.148), Vickers J.:

(a) dismissed, on a without prejudice basis, a claim for a declaration of Aboriginal title and for damages. In his reasons, he gave a number of non-binding opinions on his view of the community that holds Aboriginal title, the geographic scope of Aboriginal title in and outside the Claim Area and on the consequences of proof of title in relation to application of the *Forest Act*, RSBC 1996 c.157**{** TA \l "*Forest Act*, RSBC 1996 c.157" \s "Forest Act, RSBC 1996 c.157" \c 2 **}**: ("Non Binding Opinions");

(b) granted, in favour of the members of the Tsilhqot'in Nation, declarations of Aboriginal rights to hunt and trap birds and animals for specified purposes, to capture and use horses and to trade in skins and pelts as a means of securing a moderate livelihood; and

(c) held forest harvesting activities have unjustifiably infringed Tsilhqot'in Aboriginal rights in the Claim Area.

2. In this appeal, British Columbia submits that Vickers J. erred in identifying the Tsilhqot'in, instead of the pleaded Xeni Gwet'in, as the holder of Aboriginal rights (and title). He also erred in defining the content of those rights, by transforming an admitted right to carry on an activity (hunting and trapping), into a property right to an undiminished supply of wildlife, and by finding a trading right contrary to the requirements of Supreme Court of Canada authority. Vickers J. reversed the onus of proof of infringements of Aboriginal hunting rights, finding infringements without any findings of interference with Aboriginal hunting activities or unmet hunting needs. Lastly, he erred in his justification analysis by failing to take into account the Province's efforts to consult by labelling those efforts as not genuine absent "acknowledgment" of rights and title during the process of consultation.

3. British Columbia asks that:

(a) the declaration of hunting, trapping and trading rights in favour of the Tsilhqot'in be set aside and in its place, this Court declare:

> The Xeni Gwet'in has an existing Aboriginal right to hunt and trap for subsistence purposes in the Claim Area, which right has not been shown to have been infringed by the *Forest Act,* or any authorization made thereunder.

(b) the declarations of infringement and absence of justification be set aside.

PART 1

STATEMENT OF FACTS[1]

1. Aboriginal Rights: The Claims and Responses Made in the Pleadings.

4. In his Amended Statement of Claim, the Plaintiff sought, *inter alia*:

> (a) A declaration that the Xeni Gwet'in has an existing aboriginal right to carry on Trapping Activities within the Brittany;
> (b) A declaration that the Xeni Gwet'in has an existing aboriginal right to carry on the Trapping Activities within the Trapline Territory.
>
> Amended Statement of Claim, Joint Appeal Record, p. 9, paras. d) and e)

5. In the body of his Pleading, the Plaintiff defined Trapping Activities as:

> 14. Before and at the time of European contact, the Xeni Gwet'in trapped (trapping includes hunting) animals for their own use and for trading in skins and pelts (collectively "Trapping Activities") in the Brittany and the Trapline Territory. These Trapping Activities included the trapping of squirrel, marten, fisher, black bear, grizzly bear, wolverine, lynx, bobcat, beaver, muskrat, mink, river otter, weasel, red fox, wolf, cougar and all other fur bearing animals.
>
> Amended Statement of Claim, Joint Appeal Record, p. 4, para. 14

6. In answer, the Province stated in its Defence:

> 15. In answer to paragraph 14 of the Statement of Claim, the Provincial Defendants:
>
> (a) admit that before and at the Date of Contact, Ancestral Tsilhqot'in Groups hunted animals for subsistence purposes and that such practice was integral to their culture at the Date of Contact;

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[1] References to reasons of Vickers J.: Numbers in square brackets refer to paragraph numbers of *Tsilhqot'in Nation v. British Columbia,* 2007 B.C.S.C, 1700, Joint Appeal Record, pp. 148-632. Thus, [250, AR p. 236] refers to paragraph 250 of Vickers J. reasons of November 20, 2007 found in the Joint Appeal Record at page 236.

(b) admit that Ancestral Tsilhqot'in Groups possessed Aboriginal hunting rights for subsistence purposes at the Date of Contact, and that the Xeni Gwet'in is the successor to such Ancestral Tsilhqot'in Groups, but put the Plaintiff to the proof of where such Aboriginal hunting rights subsist;

(c) admit that some hunting by ancestors of members of the Xeni Gwet'in was conducted using trapping methods, but otherwise do not admit that trapping included hunting;

(d) admit that the ancestors of the members of the Xeni Gwet'in traded on an irregular and occasional basis some skins and pelts hunted or trapped for subsistence purposes before and at the Date of Contact, but say that such trading was not on a commercial scale;

(e) do not admit that hunting or trapping animals for trading in skins and pelts was integral to the culture of the Xeni Gwet'in at the Date of Contact or subsequently;

(f) do not admit that the Xeni Gwet'in or its members have today an Aboriginal right to hunt or trap animals for the purpose of trading in skins or pelts;

(g) do not admit that the Xeni Gwet'in trapped squirrel, marten, fisher, black bear, grizzly bear, wolverine, lynx, bobcat, beaver, muskrat, mink, river otter, weasel, red fox, wolf, cougar, and all other species of fur bearing animals in the Brittany and the Trapline Territory at or before the Date of Contact as claimed by the Plaintiff;

(h) say that to the extent that the members of the Xeni Gwet'in today hunt or trap, they take many more deer and moose than they do any of the animals referred to in paragraph 14 of the Statement of Claim.

> Statement of Defence of the Defendants, Her Majesty the Queen in Right of the Province of British Columbia and The Regional Manager of the Cariboo Forest Region, Joint Appeal Record, pp. 22-23, para. 15

7. The Province responded to a Notice to Admit by admitting Xeni Gwet'in subsistence hunting rights were exercisable in Ts'il-os Provincial Park, and put the Plaintiff to the proof of where else in the Claim Area such hunting rights might exist. At the end of trial, the Province did not contest Xeni Gwet'in subsistence hunting rights throughout the Claim Area.

8. In reply to a Demand for Particulars, the Plaintiff added non-fur-bearing animals, including horses, and birds to the description of animals in relation to which he claimed trapping rights.

2. The Changed Relief Sought in Argument

a) The Rights Holders – Xeni Gwet'in changed to Tsilhqot'in

9. In final argument, and without seeking an amendment to the pleadings, the Plaintiff argued that although the pleadings claimed rights on behalf of the Xeni Gwet'in, a declaration should be made on behalf of the members of the Tsilhqot'in Nation. British Columbia maintained that the proper rights holders (and potential title holders) were the members of the Xeni Gwet'in. Canada in its argument agreed with the Plaintiff that the members of the Tsilhqot'in Nation were the appropriate rights holders.

b) The Expanded Rights Claim in Argument

10. Also in final argument, and without obtaining amendments, the Plaintiff expanded his claim to Aboriginal Trapping Activities to include:

> (a) the Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. This includes the Aboriginal right to capture and use horses for transportation and work.

(b) the Aboriginal right to trade in skins, pelts and other products obtained from hunting and trapping in the Claim Area, for the purposes of securing a moderate livelihood.

Plaintiff's Argument, Vol. 1, para. 65 (Appellants' Appeal Book, Tab 1); Vol. 5, para. 2046 (Appellants' Appeal Book, Tab 2). Note: The "moderate livelihood" claim did not appear in the pleadings.

11. In his allegations of infringement, and again without obtaining amendments, the Plaintiff asserted a claim to a right to a "harvestable surplus of all species, sufficient to meet the needs of the Tsilhqot'in" [1270, AR p. 574].

12. British Columbia did not contest the Xeni Gwet'in claim to carry on the activity of hunting for subsistence and cultural purposes in the Claim Area, but submitted that such right did not extend to the capture of wild horses, nor to any right to trade skins and pelts, for a moderate livelihood or otherwise. British Columbia denied any right to an undiminished supply of wildlife, and asserted that no infringement of hunting activities had been established.

3. Vickers J.'s Findings

a) The Rights Holders are the Members of the Tsilhqot'in

13. Mr. Justice Vickers found that Aboriginal hunting rights were held on behalf of the members of the Tsilhqot'in Nation. His finding was based upon his view of the "socio-political structure of the Tsilhqot'in people" and his finding that "all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory in the course of their seasonal rounds" [1220, AR p. 561]. He justified his willingness to grant a declaration in favour of the Tsilhqot'in, even though the claimants in the pleadings were the Xeni Gwet'in, on the grounds that his finding "comes as no surprise and it cannot be prejudicial to British Columbia" [1221, AR p. 561].

b) Right to Hunt for Domestic Purposes

14. Mr. Justice Vickers first accepted in general terms the Plaintiff's claim to an Aboriginal right to “hunt and trap birds and animals throughout the Claim Area for the purposes of securing ... food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses” [1240-1241, AR pp. 566-567].

c) Right to Capture Horses

15. Mr. Justice Vickers further found that the Tsilhqot’in people possessed “an Aboriginal right to … trap … animals throughout the Claim Area for the purposes of securing animals for work and transportation …” [1240-1241, AR pp. 566-567]. This finding was intended to encompass the capture of ownerless horses [1224-1239, AR pp. 562-566].

16. As an alternative ground for this finding, Vickers J. said that:

> The horse is an animal provided to the Tsilhqot’in people by the land. The capture of horses for transportation and work is a contemporary extension of the pre-contact right the Tsilhqot’in people had to use plants and hunt and trap animals in the Claim Area for their subsistence and livelihood. [1239, AR p. 566]

17. In reaching this conclusion, Mr. Justice Vickers referred to climate change and the historic expansion of the range of the moose that occurred in the early twentieth century as examples of how the land might provide different products in different eras [1238-9, AR p. 566]. It should be noted that no “right to use plants” was pleaded.

d) Right to Trade Skins and Pelts

18. Although a moderate livelihood right was not pleaded, Vickers J. found and interpreted a Tsilhqot’in Aboriginal right to trade in skins and pelts as a right to trade “as a means to secure a moderate livelihood." [1246, AR p.568] Vickers J. found that the practice of trading in furs and pelts was integral to Tsilhqot’in culture “at the time of first contact and continuing well into the twentieth century” [1263, AR pp. 572-573]. Vickers J. found the date of first contact to be 1793, as submitted by British Columbia.

19. Vickers J. acknowledged that trade was a means of coping with the periodic failure of salmon runs, which were critical to Tsilhqot'in survival. Vickers J. characterized this trade as "intermittent" but also as "regular" in a cyclical sense [1248, AR p. 568]. He concluded:

> I am satisfied that trade was not just opportunistic or incidental and was not limited to times of need. It was a way of life, accelerated in times of need. [1248, AR p. 568]

20. Mr. Justice Vickers held that Tsilhqot'in trade "was never about the accumulation of wealth" [1257, AR p. 571]. He added that it "always undertaken for the necessaries of life" [1263, AR p. 572-573]. He declined to characterize the right to trade on a species-specific basis [1165, AR pp. 542-543].

4. Forestry Infringement of Hunting Rights and Justification

21. Vickers J.'s findings with respect to infringement of hunting rights and justification can be summarized as follows:

(a) Forestry harvesting activities, including silviculture practices, infringe Tsilhqot'in Aboriginal rights to hunt and trap by failing to ensure no reduction in the diversity and abundance of wildlife species.

(b) The Province has not met the burden of proving justification of this infringement by reason of the Province's failure to acknowledge Aboriginal rights and failure to manage forestry to ensure, as its priority, the paramount protection of the continuation of Tsilhqot'in rights to hunt, trap and trade in the Claim Area.

a) Infringement Analysis

22. Vickers J. wrote:

> The question for the Court is whether forest harvesting activities pursuant to the relevant forestry legislation are an infringement of Tsilhqot'in Aboriginal rights to hunt, trap and trade. [1271, AR p. 575]

23. This was rephrased soon after (with reference to *R. v. Sparrow,* [1990] 1 S.C.R. 1075**{** TA \l "*R. v. Sparrow,* [1990] 1 S.C.R. 1075" \s "R. v. Sparrow" \c 1 **}**) as to whether forestry harvesting activities and forest silviculture activities "are or might be an infringement" by imposing "an undue hardship on Tsilhqot'in people and whether the activities would deprive them of their preferred means or way of exercising their rights to hunt, trap and trade" [1275, AR p. 576].

24. Vickers J. approached the onus of proof as follows:

> The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. [1103, AR pp. 517-518]

25. Vickers J. held:

> On the whole of the evidence, I conclude that forestry harvesting activities, which include logging and all other silviculture practices, reduce the number of different wildlife species (diversity) and the number of individuals within each species (abundance) in a landscape. [1276, AR p. 576]

26. He found that silviculture practices such as thinning (designed to increase wood fibre in pine stands) and snag removal (designed to maximize economic value and leave "clean" sites) result in an inappropriate habitat for some wildlife species [1280-1281, AR p. 577].

27. After listing some of the wildlife species in the Claim Area, Vickers J. concluded that:

> Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification. [1288, AR p.580] (emphasis added)

b) Justification Analysis

28. On justification, Vickers J. stated:

> Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act*, *1982* demands that the protection of those rights is a paramount objective. [1291, AR pp. 580-581]

29. He cited *R. v. Gladstone* for its holding that where the Aboriginal right in question has no internal limitation, the court should assess the government's actions to determine whether the government has taken into account the existence and importance of such rights.

> *R. v. Gladstone*, [1996] 2 S.C.R. 723**{** TA \l "*R. v. Gladstone*, [1996] 2 S.C.R. 723" \s "R. v. Gladstone" \c 1 **}**

30. Applying this test, Vickers J. found:

> The Province has not conducted a needs analysis that would inform decision makers on the needs of the Tsilhqot'in people related to their hunting, trapping and trading rights. Such an analysis would ensure those needs are addressed when planning and conducting forestry activities. The absence of a database or a needs analysis indicates that Tsilhqot'in Aboriginal rights in the Claim Area are not a priority with respect to timber harvesting and other forestry activities. [1293, AR pp, 581-582].

31. Vickers J. focused on the impact of timber harvesting on wildlife, holding:

> To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. [1294, AR p. 582]

5. Refusal To Consider Consultation Efforts

32. In the view of Vickers J., all of the "considerable effort" made to engage Tsilhqot'in people in the forestry proposals and land use planning in the Claim Area did not amount to "genuine consultation" [1123, AR p. 526] because:

> Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that Aboriginal title and rights could only be addressed or

> considered at treaty negotiations. At all material times, British Columbia has refused to acknowledge title and rights during the process of consultation. [1136, AR p. 530]

And further:

> As I mentioned earlier [with respect to title], the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights. [1294, AR p. 582]

PART 2

ERRORS IN JUDGEMENT

33. The learned trial judge erred in the following respects:

a) Rights Holders

34. Vickers J. erred in identifying the Tsilhqot'in as the Aboriginal rights holders [1220-1221, AR p. 561], when the pleadings alleged that the rights holders were the Xeni Gwet'in, the Province was prejudiced by the late change, and legal principle and the evidence established the Xeni Gwet'in as the relevant community for both rights and title claims.

b) Characterizing the Hunting Right as including A Right to Harvestable Surplus of all Wildlife

35. Vickers J. found that forest harvesting activities would infringe Aboriginal rights to hunt and trap without any finding of unmet hunting needs or any interference with hunting or trapping activities. He wrongly characterised an Aboriginal right to carry on the activity of hunting as a right to particular resource – a right to a harvestable surplus of all wildlife species – a right that would, in Justice Vickers view, be infringed by any reduction in abundance or diversity of wildlife [1276, AR p. 576].

c) Failure to Make Specific Findings of Infringement of Hunting Activity and Reversal of Onus of Proof

36. Infringement is a fact specific enquiry and Vickers J. failed to make the necessary findings respecting any specific timber harvesting activities and their impact on the activity of hunting to determine whether hunting rights would be infringed, incorrectly placing the onus on British Columbia to prove forest harvesting would not cause any infringements [1103, AR pp. 517-518].

d) Requiring Acknowledgment of Rights as a Prerequisite to "Genuine" Consultation When Acknowledgment is Not a Legal Requirement

37. Vickers J. found that British Columbia could not justify any harvesting [1294, AR p. 582], wrongly ignoring the record of consultation on the basis that British Columbia 's consultation did not "acknowledge" Tsilhqot'in Aboriginal rights. At the consultation stage, acknowledgment of rights is not legally required. In any event, Vickers J. erred in considering that British Columbia denied Aboriginal rights [1136,1294, AR pp. 530, 582] (when subsistence rights were admitted in the pleadings and in policy), wrongly ignoring British Columbia's consultation policies and consultation efforts.

e) Right to Trade For a Moderate Livelihood

38. Insofar as the claimed right to hunt and trade skins and pelts, Vickers J. erred in finding that hunting for trade was integral to the culture of the Xeni Gwet'in [1263, AR pp. 572-573], applying legal tests found in harvesting rights and treaty rights cases, rather than the legal requirements for a trading right, which were not met on his findings. No right to trade "for a moderate livelihood" was pleaded and that claim should not have been considered.

f) Right to Capture Horses

39. The right to capture horses for transportation was not alleged to be infringed in the pleadings, and should not have been considered. Also, Vickers J. erred in law in inferring such a right as a "contemporary extension" of a pre-contact right to use plants (not pleaded) and to hunt and trap [1239, AR p. 566].

PART 3

ARGUMENT

1. Proof of Aboriginal Rights: General Principles

a) The Relationship Between Aboriginal Rights and Aboriginal Title

40. In the pre-*Constitution Act, 1982* era, claims were made that Aboriginal or "Indian title" existed throughout "traditional territories" and gave rise to a right to continue to use Crown lands for "traditional" pursuits. The content of this "Indian title" was commonly understood to include traditional user rights to hunt and fish. Its geographic scope was defined by the extent of those activities based on a "territorial" concept of "occupation". "Occupation" in this sense existed throughout the entirety of hunting, fishing and gathering grounds.

41. For example, in support of a claim to an "Aboriginal title" restricted in content to "the right to hunt and fish as their ancestors did", the claimants in *Baker Lake v. Minister of Indian Affairs* established that "to the extent the barrens lent themselves to human occupation, the Inuit occupied them." In support of a "title" to "hunt and fish", they argued that their hunting grounds "were as much in their actual possession as the cleared fields of the whites".

> *Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (T.D.)**{** TA \l "*Baker Lake v. Minister of Indian Affairs*, [1980] 1 F.C. 518 (T.D.)" \s "Baker Lake v. Minister of Indian Affairs" \c 1 **}** at paras. 83, 87 and 89

42. The geographic scope of this "hunting and fishing" title extended throughout the "traditional territory" exclusively "occupied or used" by an Aboriginal community. This became known as the "*Baker Lake* test" of occupation. Until the mid-1990s it was thought that the existence of Aboriginal hunting and fishing rights depended upon successfully establishing this underlying Aboriginal title throughout a traditional territory. In the modern section 35 cases, the Supreme Court has redefined the content of Aboriginal title and "has rejected the view of a dominant right to title to the land, from which other rights, like the right to hunt or fish, flow: *R. v. Adams*, [1996] 3 S.C.R. 101**{** TA \l "*R. v. Adams*, [1996] 3 S.C.R. 101" \s "R. v. Adams" \c 1 **}**, at para. 26; *R. v. Côté*,

[1996] 3 S.C.R. 139**{** TA \l "*R. v. Côté*, [1996] 3 S.C.R. 139" \s "R. v. Côté" \c 1 **}**, at paras. 35-39."

> *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43**{** TA \l "*R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43" \s "R. v. Marshall; R. v. Bernard" \c 1 **}** at para. 53
> *R. v. Adams*, [1996] 3 S.C.R. 101**{** TA \l "*R. v. Adams*, [1996] 3 S.C.R. 101" \s "R. v. Adams" \c 1 **}**, at para. 26
> *R. v. Côté*, [1996] 3 S.C.R. 139**{** TA \l "*R. v. Côté*, [1996] 3 S.C.R. 139" \s "R. v. Côté" \c 1 **}**, at paras. 35-39

43. The Supreme Court of Canada explained the historic view in *R. v. Côté*:

> [I]n all three of the courts below, the parties characterized their asserted Aboriginal right to fish as a right incident to Aboriginal title…. [T]he courts below did not consider the possibility that the appellants may have enjoyed a free-standing Aboriginal right to fish independent of title.
>
> *R. v. Côté**{*** TA \s "R. v. Côté" ***}**, supra,* at para. 11

44. The historic view has been rejected in the modern cases. It is now understood that Aboriginal title is "one manifestation" of the broader concept of Aboriginal rights. Aboriginal rights are not incidents of an underlying Aboriginal title.

45. The modern cases (*Adams, Côté, Van der Peet*, *Delgamuukw, Marshall*; *Bernard, Sappier; Gray*) describe a spectrum of Aboriginal rights, including:

(a) some free-standing Aboriginal activities;

(b) some site-specific Aboriginal activities limited in their exercise to Crown lands traditionally used for the particular purpose in question; and

(c) "the right to the land itself", the subject of Aboriginal title;

according to the degree of connection established over specific "pieces of land", and whether "occupation" of those lands is "sufficient" to make out a "claim to title".

> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010**{** TA \l "*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010" \s "Delgamuukw v. British Columbia" \c 1 **}** at paras. 138-139
> *R. v. Adams**{*** TA \s "R. v. Adams" ***}**, supra*
> *R. v. Côté**{*** TA \s "R. v. Côté" ***}**, supra*
> *R. v. Van der Peet*, [1996] 2 S.C.R. 507**{** TA \l "*R. v. Van der Peet*, [1996] 2 S.C.R. 507" \s "R. v. Van der Peet" \c 1 **}**

> *R. v. Marshall; R. v. Bernard**{*** TA \s "R. v. Marshall; R. v. Bernard" ***}**, supra*
> *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54**{** TA \l "*R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54" \s "R. v. Sappier; R. v. Gray" \c 1 **}**

46. It is axiomatic from this spectrum analysis that Aboriginal title does not exist everywhere activities that are Aboriginal rights are carried out. The Supreme Court has recognized different degrees of "occupation" or "connection" with specific "pieces of land", some of which are "sufficient" to establish Aboriginal title and some of which are "short of title", although those activities may establish a site-specific Aboriginal right to carry on the activities on specific tracts of land.

> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}***, *supra*, at para. 72

47. Many forms of Aboriginal "occupation and use" of land will not support a claim of title. To prove title, there is:

> … the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to Aboriginal title to the land.
>
> *R. v. Adams**{*** TA \s "R. v. Adams" ***}**, supra,* at para. 26

48. This further hurdle is met by proof of physical occupation equivalent to common law title.

> *R. v. Marshall; R. v. Bernard**{*** TA \s "R. v. Marshall; R. v. Bernard" ***}**, supra*

49. Vickers J. referred to these developments [517-530, AR pp. 322-336]. However, he thought it would be unfair to apply to semi-nomadic peoples the requirement that the degree of occupation that will satisfy this "further hurdle" is physical occupation equivalent to common law title.

50. His errors in that regard will be examined in more detail in response to Roger William's Appeal. Briefly, the Supreme Court has required proof of physical occupation equivalent to common law title to establish Aboriginal title since, "The proof of title must

… mirror the content of the right." In the historic traditional territory cases, the content of "Indian title" was limited to non-proprietary usufructuary rights restricted to traditional activities of hunting and fishing. The content of section 35 Aboriginal title is different, and confers a "right to the land itself", including rights to use the land in non-traditional ways. As the content of the rights conferred by title have changed, so too has the understanding of its geographic scope. The scope of territorial occupation throughout a seasonal round that might support rights to carry on hunting activities has, in the case of title, been narrowed to the extent of physical occupation equivalent to common law title.

> *Delgamuukw v. British Columbia**{*** TA \s "Delgamuukw v. British Columbia" ***}**, supra,* at para. 155

51. This approach maintains the spectrum of Aboriginal rights, and the subcategory right of Aboriginal title. If Aboriginal title subsisted throughout an entire area traditionally used, and gives its holders exclusive rights to use the lands in non-traditional ways, no claimant would ever attempt to establish the requirements for proof of site-specific Aboriginal rights, since a declaration of Aboriginal title would give them more and would be less onerous to establish. It will be argued in this and in Roger William's Appeal that Vickers J.'s wrongly collapsed the spectrum of rights and title:

(a) In this appeal, by transforming a right to carry on the activity of hunting into a right to a resource;

(b) In Roger Williams Appeal, by conflating lands subject to Aboriginal rights to hunt with Aboriginal title lands.

b) The Foundation of the Doctrine of Aboriginal Rights

52. In *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}**, supra*, the Supreme Court explored the modern doctrine of Aboriginal rights.

> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}**, supra*

53. Lamer C.J.C., for the majority, explained the foundation of the modern doctrine of Aboriginal rights:

> … the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and

> participating in distinctive cultures, as they had done for centuries.
>
> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at para. 30

54. The purpose of section 35(1) is to:

> … provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.
>
> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at para. 31

55. Lamer C.J.C. in *Van der Peet* described Aboriginal title as a specific Aboriginal right, a subcategory of other Aboriginal rights:

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

And further:

> … Aboriginal title is a sub-category of Aboriginal rights which deals solely with claims of rights to land.
>
> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at paras. 33 and 74

c) The Test for Identifying Aboriginal Rights as Central Elements of Aboriginal Societies

56. *R. v. Van der Peet* articulated the “integral to the distinctive culture” test for determining whether a particular activity is protected as an Aboriginal right, as follows:

> … in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.
>
> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at para. 46

d) The Intersection of the Aboriginal Perspective and the Common Law Perspective

57. Lamer C.J.C. emphasized that the perspective of the Aboriginal people claiming the Aboriginal right must be taken into account "…framed in terms cognizable to the Canadian legal and constitutional structure". Sensitivity to the Aboriginal perspective has to be balanced with the common law perspective of the non-Aboriginal legal system.

> Courts adjudicating Aboriginal rights claims must, therefore, be sensitive to the Aboriginal perspective, but they must also be aware that Aboriginal rights exist within the general legal system of Canada.
>
> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at para. 49-50

58. The Chief Justice concluded that:

> … the only fair and just reconciliation is … one which takes into account the Aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.
>
> *R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at para. 50

e) Application of the "Integral to a Distinctive Culture" Test to a Particular Claim: The Need to Identify the Precise Claim Made

59. An essential step in the application of the "integral to a distinctive culture" test requires the Court to identify the precise nature of the applicant's claim. Identification of the precise scope of the claim requires, in the case of site-specific rights, definition of the geographic scope of the claim. For example, the site-specific right to harvest Crown timber recognized in *R. v. Sappier*; *R. v. Gray* was restricted to the Crown lands "traditionally used for that purpose" by members of the Pabineau First Nation and Woodstock First Nation, respectively.

> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}***, *supra,* at paras. 50-53, 72

60. In *Mitchell v. Minister of National Revenue*, the issue was whether Mohawk Canadians of Akwesasne had an Aboriginal right to bring goods into Canada from the United States for collective use and trade with other First Nations without paying customs duties. The Court noted that, in the case of site-specific rights, it was necessary to demonstrate the integrality of the practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised, rather than in the abstract. McLachlin C.J.C. said:

> Thus, geographical considerations are clearly relevant to the determination of whether an activity is integral in at least some cases, most notably where the activity is intrinsically linked to specific tracts of land.
>
> *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33**{** TA \l "*Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33" \s "Mitchell v. M.N.R." \c 1 **}** at paras. 55-56

f) The Steps in Considering an Aboriginal Rights Claim

61. The first step is to characterize the right claimed. The right must be characterized in context and with sufficient specificity to allow the court to "identify a practice that helps to define the way of life or distinctiveness of the particular aboriginal community": *R. v. Sappier; R. v. Gray*. The right claimed should not be framed in excessively general terms or artificially broadened or narrowed or otherwise distorted to fit the desired result: *Mitchell v. MNR, R. v. Pamajewon,* [1996] 2 S.C.R. 821 at para. 27; *Delgamuukw v. British Columbia*.

> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}***, *supra*, at paras. 22, 24
> *Mitchell v. M.N.R.**{*** TA \s "Mitchell v. M.N.R." ***}****, supra,* at paras. 15, 20
> *R. v. Pamajewon*, [1996] 2 S.C.R. 821**{** TA \l "*R. v. Pamajewon*, [1996] 2 S.C.R. 821" \s "R. v. Pamajewon" \c 1 **}** at para. 27
> *Delgamuukw v. British Columbia**{*** TA \s "Delgamuukw v. British Columbia" ***}***, *supra,* at para. 170

62. The onus is on the claimant to establish that an unextinguished Aboriginal right exists: *R. v. Sparrow{* TA \s "R. v. Sparrow" *}, supra*. The following elements must be proved:

(a) the existence of an Aboriginal practice, custom or tradition that supports the right;

(b) that the practice, custom or tradition was integral to the distinctive culture of the claimant group's pre-contact society, and

(c) reasonable continuity between the pre-contact practice, custom or tradition and the contemporary claim: *Van der Peet, Mitchell*.

R. v. Van der Peet{ TA \s "R. v. Van der Peet" *}, supra,* at para. 53-59
Mitchell v. M.N.R.{ TA \s "Mitchell v. M.N.R." *}, supra,* at para. 12

63. The requirement to establish an Aboriginal practice was explained in *R. v. Sappier; R. v. Gray{* TA \s "R. v. Sappier; R. v. Gray" *}, supra,* at para. 22:

> It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. (emphasis in original)
>
> *R. v. Sappier; R. v. Gray{* TA \s "R. v. Sappier; R. v. Gray" *}, supra,* at para. 22

64. In contrast to the right to carry on activities identified by practices, there is no such thing as an Aboriginal right to sustenance or a bare claim to resource access: *R. v. Sappier; R. v. Gray{* TA \s "R. v. Sappier; R. v. Gray" *}, supra*, at para. 21, 37.

2. The Rights Holder Identified in the Pleadings

65. The pleadings sought a declaration of a right to carry on hunting and trapping activities on behalf of the Xeni Gwet'in. The Province made a number of admissions in response to the hunting rights claims made in the pleadings. Vickers J. referred to those admissions [1214, AR p. 559]. In interlocutory rulings, Vickers J. recognized

that aboriginal rights were claimed on behalf of the Xeni Gwet'in (November 2, 1999, para. 9).

66. Without seeking an amendment, in final argument, the Plaintiff asked for a declaration that the Tsilhqot'in, not the Xeni Gwet'in, have Aboriginal hunting rights.

a) The Prejudice Arising From the Late Change

67. Vickers J. erred in finding that this change "cannot be prejudicial to British Columbia" [1221, AR p. 561].

68. The Supreme Court of Canada held in *Delgamuukw v. British Columbia* that late amalgamation of Aboriginal claims brought by individual groups (Houses) at trial to collections of groups (Nations) on appeal was prejudicial because it retroactively denied to the defendants the right to know the case to be met. In respect of the Aboriginal title claim made in the instant case, Justice Vickers correctly found that prejudice arose by the Plaintiff's attempt in Reply to advance a new claim to territories that were different than the pleaded Claim Area. He erred in failing to recognize the prejudice arising from the proposed late change to the claimant for Aboriginal rights.

> *Delgamuukw v. British Columbia**{*** TA \s "Delgamuukw v. British Columbia" ***}**, supra*, at para. 76

69. Prejudice arises at a number of levels. The Province's admissions were made in response to the claims made in the pleadings, and not the revised claim made in argument.

70. The Province is required to consult with claimants who assert Aboriginal rights. The Province consulted extensively with the Xeni Gwet'in. The Xeni Gwet'in has a structure, a decision-making capacity and an ascertainable membership. The Province can consult with the Xeni Gwet'in through its leadership, and its members will be bound by the result of that consultation. It is argued below that Vickers J. erred in ignoring the record of this consultation.

> *Red Chris Development v. Quock*, 2006 BCSC 1472**{** TA \l "*Red Chris Development v. Quock*, 2006 BCSC 1472" \s "Red Chris Development v. Quock" \c 1 **}**

71. On Vickers J.'s findings, there is no decision–making body that exists that represents the Tsilhqot’in Nation [30,31,32,36, AR pp. 167-169].

72. The Tsilhqot’in Nation had an unknown membership (Reasons of Vickers J. November 2, 1999), and different groups claimed to represent some of its members.

> *William et al. v. British Columbia* (2 November 1999), Victoria 900913 & 984847 (B.C.S.C.)**{** TA \l "*William et al. v. British Columbia* (2 November 1999), Victoria 900913 & 984847 (B.C.S.C.)" \s "William et al. v. British Columbia - 1999" \c 1 **}** at para. 3

73. Insofar as trapping rights are concerned, a potential conflict arises between the members of the Xeni Gwet’in and the members of the Tsilhqot'in. The Xeni Gwet'in are the holders of Provincially recognized exclusive rights to trap commercially in the Trapline Area, not the Tsilhqot’in. The Province’s admissions of Xeni Gwet'in hunting rights did not give rise to any potential for conflict between the holder of the Trapline, and the holder of an Aboriginal right. Vickers J.’s finding does give rise to potential conflict.

74. The evidence relied upon by Justice Vickers – that all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory in the course of their seasonal rounds [1220, AR p. 561] – was assumed to have been adduced, not in support of the hunting rights claim claimed on behalf of the Xeni, but rather the territorial title claim that was brought on behalf of the Tsilhqot'in. If the pleadings had disclosed that the rights claim was also made on behalf of the Tsilhqot'in, the potential conflict could have been explored during the course of the trial.

75. Vickers J. recognized the potential for conflict in claims by the Tsilhqot'in and by the Xeni to title for reserve lands.

> *William et al. v. British Columbia* (15 January 2003), Victoria 900913 (B.C.S.C.)**{** TA \l "*William et al. v. British Columbia* (15 January 2003), Victoria 900913 (B.C.S.C.)" \s "William et al. v. British Columbia - 2003" \c 1 **}** at paras. 14-16

76. Moreover, the territory that Vickers J. described as the potential title area was, on his findings, the traditional territory of the Xeni Gwet'in, not the Tsilhqot'in [337, AR p. 267].

b) The Proper Rights and Title Holders According to the Authorities

77. Depending on the context, the cases have recognized that Aboriginal people have identified with a spectrum of different groupings – collectives defined by different criteria, ranging from linguistic groupings, at the most general level, and family or kinship groupings at the local activities level, with camp, band or tribal level community groupings lying along the spectrum. When defining the appropriate collective that is the holder of site-specific Aboriginal rights, the Courts have identified the geographic scope of the rights in relation to the legally relevant grouping, most often finding this relationship at the local band level.

78. All Aboriginal rights are held communally, and this is also true of the subset right, Aboriginal title. *Delgamuukw{* TA \s "Delgamuukw v. British Columbia" *}, supra,* confirmed that one "dimension" of Aboriginal title is its communal nature. Lamer C.J.C. said:

> Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.
>
> *Delgamuukw{* TA \s "Delgamuukw v. British Columbia" *},* *supra,* at para. 115

79. Thus, in searching for the relevant community where an individual is identified with more than one collective, the search for Aboriginal title purposes begins with the community that makes "decisions with respect to that [title] land". In *R. v. Marshall*, the trial judge found this community at the band level rather than the larger cultural Mi'kmaq level:

> Occupancy necessary to establish Aboriginal possession is a question of fact and Aboriginal title should be determined on the facts pertinent to the band and not on a global basis.

> *R. v. Marshall*, [2002] N.S.J. No: 98, 2002 NSSC 57**{** TA \l "*R. v. Marshall*, [2002] N.S.J. No: 98, 2002 NSSC 57" \s "R. v. Marshall, [2002]" \c 1 **}**, para. 84

80. Another example is *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***},*** *supra,* where Sappier identified both as a Mali'seet, a larger cultural collective, and as a band member of the Pabineau First Nation, and Gray identified as a Mi'Kmaq, and a band member of the Woodstock First Nation. In the result, the Court restricted a site-specific Aboriginal right to harvest wood for domestic purposes to the traditional areas of the Pabineau First Nation, and the Woodstock First Nation, respectively, not the larger cultural groups.

81. In *R. v. Sparrow**{*** TA \s "R. v. Sparrow" ***}***, *supra*, the Musqueam Band was recognized to be part of the Salish people, a larger regional social network, but, as an organized social group with their own name, attached to a place name, the Supreme Court recognized the Aboriginal fishing rights of the members of the Musqueam Band, not the Salish people.

82. In *R. v. Côté**{*** TA \s "R. v. Côté" ***}, supra,*** the Court accepted that multi-family groups of fifteen or more people organized into larger groups of winter bands and summer bands for purposes of co-ordinating domestic activities shared a sufficient sense of community to be characterized as the appropriate collective to hold Aboriginal fishing rights.

83. Properly understood, the requirement to identify the relevant community is not an invitation for the courts to pass value judgments on the level of organization of other societies, but rather it involves an examination of the "way of life" of the group in question. The Aboriginal community must be identifiable and distinguishable from other groups and must exist at the relevant time.

84. These requirements were examined in *R. v. Billy and Johnny*, where Judge Gordon said:

> The problem with the Respondent's position is that, as the existing case law clearly establishes, aboriginal rights are not individual, but collective rights continuously held by an

> identifiable aboriginal community since pre-contact times. Assuming that the Canyon Shuswap were sufficiently distinguishable from other Shuswap Bands, any aboriginal rights exercised by them at contact could today be claimed by members of the Canyon Shuswap, but only if they still constituted a present identifiable community.
>
> …[E]xcept for the one or two families who continued to live near the mouth of the Chilcotin River, members of the Canyon Shuswap abandoned their traditional territory in the smallpox epidemic of 1862 and settled either with other Shuswaps at Alkali Lake (and perhaps elsewhere) or opted to settle in with Chilcotin relatives of the Anahem Band.
>
> …I am satisfied that the right of the Canyon Shuswap to engage in the commercial exchange of fish with outside groups (which right has been clearly established through the evidence in this proceeding) must be considered as having been extinguished with the elimination of the Canyon Shuswap as an intact functioning community. Caroline Billy's personal claim to that aboriginal right as a remote blood descendant of the Canyon Shuswap cannot succeed.
>
> *R. v. Billy and Johnny*, 2006 BCPC 48**{** TA \l "*R. v. Billy and Johnny*, 2006 BCPC 48" \s "R. v. Billy and Johnny" \c 1 **}** at paras. 46-49

85. *R. v. Powley,* the Supreme Court considered self-identification, ancestral connection and community acceptance as indicia of Métis identity for the purpose of claiming Métis rights under s. 35 of the *Constitution Act*. The Supreme Court noted:

> It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.[2]

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[2] British Columbia acknowledges that the different test adopted for proof of Métis Aboriginal right requires caution in applying case law concerning the Métis to First Nation communities. However, the identification of the proper rights claimant is an issue that logically precedes the application of the test for proof of rights.

> *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43**{** TA \l "*R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43" \s "R. v. Powley" \c 1 **}** at para. 34

86. Thus, no matter how a contemporary community defines membership, the relevant inquiry for the purposes of s. 35 right is ancestral connection to the relevant community extant at first contact, in the case of rights, or sovereignty, in the case of title.

c) The Approach Taken by Justice Vickers

87. Justice Vickers recognized that Aboriginal people typically identified with more than one group, including families, clans or descent groups, hunting parties, bands and nations [446, AR p. 300]. Justice Vickers identified or referred to a number of possible groupings and representatives of groupings in and around the Claim Area:

(a) the Nadene people [206, AR p. 223];

(b) the Athapaskan language group [207, AR p. 223];

(c) the Carriers [460, AR p. 304];

(d) the Tsilhqot'in people [207, AR p. 223] – approximately 3,000 today [31, AR pp. 167-168];

(e) the Xeni Gwet'in people (people of the Nemiah Valley) [24, AR p. 166] – approximately 390 to 400 people today [33, AR p. 168];

(f) the Xeni Gwet'in First Nations Government, also known as the Nemiah Valley Indian Band, a "band" within the meaning of the *Indian Act*, having common Crown lands set apart for their exclusive use and benefit" [35, AR p. 168];

(g) the Tsilhqot'in National Government ("TNG"), incorporated under the Canada Corporations Act in 1996, which has, represented five of seven Tsilhqot'in speaking bands [36, AR p. 169 and 456, AR p. 303];

(h) named ancestral local encampments such as "Nicootlem Indians, a branch of the Chilcoatens" [263, AR p. 239]; "the Indians of Ponts-een " [246, AR pp. 234-235]; the Long Lake Indians [246, AR pp. 234-235]; the camp of Keogh [297, AR p. 252];

(i) villages [256, AR pp. 234-235];

(j) semi-bands [361, AR pp. 273-274];

(k) mixed bands [361, AR pp. 273-274];

(l) unnamed local encampments – kinship or friendship groups who camped together [359, AR pp. 272-273]; and

(m) families [357, AR p. 272].

88. As for the characteristics of these ancestral groupings, Vickers J. noted that:

(a) no one leader of all Tsilhqot'in speaking people was recognized [357, AR p. 272 and 363, AR pp. 274-275];

(b) conformity to behavioural norms occurred, if at all, at the family or at encampment level, rather than the band or nation level [357, AR p. 272];

(c) encampments had no definitely outlined territorial rights [359, AR pp. 272-273];

(d) families in an encampment group had rights to certain winter camping sites, but only provided they occupied them every season [359, AR pp. 272-273];

(e) all Tsilhqot'in people were entitled to use the entire Tsilhqot'in territory [360, AR pp. 273]; and

(f) the band was a functioning unit only upon a few special occasions such as feast or celebrations, it never gathered in one more place for economic purposes [361].

89. These findings would not support a finding that there existed one Tsilhqot'in Nation.

> See *Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2009 BCSC 1494**{** TA \l "*Ahousaht Indian Band and Nation v. Canada (Attorney General)* 2009 BCSC 1494" \s "Ahousaht Indian Band and Nation v. Canada (Attorney General)" \c 1 **}** at para. 8

90. Without regard to these significant findings, and or to the authorities noted above, Vickers J. adopted a new test, concluding that the relevant rights holding community was one that "shares language, customs, traditions and a shared history", in the same

way that French speaking Canadians are viewed as a nation [457 – 458, AR pp. 303-304].

91. Insofar as the title holder was concerned, Vickers J. recognized that the authorities require the court to consider who made decisions about land use and occupation in the historic Aboriginal culture [439, AR pp. 297-298] and that title is a subcategory of Aboriginal rights [518, AR pp. 323], but later, applying his new test, he rejected the relevance of the land use decisions of small decision-making bodies for the purpose of reserve occupation, as not necessarily being the "hallmark" of a community [451, AR pp. 301-302].

92. He took into account the following:

(a) that the test for existence of an Aboriginal group should be the same as Métis group [444, AR p. 299];

(b) Aboriginal communities should determine their own membership [455, AR p. 303];

(c) it is as out-of-date and offensive to search for a “pan-Tsilhqot’in decision-making institution” as it is to apply the *Baker Lake* test for an “organized society” [453, AR p. 302];

(d) it is not necessary, nor relevant, to look for a collective legal entity that represents all members of the nation [456, AR p. 303];

(e) *Baker Lake,* identified the Inuit as the relevant community [453, AR p. 302];

(f) all the Aboriginal rights and title decisions identified the relevant historic community as the larger First Nation that existed at the time of contact or sovereignty [445, AR pp. 299-300]; and

(g) the Supreme Court of Canada in *Marshall; Bernard,* rejected the finding that the relevant community was the band level community [448-449, AR pp. 300-301].

*Baker Lake v. Minister of Indian Affairs**{*** TA \s "Baker Lake v. Minister of Indian Affairs" ***}**, supra*
*R. v. Marshall, R. v. Bernard**{*** TA \s "R. v. Marshall; R. v. Bernard" ***}**, supra*

93. There is no authority for (a). Although decisions on the appropriate rights-bearing Métis community may well be relevant to a similar determination with respect to First Nation communities, it is going too far to hold that the tests “can be no different”. If Vickers J. had applied the *Powley* test he would have to concede that it could not be met solely by a showing of shared language and traditions.

94. To the extent that the second point (b) is not circular, it tells against the conclusion of Vickers J. that significant numbers of Tsilhqot’in, including entire Tsilhqot’in communities, have chosen not to join membership in a single Tsilhqot’in Nation organization. The authorities do not support the view that Aboriginal communities are defined solely by their own members. Self-identification is only one factor in that determination.

95. As for (c), the test for identifying the proper rights bearing community has been affirmed by the Supreme Court in *Delgamuukw**{*** TA \s "Delgamuukw v. British Columbia" ***}**, supra*, and no subsequent decision, with the exception of Vickers J., has suggested it is out-dated. There is nothing offensive about an inquiry into how aboriginal communities actually functioned and make decisions.

96. As for (d), whatever may have been the situation earlier, it has become essential for the consultation process that a proper collective that is representative of the rights holding community be identified. The Supreme Court of Canada has consistently identified consultation as a necessary element of reconciliation.

97. Points (f) and (g), are simply wrong. First, as noted above, most of the Aboriginal rights decisions identify the band level community as the relevant grouping (*R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}**, supra; R. v. Sparrow**{*** TA \s "R. v. Sparrow" ***}**, supra; R. v. Billy* and *Johnny**{*** TA \s "R. v. Billy and Johnny" ***}**, supra; Delgamuukw**{*** TA \s "Delgamuukw v. British Columbia" ***}**, supra* and the majority of the consultation cases). Second, in *R. v. Marshall; R. v. Bernard,* McLachlin C.J. approved the finding of Curran Prov. Ct. J. who "concluded that the Mi'kmaq of the 18th century on mainland Nova Scotia probably had Aboriginal title to *lands around their local communities*, but not to the cutting sites [143, AR p. 201]". The emphasis was on the

lands occupied by the local band level community, not the larger linguistic grouping Vickers J. cited no examples of Nation-lead decision-making on the part of the Tsilhqot'in with respect to question of land or resource use.

> *R. v. Marshall; R. v. Bernard**{*** TA \s "R. v. Marshall; R. v. Bernard" ***}**, supra*, at para. 30

98. There was little evidence concerning how such decisions might have been made until after the dates of contact and sovereignty. The lack of such evidence makes the evidence of decision-making in the late nineteenth and twentieth century all that more important. In that regard, it is significant that it was the Tsilhqot'in bands, including the Xeni Gwet'in, who made decisions concerning the location of their reserves, and not any groups purporting to represent all of the Tsilhqot'in [635, AR pp. 366-367].

99. Vickers J. erred in dismissing the relevance of band level organization, stating:

> While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people. [469, AR pp. 306-307]

100. The courts have consistently recognized elected Band councils, even though constituted under the *Indian Act,* are a legitimate representative for the collective Aboriginal rights of their members. The fact that an Aboriginal group may also be a band under the *Indian Act* does not preclude that same group from being the proper rights holder if it is the successor to the original Aboriginal occupants. Legal recognition in this regard is particularly important in the consultation cases, many of which have involved *Indian Act* Bands, including *Hupacasath*; *Huu-Ay-Aht*; *Klahoose*; *Kwikwetlem*; *Musqueam*; *Squamish Nation*; *Taku* and *Tzeachten*, to name a few. See also *Lax Kw'alaams and Ahousaht Indian Band*, *supra*.

> *Hupacasath First Nation v. British Columbia* 2005 B.C.S.C. 1712**{** TA \l "*Hupacasath First Nation v. British Columbia,* 2005 B.C.S.C. 1712" \s "Hupacasath First Nation v. British Columbia" \c 1 **}**
> *Huu-Ay-Aht First Nation v. Minister of Forests,* 2005 B.C.S.C. 697**{** TA \l "*Huu-Ay-Aht First Nation v. Minister of Forests,* 2005 B.C.S.C. 697" \s "Huu-Ay-Aht First Nation v. Minister of Forests" \c 1 **}**

Klahoose First Nation v. Sunshine Coast, 2008 B.C.S.C. 1642**{** TA \l "*Klahoose First Nation v. Sunshine Coast*, 2008 B.C.S.C. 1642" \s "Klahoose First Nation v. Sunshine Coast" \c 1 **}**
Kwikwetlem First Nation v. British Columbia (Utilities Commission), 2009 B.C.C.A. 68**{** TA \l "*Kwikwetlem First Nation v. British Columbia (Utilities Commission),* 2009 B.C.C.A. 68" \s "Kwikwetlem First Nation v. British Columbia (Utilities Commission)" \c 1 **}**
Musqueam Indian Band v. British Columbia, 2005 B.C.C.A. 128**{** TA \l "*Musqueam Indian Band v. British Columbia*, 2005 B.C.C.A. 128" \s "Musqueam Indian Band v. British Columbia" \c 1 **}**
Squamish Nation v. British Columbia, 2004 B.C.S.C. 1320**{** TA \l "*Squamish Nation v. British Columbia*, 2004 B.C.S.C. 1320" \s "Squamish Nation v. British Columbia" \c 1 **}**
Taku River Tlinget First Nation v. British Columbia, [2004] 3 S.C.R. 550**{** TA \l "*Taku River Tlinget First Nation v. British Columbia*, [2004] 3 S.C.R. 550" \s "Taku River Tlinget First Nation v. British Columbia" \c 1 **}**
Tzeachten First Nation v. Canada, 2007 B.C.C.A. 133**{** TA \l "*Tzeachten First Nation v. Canada,* 2007 B.C.C.A. 133" \s "Tzeachten First Nation v. Canada" \c 1 **}**
Lax Kw'alaams Indian Band v. Canada (Attorney General) 2009 BCCA 593**{** TA \l "*Lax Kw'alaams Indian Band v. Canada (Attorney General)* 2009 BCCA 593" \s "Lax Kw'alaams Indian Band v. Canada (Attorney General)" \c 1 **}**
*Ahousaht Indian Band v. Canada (Attorney General)**{*** TA \s "Ahousaht Indian Band and Nation v. Canada (Attorney General)" ***}***, *supra*

101. Vickers J.'s new test risks endangering the legal efficacy of consultation efforts by replacing existing bands with undefined entities with unclean mandates, which on his findings, may have no acknowledged or consistently recognized representatives.

102. Moreover, since Aboriginal title is a subset of Aboriginal rights, it would be expected that the holder of Aboriginal rights, or a subset of it, would also be the holder of Aboriginal title.

103. In the circumstances, Vickers J. erred in finding that the Tsilhqot'in was the relevant collective holder of Aboriginal rights and of Aboriginal title. The legally relevant collective was the Xeni Gwet'in for hunting and trapping rights and for title.

3. Vickers J. Erred in Characterizing a Hunting Right As a Right to Wildlife

104. Vickers J. characterization of Tsilhqot'in hunting rights cannot be understood without also having regard to his infringement analysis. Definitions of Aboriginal rights cannot take place absent consideration of the specific limitations on the rights alleged.

105. In the regulatory context, the Supreme Court of Canada has held that to characterize an applicant's claim correctly, the Court should take into account:

> …such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the tradition, custom or practice relied upon to establish the right.
>
> *R. v. N.T.C. Smokehouse Ltd*., [1996] 2 S.C.R. 672**{** TA \l "*R. v. N.T.C. Smokehouse Ltd*., [1996] 2 S.C.R. 672" \s "R. v. N.T.C. Smokehouse Ltd." \c 1 **}** at para. 16
> *S*ee also *Mitchell v. M.N.R.**{*** TA \s "Mitchell v. M.N.R." ***}***, *supra,* at paras. 14-15

106. The requirement to identify a specific infringement applies in an action for a declaration, just as it does in the regulatory context. In an action for declaratory relief, the requirement for a live controversy informs the requirement to identify infringement as part of the definition of the Aboriginal rights that are in issue. The Court of Appeal has held that Aboriginal rights cannot be defined separately from the limitation of those rights, stating as follows:

> The foregoing reasons for following the usual rule against exercising jurisdiction in the absence of a "live controversy" apply in my view with even greater force where the definition of Aboriginal rights is in issue. It is only in the last 20 years or so that a framework for the analysis of Aboriginal claims has been established, case by case, by the Supreme Court of Canada. As Mr. Wruck argued, that analysis is a purposive one and is directed towards the "reconciliation" of Aboriginal rights with Crown sovereignty over Canadian territory. In my view, such rights cannot be properly defined separately from the limitation of those rights. The latter are needed to refine and ultimately define the former: ***R. v. Van der Peet***, [1996] 2 S.C.R. 507, at paras. 30-1.
>
> … it is clear that any Aboriginal "right to fish" that might be the subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or

> restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.
>
> *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539**{** TA \l "*Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539" \s "Cheslatta Carrier Nation v. British Columbia" \c 1 **}** at paras. 18-19

a) The Trial Judge's Initial Characterization

107. In his initial examination of the Aboriginal rights claimed, Justice Vickers described the right as an activity right in the terms articulated by the Plaintiff in final argument, stating:

> In his final submissions, the plaintiff claims an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses, inclusive of a right to capture and use horses for transportation and work. The Plaintiff also claims an Aboriginal right to trade in furs, pelts and other animal products as a means of securing a moderate livelihood. [1213, AR p. 559]

108. Other than the claim to capture and use horses, British Columbia did not object to the first part of this description. British Columbia noted that the Plaintiff employed the phrase "for the purposes of securing food, clothing, shelter, mats, blankets and crafts...". In that regard, British Columbia assumed that the Plaintiff meant that the birds and animals hunted and trapped would be directly used for the purposes enumerated (domestic purposes) and not sold or bartered for money or other commodities. British Columbia noted that Aboriginal rights are intended to protect the ongoing ability to carry on traditional activities in contemporary form in the present and in the future.

b) The Transformation of the Characterization of the Right

109. Vickers J. did not address the infringement analysis required by *Sparrow****{*** TA \s "R. v. Sparrow" ***}*** [1275, AR p. 576]. Instead, he accepted the Plaintiff's re-characterization of the content of their hunting rights as a right to a "harvestable surplus of all species, sufficient to meet the needs of the Tsilhqot'in" [1270, AR p. 574]. He did

not make any findings of interference with hunting activities or unmet Tsilhqot'in hunting needs or undue hardship or deprivation of preferred means, holding instead that any reduction in diversity or abundance of wildlife amounted to an infringement.

110. Rather than focus on any alleged specific and discrete interference with hunting activities, or unmet hunting needs, Vickers J. instead transformed the claimed activity right into a right to an undiminished diversity and number of each species of wildlife whether actively hunted or not [1276, AR p. 576].

111. In this, Vickers J. has characterized the right, not as a protected activity, but as a right to a particular resource, contrary to the Supreme Court's finding in *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}, supra***:

> …an aboriginal right cannot be characterized as a right to a particular resource …
>
> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***},*** *supra* at para. 21

112. In his infringement analysis, Vickers J. focused solely on the resource - "the impact on *the wildlife* in the area" (emphasis added) [1294, AR p. 582] and not on the impact on ongoing or proposed hunting activities.

113. The weight of authority is that an infringement requires a "meaningful diminution" on the ability to carry on a traditional activity. (*R. v. Morris*, 2006 S.C.C. 59**{** TA \l "*R. v. Morris*, 2006 S.C.C. 59" \s "R. v. Morris" \c 1 **}** at para. 53). The test asks whether the scheme imposes "undue hardship", or interferes with the "preferred means" of exercising the right. To impose a bare license requirement is not an infringement (*R. v. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}, supra***). To fail to provide the requisite priority for the activity falls at the justification stage of the analysis (*R. v. Adams**{*** TA \s "R. v. Adams" ***}, supra,*** at para. 59), after infringement is found.

114. To reduce the abundance and diversity of wildlife may or may not amount to an impairment of the right to continue the activity of hunting, depending on what level and type of hunting actually takes place. The Province consulted, or attempted to consult, with the Xeni Gwet'in in that regard and learned that they hunted deer for food, they

were not interested in trapping given current fur prices; and the Province was also aware that responsible forest harvesting can increase abundance of ungulates and may facilitate access to deer hunting areas [379, AR pp. 280-281].

c) The Reversal of the Onus of Proof of Infringement and Failure to Make Necessary Findings

115. As noted above, Vickers J. said:

> The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. [1103, AR p. 483]

116. This is contrary to established authority. Throughout *R. v. Sparrow*{ TA \s "R. v. Sparrow" }, *supra*, the issue was expressly joined on the question of who bore the onus of proof of infringement by showing real interference with the ability of the Musqueam to meet food fish requirements. The court emphasized that infringement invokes interference with the Aboriginal activity (p1110-1112) and clearly confirmed the onus of proof was on the rights claimant (p1120). As well, the court emphasized that infringement and justification must be " defined in the specific factual context of each case (p. 1111). See also *R. v. Sampson,* [1996] 2 C.N.L.R. 184 (B.C.C.A)**{** TA \l "*R. v. Sampson,* [1996] 2 C.N.L.R. 184 (B.C.C.A)" \s "R. v. Sampson" \c 1 **}**.

117. Vickers J. made no finding of any meaningful interference with any hunting or trapping activity carried on by the Tsilhqot'in in the Claim Area or elsewhere. He found that today the Xeni Gwet'in primarily hunt and rely upon ungulates for their subsistence needs, and that the hunting and trapping of furbearers was of minor importance.

118. Vickers J.'s own description of Tsilhqot'in present hunting activities was:

> A more frequent pattern of hunting by a younger generation is to use available roads and to hunt on the road or short distances off the road. [379, AR pp. 280-281]

119. The roads in question are primarily logging roads. Logging roads into new areas provide improved access to carry on hunting activities. Access to carry on Aboriginal activities has been recognized in the cases as an enhancement of Aboriginal rights, not as an infringement.

R. v. Côté{ TA \s "R. v. Côté" *}, supra*, at para. 80

120. By wrongly characterizing the Aboriginal right as an absolute right to a particular resource, and by reversing the onus of proof, Vickers. J. concluded that any forest harvesting activities, would infringe the plaintiffs Aboriginal hunting and trapping rights, without any examination of the type, amount, or location of the specific wildlife harvesting activities. On his analysis, the building of a road in the north end of the Brittany Triangle, many miles from any preferred hunting location, would diminish abundance and diversity of wildlife and thereby infringe the plaintiff's rights, even if the road had no impact on Xeni hunting activities, or even if the road enhanced access to hunting opportunities.

121. As to the impact of logging on the resource itself - wildlife - the Province adduced evidence from expert wildlife biologists that confirmed that while forestry operations would have varying impacts on different species of wildlife, forestry as conducted under the regulations imposed by the province was designed to mimic natural disturbances, primarily fire. Vickers J. did not address this evidence.

122. Conducted under the regulations imposed by the Province in relation to forest harvesting on lands of the types to be found in the Claim Area, logging will generally increase the carrying capacity of the land for ungulates, while any adverse impact on furbearers is moderated by such measures as the protection of riparian areas, the requirement to create wildlife tree patches, and the retention of certain amounts of coarse woody debris in harvested cut blocks. Vickers J. did not deal with this evidence.

123. Moreover, for at least the last quarter century, since the Nemaiah Valley Indian Band Trapline was registered, very little trapping appears to have been conducted by the members of the Xeni Gwet'in. Witnesses indicated that this was primarily due to the general decline in the price of furs, making trapping a less lucrative activity than it had been in times past. Hunting birds and animals for food has by and large continued during that period.

124. The evidence showed that Tsilhqot'in had largely ceased trapping furbearers because current fur prices were too low – each of Ervin Charleyboy, David Lulua, Cecilia Quilt, Ubill Hunlin, Lloyd Myers, Norman George Setah, Francis Setah, Ubill Lulua, David Setah, Thomas Billyboy and Doris Lulua gave evidence to that effect. Tsilhqot'in witnesses David Lulua and Doris Lulua testified that if fur prices would rise, they would resume trapping.

> Ervin Charleyboy, Examination in chief, Transcript Vol. 82, Day 218, p.14187:45 to 14188:2 and pp.14212:47 to 14213:28 (Appellants' Transcript Extract Book, Tab 8)
> David Lulua, Cross-examination, Transcript Vol. 48, Day 125, pp.8113:9 to 8113:23, 8116:3 to 8116:9 and 8148:14 to 8148:21 (Appellants' Transcript Extract Book, Tab 3)
> Cecilia Quilt, Cross-examination, Transcript Vol. 95, Day 253, p.16745:5 to 16745:19; Re-examination, p.16756:8 to 16756:17 (Appellants' Transcript Extract Book, Tab 11)
> Ubill Hunlin, Examination in chief, Transcript Vol. 75, Day 201, p.13076:11 to 13076:18; Examination in chief, Day 202, p.13090:5 to 13090:12 (Appellants' Transcript Extract Book, Tab 7)
> Lloyd Myers, Cross-examination, Transcript Vol. 88, Day 235, p.15462:47 to 15463:27 (Appellants' Transcript Extract Book, Tab 9)
> Norman George Setah, Examination in chief, Transcript Vol. 61, Day 163, p.10450:13 to 10450:26 (Appellants' Transcript Extract Book, Tab 5)
> Francis Setah, Examination in chief, Transcript Vol. 27, Day 61, p.4546:23 to 4546:37 and 4564:24 to 4564:31 (Appellants' Transcript Extract Book, Tab 1)
> Theophile Ubill Lulua, Examination in chief, Transcript Vol. 40, Day 100, p.6848:15 to 6848:26 (Appellants' Transcript Extract Book, Tab 2)
> David Setah, Examination in chief, Transcript Vol. 73, Day 194, p.12612:35 to 12612:43 (Appellants' Transcript Extract Book, Tab 6)
> Thomas Billyboy, Cross-examination, Transcript Vol. 90, Day 238, p.15699:8 to 15699:30 (Appellants' Transcript Extract Book, Tab 10)
> David Lulua, Cross-examination, Transcript Vol. 48, Day 125, p.8116:3 to 8116:9 (Appellants' Transcript Extract Book, Tab 3)
> Ex. 162 at para. 110: Affidavit No. 3 of Doris Lulua, sworn July 23, 2004, PLX-000120-01 at PLX-000120-28 (Appellants' Appeal Book, Tab 3)

125. Ervin Charleyboy stopped trapping altogether in 1988. Annie William stopped trapping before 1970 when she was a young teenager; her children do not trap furbearers. Cecilia Quilt gave evidence that she last trapped in 1943.

Annie William, Cross-examination, Transcript Vol. 51, Day 132, p.8515:15 to 8515:30 (Appellants' Transcript Extract Book, Tab 4)
Cecilia Quilt, Cross-examination, Transcript Vol. 95, Day 253, p.16745:5 to 16745:19; Re-examination, p.16756:8 to 16756:17 (Appellants' Transcript Extract Book, Tab 11)

126. This cessation of trapping could not be attributed to forest harvesting activities or to restrictions placed upon trapping by the federal or provincial Crown. From the 1920's to the 1970's officials of the federal government made repeated, and successful efforts to obtain registered traplines for Xeni Gwet'in members, insuring that their interests were not subordinated to those of non-Aboriginal trappers.

127. Vickers J. did not examine the specifics of any past or proposed logging to gauge whether there was any actual impact on specific hunting or trapping activities. He made no findings of fact that would permit this Court to determine whether specific forest harvesting amounted to an actual infringement or could be justified, in light of the consultation that had occurred with respect to that specific harvesting or that would occur in advance of future activities.

4. Justice Vickers' Justification Analysis Wrongly Failed To Consider The Consultation Record

128. The Crown's duty to consult, and the consultation cases, are concerned with avoiding or mitigating the risks of infringement. Those cases recognize that actual infringement can arise, by reason of direct regulation of Aboriginal activities (the Direct Regulation cases) or indirectly, by impacts on Aboriginal activities by the actions of third parties who are authorized by the Crown (The Indirect Impact Cases).

129. Direct Regulation Cases (*Sparrow, Adams, Côté,* and the like) involve legislation that purports to regulate Aboriginal people in the exercise of Aboriginal or Treaty rights. Indirect Impact cases (*Haida*, *Taku*, *Mikisew* and the like) involve laws that do not directly regulate Aboriginal people, in the exercise of their rights, but authorize activities by others that have the potential to adversely affect the exercise of Aboriginal or Treaty rights. For example, *Mikisew,* involved the building of a road that would traverse the traplines of 14 Mikisew families and adversely affect the hunting grounds of 100 Mikisew people. Creation of the road would trigger a 200 metre wide corridor within

which use of firearms would be prohibited. In these cases, it is not the regulating legislation or its enforcement that infringes, but rather the authorized activity. The specifics of the proposed activity and its impact on the exercise of Aboriginal or Treaty rights must be examined. Adverse effect on the exercise of Aboriginal activities is necessary before an infringement occurs.

> *R. v. Sparrow**{*** TA \s "R. v. Sparrow" ***}**, supra*
> *R. v. Adams**{*** TA \s "R. v. Adams" ***}**, supra*
> *R. v. Côté**{*** TA \s "R. v. Côté" ***}**, supra*
> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 **{** TA \s "Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73" **}**
> *Taku River**{*** TA \s "Taku River Tlinget First Nation v. British Columbia" ***}**, supra*
> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69**{** TA \l "*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388, 2005 SCC 69" \s "*Mikisew*" \c 1 **}**

130. Aboriginal rights holders do not have to wait for the authorized activity to take place before seeking a remedy. First Nations are entitled to be consulted at the strategic planning level, not just the operational level, because the purpose of the consultation is to avoid the risk of future infringement. The Crown's duty to consult arises when contemplating authorizing activity that will adversely affect the exercise of Aboriginal or treaty rights. Judicial review is available to ensure the duty to consult is discharged but the ability of right holders and rights claimants to seek remedies in advance of actual infringements should not obscure the fact that infringement does not occur until there is an actual adverse impact.

131. Justice Vickers recognised that the Ministry of Forests did engage in extensive consultations with Tsilhqot'in people but he declined to examine the consultation record because:

> ..this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringement of those rights. [1294, AR p. 582]

132. There are two errors in this approach. First, in law, there is no requirement in discharging the duty to consult to "acknowledge " rights. The Crown's duty to consult arises when the Crown has knowledge of credible but unproven claims to rights.

> *Haida**{*** TA \s "Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73" ***}**, supra* at para. 37

133. In *R. v. Nikal,* Cory J. identified what was necessary to meet the justification test:

> So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement.
>
> *R. v. Nikal*, [1996] 1 S.C.R. 1013**{** TA \l "*R. v. Nikal*, [1996] 1 S.C.R. 1013" \s "R. v. Nikal" \c 1 **}** at para. 110

134. The Crown is obliged to acknowledge that claims are made, not that rights exist. The Crown is directed to assess, in a preliminary way, the strength of the asserted claim in order to locate the scope of the duty to consult. By definition, consultation occurs prior to acknowledgement of rights. *Haida**{*** TA \s "Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73" ***}**, supra,* requires that the Crown take claims seriously, not that rights are acknowledged.

135. Secondly, provincial officials did acknowledge the existence of subsistence hunting rights. The Province made admissions in the pleadings and cannot be faulted for failing to accept all of the claims made: See *Ahousaht Indian Band and Nation v. Canada (Attorney General)**{*** TA \s "Ahousaht Indian Band and Nation v. Canada (Attorney General)" ***}***, *supra* at para. 865.

136. Vickers J. repeated [1123, AR p. 526] his assertion of British Columbia's denial of Aboriginal title and rights. British Columbia's response to the assertion of denial of Aboriginal title will be canvassed in its factum in Roger William's appeal.

137. Vickers J. did not examine the Province's and the Ministry of Forests and Range Consultation Policies. The use of policies to guide consultation efforts has been approved by the Supreme Court of Canada. These policies do not restrict First Nations to the Treaty process, as Vickers J. asserted [1136, AR p. 530].

> *Haida**{*** TA \s "Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73" ***}***, at para. 51

5. Right to Trade

a) The Requirements For Proof of a Trading Right were Not Established

138. Vickers J. erred in law in finding a right to trade in the following respects:

(a) his findings of the scale and extent of pre-contact trade did not meet the legal standard to establish a trading right;

(b) he incorrectly applied a harvesting rights standard, not a trading right standard;

(c) he incorrectly applied a treaty rights analysis, not an Aboriginal rights analysis;

(d) In the further alternative, he failed to make species-specific findings.

b) Vickers J's Findings of the Scale of Trade

139. The Plaintiff cannot claim that hunting and trapping for the purpose of trading in skins and pelts was integral to the distinctive culture of the Xeni Gwet'in because the evidence showed that the practice of trapping for the purpose of trading such products was an activity to which the Xeni Gwet'in have not shown a strong cultural attachment.

140. On Vickers J.'s findings, and the evidence, the Tsilhqot'in trade in furs was low-volume, opportunistic, irregular and for food purposes: *Lax Kw'alaams Indian Band v. Canada (Attorney* General*)**{*** TA \s "Lax Kw'alaams Indian Band v. Canada (Attorney General)" ***}***, *supra*.

141. While the Plaintiff, in his argument, suggested that the Tsilhqot'in had a strong attachment to the fur trade, that was not the opinion of the three persons who have conducted the most extensive scholarly studies of the Tsilhqot'in culture. Dr. Robert Lane, in his 1981 article on the Tsilhqot'in published in the Smithsonian *Handbook of North American Indians* stated:

> Trapping was never important for the Chilcotin. They took fur-bearing animals as the opportunity arose, but only a few individuals had traplines.

> Ex. 176 at p. 412: Robert B. Lane, “Chilcotin”, in June Helm (ed.), Subarctic, Volume 6 of William Sturveysant (Gen. Ed.), Handbook of North American Indians, Washington: Smithsonian Institution, 1981, LMB-16280 at LMB-16292 (Appellants’ Appeal Book, Tab 4)

142. Robert Tyhurst, in his draft dissertation stated:

> Animal furs – especially those of the beaver, muskrat, marmot, snowshoe, hare [*sic*] caribou and bear – were almost certainly a significant item in the Chilcotin pre-contact economy. Taken as part of the food quest, the skins of these animals were made into clothing, blankets and robes (essential in a very cold climate) and were of some importance in pre-contact Chilcotin trade with the Bella Coola and Canyon Shuswap peoples. **However, an economy based principally on fur trading seems never to have become a dominant feature of the Chilcotin people’s patterns of social life or subsistence.** (Emphasis added)
>
> Ex. 177 at p. 25: Robert Tyhurst, Draft dissertation “The Chilcotin, An Ethnographic History”, July 1984, HMTQ-2009149 at HMTQ-2009184 (Appellants’ Appeal Book, Tab 5)

143. Dr. David Dinwoodie, in his report entered in evidence in this case stated:

> When Tsilhqot’in speakers talk about “trapping,” on the other hand (the same goes for “hunting” and “fishing”), the term has the primary connotation that they are engaged in a larger process of producing food and clothing. This does not mean they did not trade pelts with neighboring peoples; they are well known for doing so. It simply means that for the Tsilhqot’in the idea of trapping is not inherently linked to the commercial marketing of furs.
>
> Ex. 224 at p. 52: Expert Report of Dr. David Dinwoodie, December 2004, HMTQ-0112558 at HMTQ-0112609 (Appellants’ Appeal Book, Tab 6)

144. Vickers J.’s own findings were that trade in furs was, prior to contact, restricted to “subsistence and survival” [3, AR p. 160].

145. When first encountered by representatives of the Hudson's Bay Company, the Tsilhqot'in had no furs to trade [234, AR pp. 230-231]. Subsequently, there was insufficient trade to justify a HBC post in Tsilhqot'in territory [251, AR p. 236].

146. The evidence showed occasional, intermittent trade of furs for survival purposes when the salmon runs failed. Vickers J. accepted this view of the evidence noting that the Tsilhqot'in traded annually in Bella Coola [247, AR p. 235], and stated:

> When salmon failed, the Tsilhqot'in way of life included a trade in furs, root plants and berries for salmon. [1263, AR pp. 572-573]

147. Vickers J. regarded the pattern of trading as an element of survival:

> Trading with neighbours was an element of the traditional pattern of survival. [1247, AR p. 568]

c) The Incorrect Application of a Survival Standard Found in a Harvesting Case.

148. The Supreme Court of Canada trading rights cases are *R. v. Gladstone{* TA \s "R. v. Gladstone" *}, supra*; *R. v. N.T.C. Smokehouse Ltd.{* TA \s "R. v. N.T.C. Smokehouse Ltd." *}, supra* and *Mitchell v. M.N.R.{* TA \s "Mitchell v. M.N.R." *}, supra*.

149. Vickers J. did not make any findings that the scale of trade would approach that which was shown in *R. v. Gladstone{* TA \s "R. v. Gladstone" *}, supra,* at para. 27-28. His findings were similar to *N.T.C. Smokehouse{* TA \s "R. v. N.T.C. Smokehouse Ltd." *}, supra,* where trades that were made were "few and far between" (para. 7). Rather than apply these cases, he applied the "survival" test in *R. v. Sappier; R. v. Gray{* TA \s "R. v. Sappier; R. v. Gray" *}*, stating:

> The Court concluded that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture test. [1249, AR p. 568]

150. *R. v. Sappier, R. v Gray{* TA \s "R. v. Sappier; R. v. Gray" *}, supra* was not a trading rights case; it was a harvesting rights case in which the Supreme Court of Canada expressly found that the fruits of the harvest could not be traded or sold. Vickers J. erred in law in failing to recognise this distinction.

151. Sappier and Gray were charged under New Brunswick *Crown Lands and Forests Act* with unlawful possession or cutting of Crown timber from Crown lands. They had no intentions of selling the logs or any product made from them. They claimed an Aboriginal right to harvest timber for personal use. The Supreme Court of Canada found this to be too general a characterization, because it did not define the way of life or distinctiveness of the particular Aboriginal community as is required to establish an Aboriginal right. The record showed that wood was used to fulfill the communities domestic needs for such things as shelter, transportation, tools and fuel. Bastarache, J. for the majority said:

> I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community
>
> The word "domestic" qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension. The harvested wood cannot be sold, traded or bartered to produce assets or raise money . This is so even if the object of such trade or barter is to finance the building of a dwelling. In other words, although the right would permit the harvesting of timber to be used in the construction of a dwelling, it is not the case that a rightholder can sell the wood in order to raise money to finance the purchase or construction of a dwelling, or any of its components.
>
> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}***, *supra* at paras. 24-25

152. Thus, the *Sappier, Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***}*** case provided no support for the right to trade found by Vickers J. and he erred in failing to appreciate the restricted nature of the right recognised in that case.

d) The Incorrect Application of a Treaty Case

153. Vickers J. went further and extended the trading right to a right to trade for a moderate livelihood by reference to *R. v. Marshall* (No1) [1264, AR p. 573]. In this extension, he incorrectly applied the standards of a case dealing with a treaty right to trade for necessaries: see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*.

> *R. v. Marshall (No1)*, [1999] 3 S.C.R. 456**{** TA \l "*R. v. Marshall (No1)*, [1999] 3 S.C.R. 456" \s "R. v. Marshall (No1)" \c 1 **}**
> *Lax Kw'alaams Indian Band v. Canada (Attorney General)**{*** TA \s "Lax Kw'alaams Indian Band v. Canada (Attorney General)" ***}***, *supra* at para. 59-60

154. *R. v. Marshall (No.1)**{*** TA \s "R. v. Marshall (No1)" ***}***, *supra* was a treaty rights case – a treaty right to continue to obtain necessaries though hunting and fishing by trading the products of those traditional activities. Treaty rights depend upon the interpretation of the language used in them – there the word "necessaries". Aboriginal and treaty rights differ in origin and structure: see *R. v. Badger*. It was legal error for Vickers J. to import a treaty right standard into the characterization of an Aboriginal right.

> *R. v. Badger,* [1996] 1 SCR 771**{** TA \l "*R. v. Badger,* [1996] 1 SCR 771" \s "R. v. Badger" \c 1 **}** at para. 76

e) The Moderate Livelihood Issue

155. In any event, there was no claim in the pleadings to a right to trade "for a moderate livelihood" and that claim should not have been considered.

156. Moreover, the moderate livelihood concept first introduced by Lambert J.A., dissenting in *R. v. Van der Peet* (1993), 83 C.C.C. (3d) 289 (BCCA)**{** TA \l "*R. v. Van der Peet* (1993), 83 C.C.C. (3d) 289 (BCCA)" \s "R. v. Van der Peet - 1993" \c 1 **}** at 304 was rejected on appeal: *R. Van der Peet**{*** TA \s "R. v. Van der Peet" ***}***, *supra,* at para. 52.

f) Failure to Make Species Specific Findings

157. Alternatively, Vickers J. erred [1165, AR pp. 542-543] in failing to recognise that on the existing authorities, Aboriginal trading rights, unlike subsistence hunting rights, are both species – specific (*R. v. Gladstone**{*** TA \s "R. v. Gladstone" ***}***, *supra*; *Lax Kw'alaams Indians Band v. Canada* (*Attorney General)**{*** TA \s "Lax Kw'alaams Indian Band v. Canada (Attorney General)" ***}***, *supra*) and transaction specific (*R. v. Billy and Johnny**{*** TA \s "R. v. Billy and Johnny" ***}***, *supra*). He erred in failing to restrict any trading right to particular species.

158. In interlocutory rulings, he recognized:

> I agree with the observations of counsel for the plaintiff that the evidence to date would not support a finding of fact that the skins and pelt of certain animals were traded.
>
> *William et al v. British Columbia et al*, 2006 B.C.S.C. 399**{** TA \l "*William et al v. British Columbia et al*, 2006 B.C.S.C. 399" \s "William et al v. British Columbia et al - 2006" \c 1 **}** at para. 18

6. Right to Capture Horses

159. There was no claim in the pleadings to a right to capture horses for transportation purposes and the claim ought not to have been considered.

160. British Columbia did not agree that the capture and use of horses for transportation and work was appropriately included as part of an Aboriginal right to hunt and trap. The capturing of animals for the purpose of domesticating them is a distinct activity from the killing and dismembering of animals for the purpose of securing food, clothing, shelter, mats, blankets or crafts.

161. British Columbia also noted that the Plaintiff had not identified any governmental legislation or action which he alleged had infringed a horse capturing right. There is no provision in the *Forest Act* which would appear to have any application to the capture of horses that lack a recognised owner. Nor did the Plaintiff produce any evidence of actions taken under the *Forest Act* that would interfere with his actions in capturing such a horse.

162. The claim to capture horses was not shown to have existed pre-contact (*R. v. Van der Peet****{*** TA \s "R. v. Van der Peet" ***}***, at paras. 60-67) and was ultimately the result of European influences (*R. v. Van der Peet****{*** TA \s "R. v. Van der Peet" ***},*** at para. 73). See also *R. v. Deneault,* 2007 BCPC 0307, [2008] 1 C.N.L.R. 87**{** TA \l " *R. v. Deneault,* 2007 BCPC 0307, [2008] 1 C.N.L.R. 87 " \s "R. v. Deneault" \c 1 **}**, paras. 16ff.

> *R. v. Van der Peet****{*** TA \s "R. v. Van der Peet" ***}, supra,*** at para. 60-67 and 73

> *R. v. Deneault,* 2007 BCPC 0307, [2008] 1 C.N.L.R. 87 **{** TA \l " *R. v. Deneault,* 2007 BCPC 0307, [2008] 1 C.N.L.R. 87 " \s "R. v. Deneault" \c 1 **}**, paras. 16ff

163. Justice Vickers' findings of a right to capture horses as a contemporary extension of a right to hunt and trap animals for subsistence amounted to a finding of an Aboriginal right to fulfil an abstract goal equivalent to "sustenance", contrary to the authorities.

164. As noted above, the Supreme Court has clarified that there is no such thing as an Aboriginal right to "sustenance". Instead, it is the traditional means of sustenance – Aboriginal activities – that are protected.

> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***},*** *supra*, at para. 37

165. Vickers J. referred to a general right to use land [1239, AR p. 566]. As noted above, a generalized Aboriginal right to the benefit of tribal lands does not accord with the legal approach to the recognition of Aboriginal rights; the legal test requires:

> …aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. (Emphasis in original)
>
> *R. v. Sappier; R. v. Gray**{*** TA \s "R. v. Sappier; R. v. Gray" ***},*** *supra,* at para. 22

Part 4

NATURE OF ORDER SOUGHT

166. That this appeal be allowed with costs, and

(a) the declaration of hunting, trapping and trading rights in favour of the Tsilhqot'in be set aside and in its place, this Court declare:

> The Xeni Gwet'in has an existing Aboriginal right to hunt and trap for subsistence purposes in the Claim Area, which right has not been shown to have been infringed by the *Forest Act,* or any authorization issued thereunder.

(b) the declarations of infringement and absence of justification be set aside.

All of which is respectfully submitted.

Dated: June 4, 2010

P. G. Foy

Patrick G. Foy, Q.C.
(BORDEN LADNER GERVAIS LLP)
Solicitors for Her Majesty the Queen in Right of the Province of British Columbia and the Manager of the Cariboo Forest Region

CASES

LEGISLATION