Court of Appeal File No. CA035618
Supreme Court File No. 900913
Supreme Court Registry: Victoria

COURT OF APPEAL

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

BETWEEN:

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

Respondent
(Plaintiff)

AND:

The Attorney General of Canada

Appellant
(Defendant)

AND:

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

Respondent
(Defendants)

FACTUM OF THE RESPONDENT, ROGER WILLIAM, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE XENI GWET'IN FIRST NATIONS GOVERNMENT AND ON BEHALF OF ALL OTHER MEMBERS OF THE TSILHQO'TIN NATION

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CHRONOLOGY OF RELEVANT DATES IN LITIGATION

Date	Event
December 14, 1989	The Plaintiff commenced Action No. 89/2573 against British Columbia (the "Original Action"). The Original Action was discontinued when Action No. 90/0913 (the "Nemiah Trapline Action" or the "Trapline Action") was commenced [63].[1]
April 18, 1990	The Nemiah Trapline Action was commenced in the Supreme Court of British Columbia. At that time, the Plaintiff sought injunctions restraining defendant forest companies from clear-cut logging within the Trapline Territory [64]. (Appeal Record ["AR"] p. 1)
December 17, 1990	Millward J. made a consent order accepting Carrier Lumber Ltd.'s undertaking not to apply to British Columbia for timber cutting permits in the Nemiah Trapline without notice [65]. (AR p. 441) The proceedings against other forest companies were eventually discontinued [66].
October 11, 1991	The Supreme Court of British Columbia issued an injunction by consent, enjoining Carrier from logging (or any other preparatory work for logging) within the Trapline Territory until the trial of this matter. Carrier was specifically enjoined from logging certain named cut blocks located within the Trapline Territory [67]. (AR p. 443)
January 8, 1997	The Xeni Gwet'in filed a notice of intention to proceed with the Nemiah Trapline Action [75].
June 25, 1998	The Trapline Action was amended to advance claims for Tsilhqot'in Aboriginal title, damages for infringement of Aboriginal rights and title, compensation for breach of fiduciary duty, declaratory orders concerning the issuance and use of certain forest licences and injunctions restraining the issuance of cutting permits [68]. (AR p. 67) Following the injunction restraining logging in the Trapline Territory, forest companies indicated interest in logging within Tachelach'ed (Brittany Triangle) [69].

[1] Numbers in [ ] refer to paragraphs in *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, [2007] B.C.J. No. 2465.

Date	Event
December 18, 1998	The Plaintiff commenced Action No. 98/4847 (the "Brittany Triangle Action") against British Columbia, Riverside Forest Products Ltd. and others, seeking declarations similar to those in the Nemiah Trapline Action with respect to the lands known as Tachelach'ed (or the "Brittany Triangle") [79]. (AR p. 12)
October 14, 1999	Order entered by consent to have both actions heard at the same time. (AR p. 447)
November 2, 1999	Vickers J. dismissed an application brought by British Columbia to strike the representative claim for Aboriginal title in both actions: *Nemaiah Valley Indian Band v. Riverside Forest Products* Ltd., [1999] B.C.J. No. 2459, 37 C.P.C. (4th) 101 (S.C.) [81]. (AR p. 714)
February 21, 2000	A notice of trial was issued setting the trial date in both actions for September 10, 2001 [82].
March 20, 2000	Consent order allowing Province to amend their Statement of Defence, in the Brittany Triangle Action. (AR p. 514)
October 5, 2000	Vickers J. made an order that the Attorney General of Canada be added as a defendant in the Brittany Triangle Action [83]. (AR p. 538)
November 2, 2000	Vickers J. made an order that the Attorney General of Canada be added as a defendant in the Trapline Action [83]. (AR p. 516)
March 19, 2001	The trial of the action was adjourned to March 11, 2002 [86]. (AR p. 567)
April 18, 2001	A Ministry of Forests official confirmed that logging and road building in the Claim Area were inevitable, as the decision to permit harvesting in the disputed area was made at the time the licenses were issued early in 1997 [87].
April 4, 2002	Vickers J. made an order consolidating the Nemiah Trapline Action and the Brittany Triangle Action [88]. (AR p. 581)
August 14, 2002	Vickers J. dismissed an application by the defendant, British Columbia, for an order compelling the Plaintiff to provide notice of the Plaintiff's claims to all land or resource use tenure holders, or applicants for tenure, whose interests may be affected by the litigation: *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, 2002 BCSC 1199, [2002] 10 W.W.R. 486 [89]. (AR p. 785)
November 18, 2002	The trial of the consolidated action began [91].

Date	Event
November 20, 2002	Vickers J. dismissed an application by Canada to be removed as a party: *Xeni Gwet'in First Nations Government v. British Columbia*, 2002 BCSC 1904, 163 A.C.W.S. (3d) 2 [91]. (AR pp. 616, 789)
January 8, 2003	Vickers J. struck out the claim against Riverside Forest Products Ltd.*: Xeni Gwet'in First Nations Government v. British Columbia*, 2003 BCSC 2036, 163 A.C.W.S. (3d) 1 [92]. (AR p. 624, 793)
February 14, 2003	Vickers J. allowed the Plaintiff to amend the Statement of Claim and dismissed an application by British Columbia for an order striking out the Statement of Claim on the basis that it disclosed no reasonable claim, or was otherwise an abuse of process: *Nemaiah Valley Indian Band*, 2003 BCSC 249, 121 A.C.W.S. (3d) 1030 [93]. (AR p. 797)
June 4, 2001	Consent order allowing Plaintiff to amend Statement of Claim. (AR p. 640)
June 16, 2003	The Plaintiff filed an amended Statement of Claim [94]. (AR p. 387)
June 19, 2003	Canada filed an amended Statement of Defence [94]. (AR p. 399)
June 26, 2003	British Columbia filed a Statement of Defence [94]. (AR p. 402)
June 27, 2003	The Plaintiff filed a reply to British Columbia's Statement of Defence [94]. (AR p. 427)
November 17, 2003	The Supreme Court of British Columbia convened at the Naghataneqed School in Tl'ebayhi in Xeni (Nemiah Valley) [99]. (AR pp. 663, 666)
May 6, 2004	Vickers J. directed counsel to frame an issue of law or fact, or partly of law and partly of fact, pursuant to Rule 33. Counsel were unable to frame such an issue by consent [96]. (AR p. 842 par 50)
July 16, 2004	Following submissions by counsel, Vickers J. concluded that this case or specific issues arising in this case ought not to proceed as a stated case pursuant to Rule 33: *William v. British Columbia*, 2004 BCSC 964, 30 B.C.L.R. (4th) 382 [96]. (AR p. 849)
November 20, 2007	Judgment was rendered by Vickers J. (*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2007] B.C.J. No. 2465).
May 14, 2008	Vickers J. dismissed a motion by the Plaintiff to amend the Statement of Claim by adding the words "or portions thereof" throughout the relevant sections of the Statement of Claim. (AR p. 933)

OPENING STATEMENT

Canada, on this appeal, takes the astonishing position that the Tsilhqot'in people should be barred forever from judicial recognition of their Aboriginal title in the core of their traditional lands – notwithstanding the Trial Judge's findings that the Tsilhqot'in people hold Aboriginal title to a substantial portion of the Claim Area. If there was ever a question that the just and long over-due recognition of Aboriginal title will not occur without forceful intervention by the courts, Canada's submissions on this appeal can leave no doubt.

The Trial Judge correctly applied the law of Aboriginal title to the abundant evidentiary record in this case. In the result, he held that the Plaintiff had established Aboriginal title to core traditional lands, which were regularly exploited at sovereignty according to a clear pattern of land use and held within exclusive Tsilhqot'in control. These were the core lands that provided "cultural security and continuity to the Tsilhqot'in people for better than two centuries" and that "ultimately defined and sustained them as a people".

These findings could not resonate more fully with the direction of the Supreme Court of Canada in *Delgamuukw* and *Marshall; Bernard*. Canada continues to argue that it is "implausible" that semi-nomadic peoples can hold Aboriginal title, but it is clear from these leading authorities, and the facts of this case, that it is Canada's discredited "postage stamp" theory of Aboriginal title that is truly implausible.

The Plaintiff agrees with Canada that finality is required in litigation. For the reasons set out in the Plaintiff's Appeal, the proper remedy is a declaration of Aboriginal title. In the alternative, however, the "without prejudice" aspect of the Trial Judge's order was fully justified. It would work a massive injustice to permanently bar the Tsilhqot'in Nation from recognition of its Aboriginal title lands in the Claim Area based on an alleged pleadings defect. The Supreme Court of Canada declined to impose this draconian result in *Delgamuukw* and instead ordered a new trial with the necessary amendments in place. Canada's position, by contrast, demonstrates an unconscionable disregard for the honour of the Crown and the overall objective of reconciliation. The Plaintiff respectfully asks the Court to dismiss this appeal.

PART 1 – STATEMENT OF FACTS

1. The Attorney General of Canada ("**Canada**") is appealing from the trial judgment of Mr. Justice Vickers (the "**Trial Judge**"), rendered November 11, 2007.[2] This is the response of the Plaintiff-Respondent (the "**Plaintiff**").

2. The Plaintiff relies on the facts set out by the Plaintiff in his appeal from the Trial Decision, Appeal CA035620 (the "**Plaintiff's Appeal**"). The Plaintiff otherwise accepts Canada's statement of facts, subject to the following comments and additional facts.

3. In its Statement of Facts, Canada says it does not dispute the existence or geographic scope of the Aboriginal hunting and trapping rights declared by the Trial Judge.[3] It is important to note that the Trial Judge held that these Aboriginal rights extend throughout the entire Claim Area, based on the fact that "Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day".[4]

4. Canada claims that the Plaintiff advanced for the first time, in his reply submissions, "the alternative theory that the Claim Area consisted of a number of distinct tracts of lands".[5] This statement mischaracterizes the Plaintiff's reply submissions. From the start of trial to its conclusion, the Plaintiff's central purpose remained consistent and unwavering: "The Plaintiff [sought] to demonstrate regular use of all of the various geographical areas that comprise the Claim Area pursuant to an organized pattern of occupation".[6]

5. The extensive evidence led at trial from Tsilhqot'in witnesses and experts, the Plaintiff's main submissions, and the Plaintiff's reply submissions were all consistently directed at providing the Trial Judge with a rich, geographically specific, and detailed

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[2] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2007] B.C.J. No. 2465 (the "**Trial Decision**").
[3] Canada's Appeal Factum, para. 2.
[4] Trial Decision, Joint Appeal Record, v. II(b), p. 574, para. 1268.
[5] Canada's Appeal Factum, para. 6.
[6] Trial Decision, Joint Appeal Record, v. II(a), p. 186, para. 104.

account of the regular patterns of Tsilhqot'in land use and occupancy throughout the various tracts of land that together comprise the Claim Area.

6. As explained by the Trial Judge, the Plaintiff presented this "same body of occupation evidence" in his main submissions and his reply submissions, but from different "perspectives" to assist the court with its assessment of use and occupation:

> In his main argument, the plaintiff refers to evidence which, in his submission, portrays a regular and highly organized schedule of Tsilhqot'in land use and occupancy throughout the Claim Area. The plaintiff organizes this evidence by season according to Tsilhqot'in subsistence patterns. The evidence provides details about the character of the lands. It includes evidence about the bioclimatic zones, animal habitats, and seasonal variations in animal and plant abundance allowing Tsilhqot'in people to sustain themselves from these resources.
>
> The plaintiff seeks to demonstrate regular use of all of the various geographical areas that comprise the Claim Area pursuant to an organized pattern of occupation. This pattern consists of systematic, oscillating, regular use of the plateau lands, its lakes, rivers and streams and the mountainous regions of the Claim Area.
>
> The plaintiff argues that this evidence is presented through the lens proposed by the Supreme Court of Canada in ***Delgamuukw*** and ***R. v. Marshall; R. v. Bernard***, 2005 SCC 43 (CanLII), [2005] 2 S.C.R. 220, 2005 SCC 43. This evidence is grounded in the perspective of Tsilhqot'in people and focuses on the cultural, economic and legendary significance of their land use patterns.
>
> …
>
> In his reply … the plaintiff took the same body of occupation evidence that is presented in the main argument according to season and by geographical location … This allows the Court to consider the evidence associated with each of the various tracts of land that comprise the Claim Area. Thus the Court had the benefit of considering the occupation evidence from the perspective of traditional, seasonal use (as conveyed for the most part in Appendix 3 of the main argument) or from the perspective of geographical location (as set out the reply Appendices 1A and 1B).[7]

[7] Trial Decision, Joint Appeal Record, v. II(a), p. 186-187, paras. 103-107 [underscore added, bolding in original].

7. The Trial Judge ultimately concluded that he was not able to make a formal declaration of Aboriginal title because of the manner in which the action had been pleaded. In his view, the Plaintiff had advanced an "all or nothing" claim, such that the Court could find Aboriginal title only to Tachelach'ed or the Trapline Territory as a whole, but not to smaller, component portions.[8] This holding is the subject of the Plaintiff's Appeal.

8. Nonetheless, the Trial Judge offered a non-binding opinion as to the existence and extent of Tsilhqot'in Aboriginal title in and around the Claim Area.[9] The Trial Judge offered this opinion in response to "the invitation of counsel to express an opinion on where Tsilhqot'in Aboriginal title might lie".[10] He concluded that the evidence established Aboriginal title to a substantial portion of the Claim Area. He described six contiguous tracts of land, comprising roughly 40% of the Claim Area, which were "in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title" (the "**Proven Title Area**").[11]

9. Canada's dismissal of the Trial Judge's opinion on Tsilhqot'in Aboriginal title as "his own creation"[12] fails to convey the reality that the Trial Judge reached this determination by applying the correct legal test to the voluminous body of evidence before him, with which he was intimately familiar:

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

[8] Trial Decision, Joint Appeal Record, v. II(a), p. 187, para. 106.
[9] Trial Decision, Joint Appeal Record, v. II(b), p. 466-469, paras. 958-62.
[10] Trial Decision, Joint Appeal Record, v. II(b), p. 411, para. 765 and p. 428, para. 825; see also Trial Decision, Joint Appeal Record, v. II(a), p. 385, para. 686 and v. II(b), p. 466, para. 958.
[11] Trial Decision, Joint Appeal Record, v. II(b), p. 466-468, paras. 959-60.
[12] Canada's Appeal Factum, para. 10.

> by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title as follows: …
>
> …
>
> The foregoing describes a tract of land mostly within the Claim Area but not entirely. It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: ***Marshall; Bernard*** at para. 77. This was the land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion: ***Sappier; Gray*** at para. 33.[13]

10. In closing argument, the Respondents Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region ("**British Columbia**") invited the Trial Judge to dismiss the Plaintiff's Aboriginal title claims on a "without prejudice" basis:

> The Province is prepared to negotiate with the Plaintiff in this regard should the Plaintiff move beyond the "all or nothing" claim presently advanced. In these circumstances, the Province submits that the Court could best assist the Parties if it dismissed the claim as made. However, the Province submits that further reconciliation in this case would be enhanced if the dismissal be without prejudice to the right of the Plaintiff to make an alternative claim to specific sites if the parties cannot, through negotiations, resolve that issue.[14]

11. In the result, the Trial Judge dismissed the Plaintiff's claims for declarations of Aboriginal title "without prejudice to a renewal of Aboriginal title claims as they may pertain to Tsilhqot'in Aboriginal title lands in the Brittany Triangle and the Trapline

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[13] Trial Decision, Joint Appeal Record, v. II(b), p. 466-468, paras. 959-60 [underscore added].
[14] Trial Submissions of British Columbia, para. 9 [underscore added]; see also Trial Decision, Joint Appeal Record, v. II(a), p. 355-356, para. 605.

Territory".[15] Canada now appeals from the "without prejudice" aspect of the Trial Judge's order.

PART 2 – ISSUES ON APPEAL

12. Canada's appeal raises the following issues for determination:

a. ***Was the Trial Judge correct in dismissing the Plaintiff's claims for Aboriginal title?*** No. For the reasons set out in the Plaintiff's Appeal, the Trial Judge erred in dismissing the Plaintiff's claims for Aboriginal title. Declarations of Aboriginal title should be granted. Accordingly, this Plaintiff's submissions on this appeal are in the alternative to his main position.

b. ***If so, was the Trial Judge bound to dismiss the Plaintiff's claims for Aboriginal title with prejudice?*** No. The Trial Judge had full discretion to make his order "without prejudice". The doctrine of *res judicata* and the *Henderson* rule do not bar the Plaintiff from bringing subsequent Aboriginal title claims to portions of the Claim Area.

c. ***If not, and the Trial Judge had the discretion to dismiss the Plaintiff's claims for Aboriginal title without prejudice, did he err in his exercise of this discretion?*** No. Contrary to Canada's submissions, the Trial Judge's findings of Aboriginal title are not "implausible"; they are entirely consistent with the Supreme Court of Canada's decisions in *Delgamuukw* and *Marshall; Bernard*. Moreover, the Trial Judge was fully justified in exercising his discretion to make his order "without prejudice" to avoid working a manifest injustice and frustrating all prospects of a just and lasting reconciliation of Tsilhqot'in Aboriginal title claims.

d. ***At a minimum, should the Trial Judge's dismissal of the Plaintiff's Aboriginal title claims be final with respect to lands not inside the Proven Title Area?*** No. The Trial Judge should have declared Aboriginal title throughout the Claim

[15] Trial Order, 20 November 2007, Joint Appeal Record, v. I, p. 48.

Area, for the reasons argued in the Plaintiff's Appeal; alternatively, his order is appropriately "without prejudice" to all subsequent Aboriginal title claims to portions of the Claim Area.

PART 3 – ARGUMENT

A. The Trial Judge erred by dismissing the Plaintiff's claims to declarations of Aboriginal title

13. The Plaintiff's central position is that the Trial Judge erred on the preliminary issue and wrongly considered himself barred by the pleadings from granting declarations of Aboriginal title. In this respect, the Plaintiff relies on his submissions in the Plaintiff's Appeal.

14. Canada's submissions underscore the fundamental errors in the Trial Judge's determination of this important issue. In this section, the Plaintiff will respond briefly to the key assertions made by Canada.

1. The Plaintiff's claim to Aboriginal title was not "all or nothing"

15. Canada maintains that the Plaintiff "deliberately"[16] decided to "pursue a litigation strategy to claim 'all' of the Claim Area because he would accept nothing less" and is thus "bound by this strategy".[17]

16. With respect, Canada's position does not stand to reason. It is simply not plausible that the Plaintiff, or any litigant in the circumstances, would take the extreme "all or nothing" position described by Canada. It defies common sense to suggest that a First Nation seeking Aboriginal title in an action to prevent clear-cut logging in the heartland of its traditional territory would argue to the Court that it only wanted

[16] Canada's Appeal Factum, para. 21.
[17] Canada's Appeal Factum, para. 59.

Aboriginal title to the entire area and would "accept nothing less" even if the evidence supported it and such a declaration would preserve the land from logging.

17. The Plaintiff never described his claim as "all or nothing", nor did he indicate at any point that he was adverse to findings of Aboriginal title to portions of the Claim Area. Canada cannot and does not point in its factum to any statement by the Plaintiff to the effect that "he would accept nothing less"[18] than a declaration of Aboriginal title to the entire Claim Area.

18. Instead, Canada invites this Honourable Court to infer this nonsensical litigation strategy from the mere fact that the Plaintiff declined to amend his pleadings after the Supreme Court of Canada's decision in ***R. v. Marshall; R. v. Bernard*** ("***Marshall; Bernard***").[19] However, while the appellate-level decisions in *Marshall* and *Bernard* were favourable to the Plaintiff's claims, the Plaintiff's assertions of Aboriginal title in the Claim Area did not depend on the view of the law of Aboriginal title set out in those decisions. When the Supreme Court of Canada issued its judgment in *Marshall; Bernard*, the Plaintiff reviewed the record developing at trial and concluded that the abundant evidence of regular use and occupation throughout the Claim Area satisfied the test set out by the Court in that case.

19. The Trial Judge ultimately agreed that the evidentiary record established Aboriginal title to a substantial portion of the Claim Area, pursuant to the tests set down by the Supreme Court of Canada in *Marshall; Bernard*.[20] This clearly supports the Plaintiff's view that the occupation evidence generated at trial was consistent with the tests set down by the Supreme Court of Canada. The mere fact that the Plaintiff did not amend his pleadings in response to *Marshall; Bernard* cannot reasonably be interpreted as "a litigation strategy to claim 'all' of the Claim Area because he would accept nothing less", as Canada suggests.

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[18] Canada's Appeal Factum, para. 59.
[19] Canada's Appeal Factum, paras. 5, 21-30.
[20] Trial Decision, Joint Appeal Record, v. II(a), p. 358-359, paras. 614-15 and v. II(b), p. 468, para. 960.

20. Ultimately, Canada's position is disingenuous. It is not as if the Defendants focussed their cross-examination on the "entire Claim Area" and ignored evidence led on the use and occupation of portions of the Claim Area. From the outset, Canada put the Plaintiff to proof of Aboriginal title to lesser, included portions of the Claim Area. In its Statement of Defence filed March 12, 2001, Canada stated:

> In answer to paragraph 10 of the Statement of Claim, he states that he has no knowledge as to whether a group having the characteristics set forth in paragraph 10 of the Statement of Claim exclusively occupies part or all of the lands within the boundary of Trapline Licence #0504T003 (the "Trapline Territory"), whether at the time of the assertion of British-sovereignty or at all, nor as to whether a group having the characteristics set forth in paragraph 10 of the Statement of Claim exclusively occupies part or all of the Trapline Territory today, and he does not admit these allegations. Further, he states that he has no knowledge as to whether a group having the characteristics set forth in paragraph 10 of the Statement of Claim had or has aboriginal title to part or all of the Trapline Territory, and he does not admit these allegations, and he puts the Plaintiff to the strict proof thereof.[21]

21. Canada not only put the Plaintiff to strict proof of Aboriginal title "to part or all" of the Claim Area from the outset, but also understood that such "allegations" were advanced by the Plaintiff in his Statement of Claim. Similarly, in its closing submissions, Canada stated:

> The evidence presented in this case does not support a finding that the Tsilhqot'in occupied any part of the claim area with sufficient intensity or exclusivity to establish aboriginal title, whether the date for the establishment of aboriginal title is 1792, 1846 or any date in between.
>
> …
>
> … If any parts of the claim area are subject to aboriginal title, such lands remain provincial Crown land, albeit burdened by aboriginal title, and the *Forest Act* and the *Forest Practices Code of British Columbia Act* continue to apply to such lands.[22]

[21] Canada's Statement of Defence, filed March 12, 2001 [underscore added].
[22] Trial Submissions of Canada, para. 6 [underscore added].

22. British Columbia similarly pleaded its defence to the Plaintiff's Aboriginal title claims. In its Fresh Statement of Defence, filed March 9, 2001, British Columbia expressly denied that "the Tsilhqot'in or their ancestors had or has aboriginal title to the Brittany, or any portion thereof".[23]

23. In the final iteration of its Statement of Defence, filed June 26, 2003, British Columbia was even more explicit in putting in issue whether or not portions of the Claim Area were subject to Aboriginal title:

> **Claim to Aboriginal Title**
>
> 12. In answer to paragraphs 10 and 12 of the Statement of Claim, the Provincial Defendants....
>
> (c) say, in the alternative, that if the Aboriginal activities that may have been practised by the Ancestral Tsilhqot'in Groups constituted occupation establishing Aboriginal title to any portions of the Brittany of the Trapline Territory, such occupation did not extend to the whole of the Brittany of the Trapline Territory, but only to limited portions thereof and put the Plaintiff to the strict proof of the location and extent of such limited portions;
>
> (d) say, in the further alternative, that if Ancestral Tsilhqot'in Groups exclusively occupied the Brittany of the Trapline Territory, or any portions of those lands, at the Date of Sovereignty, the Provincial Defendants do not admit that such groups or their descendants have continued to occupy, or have maintained a substantial connection to, any parts of the Brittany or the Trapline Territory …[24]

24. The Defendants had clear notice that Aboriginal title to portions of the Claim Area was directly at issue in these proceedings. Both Defendants joined issue with the Plaintiff on the location and extent of Aboriginal title in the Claim Area. In the words of the Trial Judge, the "central question" at trial was "do aboriginal rights and aboriginal title exist for Tsilhqot'in people anywhere in the claim area …"[25]

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[23] British Columbia's Fresh Statement of Defence, filed March 9, 2001 [underscore added].
[24] Joint Appeal Record, v. I, p. 021 [underscore added].
[25] *William v. British Columbia*, 2004 BCSC 964, 30 B.C.L.R. (4th) 382 at para. 5 [underscore added].

25. From the outset of the litigation and throughout the course of the trial, all Parties and the Trial Judge were alive to the real issue that was raised in the litigation: where does Aboriginal title exist in the Claim Area? For five years, over 339 days of trial, the Parties and the court explored this question in exhaustive detail. The Defendants were well aware that Aboriginal title might be established to *portions* of the Claim Area[26] and took all precautions to test, minimize and limit the geographical reach of the use and occupation evidence tendered by the Plaintiff.[27]

2. No prejudice to the Defendants from declarations of Aboriginal title

26. Canada cannot be prejudiced, at the conclusion of a trial in which the nature and extent of Aboriginal title was the central issue, by declarations of Aboriginal title shaped by the Trial Judge's findings from the resulting evidentiary record. On this point, the Plaintiff relies on his submissions in the Plaintiff's Appeal.

27. Canada's submissions only serve to underscore the errors made by the Trial Judge on the issue of prejudice. First, like the Trial Judge, Canada relies heavily on the decision of the English Court of Appeal in ***Biss***. However, *Biss* has been explicitly rejected as a general statement of the law by courts and commentators throughout the Commonwealth. The law recognizes that, particularly in disputes over possession of real property, it may not be realistic or even possible to plead exact boundaries from the outset. Frequently it is "only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted".[28]

28. The law does not require the Plaintiff to plead alternative claims to every possible variation of the individual "definite tracts" of land to which Aboriginal title might

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[26] See, *e.g.*: Transcript, v. 13, p. 2246, lines 18-35; v. 36, p. 6142, line 47 – p. 6143, line 18; v. 45, p. 4618, line 44 – p. 7619, line 40; p. 7628, lines 8-12; v. 56, p. 9470, line 23 – p. 9472, line 24; v. 111, p. 19302, lines 35 – 40; p. 19309, line 21 – p. 19310, line 16; p. 19311, lines 16-41.
[27] See, *e.g.*: Transcript, v. 17, p. 2893, lines 15-23, p. 2894, lines 14-22; v. 26, pp. 4307-4308; v. 27, p. 4614, line 2 – p. 4615, line 47; v. 53, p. 8995, line 37 – p. 8996, line 10; p. 9002, lines 16-30.
[28] Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf*, *The Declaratory Judgment,* 3rd ed. (London: Sweet & Maxwell, 2002) at 284. See Plaintiff's Appeal Factum, paras. 115-37 and authorities cited therein.

eventually be proved at trial. As argued in the Plaintiff's Appeal,[29] this would impose an impossible burden on claimants to Aboriginal title. The Trial Judge was wrong in law to require "notice of such tracts"[30] in the pleadings as a precondition to declaratory relief.

29. Canada's submissions amply illustrate this point. Canada's central objection is that the Plaintiff did not plead specific tracts of land within the Claim Area to which Aboriginal title might be proved at trial. At the same time, Canada complains that the Proven Title Area described by the Trial Judge, based on his extensive review of the evidence, was not "referred to in the pleadings" and was "not even the same boundaries of land referred to in the plaintiff's reply argument".[31]

30. Thus, on Canada's theory, even if the Plaintiff **had** pleaded alternative claims of Aboriginal title to smaller tracts of land within the Claim Area (such as the tracts described in the Plaintiff's reply argument), the Plaintiff would **still** be denied declaratory relief, because the Trial Judge found Aboriginal title along different lines. According to Canada, it would be improper for the Trial Judge to issue declarations in this manner "on a case to which the defendants had no opportunity to respond".[32]

31. In essence, Canada argues that unless the Plaintiff pleads from outset of trial the exact boundaries of the tracts of land to which the Trial Judge will find Aboriginal title at its conclusion, the Defendants are unfairly prejudiced and no declarations of Aboriginal title can issue. This position was apparently accepted by the Trial Judge. However, it is clearly wrong in law, not least because it leads to a manifestly unjust and absurd result.

32. One can never know with precision what a court will decide on the evidence. This is not a case in which the Plaintiff can refer to land title surveys or subdivisions; rather, the Trial Judge must hear all of the occupation evidence led at trial and then do his or her best to decide where Aboriginal title is established. According to Canada's

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[29] See Plaintiff's Appeal Factum, paras. 138-51.
[30] Trial Decision, Joint Appeal Record, v. II(a), p. 188-189, para. 111.
[31] Canada's Appeal Factum, para. 10.
[32] Canada's Appeal Factum, para. 55; see also, paras. 91-93.

argument, even if the Plaintiff had accurately pleaded 90% of the area described as the Proven Title Area by the Trial Judge at the end of the trial, the Plaintiff would still be denied declaratory relief. The injustice of this approach is clear.

33. This result is not compelled by the authorities cited by Canada. As set out in argument on the Plaintiff's appeal, the reliance of Canada and the Trial Judge on *Delgamuukw* is misplaced. In fact, *Delgamuukw* demonstrates the flexibility courts have adopted to pleadings challenges in an area of law that is as complex and rapidly evolving as Aboriginal title litigation.[33]

34. Moreover, Macfarlane J.A. in *Delgamuukw* expressly noted that "this is not a case in which the Plaintiffs seek a declaration narrower in terms than those requested at trial ..."[34] MacFarlane J.A. in *Delgamuukw* made it clear that the Court was not considering the issue which arises on these appeals; *i.e.* whether or not the Court can grant a declaration narrower in terms than those requested at trial. Indeed, in that decision, Lambert J.A. expressly stated that the Court **could** make a declaration in narrower terms than those requested in the prayer for relief.[35]

35. Canada also relies on ***Lax Kw'alaams Indian Band v. Canada (Attorney-General)***. *Lax Kw'alaams* is distinguishable from the present appeal on two important points. First, *Lax Kw'alaams* concerned late-stage attempts to introduce entirely new ("lesser" or "intermediate") Aboriginal rights claims. By contrast, the present case does not concern claims to new Aboriginal rights. The Plaintiff has consistently claimed the same **right** throughout trial (Aboriginal title) and the only uncertainty is its **geographical extent**. This was the central question at trial and, in fact, can **only** be determined by the Trial Judge with the benefit of the record generated at trial.

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[33] See Plaintiff's Appeal Factum, paras. 152-68.
[34] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (B.C.S.C.) at 27.
[35] *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97 (B.C.C.A.) at paras. 872-73.

36. Second, while a trial judge's findings of prejudice are undoubtedly entitled deference, Madam Justice Newbury was careful in *Lax Kw'alaams* to point out the limits of appellate deference:

> … [The Trial Judge] considered that it was too late for the appellants to seek such a lesser right at the late stage at which it was raised. This was a 'judgement call' which the trial judge was uniquely positioned to make ...
>
> Since the appellants have not shown that the trial judge erred in law or exercised her discretion on a wrong principle, I would not accede to this ground of appeal.[36]

37. In the present case, the Trial Judge committed a clear error of law that warrants appellate intervention. The Trial Judge's findings of prejudice to the Defendants rest solely on his mistaken belief that the Plaintiff was required to plead the exact boundaries of the lesser, included tracts of the Claim Area to which Aboriginal title would be established at the conclusion of trial, so that the Defendants would have "notice of such tracts".[37] As argued above, and in the Plaintiff's appeal,[38] this view of the law cannot be correct, as it would impose an impossible burden on claimants to Aboriginal title.

38. On a proper understanding of the law, the Trial Judge's concerns about prejudice to the Defendants fall away. The Defendants had clear and unequivocal notice that the Plaintiff claimed exclusive Tsilhqot'in occupation throughout the Claim Area. The nature and extent of Tsilhqot'in occupation was the central issue at trial, as both Defendants acknowledged in their pleadings and at trial. Ultimately, the Trial Judge delineated the Proven Title Area based on the "boundaries that are shaped by the evidence".[39]

39. This is the proper approach at law, and the only practical and workable approach in cases of this scale and complexity. After an extensive trial in which the location, extent and intensity of Tsilhqot'in occupation throughout the Claim Area were thoroughly

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[36] *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2009 BCCA 593, [2009] B.C.J. No. 2556 at paras. 62-63 [emphasis added].
[37] Trial Decision, Joint Appeal Record, v. II(a), p. 188-189, para. 111.
[38] See Plaintiff's Appeal Factum, paras. 138-51.
[39] Trial Decision, Joint Appeal Record, v. II(b), p. 466, para. 958.

litigated, the Defendants cannot be said to be prejudiced by declarations of Aboriginal title that are shaped by the resulting evidentiary record.

40. The direction of the Hong Kong Court of First Instance in ***Lau Wing Hong & Others v. Wong Wor Hung & Another*** is particularly instructive on this point:

> It cannot be overlooked that, in an adverse possession case, the pleaded factual issues may permit of several possible variations and permutations as to the edges or boundaries of the disputed land at the material time. It would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved. It would be like pleading all the results of the peeling of an onion - in which every single layer generates a slightly different and smaller variation of the one before it. The real test is whether there is genuine prejudice caused by this ambulatory approach. Here there was none. It will always be a matter of degree; but the Court should not indulge pedantry as being the same thing as prejudice.[40]

41. Finally, Canada has not ever suggested, at trial, or to date in this Court, how the pleadings could be amended to cure the "prejudice" of which it complains. Canada has made it clear that its response to any amendments by the Plaintiff would have included significant litigation steps bordering on re-starting the entire trial – *e.g.* "new particulars, discovery and other investigation in relation to the smaller definite tracts of land".[41]

42. In Canada's submission, the 45 days of discovery and 14 days of cross-examination endured by Roger William were not sufficient. The exhaustive examination of each Tsilhqot'in witness on the particular location of use and occupation of the Claim Area was not sufficient. The 339 days of trial were not sufficient. The absurdity of Canada's position is apparent. In effect, Canada argues that new pleadings and a new trial would have been required. Yet Canada argues no new trial should be allowed because the dismissal should have been "with prejudice". Canada's argument is intrinsically contradictory.

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[40] *Lau Wing Hong & Others v. Wong Wor Hung & Another* [2006] 4 HKLRD 671 at para. 145 [emphasis added].
[41] Canada's Appeal Factum, para. 32.

3. Conclusions on the Preliminary Issue

43. Because the Trial Judge was wrong on the preliminary issue, and pursuant to his express direction, his findings of Aboriginal title bind the parties:

> It should be borne in mind that this view of Tsilhqot'in Aboriginal title is not binding on the parties given the conclusion I have reached in Section 4 on the preliminary issue. If I am wrong on this preliminary issue, then my conclusion on Tsilhqot'in Aboriginal title, insofar as it describes land within Tachelach'ed and the Trapline Territory, is binding on the parties as a finding of fact in these proceedings.[42]

44. If this Honourable Court agrees with the Plaintiff that the Trial Judge had the discretion to grant declarations of Aboriginal title, then Canada's appeal is moot. Accordingly, the Plaintiff submits the balance of this factum in the alternative from his central position that the Trial Judge erred by dismissing the claims for Aboriginal title on the preliminary pleadings issue.

B. In the alternative, the Trial Judge was not bound to dismiss the Plaintiff's Aboriginal title claims "with prejudice"

45. Canada argues that the Trial Judge had no discretion to make a "without prejudice" determination, because the rule in *Henderson* requires a plaintiff to bring forward all the claims he intends to advance. According to Canada, because the Plaintiff purportedly chose to bring an "all or nothing" claim, the rule in *Henderson* prohibits him from bringing subsequent claims for Aboriginal title to "portions" of the Claim Area.

46. The Plaintiff's primary position is that he did not advance an "all or nothing" claim and his pleadings have always included alternative claims to lesser, included relief, as argued above and in the Plaintiff's Appeal.

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[42] Trial Decision, Joint Appeal Record, v. II(b), p. 468-469, para. 961.

47. In the alternative, should this Court decide that the Plaintiff's claim was "all or nothing", the *Henderson* rule does not operate to bar the Plaintiff from bringing subsequent Aboriginal title claims to portions of the Claim Area, for the reasons set out below.

1. *Res Judicata*, Cause of Action Estoppel and Issue Estoppel

48. To understand the proper scope of the *Henderson* rule, it is necessary to review the doctrine of *res judicata* to which it relates.

49. The doctrine of *res judicata* is part of the general law of estoppel. *Res judicata* has two distinct forms: cause of action estoppel and issue estoppel.[43] They are distinguished as follows:

> In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding. And cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.[44]

Or put otherwise:

> … a dispute once judged with finality is not subject to relitigation ... The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel) …[45]

50. Critically, as discussed following, the *Henderson* rule applies **only** to cause of action estoppel and not to issue estoppel.

2. Cause of Action Estoppel and the *Henderson* Rule

51. The elements of cause of action estoppel are as follows: (1) there must be a final decision of a court of competent jurisdiction in the prior action; (2) the parties to the

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[43] Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at 1; *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 20.
[44] Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at 1.
[45] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 20 [underscore added].

subsequent litigation must have been parties to or in privy with the parties to the prior action; (3) the cause of action in the prior action must not be separate and distinct; and (4) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[46]

52. The last element of the test for cause of action estoppel expresses what is known as the *Henderson* rule, from the seminal English case decided in 1843:

> ... [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the Parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time …[47]

53. It is important to note that while the *Henderson* Rule applies in the context of cause of action estoppel, from its inception the rule has recognized an exception from its application "in special cases". This exception is discussed later in these submissions.

3. The *Henderson* Rule does not apply to issue estoppel

54. In ***Danyluk v. Ainsworth Technologies Inc.***, the leading authority on issue estoppel, the Supreme Court of Canada described the elements of issue estoppel as follows:

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[46] *Bjarnarson v. Manitoba (Government of),* [1987] 4 W.W.R. 645, 38 D.L.R. (4th) 32 at 3-4, citing *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621. *Grandview (Town) v. Doering* is the leading case on cause of action estoppel.

[47] *Henderson v. Henderson* (1843), 3 Hare 100 at 115, 67 E.R. 313 [underscore added].

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.[48]

55. As this test suggests, unlike cause of action estoppel, the doctrine of issue estoppel is **not** subject to the *Henderson* rule; that is, issue estoppel operates as a bar only to the re-litigation of a right, question or fact that was "**distinctly put in issue and directly determined**"[49] in a previous proceeding, and not more broadly to all matters that could have been raised with reasonable diligence.

56. The Court in ***Danyluk*** expressly confirmed this key distinction between cause of action and issue estoppels:

> … This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.[50]

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[48] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 24, quoting Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 at 422 [underscore in SCC judgment]; see also: *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at 254.

[49] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 24, quoting Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 at 422 [bolding added, underscore in SCC judgment].

[50] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 23 [underscore added]; see also: *Grandview v. Doering*, [1976] 2 S.C.R. 621 at 635.

In other words, the same question must have been decided in an early proceeding rather than could have been decided for issue estoppel to apply. The *Henderson* rule has no application.

4. Application to the Plaintiff's Aboriginal title claims

57. The dismissal of the Plaintiff's Aboriginal title claims "without prejudice" to renewed claims for smaller portions within the Brittany Triangle and Trapline Territory is governed by the principles of issue estoppel.

58. This is because the question of Aboriginal title to the Brittany Triangle and Trapline Territory was an essential part of the factual foundation to the cause of action raised in this case (damages and associated relief for forestry infringements to Aboriginal title) but not the cause of action in itself. This same issue could arise in the future in numerous other contexts (*e.g.* mining approvals, leases, other forestry licences, etc.).

59. Indeed, this Court has confirmed that an action seeking a declaration of Aboriginal rights, without pleading an infringement, can be struck out as disclosing no reasonable cause of action.[51] This direction makes it clear that determinations of Aboriginal rights, including Aboriginal title, are issues material to certain causes of action, but do not constitute distinct causes of action in themselves.

60. Because the question of Aboriginal title is governed by issue estoppel, the *Henderson* rule has no application. Issue estoppel extends only to the re-litigation of facts or questions that were "distinctly put in issue and directly determined"[52] at trial.

61. If Canada is correct that the Plaintiff advanced an "all or nothing" claim to Aboriginal title (which the Plaintiff denies, as set out above), then the only relevant issue

[51] *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 80 B.C.L.R. (3d) 212 (C.A.).
[52] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 24.

"distinctly put in issue and directly determined" at trial was whether Aboriginal title was established to the Trapline Territory or Tachelach'ed as a whole. According to Canada, the question of whether Aboriginal title exists to smaller portions of the Claim Area was never distinctly put in issue by the Plaintiff or directly determined by the Trial Judge.

62. Accordingly, as a matter of law, the Plaintiff is not estopped or barred in any way from asserting Aboriginal title to portions of the Trapline Territory or Tachelach'ed in a subsequent proceeding raising a distinct cause of action. The Trial Judge's "without prejudice" decision on this issue properly describes the legal effect of his ruling.

5. No Final Decision on the Merits

63. Moreover, the Trial Judge's dismissal of the Plaintiff's Aboriginal title claims could not support either form of estoppel (*i.e.* cause of action estoppel or issue estoppel) because his determination lacks an essential ingredient: a final decision on the merits of the controversy.

64. A leading text offers the following summary of the law with respect to issue estoppel:

> For the doctrine of issue estoppel to apply, there must be a decision on the question, and the decision must be rendered in a contentious manner. There must be at least two parties adverse in interest and there must be a decision in the first proceeding in favour of one party against another. Of necessity, one party must be vexed …
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> …
>
> The decision must be a final decision. A final decision for the purposes of issue estoppel is a decision which conclusively determines the question between the parties … It must be entirely clear from the decision that the decision is a final decision which disposes, once and for all, of the question decided.[53]

[53] Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at 83, 86 [underscore added, citations omitted].

The same author describes the "finality" requirement in respect of cause of action estoppel as follows:

> Generally speaking, cause of action estoppel is limited to issues which can be fairly regarded as having been disposed of on their merits, on admission, or by compromise.
>
> …
>
> A decision is not on the merits when it is based merely on rules of procedure or on technicalities arising from mispleading rather than substantive law.[54]

65. ***Black's Law Dictionary*** offers a similar definition:

> **merits. (18c) 1.** The elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure <trial on the merits> …[55]

66. The Trial Judge dismissed the Plaintiff's claim based on what he perceived as a technical defect in the pleadings. As set out in the passage above, matters of estoppel should be determined on the basis of substance and not form. Courts have held that no estoppel arises from the insufficiency of a declaration or other defect in pleadings.[56] This principle finds recognition as early as the 1893 decision of the B.C. Supreme Court in ***Harper v. Cameron***, where the Court stated, "[a] judgment recovered for a defect in pleadings, and not on the merits … is no bar to another action".[57]

67. The Trial Judge's dismissal of the Aboriginal title claims on a "without prejudice" basis signals, in itself, that the Trial Judge did not intend his determination as a decision of the controversy on its merits or to operate as *res judicata* on the merits.[58]

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[54] Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at 156-57.
[55] B. Garner (ed.), *Black's Law Dictionary,* 9th ed. (St. Paul: Thomson, 2009) at 1079.
[56] Donald J. Lange, *The Doctrine of Res Judicata in Canada,* 2nd ed. (Markham: LexisNexis Canada Inc., 2004) at 156-57.
[57] *Harper v. Cameron*, 1893 CarswellBC 17, 2 B.C.R. 365 (B.C.S.C.) at para. 12, citing *Baker v. Booth*, U.C. Jur. 407.
[58] See, *e.g.*, *Nancy L. Palmer et al. v. Hilda Rucker et al.*, (1972), 289 Ala. 496, 268 So. 2d 773, paras. 6-7; *Ternoey v. Goulding* (1982), 35 O.R. (2d) 29, 132 D.L.R. (3d) 44 (Ont. C.A.) at paras. 24-27.

68. The lack of a "final" determination of the Plaintiff's entitlement to damages for infringement of Aboriginal title is highlighted by the Trial Judge's advisory opinion, which concluded that: Aboriginal title was established on the evidence; the resources on those lands belonged to the Tsilhqot'in people; and the unilateral removal of those resources was unjustified and without statutory or constitutional authority. In the words of the Trial Judge,

> I have found there is land inside and outside the Claim Area over which Tsilhqot'in Aboriginal title would prevail. Thus, any dismissal of the claim for damages is without prejudice to the right to renew these claims specific to Tsilhqot'in Aboriginal title land. The resources on Aboriginal title land belong to the Tsilhqot'in people and the unjustified removal of these resources would be a matter for appropriate compensation. It is not my intention to dismiss a valid claim for compensation where such a claim can be tied to Tsilhqot'in title land.[59]

69. By expressly making his decision "without prejudice", the Trial Judge confirmed his conclusion, based on his full appreciation of the conduct of the trial, that his decision rested on what he perceived as a technical defect in the pleadings, and did not represent a final decision on the merits of the claims. The Trial Judge was particularly well situated to make a determination of this nature.

70. Moreover, the Trial Judge's "without prejudice" decision was driven by considerations of justice and fairness in the circumstances. Courts retain the discretion to avoid the strict application of *res judicata* even where (unlike here) the core elements of the doctrine are satisfied, where "special circumstances" militate against its application.[60] As expressly noted by the Trial Judge, such circumstances prevail here. This exception to *res judicata* is discussed later in the Plaintiff's submissions.

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[59] Trial Decision, Joint Appeal Record, v. II(b), p. 599, para. 1336.
[60] See, *e.g.*, *Henderson v. Henderson* (1843), 3 Hare 100 at 115, 67 E.R. 313; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 64.

C. If the Trial Judge was correct in dismissing the Plaintiff's Aboriginal title claims, he properly made this dismissal on a "without prejudice" basis

71. Trial judges have the discretion to dismiss an action on a "without prejudice" basis.[61] If the Trial Judge was compelled to dismiss the Plaintiff's Aboriginal title claims based on the pleadings issue (which the Plaintiff denies), he was fully justified in making this dismissal "without prejudice" to subsequent claims of Aboriginal title to portions of the Claim Area.

72. Canada's efforts to show that the Trial Judge unreasonably exercised his discretion are, for the most part, disguised attempts to re-argue the facts of the case – or, even worse, attempts to argue this appeal based on the facts of completely different cases. Canada's position is also premised on a discredited "postage stamp" theory of Aboriginal title that the Trial Judge properly rejected.

73. Moreover, courts have the jurisdiction to temper the application of *res judicata* to ensure fairness and justice in the circumstances of a particular case. The Trial Judge acted appropriately by confirming his decision was not intended to work the profound injustice of permanently barring Tsilhqot'in peoples from seeking legal recognition of their rights in the Claim Area.

1. This case is not *Bernard; Marshall*.

74. Canada suggests throughout its factum that the Plaintiff's case is indistinguishable from the Aboriginal title claims rejected in *Bernard* and *Marshall* and accordingly should be dismissed outright. In its view, "[w]hile all cases turn on their

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[61] See, *e.g.*, *Drummond Mines Co. v. Fernholm*, [1906] O.J. No. 788, 8 O.W.R. 864 (Ont. H.C.J.). For examples of U.S. authorities, see: E. H. Schopflocher, "Provision that judgment is 'without prejudice' or 'with prejudice' as affecting its operation as *res judicata*", 149 A.L.R. 553 (cumulative supplement, originally published in 1944) and authorities cited therein.

particular facts, similar situations should not produce radically different results".[62] Canada argues that the Trial Judge's advisory opinion in this case is "implausible"[63] in light of the *Bernard* and *Marshall* decisions.

75. This case, however, is not *Marshall* or *Bernard*. In Canada's review of these earlier cases, it has glossed over and selectively omitted the fundamental differences between these earlier cases and the present appeal. As described below, the circumstances of *Marshall* and *Bernard* could not be more diametrically opposed to the record supporting the Trial Judge's findings of Aboriginal title in the Claim Area.

a. *Marshall* and *Bernard* were expansive Aboriginal title claims to entire traditional territories; the Plaintiff brought a selective claim to core traditional lands.

76. First, the Aboriginal defendants in *Marshall* and *Bernard* advanced what might fairly be described as a "territorial" theory of Aboriginal title. In both cases, the defendants relied on little more than a general Mi'kmaq "presence" across a vast expanse of land (in each case, several times the size of the Claim Area at issue in this litigation) as establishing Aboriginal title, without directing this evidence at showing actual, regular use and occupation throughout this vast territory.

77. For example, the defendant in *Bernard* asserted that the Crown's admission that "the Miramichi was Mi'kmaq territory"[64] and that the Mi'kmaq are "indigenous to the Miramichi River system"[65] sufficed *in itself* to demonstrate the exclusive physical occupation necessary to establish Aboriginal title. The defendants in *Marshall* similarly sought to establish Aboriginal title to the whole of Nova Scotia on the grounds that "Nova Scotia was part of the 'traditional lands' of the Mi'kmaq".[66]

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[62] Canada's Appeal Factum, para. 74.
[63] Canada's Appeal Factum, para. 72.
[64] *R. v. Bernard*, 2003 NBCA 55, 230 D.L.R. (4th) 57 at para. 9 (*per* Daigle J.A.).
[65] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 94.
[66] *R* v. *Marshall*, 2002 NSSC 57, [2002] N.S.J. No.98 at para. 74.

78. In short, the Aboriginal defendants in *Marshall* and *Bernard* equated proof of traditional territory with proof of Aboriginal title[67] and made almost no effort to lead evidence showing actual, regular use and occupation of the territory.

79. The Plaintiff took the opposite approach to proving Aboriginal title. One must consider the origins of this action to appreciate the reason the Claim Area was selected for proof of Aboriginal title. This litigation was "provoked by proposed forestry activities" in two regions of Tsilhqot'in traditional territory, the Trapline Territory and Tachelach'ed (the Brittany Triangle).[68] The "initial flashpoint" was clear-cut logging proposed for the Trapline Territory in the early 1980s.[69] Later, the Province issued forest licenses to various forest companies permitting logging within the Trapline Territory and Tachelach'ed.[70] These lands ultimately comprised the Claim Area in this defensive action against proposed logging.

80. The Plaintiff did not advance a claim to Aboriginal title to the entirety of Tsilhqot'in traditional territory. In fact, the Claim Area comprises only about five percent of what is considered Tsilhqot'in traditional territory.[71] In delineating his Aboriginal title claim, the Plaintiff selected a small but critical portion of the lands traditionally used and occupied by the Tsilhqot'in Nation,[72] at the core of Tsilhqot'in traditional lands. As found by the Trial Judge, the Claim Area lands "fall well within the much broader area described as Tsilhqot'in traditional territory".[73]

81. In other words, this was not a broad and sweeping claim to an expansive traditional territory (as in both *Bernard* and *Marshall*), but rather a selective Aboriginal title claim to core traditional lands of utmost cultural significance. In the words of the Trial Judge, describing the Proven Title Area, these are tracts of land that have provided

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[67] See, *e.g. R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78 at para. 115 (*per* Cromwell J.A.).
[68] Trial Decision, Executive Summary, Joint Appeal Record, v. II(a), p. 149.
[69] Trial Decision, Joint Appeal Record, v. II(b), p. 582, para. 1295.
[70] Trial Decision, Joint Appeal Record, v. II(a), p. 178-180, paras. 69-70, 75-78.
[71] Trial Decision, Joint Appeal Record, v. II(a), p. 362, para. 623.
[72] Trial Decision, Joint Appeal Record, v. II(a), p. 363, para. 626.
[73] Trial Decision, Joint Appeal Record, v. II(a), p. 362, para. 623.

"cultural security and continuity to the Tsilhqot'in people for better than two centuries"[74] and that "ultimately defined and sustained them as a people".[75]

82. Nor did the Plaintiff rest his Aboriginal title claim on the mere fact that the Claim Area falls within Tsilhqot'in traditional lands. He asserted Aboriginal title based on **proof of regular and exclusive occupation** of the lands comprising the Claim Area prior to and at sovereignty – and he led extensive evidence to substantiate this claim. As described by the Trial Judge, the Plaintiff sought to "demonstrate regular use of all of the various geographical areas that comprise the Claim Area pursuant to an organized pattern of occupation" as mandated by the Supreme Court of Canada not only in *Delgamuukw*, but in its judgment in *Marshall; Bernard*.[76] The Plaintiff's claim to Aboriginal title could not be more different from the broad "territorial" claims advanced in *Marshall* and *Bernard.*

b. No oral history evidence of ancestral use and occupation was led in *Marshall* and *Bernard*

83. The supporting evidence led by the Plaintiff to establish Aboriginal title also stands in stark contrast to the record in *Marshall* and *Bernard*. The defendants in the latter cases sought to establish Aboriginal title to territories far more vast than the Claim Area in the present case, on the basis of comparably negligible evidence. This paucity of evidence is attributable to their "territorial" theory of Aboriginal title.

84. For example, although the Aboriginal title claim in *Bernard* extended across one-quarter to one-third of New Brunswick (several orders of magnitude larger than the Claim Area in the present case),[77] the Provincial Court heard **less than two weeks of**

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[74] Trial Decision, Joint Appeal Record, v. ii(b), p. 616, para. 1376.
[75] Trial Decision, Joint Appeal Record, v. ii(b), p. 616, para. 1377.
[76] Trial Decision, Joint Appeal Record, v. ii(a), p. 186, paras. 104-5.
[77] *R. v. Bernard*, 2003 NBCA 55, 230 D.L.R. (4th) 57 at para. 318 (*per* Robertson J.A.). New Brunswick covers an area of approximately 73,000 square kilometres: http://en.wikipedia.org/wiki/New_brunswick. By contrast, the Claim Area is approximately 4,400 square kilometres (or about 0.06% of the size of New Brunswick).

evidence and argument on the question of Aboriginal title.[78] The defendants in *Marshall* claimed Aboriginal title to all of Nova Scotia, an area of about 55, 284 square kilometres[79] (*i.e.* well over 12 times the size of the Claim Area in the present case). The *Marshall* trial took approximately 18 months in Provincial Court.[80]

85. Remarkably, despite the breadth of the Aboriginal title claims advanced, oral tradition evidence was heard from only **one** Mi'kmaq witness (Chief Augustine) in each case. Moreover, Chief Augustine's evidence was very general in nature.[81] It appears that **no Aboriginal witnesses provided oral history evidence** of personal and ancestral use of the lands in issue.

86. This can be contrasted with the present case, where literally years of trial have been devoted to leading evidence from numerous Tsilhqot'in witnesses detailing ancestral use and occupation of the lands that comprise the Claim Area: the settlements, the regularly exploited hunting, fishing and gathering grounds, the trail networks, *etc*. Twenty-four Tsilhqot'in witnesses testified before the Court, and five additional Tsilhqot'in witnesses provided evidence by affidavit alone. The Trial Judge confirmed that "all of the witnesses who related oral tradition and oral history evidence at trial did so to the best of their abilities".[82] This testimony was corroborated by the historical record and expert opinion.

c. The Aboriginal title claims in *Marshall* and *Bernard* failed because the trial courts lacked precisely the evidentiary record that was before the Trial Judge in this case

87. Contrary to Canada's assertions, the Aboriginal title claims in *Bernard* and *Marshall* did not fail because seasonal occupation of hunting grounds can never

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[78] *R. v. Bernard*, 2003 NBCA 55, 230 D.L.R. (4th) 57 at para. 315 (*per* Robertson J.A.).
[79] See: http://en.wikipedia.org/wiki/Nova_Scotia.
[80] *R* v. *Marshall*, 2002 NSSC 57, [2002] N.S.J. No.98 at para. 2.
[81] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at paras. 19, 101, 108-10.
[82] Trial Decision, Joint Appeal Record, v. II(a), p. 220-221, para. 196.

establish Aboriginal title (in fact, the Supreme Court of Canada held to the contrary).[83] Rather, those claims failed because the trial judge in each case simply did not have **any persuasive evidence** demonstrating where the regularly exploited Mi'kmaq hunting grounds were actually located within the vast territories claimed by the Mi'kmaq defendants.

88. Lordon J. in *Bernard* expressly rejected as mere "speculation"[84] the expert evidence as it related to Mi'kmaq use and occupation of the Sevogle watershed, where the impugned harvesting occurred. He also rejected the only oral tradition evidence offered to establish Mi'kmaq use and occupation of the Sevogle watershed, by Chief Augustine. Lordon J. concluded that this testimony was "in conflict with much of the historical evidence" and that Chief Augustine was "uncertain as to when and to what extent the Miramichi Mi'kmaq might have utilized that area for their traditional activities and that it may very well have been subsequent to 1760".[85]

89. Accordingly, Lordon J. was left with **no persuasive evidence** of actual Mi'kmaq use and occupation of the Sevogle watershed, where the cutting occurred. He accepted that the Miramichi Mi'kmaq had well-established areas of occupation by sovereignty (now included within reserves). However, he concluded that "**[t]o what extent they would disperse from these areas and to where is uncertain**".[86]

90. It was on this basis that Lordon J. made his final holding with respect to occupation of the Sevogle watershed:

> Given the evidence before me, I cannot conclude that the land at the locus in quo was used on a regular basis for hunting and fishing. Such trips made there in 1759 would have been occasional at best. Occasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land.[87]

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[83] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 62, 66.
[84] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 100.
[85] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 101.
[86] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 100 [underscore added].
[87] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 107 [underscore added].

The Aboriginal title claims in *Bernard* failed for lack of evidence that the subject lands were “used on a regular basis for hunting and fishing”.

91. The trial decision in *Marshall* emphasized the same fatal lack of evidence. Curran J. concluded that the expert evidence[88] and the general oral tradition evidence of territoriality provided by Chief Augustine[89] were of little assistance to the court in identifying locations that were regularly occupied at sovereignty. He concluded that he could not make findings of Aboriginal title because of the absence of any persuasive evidence that would assist him in identifying whether the cutting sites fell within lands regularly used by the Mi’kmaq at sovereignty:

> The line separating sufficient and insufficient occupancy for title seems to be between nomadic and irregular use of undefined lands on the one hand and regular use of defined lands on the other. Settlements constitute regular use of defined lands, but they are only one instance of it. There is no persuasive evidence that the Mi'kmaq used the cutting sites at all, let alone regularly.[90]

92. Curran J.’s summary of his findings on Aboriginal title underscores the lack of any persuasive evidence identifying regular Mi’kmaq hunting grounds:

> To sum up regarding the claim of Aboriginal title:
>
> a) The Mi'kmaq of 18th century Nova Scotia could be described as "moderately nomadic" as were the Algonquins in *Côté*, *supra*. The Mi'kmaq, too, moved with the seasons and circumstances to follow their resources. They did not necessarily return to the same campsites each year. Nevertheless, for decades before and after 1713 local communities on mainland Nova Scotia stayed generally in the areas where they had been.
>
> b) On the mainland the Mi'kmaq made intensive use of bays and rivers and at least nearby hunting grounds. The evidence is just not clear about exactly where those lands were or how extensive they were. It is most unlikely all the mainland was included in those lands. There just weren't enough people for that.

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[88] See, for example: *R* v. *Marshall,* 2001 NSPC 2, 191 N.S.R. (2d) 323 at para. 80.
[89] *R* v. *Marshall,* 2001 NSPC 2, 191 N.S.R. (2d) 323 at paras. 56-63.
[90] *R* v. *Marshall,* 2001 NSPC 2, 191 N.S.R. (2d) 323 at para. 141 [underscore added].

> c) As for Cape Breton, there simply is not enough evidence of where the Mi'kmaq were and how long they were there to conclude that they occupied any land to the extent required for aboriginal title.
>
> d) In particular, there is no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites where these charges arose, either on the mainland or in Cape Breton. The Defendants have not satisfied me on the balance of probability that their ancestors had aboriginal title to those sites.[91]

93. Notably, despite describing the Mi'kmaq as "moderately nomadic", the trial judge acknowledged that the Mi'kmaq made "intensive use of … at least nearby hunting grounds" on the mainland, a threshold that sufficed in his view to establish Aboriginal title. The problem, as he noted, was that "[t]he evidence is just not clear about exactly where those lands were or how extensive they were".

94. *Marshall* and *Bernard* both concerned timber harvesting by Aboriginal defendants in the context of criminal prosecutions. The defence in both cases was essentially that the cutting sites fell within the traditional territory of the Mi'kmaq. There was no persuasive evidence demonstrating actual use and occupation of the cutting sites.

95. In the present case, the Trial Judge had the benefit of an abundant and detailed record documenting the nature, extent, intensity and location of Tsilhqot'in use and occupation throughout the Claim Area. In the words of the Trial Judge, "[t]he seasonal semi-nomadic round was vividly recounted by Tsilhqot'in elders".[92] This included extensive oral history evidence from close to 30 witnesses, describing personal, familial and ancestral patterns of land use and occupation throughout the Claim Area. The record included voluminous documentary evidence, extensive mapping of land use and occupancy, expert archaeological testimony, and anthropological evidence detailing specific areas of Tsilhqot'in occupation within the Claim Area – all of which was rigorously tested and scrutinized for over 300 trial days.

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[91] *R* v. *Marshall,* 2001 NSPC 2, 191 N.S.R. (2d) 323 at para. 142 [underscore added]; see also paras. 80, 131.
[92] Trial Decision, Joint Appeal Record, v. II(a), p. 282, para. 381.

d. Occupation in *Bernard* was not exclusive

96. The difference in outcome between the Plaintiff's claim and those advanced in *Marshall* and *Bernard* is entirely explicable for the reasons set out above – *i.e.* the Plaintiff in this case led the evidence required to substantiate an Aboriginal title claim.

97. Another key factor distinguishing this case from *Bernard* is the requirement of exclusive control over land to establish Aboriginal title. The trial judge in *Bernard* concluded that "the Mi'kmaq had **neither the intent nor the desire to exercise exclusive control**, which … is fatal to the claim for Aboriginal title".[93] He based this conclusion on his findings that the Mi'kmaq did not consider their hunting territories to be exclusive, but in fact shared them with others, including the Maliseet, a neighbouring tribe.[94] The Supreme Court of Canada emphasized this "fatal" finding in upholding the trial judge's dismissal of the Aboriginal title claim in *Bernard*.[95]

98. By contrast, the Trial Judge explicitly confirmed that the Tsilhqot'in people exclusively controlled the Proven Title Area, at the very least, to the standard expressed in *Delgamuukw* and *Bernard; Marshall*. As found by the Trial Judge, "[t]his is the land over which they held exclusionary rights of control";[96] "[o]thers were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people";[97] and Tsilhqot'in people were in exclusive control of that area at the time of sovereignty assertion".[98] These findings are entitled to deference from the appellate court.

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[93] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 110 (emphasis added).
[94] *R.* v. *Bernard*, [2000] 3 C.N.L.R. 184, [2000] N.B.J. No. 138 (N.B. Prov. Ct.) at para. 109.
[95] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 81.
[96] Trial Decision, Joint Appeal Record, v. II(b), p. 468, para. 960.
[97] Trial Decision, Joint Appeal Record, v. II(b), p. 460, para. 938.
[98] Trial Decision, Joint Appeal Record, v. II(b), p. 461, para. 943 [underscore added]. See also Trial Decision, Joint Appeal Record, v. II(a): p. 207, para. 156; p. 226-227, para. 221; p. 232, para. 238; p. 241, para. 269; p. 248, para. 286; p. 263, para. 331; p. 293, para. 426; p. 295, para. 431; p. 296-297, para. 436.

e. The Mi'kmaq and the Tsilhqot'in have very different traditional patterns of occupation

99. The above review illustrates the dangers of superficially comparing the outcome of one case to another. It is equally dangerous to assume that all Aboriginal groups that can be described as "semi-nomadic" had indistinguishable patterns of land use and occupation, as Canada suggests.[99]

100. As the Supreme Court of Canada cautioned in ***Kruger and al. v. The Queen***, "[i]f the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis".[100] Indeed, the Court in *Marshall; Bernard* confirmed in clear terms that the extent to which a nomadic or semi-nomadic peoples can claim Aboriginal title "is a question of fact, depending on all the circumstances" and "depends on the evidence" in each case.[101]

101. Tsilhqot'in occupation is not the same as Mi'kmaq occupation. For example, Mi'kmaq society had a maritime orientation. The Mi'kmaq principally resided in coastal communities, and moved along rivers and lakes into the interior for only a couple months of hunting each year. Expert evidence in *Marshall* indicated that even as the Mi'kmaq became dependant on the fur trade, they "… derived approximately 90 percent of subsistence from marine resources".[102]

102. Moreover, with the onset of the fur trade, Mi'kmaq hunting became "**even more nomadic** than they would have been in their maritime subsistence routine". Rather than regularly exploiting definite hunting grounds year after year, the evidence indicated

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[99] See Canada's Appeal Factum, paras. 72-75.
[100] *Kruger and al. v. The Queen*, [1978] 1 S.C.R. 104 at 109.
[101] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 66.
[102] *R* v. *Marshall*, 2002 NSSC 57, [2002] N.S.J. No.98 at para. 37.

that the "Mi'kmaq in their quest for furs and meat … may have hunted areas to extinction and then moved to new areas …"[103]

103. The maritime orientation of Mi'kmaq occupation clearly compounded the challenges of establishing regular hunting grounds in the vast interior portions of their asserted traditional lands. This contrasts readily with the Tsilhqot'in, who depended crucially on the hunt for food, clothing, shelter, trade and virtually every facet of subsistence, and who relied on the core traditional lands comprising the Claim Area in particular as the "breadbasket" that sustained their economy and culture from year to year.

f. Conclusions on Canada's comparative review of cases

104. In summary, *Marshall* and *Bernard* involved sweeping territorial claims of Aboriginal title, over areas several times the size of the Claim Area in this case, based on general, expert evidence on Mi'kmaq territoriality – and no persuasive evidence of actual, regular use of particular areas as hunting grounds. This paucity of evidence was fatal to the Aboriginal title claims.

105. Ultimately, the Supreme Court of Canada affirmed the decision of the trial courts in *Marshall* and *Bernard* to dismiss the Aboriginal title claims for lack of evidence of regular, pre-sovereignty use of the cutting sites in issue.[104] Agreeing with the Chief Justice's disposition of the case for the majority of the Court, LeBel J. added,

> The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the respondents in these cases have failed to sufficiently establish their title claim. In the circumstances, I do not wish to suggest that this decision represents a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick. A final determination

[103] *R* v. *Marshall*, 2002 NSSC 57, [2002] N.S.J. No.98 at para. 107.
[104] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 78-83.

> should be made only where there is an adequate evidentiary foundation that fully examines the relevant legal and historical record …[105]

106. The Trial Judge in this case had the benefit of precisely the "evidentiary foundation" that was lacking in *Marshall* and *Bernard*. He was in an ideal position to identify the lands the location and extent of the lands regularly used and occupied by the Tsilhqot'in people *c.* 1846.

107. This key distinction from *Marshall* and *Bernard* pervades the Trial Decision. Where the trial judges in those earlier cases lamented the complete absence of persuasive evidence to assist them in identifying regularly used areas, the Trial Judge in this case had no difficulty describing, in geographic- and site-specific terms, "a clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area".[106] He conducted an extensive, site-by-site assessment of Tsilhqot'in occupation throughout all of the lands and waters that comprise the Claim Area – using Tsilhqot'in names for specific sites, resources, seasons and geographical features.[107] Ultimately, the Trial Judge was in a position to identify and delineate "definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title".[108]

108. Contrary to Canada's submissions, the difference in outcome between these cases is not only "plausible" but unsurprising given the stark differences in the evidentiary record before the trial judges. Aboriginal title claims must be decided on the particular evidence and facts of each case. With respect, Canada's efforts to argue the present appeal on the facts of *Bernard* and *Marshall* should be rejected.

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[105] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 141 [emphasis added].
[106] Trial Decision, Joint Appeal Record, v. II(b), p. 463, para. 948; see esp. Trial Decision, Joint Appeal Record, v. II(a), p. 281-286, paras. 380-97 and v. II(b), p. 464-465, paras. 953-56.
[107] Trial Decision, Joint Appeal Record, v. II(a), p. 386-400, paras. 688-731 and v. II(b), p.401-451, paras. 732-911.
[108] Trial Decision, Joint Appeal Record, v. II(b), p. 466-468, para. 959.

2. Tsilhqot'in population and exclusive control of the Claim Area

109. Canada also argues that the Trial Judge's findings of Tsilhqot'in Aboriginal title are "implausible" because, in its view, it is not reasonable to conclude that a resident Tsilhqot'in population of 400 people living in the Claim Area exercised exclusive control over the Proven Title Area.[109] Again, Canada attempts to bolster its attack on the clear and well supported findings of the Trial Judge by importing the conclusions reached in *Marshall*, an entirely different case.

110. Canada relies on the trial judge's opinion in *Marshall* that approximately 1,000 Mi'kmaq people could not exercise exclusive control over the mainland of Nova Scotia. Notably, the Nova Scotia mainland extends over some 45,000 square kilometres[110] – that is, approximately **22 times** the area of the Proven Title Area. These cases are on an entirely different scale. Again, this illustrates the dangers of importing conclusions from one case into an entirely different factual situation.

111. It is also important to appreciate that the Trial Judge identified a resident population of some 400 Tsilhqot'in people **living in the Claim Area**.[111] This is, if anything, a low estimate: expert analysis presented at trial estimated a resident population of some 1200 Tsilhqot'in people in the Claim Area at sovereignty.[112] In either event, there was a significant population of Tsilhqot'in people living outside of, and defending, the Claim Area as well.

112. More importantly, as Canada itself asserts, there are no grounds for an appellate court to overturn findings of fact made by a trial judge "after a thorough examination of the evidence", unless these findings are "clearly and palpably wrong".[113]

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[109] Canada's Appeal Factum, para. 88.
[110] Cape Breton accounts for the remaining approx. 10, 300 sq. km. of Nova Scotia's area: http://en.wikipedia.org/wiki/Cape_Breton_Island.
[111] Trial Decision, Joint Appeal Record, v. II(b), p. 463-464, para. 951.
[112] Exhibit 0443, Dewhirst, August 8, 2005 Report, p. 39.
[113] Canada's Appeal Factum, para. 100.

113. The Trial Judge made numerous factual findings, which Canada has not contested, supporting the capacity of the Tsilhqot'in people to exclusively control the Proven Title Area, including:

- "Tsilhqot'in people were there in sufficient numbers to monitor European traders, missionaries, settlers and railway surveyors on their arrival. There is evidence that each of these groups of new arrivals were aware that Tsilhqot'in people considered this to be their land. Others were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people";[114]

- "For Tsilhqot'in people, the high mountains of the Cascade Range provided a natural barrier from any intrusive actions by others …";[115]

- "[T]he struggle, if any, between different Aboriginal groups came at the margins of their territories",[116] and the Claim Area lands "fall well within the much broader area described as Tsilhqot'in traditional territory";[117]

- "[B]oth Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within the much larger traditional Tsilhqot'in territory";[118]

- Tsilhqot'in military practices were particularly fierce and "worked to instill fear of Tsilhqot'in people in all who might venture into Tsilhqot'in territory";[119]

- The archival records show that "[t]o be safe" in Tsilhqot'in country, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down";[120]

- The historical record furnishes numerous examples where non-Tsilhqot'in Aboriginal guides refused to enter Tsilhqot'in territory, "expressing fear of Tsilhqot'in people";[121]

- "… [T]he Homalco people living at Bute Inlet feared the Tsilhqot'in and were reluctant to venture into Tsilhqot'in territory";[122]

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[114] Trial Decision, Joint Appeal Record, v. II(b), p. 460, para. 938.
[115] Trial Decision, Joint Appeal Record, v. II(b), p. 457, para. 930.
[116] Trial Decision, Joint Appeal Record, v. II(b), p. 457, para. 930.
[117] Trial Decision, Joint Appeal Record, v. II(a), p. 362, para. 623.
[118] Trial Decision, Joint Appeal Record, v. II(a), p. 362, para. 622.
[119] Trial Decision, Joint Appeal Record, v. II(b), p. 454, para. 920.
[120] Trial Decision, Joint Appeal Record, v. II(b), p. 453, para. 917, quoting from Exhibit 0391, Expert Report of Hamar Foster.
[121] Trial Decision, Joint Appeal Record, v. II(b), p. 455, para. 921.
[122] Trial Decision, Joint Appeal Record, v. II(a), p. 216, para. 182.

- The historical record contains several examples of various Tsilhqot'in bands and villages mobilizing rapidly for collective action in response to external threats;[123]

- "At the time of sovereignty assertion, the Tsilhqot'in people enjoyed a reasonable trading relationship with the Nuxalk (Bella Coola) people to the northwest and the Secwepemc people to the east";[124]

- "There is nothing to indicate that Tsilhqot'in populations at any given time were small compared to their neighbours … the population was small given the size of the area, but it is fair to infer there were no large numbers of invaders on the edges of Tsilhqot'in territory …"[125]

- "It is also important to place events in context. If an area was used to hunt, fish, and gather berries, root plants and medicines, the area would not be available for resource exploitation for at least another year. It would be highly unlikely that a neighbouring Aboriginal group would follow into an area that had already been exploited";[126]

- The Proven Title Area "does not include overlapping territory and was effectively controlled by Tsilhqot'in people …";[127]

- "Human carrying capacity can be roughly defined as the number of individuals an environment can sustain or support, taking into account the technologies of resource exploitation adopted by the population. The plaintiff's demography expert estimated the carrying capacity of the whole Claim Area at 100-1000 persons …";[128]

- "[T]here is no evidence of adverse claimants at the time of sovereignty assertion" in the Proven Title Area;[129] and

- "[A]t the time of sovereignty assertion, Tsilhqot'in people did have exclusive control over those lands which they used regularly".[130]

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[123] See *e.g.*, Trial Decision, Joint Appeal Record, v. II(a), p. 234-237, paras. 246, 248, 253-54.
[124] Trial Decision, Joint Appeal Record, v. II(b), p. 459, para. 936. See: *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 64.
[125] Trial Decision, Joint Appeal Record, v. II(b), p. 455-456, para. 923.
[126] Trial Decision, Joint Appeal Record, v. II(b), p. 456, para. 924.
[127] Trial Decision, Joint Appeal Record, v. II(b), p. 460, para. 938. See: *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 65 ("The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference [of exclusive control]).
[128] Trial Decision, Joint Appeal Record, v. II(a), p. 394, para. 711.
[129] Trial Decision, Joint Appeal Record, v. II(b), p. 461, para. 943.
[130] Trial Decision, Joint Appeal Record, v. II(b), p. 459, para. 935.

114. The Trial Judge reviewed an extensive record and determined, based on the entirety of the evidence, that the Tsilhqot'in people exclusively controlled the Proven Title Area to the standard required by the Supreme Court of Canada in *Marshall; Bernard*.[131] By focusing solely on population numbers, Canada improperly reduces a multifaceted and contextual inquiry to a single determinative factor (*i.e.* "simple arithmetic",[132] in Canada's words). Canada ignores the evidence and findings of fact that the Tsilhqot'in people not only had the ability to exclude others from the Claim Area; they actively did so.

115. The Trial Judge provided extensive support for his conclusions and Canada has not demonstrated or even pointed to a clear and palpable error in his findings. With respect, this disguised attack on the Trial Judge's findings is without basis and should be dismissed.

3. The Proven Title Area accords with the law of Aboriginal title

116. In support of its argument that the Trial Judge should have dismissed the Plaintiff's Aboriginal title claims "with prejudice", Canada argues that the Trial Judge's opinion on the Proven Title Area is "on its face an implausible one" in light of the Supreme Court of Canada's discussion in *Marshall; Bernard* of proof of Aboriginal title by semi-nomadic peoples.[133]

117. This argument is an extension of the remarkable position advanced by Canada and British Columbia at trial: in the face of what one might consider the obvious meaning of the phrase "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources",[134] the Defendants contended that Aboriginal title cannot extend to the tracts of land that were regularly exploited for their game, fish, and

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[131] Trial Decision, Joint Appeal Record, v. II(b), p. 457, para. 929 and p. 468, para. 960.
[132] Canada's Appeal Factum, para. 85.
[133] Canada's Appeal Factum, paras. 72 *et seq.*
[134] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 149; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 56.

other resources. Rather, in the Defendants' view, Aboriginal title is narrowly confined to **pinpoint sites**: "such as a salt lick or a narrow defile between mountains or cliffs"[135] or "a particular rock or promontory" used each year to net salmon.[136]

118. A review of the Supreme Court of Canada's direction in *Delgamuukw* and *Marshall; Bernard* confirms that the Trial Judge correctly applied the law to the facts before him to find Aboriginal title to the Proven Title Area. The Trial Judge was equally correct to reject the Defendants' "postage stamp" approach to Aboriginal title as an "impoverished view" that did not reflect the law or foundational principles of Aboriginal title as set out by the Supreme Court of Canada.[137]

a. Proof of Aboriginal title

119. To make out a claim for Aboriginal title, the Aboriginal group asserting title must show that it exclusively occupied the subject lands prior to the Crown's assertion of sovereignty.[138] The two leading authorities on proof of Aboriginal title are *Delgamuukw* and *Marshall; Bernard*.

120. In *Delgamuukw*, the Supreme Court of Canada described proof of occupation for the purposes of establishing Aboriginal title:

> Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to <u>regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources</u> …[139]

[135] Trial Decision, Joint Appeal Record, v. II(a), p. 356-357, para. 608.
[136] Trial Decision, Joint Appeal Record, v. II(a), p. 357, paras. 609.
[137] Trial Decision, Joint Appeal Record, v. II(b), p. 616, paras. 1376-77.
[138] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 143.
[139] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 149 [underscore added].

121. In *Marshall; Bernard*, the Court confirmed this test for proving occupation and specifically recognized proof of Aboriginal title based on "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources".[140]

b. Occupation as part of the Aboriginal society's traditional way of life

122. Critically, every judge who wrote in *Delgamuukw* and *Marshall; Bernard*, whether a majority or a concurring opinion, stressed the importance of **assessing occupation with reference to the nature of the land and the traditional way of life** of the claimant group.

123. In *Delgamuukw*, Lamer C.J. emphasized the importance of assessing occupation within the specific context of the Aboriginal group:

> In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed" …[141]

In his concurring opinion in *Delgamuukw*, La Forest J. similarly directed courts to

> … focus on the occupation and use of the land as part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. …[142]

It is hard to imagine a better description of the task undertaken by the Trial Judge in the present case.

124. Writing for the majority of the Court in *Marshall; Bernard*, McLachlin C.J., specifically endorsed the views expressed above by Lamer C.J. and La Forest J. in

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[140] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 56.
[141] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 149 [underscore added].
[142] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 194 [underscore in original].

Delgamuuukw and again directed trial courts to "focus on the occupation and use of the land as part of the aboriginal society's *traditional way of life*".[143]

125. This accords with the Court's direction in *Delgamuukw* that the purpose of Aboriginal title is the protection of "**historic patterns of occupation**":

> … [T]he law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.[144]

c. "Regular use of definite tracts of land …"

126. The above principles provide considerable guidance in defining the "**regular use of definite tracts of land**" that satisfies the element of physical occupation required for proof of Aboriginal title.

127. In *Marshall; Bernard*, the Chief Justice contrasted such "regular use" of land (which will support a title claim) with use that is merely "**incidental**" or "**occasional**" (which may establish site-specific rights, but not Aboriginal title).[145] Stated simply, and as noted by the Trial Judge in this case, "the line separating sufficient and insufficient occupancy for title is between **irregular use of undefined lands** on the one hand and **regular use of defined lands** on the other".[146]

128. What constitutes "regular use" of land? From the outset, it must be observed that "regular" has no fixed meaning without context. It takes its meaning from the activity in question, the common practice, and the surrounding circumstances. Undertaking an activity "regularly" can mean hourly, daily, monthly, annually, or at some other interval,

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[143] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 49 [emphasis in original].
[144] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 126 [underscore added]; see also: *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 139 (*per* Lebel J.).
[145] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 41, 56-57, 66.
[146] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 73 [emphasis added], para. 75; Trial Decision, Joint Appeal Record, v. II(a), p. 358-359, para. 614.

depending on the activity and the particular demands that it imposes. Fundamentally, **"regular use" describes a pattern, custom or system of use**. "Regular" events are those that recur periodically, according to a predictable pattern or system of conduct.

129. Properly considered, "regular use" of the land must mean "regular use" as part of the claimant First Nation's way of life, in accordance with its traditional patterns of occupation. A claimant First Nation, then, can establish sufficiently "regular" use of lands where it systematically exploited the lands for game, fish and other resources, on a recurring basis, pursuant to its customary patterns of land use.

130. By contrast, McLachlin C.J. in *Marshall; Bernard* repeatedly emphasized that "**occasional**", "**irregular**" or "**incidental**" uses of land will not support a claim to Aboriginal title.[147] These phrases suggest uses of the land that are not part of a system or recurring pattern of occupation. For example, the *Oxford English Dictionary* defines "occasional" primarily in terms of **irregularity** of action:

> **Occasional** … **2.** Happening casually or incidentally, incidental … **3.** Occurring or met with now and then; irregular and infrequent; sporadic …[148]

131. Thus, "occasional use" refers to activities on the land that do not recur periodically as an essential element of traditional patterns of land use, but rather occur irregularly or opportunistically. This interpretation is reinforced by the manner in which the Chief Justice employed this phrase in *Marshall; Bernard*. For example, she held that "occasional **visits**" and "occasional **forays**" are insufficient to establish Aboriginal title; both phrases suggesting incidental or casual uses of the land.[149]

132. This approach to defining "regular use of definite tracts of land" accords with the direction mandated by *Delgamuukw* and *Bernard*; that is, it focuses on whether Indian land use demonstrates sufficient occupation to establish title by reference to Aboriginal

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[147] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 41, 59, 73-76 [emphasis added].
[148] *The New Shorter Oxford English Dictionary*, vol. 2 (Oxford: Clarendon Press, 1993), at 1972. See also: "occasionally".
[149] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, at paras. 74, 81 [emphasis added].

modes of life. The assessment of "regular use" is grounded in the facts of each case, and inquires into whether the lands in question were routinely exploited as part of a recurring system or pattern of traditional land use.

133. The Supreme Court of Canada affirmed in both *Delgamuukw* and *Marshall; Bernard* that Aboriginal title extends to hunting, trapping, gathering and fishing areas that were exclusively controlled and regularly used by a First Nation at sovereignty. This direction is consistent with the Court's foundational jurisprudence on Aboriginal title. In ***St. Catharine's Milling***, for example, Strong J. quoted with approval the seminal U.S. decisions that held:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals ...[150]

134. Hall J., in ***Calder***, expressly affirmed Strong J.'s reliance on these U.S. authorities.[151] The claimed lands, admitted to be in the possession of the Nishga from time immemorial in *Calder*, extended beyond village sites and other settled areas. They represented the lands where the ancestors of the Nishga "hunted, fished and roamed".[152] These were the lands controlled by the Nishga, and exploited by the Nishga in pursuit of their traditional pattern of survival from the land.[153]

135. Significantly, the lands admitted to be in possession of the Nishga in *Calder* included lands that they exploited "periodically, seasonally, according to the game and

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[150] *St. Catharine's Milling & Lumber Co. v. R*. (1887), 13 S.C.R. 577, at 612 (*per* Strong J., dissenting in result), quoting with approval from *Mitchel v. United States*, 9 Pet. 711 at 746 (1835) [emphasis added]; see also: *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) (Charlottesville: The Michie Company, 1982) at p. 492; *Confederated Tribes of the Warm Springs Reservation v. United States* (1967), 177 Ct. Cl. 184 at 194; *Spokane Tribe of Indians v. United States*, 163 Ct. Cl. 58 (1966); *Confederated Tribes of the Warm Springs Reservation v. United States* (1967), 177 Ct. Cl. 184; *United States v. Seminole Indians*, 180 Ct. Cl. 375 at 383-86 (U.S. Ct. Cl. 1967); *Zuni Tribe v. United States*, 12 Cl. Ct. 607 (1987).
[151] *Calder* v. *A.G. (B.C.),* [1973] S.C.R. 313 at 376-79.
[152] *Calder* v. *A.G. (B.C.),* [1973] S.C.R. 313 at 317.
[153] *Calder* v. *A.G. (B.C.),* [1973] S.C.R. 313 at 363-64.

the fishing season".[154] In finding that the Nishga held title to the claimed lands, Hall J. rested his opinion on "a wealth of jurisprudence affirming the common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation here".[155]

136. In the present case, the Trial Judge's conclusions on the Proven Title Area leave no doubt as to the regularity with which these lands were exploited as an essential feature of the Tsilhqot'in traditional pattern of occupation at sovereignty:

> … Tsilhqot'in people tended to follow the same seasonal patterns in ways that accommodated their kinship based society. They were semi-nomadic in the sense that there was a collective regrouping in one location each year as a respite from the dark and cold of winter ...[156]
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> …
>
> … I considered the use and occupation of the Claim Area from a land use perspective. What emerged from that analysis was a clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area … [T]he historical pattern of seasonal resource gathering in various locations in the Claim Area has continued over time.[157]
>
> …
>
> The [Proven Title Area] describes a tract of land mostly within the Claim Area but not entirely. It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering …[158]

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[154] *Calder* v. *A.G. (B.C.),* [1973] S.C.R. 313 at 349.
[155] *Calder* v. *A.G. (B.C.),* [1973] S.C.R. 313 at 376.
[156] Trial Decision, Joint Appeal Record, v. II(a), p. 371, para. 647 [underscore added]. See also: Exhibit 0443, Dewhirst, August 8, 2005 Report, at paras. 27-29; Exhibit 0224, Expert Report of David Dinwoodie, at 41.
[157] Trial Decision Joint Appeal Record, v. II(b), p. 463, paras. 948-49 [underscore added].
[158] Trial Decision, Joint Appeal Record, v. II(b), p. 468, para. 960 [emphasis added].

137. The Trial Judge's findings clearly support his conclusion that the lands comprising the Proven Title Area were put to "regular use … for hunting, fishing or otherwise exploiting its resources …"[159]

d. Aboriginal title and traditionally nomadic peoples

138. Canada implies at various points in its factum that *Marshall; Bernard* imposes insuperable barriers to proof of Aboriginal title by traditionally nomadic Aboriginal peoples. That is simply not the case. If the Court in *Marshall; Bernard* had intended to hold that seasonal occupation of land could **never** support Aboriginal title, or that Aboriginal title could **never** be established to hunting grounds, as Canada suggests, then the Court certainly had the opportunity to make those clear statements in its judgment.

139. Instead, in the passage dedicated to this issue, the Chief Justice **affirmed** the capacity of traditionally nomadic peoples to establish Aboriginal title, and clarified that it was a matter of evidence in each case:

> The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient "physical possession" to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used.

The Chief Justice reiterated that the central issue is whether the use of the land at sovereignty was sufficiently "**regular**" to engage the concept of physical occupation at common law:

> Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to

[159] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 149 [underscore added].

> nomadic peoples (para. 27). On the other hand, *Delgamuukw* contemplates that "physical occupation" sufficient to ground title to land may be established by "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.[160]

e. Aboriginal Practices that Indicate Possession

140. The Chief Justice provided some direction in *Marshall; Bernard* to assist in determining when Aboriginal practices support findings of Aboriginal title. She described the task of the courts as "**translating**" pre-sovereignty Aboriginal practices into the equivalent rights at common law.[161]

141. She cautioned that Aboriginal and European perspectives must both inform this translation process. The Court considers the nature and extent of the pre-sovereignty practice **from the perspective of the Aboriginal people**. However, in translating this practice into a modern legal right, the Court also considers **the common law perspective**: "the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it".[162]

142. The Chief Justice stressed that this translation process "must not be conducted in a formalistic or narrow way". She emphasized that the Court should take a "generous view of the aboriginal practice" and a "generous approach must be taken in matching it to the appropriate modern right". She cautioned the courts against demanding "exact conformity" with the legal parameters of the common law right.[163]

143. The governing question, rather, is "whether the [Aboriginal] practice corresponds to the **core concepts** of the legal right claimed". "Absolute congruity is not required", she continued, "so long as the [Aboriginal] practices engage the **core idea** of the modern right". Stated differently, the pre-sovereignty practices must correspond "**in**

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[160] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 66 [underscore added].
[161] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 48.
[162] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 48.
[163] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 48, 50.

some broad sense to the modern right claimed".[164] The question in each case is "what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective?"[165]

144. What Aboriginal practices correspond to title to the land? In *Marshall; Bernard*, the Chief Justice stated that Aboriginal title "is established by **aboriginal practices that indicate possession** similar to that associated with title at common law".[166] Again, the exercise in translation is to consider whether "the practices of aboriginal peoples at the time of sovereignty compare with the **core notions** of common law title to land".[167]

145. Two core notions of common law title are emphasized throughout McLachlin C.J.'s opinion in *Bernard*. First, she reiterated the fact that common law title is established by "**physical occupation**", including "regular use of definite tracts of land for hunting, fishing and otherwise exploiting its resources".[168] Second, she emphasized that the distinguishing feature of common law title is the right of **exclusive physical control**. In her words, "[t]he right to control the land and if necessary exclude others from using it is basic to the notion of title at common law".[169]

146. Aboriginal practices that engage these same core notions, when considered from the Aboriginal perspective, thus establish Aboriginal title. Where either of these core notions is absent, however, then the Aboriginal practice corresponds more closely to site-specific Aboriginal rights than to title.

147. McLachlin C.J. made this distinction clear in a critical passage from her opinion. The first portion reads as follows:

> It follows from the requirement of exclusive occupation that <u>exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into</u>

[164] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 48, 50 [emphasis added].
[165] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 52.
[166] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 54 [emphasis added].
[167] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 61 [emphasis added].
[168] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 56 [emphasis added].
[169] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 64 [emphasis added].

> aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.[170]

148. Canada suggests that this passage contradicts the Trial Judge's findings of Aboriginal title in this case.[171] With respect, Canada is selectively relying on parts of this one passage, excerpted from the context of the judgment as a whole. Indeed, even in this passage, the Chief Justice begins by **confirming**, as she does throughout the judgment,[172] that "exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land" if such use of the land was sufficiently regular and exclusive.

149. However, the Chief Justice observed that "more typically" such activities will translate into hunting or fishing rights, because they lack the necessary, additional element of **physical control** over the land: "the season over, they left, and the land could be traversed and used by anyone". Absent exclusive control, the Aboriginal practices correspond most closely with site-specific rights, rather than title.

150. In short, if the claimant First Nation ensured that certain lands could not be traversed and used by non-members, and instead excluded all others not only during its regular, seasonal exploitation of the land, but also throughout the interval between these regular uses, then the corresponding right at common law is **title** and not a hunting or gathering right.

151. McLachlin C.J. expressed this essential distinction as follows:

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[170] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 58 [emphasis added].
[171] Canada's Appeal Factum, para. 83.
[172] See also: *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 56, 62, 66.

> Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title … They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.[173]

152. Canada's position that *Marshall; Bernard* has confined Aboriginal title to "postage stamp" sites cannot be squared with the Court's clear direction that Aboriginal title can be established not only to village sites but also to "**larger areas of land** which they exploited for agriculture, hunting, fishing or gathering" when exclusive physical possession is established on the evidence.

153. The Trial Judge in this case correctly stated the approach to assessing occupancy dictated by the Court in *Marshall; Bernard*.[174] He concluded that the Tsilhqot'in people not only exploited the Proven Title Area regularly as part of their traditional pattern of subsistence, but also that the Tsilhqot'in exercised "exclusionary rights of control" over these lands commensurate with common law notions of title.[175] There are no grounds to interfere with these conclusions, which were amply supported by the evidentiary record before him.

f. The "European Template"

154. McLachlin C.J. recognized the dangers inherent in "translating" Aboriginal practices into modern rights when she cautioned that "[t]o determine aboriginal entitlement, one looks to aboriginal practices rather than imposing a European template".[176] Fundamentally, Canada's argument that traditionally nomadic peoples cannot hold Aboriginal title to the critical hunting, trapping, gathering and fishing areas

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[173] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 62 [emphasis added].
[174] Trial Decision, Joint Appeal Record, v. II(a), p. 358-359, paras. 614-15.
[175] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 77; Trial Decision, Joint Appeal Record, v. II(b), p. 468, para. 960.
[176] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at para. 49; See also: B. Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85 Can. Bar Rev. 256 at 268-69.

that sustained their culture from year to year reflects an inappropriate "European template" that is no longer defensible.

155. The very legitimacy of the doctrine of Aboriginal rights hinges on its ability to accord equal and meaningful respect to the Aboriginal perspective.[177] Incorporating the Aboriginal perspective means dispelling outmoded and facile beliefs and assumptions, especially those that have played a critical role in justifying and facilitating the dispossession of Aboriginal peoples of their lands.[178]

156. For example, modern courts have rejected colonial justifications for the appropriation of indigenous lands, such as the theory of *terra nullius* and the theory of Crown recognition as a precondition to the survival of native land interests.[179] The Supreme Court of Canada refused to bar claims to Aboriginal rights simply because they may not have been recognized under the laws of New France, reasoning that such a result would perpetuate "the historical injustices suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies".[180]

157. In support of this proposition, Lamer C.J. quoted from the opinion of Brennan J. in *Mabo* v. *Queensland*:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.[181]

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[177] *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 42; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 112, 114, 147-48; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 128, 130 (*per* Lebel J.); J. Borrows and L. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. 9, at 44.

[178] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911**,** 2001 SCC 33 at para. 34; *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 53.

[179] *Morocco v. Western Sahara: Mauritania v. Western Sahara, Advisory Opinion*, [1975] I.C.J. Rep. 12 at 39; *Mabo and Others v. Queensland (No. 2)* (1992), 175 CLR 1 (H.C.A.) (per Brennan J.) at paras. 41-42; *Richtersveld Community and Others v. Alexkhor Ltd. and South Africa* (24 March 2003), Case No. 488/2001 (Supreme Court of Appeal of South Africa); *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 127, 134.

[180] *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 53.

[181] *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 53, quoting *Mabo and Others v. Queensland (No. 2)* (1992), 175 CLR 1 (H.C.A.) at para. 42 (*per* Brennan J.).

158. These same considerations must govern the assessment of Aboriginal occupancy. Such an inquiry is easily tainted by traditional European conceptions of property and land-use. Indeed, colonizing societies have always invoked the "less intensive development of lands and resources by Aboriginal peoples … as a reason for dispossessing them" of their traditional lands.[182]

159. As Professor Kent McNeil has observed, "[a]lthough of a different nature, the connection of hunter-gatherers with the land would be just as integral to their distinctive cultures as that of horticulturalists. Evaluating their connection with the land on the basis of their conditions of life and their own perspectives, they would no doubt be in occupation".[183]

160. This is undoubtedly true in the present case. The Trial Judge described in detail the deep connection of the Tsilhqot'in people to the lands at issue. In his words, the Proven Title Area had provided "cultural security and continuity to the Tsilhqot'in people for better than two centuries"[184] and such lands "ultimately defined and sustained them as a people".[185] The Trial Judge specifically cautioned that his description of the Tsilhqot'in as "semi-nomadic" should not be taken as minimizing their connection to the land:

> While the term 'nomadism' generally implies a high degree of territorial mobility and little or no reliance on 'cultivation' in the Lockean sense, it does not mean 'haphazard' or 'unorganized'. Rather, nomadism is properly conceived as a 'way of living' in which individuals or groups are occasionally compelled to alter movements on short notice when conditions demand it, but beyond that inhabit recognizable spaces, know where they can and or cannot go, and whose daily or seasonal patterns of land use tend to follow the same cyclical trajectories over time. Put alternately, nomadism is a form of territoriality …
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> …

[182] Richard H. Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998) 61 Sask. L. Rev. 377 at 386; Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Service Canada, 1996) at 424-425.
[183] K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. R. 117 at 127; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 126-27 (*per* Lebel J.). See also: Exhibit 0407, Expert Report of Dr. Ken Coates, at 39-40.
[184] Trial Decision, Joint Appeal Record, v. II(b), p. 616, para. 1376.
[185] Trial Decision, Joint Appeal Record, v. II(b), p. 616, para. 1377.

> Tsilhqot'in nomadism, characterized by Dr. Brealey as "relatively nomadic" or "semi nomadic" was centralized within Tsilhqot'in traditional territory. Tsilhqot'in people tended to follow the same seasonal patterns in ways that accommodated their kinship based society …[186]

161. A test of occupation that would deny title to the Tsilhqot'in people, or nomadic peoples generally, based solely on their preferred means of using and relating to the land, would unjustly subordinate Aboriginal perspectives to lingering Western conceptions of land-use and property rights. It would perpetuate rather than redress historical injustices. In the words of Brennan J. in *Mabo*, "an unjust and discriminatory doctrine of that kind can no longer be accepted".

g. Central cultural significance of Aboriginal title lands

162. Finally, the test for proving Aboriginal title must be considered in light of its paramount objective: *i.e.* identifying and protecting relationships to the land that are of defining cultural significance to Aboriginal societies. The Supreme Court of Canada has stated, "a claim to title is made out when a group can demonstrate 'that their connection with the piece of land … was of central significance to their distinctive culture'".[187]

163. In effect, the test for Aboriginal title functions, in essence, as "a proxy for the theoretical rationale underpinning the granting of such title – a centrally significant relationship with a piece of land".[188] Accordingly, it should be applied in a manner that identifies and protects such central relationships to the land. Conversely, it should not be applied in a manner that unjustly or arbitrarily denies a First Nation title to lands to which it was integrally connected at sovereignty.

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[186] Trial Decision, Joint Appeal Record, v. II(a), p. 370-371, paras. 646-47 [underscore added].
[187] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 137, 150, quoting with approval from *R. v. Adams,* [1996] 3 S.C.R. 101 at para. 26.
[188] Brian J. Burke, "Left Out In The Cold: The Problem With Aboriginal Title Under Section 35(1) of The Constitution Act, 1982 for Historically Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall L.J. 1 at para. 69.

164. A test that denies Aboriginal title to lands that a First Nation exploited systematically as part of its traditional patterns of land use, and held within its exclusive control, leads to an unjust and arbitrary result. As noted above, while sedentary and nomadic uses of land are distinct in nature, it cannot reasonably be said that only "sedentary" uses of the land give rise to a centrally significant cultural relationship; rather, "the connection of hunter-gatherers with the land would be just as integral to their distinctive cultures as that of horticulturalists".[189]

165. Moreover, as the Supreme Court of Canada affirmed in ***R.* v. *Sappier; R.* v. *Gray***, s. 35 of the *Constitution Act, 1982* is directed at "ensuring the continued existence"[190] and providing "cultural security and continuity for the particular aboriginal society".[191]

166. As the Trial Judge noted in this case, to accede to Canada's position, and to deny Aboriginal title to the core traditional lands that have sustained an Aboriginal culture for generations, would frustrate the fundamental purpose of s. 35:

> What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.
>
> A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.[192]

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[189] K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. R. 117. See also: *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 at paras. 126-27, 129 (*per* LeBel J.). See also: Exhibit 0407, Expert Report of Dr. Ken Coates, p. 39, 97-98; Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Service Canada, 1996) at 425.
[190] *R.* v. *Sappier; R.* v. *Gray***,** [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 26.
[191] *R.* v. *Sappier; R.* v. *Gray***,** [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33.
[192] Trial Decision, Joint Appeal Record, v. II(b), p. 616, paras. 1376-77 [emphasis added].

167. Again, contrary to Canada's submissions, the Trial Judge's findings regarding the Proven Title Area are entirely "plausible" and in fact fully supported by the foundational principles and the test of Aboriginal title as articulated by the Supreme Court of Canada in *Delgamuukw* and *Marshall; Bernard*.

4. Reconciliation, fairness and justice

168. The Trial Judge concluded that, in the circumstances, dismissal of the Aboriginal title claims "without prejudice" was required to promote rather than frustrate the prospects of reconciliation.[193] He delivered his advisory opinion, at the invitation of the parties, expressly for the purpose of assisting the parties in achieving reconciliation and a just resolution of Tsilhqot'in claims.[194]

169. Canada argues on this appeal that reconciliation is not served by the Trial Judge's "without prejudice" order. It says this Honourable Court should forever bar the Tsilhqot'in people from any judicial affirmation or determination of their entitlement to Aboriginal title in the core of Tsilhqot'in traditional lands.[195]

170. To accept Canada's position would work a profound injustice and undermine any possibility of achieving the long-overdue reconciliation of Tsilhqot'in rights and interests. The Plaintiff agrees with Canada that finality of litigation is an important consideration. The need for finality is precisely the reason, after 339 trial days in which Tsilhqot'in use and occupation throughout the Claim Area was litigated and contested at every step, the Plaintiff says the Trial Judge's findings of Aboriginal title should be affirmed and given the force of law.

171. Even if the Court does not accept this position, finality does not demand dismissal of the Plaintiff's Aboriginal title claims "with prejudice". While finality is an important principle, it is not the only principle animating the doctrine of *res judicata*.

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[193] Trial Decision, Joint Appeal Record, v. II(b), p. 599, paras. 1336-37.
[194] Trial Decision, Joint Appeal Record, v. II(b), p. 615, para. 1375.
[195] Canada's Appeal Factum, paras. 94-106.

172. Ultimately, the test is to arrive at justice or fairness. The Supreme Court of Canada has indicated that the doctrine of *res judicata* requires "a judicial balance between finality, fairness, efficiency, and authority of judicial decisions".[196] Courts have recognized that

> The doctrine of *res judicata*, being a means of doing justice between the parties in the context of an adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.[197]

173. For this reason, courts retain a residual discretion to refuse to apply the doctrine of *res judicata*, even where the technical requirements of the doctrine are satisfied, if compelled by considerations of fairness and justice in the circumstances of the instant case. Contrary to the suggestion in Canada's submissions, a defendant is not entitled as of right to the application of *res judicata*.[198]

174. In *Danyluk*, the Supreme Court of Canada cautioned that the rules governing issue estoppel should not be mechanically applied: "[t]he underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case". Accordingly, the Court set out a "two-step analysis" for determining the applicability of issue estoppel:

> The first step is to determine whether the moving party … has established the preconditions to the operation of issue estoppel ... <u>If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied</u> …[199]

175. While the Court directed that "such a discretion must be very limited in application",[200] it emphasized that *res judicata* should not operate to work an injustice:

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[196] *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 15.
[197] *Iron v. Saskatchewan*, [1993] 6 W.W.R. 1**,** 103 D.L.R. (4th) 585 (Sask. C.A.) at 21, *per* Jackson J.A. dissenting.
[198] See, *e.g.*, *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at paras. 1, 19, 34.
[199] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 33 [underscore added, italics in original].
[200] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 62.

> The discretion to refuse to give effect to issue estoppel becomes relevant only where the three prerequisites to the operation of the doctrine exist. . . . The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the court must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?[201]

And:

> One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result . . . .[202]

176. Although *Danyluk* concerned issue estoppel, the same general principles apply to cause of action estoppel.[203]

177. In the present case, *res judicata* does not bar the Plaintiff from advancing subsequent Aboriginal title claims to portions of the Claim Area, for the reasons set out earlier in these submissions. However, even ***if*** the technical requirements of *res judicata* were satisfied, the strict application of *res judicata* to permanently bar the Tsilhqot'in people from recognition of their Aboriginal title in the Claim Area would work a manifest injustice. The Trial Judge was fully justified in making his order "without prejudice" in recognition of the special circumstances of the case before him.

178. Aboriginal title is fundamentally tied to cultural security and continuity. Effectively depriving the Tsilhqot'in Nation of its rights to core lands of integral importance to its distinctive culture and way of life would have a profound and unjust impact on the Tsilhqot'in people and should not be countenanced under these circumstances. The Trial Judge described the Proven Title Area as lands that had provided "cultural security and continuity to the Tsilhqot'in people for better than two

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[201] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 63, quoting *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97, 41 C.P.C. (4th) 237 (Ont. C.A.) [underscore added].
[202] *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at para. 64, quoting *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (H.L.) [underscore added].
[203] See *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 at paras. 1, 19. See also: *Bear Island Foundation v. Ontario* (2000), 126 O.A.C. 385, [2000] 2 C.N.L.R. 13 (Ont. C.A.) at para. 31.

centuries"[204] and that "ultimately defined and sustained them as a people".[205] As stated by the Trial Judge in dismissing the claims without prejudice, "Reconciliation must take these claims into account".[206]

179. This is particularly the case given that the Plaintiff's claims to Aboriginal title were pleaded, advanced and decided against a nascent and still evolving body of law. The proper approach to pleading Aboriginal title claims is deeply contested in these appeals and remains unresolved. The Parties continue to advance diametrically opposed views on the "regular use of definite tracts of land" that support Aboriginal title, and this issue may not be resolved until appeals are exhausted.

180. In this respect, Canada's reliance on *Delgamuukw* to argue that the Trial Judge correctly dismissed the Plaintiff's Aboriginal title claims is noteworthy. As the Plaintiff has argued, *Delgamuukw* is entirely distinguishable from the present case.[207] However, the outcome of *Delgamuukw* is instructive. In *Delgamuukw*, the Supreme Court of Canada held that the pleadings did not allow the Court to make findings of Aboriginal title, but did not dismiss the claim "with prejudice" as Canada seeks on this appeal.

181. Rather, after holding that the Defendants were prejudiced by late stage amendments to the plaintiffs' claims (amendments that, unlike here, substantially changed the nature of the claim), the Court concluded that the appropriate remedy was a **new trial**:

> This defect in the pleadings prevents the Court from considering the merits of this appeal. However, given the importance of this case and the fact that much of the evidence of individual territorial holdings is extremely relevant to the collective claims now advanced by each of the appellants, the correct remedy for the defect in pleadings is a new trial, where, to quote the trial judge at p. 368, "[i]t will be for the parties to consider whether any amendment is required in order to make the

[204] Trial Decision, Joint Appeal Record, v. II(b), p. 616, para. 1376.
[205] Trial Decision, Joint Appeal Record, v. II(b), p. 616, para. 1377.
[206] Trial Decision, Joint Appeal Record, v. II(b), p. 599, para. 1337.
[207] See Plaintiff's Appeal Factum, paras. 152-68.

> pleadings conform with the evidence". Moreover, as I will now explain, there are other reasons why a new trial should be ordered.[208]

Thus, in the very authority relied on by Canada, the Court did not conclude that a defect in the pleadings of an Aboriginal title claim permanently barred the Gitxsan and Wet'suwet'en peoples from judicial recognition of their Aboriginal title in the claimed lands.

182. Rather, *Delgamuukw* is a clear example of the judicial discretion to dismiss an Aboriginal title claim based on a defect in the pleadings "without prejudice" to the opportunity to re-litigate the matter at trial with appropriate amendments in place. The Trial Judge in this case was best positioned to balance these justice concerns at first instance and to exercise his discretion to make this decision on a "without prejudice" basis.

183. Again, the Plaintiff's primary position is that a new trial is not the appropriate outcome. After an exhaustive and an exhausting trial, expenditure of millions of dollars in public money to decide the issue, and findings of fact by the Trial Judge that Aboriginal title exists in the Claim Area, the Plaintiff agrees with Canada that a new trial is not the proper remedy.

184. The Plaintiff submits that the proper remedy is a declaration of Aboriginal title encompassing, at the very least,[209] the Proven Title Area within the Claim Area. However, if this Honourable Court disagrees with the Plaintiff's position, then the Plaintiff respectfully submits that the Trial Judge's decision to dismiss the Aboriginal title claims "without prejudice" must stand in the interests of fairness and justice in the circumstances.

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[208] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 77 [underscore added].

[209] The Plaintiff in the Plaintiff's Appeal has advanced the additional argument that the Trial Judge erred by not finding Aboriginal title to the entire Claim Area: see Plaintiff's Appeal Factum, paras. 177 *et seq.*

D. Claim Area Lands outside of the Proven Title Area

185. Finally, Canada argues, in the alternative, that the dismissal of the Plaintiff's Aboriginal title claims should be final, at the very least, for the Claim Area lands outside the Proven Title Area.

186. This matter is also the subject of the Plaintiff's Appeal. In that appeal, the Plaintiff argues that the Trial Judge erred in applying the law as set out in *Marshall; Bernard* to the lands outside of the Proven Title Area. The Trial Judge erred by expressly declining to consider the degree of exclusivity exercised by the Tsilhqot'in people over these lands – an essential ingredient in the inquiry into exclusive possession mandated by the Supreme Court of Canada. The Plaintiff's position is that, had the Trial Judge applied the test properly, his findings support a declaration of Aboriginal title to the entire Claim Area.[210]

187. In the alternative, there are no grounds to bar the Plaintiff from asserting Aboriginal title outside of the Proven Title Area in subsequent litigation. Canada cannot have it both ways. On one hand, it wants to argue that the Parties conducted the trial solely on an "all or nothing" basis, such that smaller portions of the Claim Area were never in issue, the Plaintiff only led evidence of "generalized use and sporadic occupation to the entire Claim Area",[211] and the record is too unreliable to support findings of fact with respect to particular tracts of land. On the other hand, it wants to argue that the evidence was sufficiently specific and directed at portions of land to conclude that the areas outside the Proven Title Area are not subject to Aboriginal title.

188. Canada's position is internally contradictory: either the record is sufficiently directed at tracts throughout the Claim Area to support findings for or against Aboriginal title, or it is not. Canada cannot pick and choose which parts of the Trial Judge's advisory opinion it would like to be binding. Further, as described above, the

[210] See Plaintiff's Appeal Factum, paras. 177 *et seq*.
[211] Canada's Appeal Factum, para. 26.

Henderson rule has no application to issue estoppel. If Canada is correct that the parties litigated an "all or nothing" claim (which the Plaintiff denies), then the Plaintiff is not estopped from bringing new Aboriginal title claims to lands within the Claim Area, as such claims according to Canada have never been properly litigated.

189. Fundamentally, however, the Plaintiff's position is that the question of Aboriginal title throughout the Claim Area ***was*** in fact litigated by the Parties, the record is more than sufficient to support the Trial Judge's findings of Aboriginal title, and declarations of Aboriginal title should issue as a result.

190. It is, frankly, nothing short of shameful that after the full trial of this issue, and in the face of clear findings of fact establishing Tsilhqot'in Aboriginal title to a substantial portion of the Claim Area, Canada's sole contribution to the pressing need for reconciliation is to argue that the Tsilhqot'in Nation should be forever barred from judicial recognition of their legal rights in the heart of their traditional lands.

PART 4 – NATURE OF ORDER SOUGHT

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

All of which is respectfully submitted this 31st day of August, 2010.

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David Rosenberg, Q.C.

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Jack Woodward

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Jay Nelson

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