

Do Aboriginal Laws Make a Difference:

William v. British Columbia et al.

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The Plaintiffs' Final and Reply Arguments are available on the Woodward & Company website at www.woodwardandcompany.com.

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I. INTRODUCTION

A. PURPOSE

In 2008, I wrote a paper primarily based on the Plaintiff's Final Argument, which postulated that oral history is "... a source of information that provides a more complete understanding of the issues and legal tests involved in Aboriginal rights litigation. Oral history not only illuminates historic events, but it provides context and an Aboriginal perspective to those events. Without oral history, the laws, cultures, traditions, religions, identities, land occupation, land use patterns, and histories of Aboriginal groups can too easily be misinterpreted, to the extent that these groups may mistakenly be held not to meet the legal tests required to prove Aboriginal rights claims."¹

In that 2008 paper I used the *William* case as a backdrop "to illustrate that oral history enables the Courts to understand and take into account the Aboriginal perspective and ultimately enable the court to make a proper assessment of Aboriginal claims."²

Similarly, the purpose of this paper is to use the *William* decision to illustrate that Aboriginal laws are an essential piece of the puzzle when proving Aboriginal rights claims in court.

B. HISTORY OF THE WILLIAM CASE

Chief Roger William, the Plaintiff in the *William* case, is the Chief of the Xeni Gwet'in First Nation, which is one of six communities that comprise the Tsilhqot'in Nation. Between the late 1980's and 1990's the Province of British Columbia purported to authorize logging companies to clear-cut Xeni Gwet'in lands. The Xeni Gwet'in and other Tsilhqot'in communities used various methods to prevent the logging, including roadblocks, negotiations, injunction applications, creating and asserting a Declaration of ownership over the lands and

¹ Oral History Does Make a Difference: *William v. British Columbia et al*, prepared by Gary S. Campo, Continuing Legal Education Society of British Columbia, February 21, 2008, Pg 3.

² *Ibid.*

finally the launching of two separate court actions based on Aboriginal title and an Aboriginal right to hunt and trap. Eventually, Chief Roger William consolidated the two actions and the trial began in 2002. In this action, Chief Roger William and the Tsilhqot'in Nation made, *inter alia*, a claim for Tsilhqot'in Aboriginal title and rights, and woven within the Plaintiff's Final Argument was Tsilhqot'in perspective, practices, customs and law.

The BCSC delivered the Tsilhqot'in decision on November 20, 2007. The BCCA delivered its decision on June 27, 2012; and leave to appeal has been granted by the Supreme Court of Canada.

II. THE IMPORTANCE OF ABORIGINAL LAWS IN THE CONTEXT OF LITIGATION

A. ABORIGINAL LAWS INFORM ABORIGINAL RIGHTS LITIGATION

In order to determine whether Aboriginal rights or title exist, a court must assess, *inter alia*, such matters as: whether the plaintiff is the correct rights holder, whether the plaintiff historically held and exercised the Aboriginal right pre-sovereignty (title) or pre-contact (rights), whether the plaintiff occupied the lands in question (title); and whether the occupation was exclusive (title). Furthermore, the court must assess the historical evidence on these issues, such as, *inter alia*, expert evidence, witness testimony, archaeological and anthropological evidence, and historical documents. In conducting these assessments the Supreme Court of Canada has warned against doing so with a Eurocentric world view, and that consideration of the Aboriginal world view, including Aboriginal laws, is imperative.

B. THE ABORIGINAL PERSPECTIVE IS REQUIRED

The Supreme Court of Canada has stated that the key fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-

Aboriginal peoples and their respective claims, interests and ambitions.³ The Court has also expressed that in order to achieve this reconciliation, Courts must take into account both the Aboriginal and common law perspectives; as true reconciliation will place equal weight on both.⁴ The Aboriginal perspective “grounds the analysis and imbues its every step.”⁵

For example, the doctrine of Aboriginal title draws from both the British common law and the systems of Aboriginal law that pre-dated and survived the British Crown’s assertion of sovereignty.⁶ These dual sources for Aboriginal title arise from the fact that, prior to the arrival of Europeans, the Aboriginal peoples of North America lived on the land in distinctive societies, pursuant to their own systems of law. English law accepted that these Aboriginal societies possessed their own laws and rights in the land, and these “aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.”⁷

The Supreme Court of Canada has emphasized that Aboriginal rights are “peculiar to the meeting of two vastly dissimilar legal cultures”. It has cautioned that a “morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives”, placing equal weight on each.⁸ This directive has immediate relevance for proof of Aboriginal title. The Supreme Court of Canada in *Delgamuukw* cautioned that the Aboriginal perspective must inform, equally, the inquiries into occupation and exclusivity for the purposes of proving Aboriginal title.⁹

³ Plaintiff’s Final Argument, at paras. 266-268, *William v. British Columbia et al*, 2007 BCSC 1700 [“Plaintiff’s Final Argument”]; *Mikisew Cree First Nation v. Canada Minister of Canadian Heritage*, [2005] 3 S.C.R. 388 at para. 1.

⁴ Plaintiff’s Final Argument, para. 268; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (SCC), [“Van der Peet”] at paras. 49-50; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (SCC), [“Delgamuukw”] at para. 147.

⁵ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 at para. 50. [“Bernard”]

⁶ Plaintiff’s Final Argument, at para. 335; *Delgamuukw* at para. 114; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, paras. 9-10. [“Mitchell”]

⁷ Plaintiff’s Final Argument, at para. 336; *Mitchell* at paras. 9-10; *Van der Peet* (SCC), paras. 40 (*per* Lamer J.), 230, 232, 260, 264 (*per* McLachlin J., dissenting, but not on this point); B. Slattery, “Understanding Aboriginal Rights” (1987), 66 Can. Bar Rev. 727 at 742.

⁸ Plaintiff’s Final Argument, at para. 337; *Van der Peet*, at para. 42; *Delgamuukw* at para. 148.

⁹ Plaintiff’s Final Argument, at para. 338; *Delgamuukw* at paras. 148, 156 and 157.

C. ABORIGINAL LAWS INFORM THE LEGAL TESTS FOR ABORIGINAL RIGHTS

Aboriginal laws can be used to assist a court in its assessment of whether an Aboriginal group meets the various legal tests required to prove Aboriginal rights claims. Provided below are only a sampling of examples where Aboriginal laws inform the legal tests associated with Aboriginal rights, and are by no means meant to be an exhaustive list.

1. Aboriginal Laws and the Rights Holder of Aboriginal Title

Lamer C.J. expressed in *Delgamuukw*, that “the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance”.¹⁰ Consequently, the Aboriginal community recognized prior to sovereignty as possessing the land, either by *de facto* practice or pursuant to its traditional system of governance, should be recognized as the appropriate claimant group for Aboriginal title.¹¹

2. Aboriginal Laws can Prove Occupation for Aboriginal Title

Delgamuukw held that proving Aboriginal title requires evidence of exclusive occupation of the claimed land at the time of Crown sovereignty.¹² Lamer C.J. held that the Aboriginal perspective on their occupation of lands can be gleaned, in part, from their “traditional laws”. Consequently, Aboriginal “laws in relation to land” are directly relevant to demonstrating occupation, including Aboriginal “land tenure systems” or “laws governing land use”.¹³ They provide direct evidence of occupation in support of a claim to Aboriginal title.¹⁴

3. Aboriginal Laws can Prove Exclusivity for Aboriginal Title

To establish Aboriginal title, the occupation of lands by the claimant Aboriginal group prior to and at sovereignty must have been exclusive. The Supreme Court of Canada has held

¹⁰ *Delgamuukw* at para. 159; *Plaintiff's Final Argument*, at para. 497.

¹¹ *Delgamuukw* at para. 159; *Plaintiff's Final Argument*, at para. 497.

¹² *Delgamuukw* at para. 143.

¹³ *Plaintiff's Final Argument*, at para. 338; *Delgamuukw* at para. 148, 156 and 157.

¹⁴ *Plaintiff's Final Argument*, at para. 494; *Delgamuukw* at para. 148.

that the claimant Aboriginal group must demonstrate that its ancestors had the intention and capacity to retain exclusive control over the land prior to, and at the date of, sovereignty.¹⁵ For proof of exclusivity, this means that Aboriginal laws concerning trespass, the granting of permission for use or settlement by non-members, or establishing peace treaties with neighbouring First Nations assist in establishing the necessary intention to control the land.¹⁶

III. ABORIGINAL LAWS IN THE CONTEXT OF THE WILLIAM DECISION

A. TSILHQOT'IN LAWS GENERALLY

The Tsilhqot'in people, prior to contact and at the time of sovereignty shared a body of law that was rooted in, emanated from, and was legitimated by the Tsilhqot'in community as a whole.¹⁷ Former Chief, Thomas Billyboy explained that the Tsilhqot'in system of law, the *Dechen Ts'edilhtan*, roughly translates as “we have laid the stick; don't cross it”.¹⁸ Elder Christine Cooper, a Tsilhqot'in elder from Tl'etinqox confirmed many other Tsilhqot'in witnesses and explained that: “These are the teachings that came down from the ?Esggidam, the ancestors, teachings on how to live, how to do certain things. These are the laws that were handed down from the ?Esggidam”.¹⁹

According to former Chief, Ervin Charleyboy, the *Dechen Ts'edilhtan* applies “to all Tsilhqot'in and whoever goes into Tsilhqot'in land”.²⁰ Thus, non-Tsilhqot'in (both Aboriginal

¹⁵ *Plaintiff's Final Argument*, at para. 1034; *Delgamuukw* at paras. 155-156; *Bernard*, at para. 57.

¹⁶ *Plaintiff's Final Argument*, at para. 338; *Delgamuukw* at para. 148, 156 and 157.

¹⁷ *Plaintiff's Final Argument*, at para. 695. It is the author's opinion that Tsilhqot'in law, the *dechen ts'edilhtan*, is still followed today.

¹⁸ Trial transcript, June 2, 2005, Thomas Billyboy Direct-Exam, 00002, 40-41.

¹⁹ Trial transcript, May 2, 2005, Christine Cooper Direct-Exam, 00020, 41-45 (emphasis added). See also: Trial transcript, April 14, 2004, Ubill Lulua Cross-Exam, 00024, 3-33; Trial transcript, April 19, 2005, Ervin Charleyboy Direct-Exam, 00005, 46 – 00007, 7; Trial transcript, March 2, 2004, Minnie Charleyboy Direct-Exam, 00045, 21-45; March 9, 2004, Minnie Charleyboy Direct-Exam, 00047, 26 – 00048, 1; Trial transcript, September 10, 2003, Roger William Direct-Exam, 00042, 25-34; Trial transcript, June 2, 2005, Thomas Billyboy Direct-Exam, 00002, 42-44; Exhibit 0203, Affidavit #1 of Julie Quilt, September 2004, paras. 33-36; Trial transcript, Nov 5, 2004, Julie Quilt Direct-Exam, 00023, 34 – 00023, 8; Exhibit 0439, Affidavit #1 of Cecelia Quilt, May 2005, para. 18; Exhibit 0366, Affidavit #1 of Gilbert Solomon, January 2005, para. 20.

²⁰ Trial Transcript, April 19, 2005, Chief Ervin Charleyboy Direct Exam, page 00007, at lines 1 to 7.

and non-Aboriginal) on Tsilhqot'in lands were subject to, and dealt with according to, Tsilhqot'in law.²¹

In sum, the Tsilhqot'in people from a time before contact with Europeans operated pursuant to a shared body of customs, traditions and rules that together comprised a distinctive legal system; *i.e.* “a system of rules of conduct that is felt obligatory upon them by members of a definable group of people”.²² These laws were considered binding by the Tsilhqot'in people and, by the time of contact with Europeans, were deeply embedded in their identity and worldview, such that they fundamentally shaped their relations to each other and to the outside world.²³

In an effort to assist the court in assessing whether the Tsilhqot'in met the occupation and exclusivity tests of Aboriginal title the Plaintiff provided evidence that the Tsilhqot'in had, and enforced, a clear and widely recognized law of trespass, as well as laws compelling payment by non-Tsilhqot'ins for the use or occupation of Tsilhqot'in lands.²⁴

B. TSILHQO'TIN LAW OF TRESPASS

According to the Supreme Court of Canada, trespass laws provide proof of exclusivity²⁵ and that the presence of other Aboriginal groups by consent reinforces a finding of exclusivity. As Lamer C.J. observed in *Delgamuukw*, “[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group’s exclusive control”.²⁶

At trial, the Federal and Provincial crowns appeared to generally deny that Tsilhqot'in laws existed, particularly any laws related to lands, governance and control of lands, ownership of lands, exclusive use of lands, or laws related to trespass. The Crown’s appeared to be arguing

²¹ *Plaintiff's Final Argument*, at para. 706.

²² Exhibit 0391, Expert Report of Hamar Foster, January 2005, 1-2, quoting with approval from *Millrrpum et al. v. Nabalco Pty. Ltd. and the Commonwealth of Australia*, [1971] 17 F.L.R. 141 (NT Sup. Ct.), at 243-33 and 266-67.

²³ *Plaintiff's Final Argument*, at para. 707.

²⁴ *Plaintiff's Final Argument*, at para. 706.

²⁵ *Delgamuukw* at para. 157; see also *Plaintiff's Final Argument*, at para. 1085.

²⁶ *Plaintiff's Final Argument*, at para. 1136; *Delgamuukw* at para. 156; *Bernard*, at para. 64.

that the Tsilhqot'in had no law, in support of their argument that the Tsilhqot'in did not occupy and control the claim area.

However, the oral history of witnesses (and expert and documentary evidence – which will be outlined below) indicated that the Tsilhqot'in exercised control over their lands by permitting use and occupation of the land by non-Tsilhqot'in, under the authority and according to the terms set by the Tsilhqot'in people. Tsilhqot'in laws not only existed, but they existed with respect to land management. The evidence showed that Tsilhqot'in law required that non-Tsilhqot'ins gain permission to enter Tsilhqot'in lands, or suffer the consequence of death for trespass.²⁷ Permission to enter Tsilhqot'in land was granted if: (1) you were related to a Tsilhqot'in by birth, marriage or adoption; (2) you were expressly invited, to gather, feast, or trade; or (3) you paid what effectively amounted to a toll or rent. If a non-Tsilhqot'in was present on Tsilhqot'in lands for any other reason (*ie.* without the requisite permission) they would be considered in trespass and removed or killed.

Former Chief Ervin Charleyboy gave an example of *dechen ts'edilhtan*, as it applies to trespass, with a story about a neighbouring First Nation that historically came into Tsilhqot'in territory. As the chief of a neighbouring First Nation was dying from a battle wound he was told by Tsilhqot'in warriors, “you're trespassing on Tsilhqot'in land; you're paying with your life.”²⁸

Tsilhqot'in witnesses described in great detail the existence and exercise of Tsilhqot'in law, and that it, at least from their perspective, proved Tsilhqot'in intent and capacity to retain control over their territory. Elder Norman George Setah explained that Tsilhqot'ins “never allowed any other people to go onto the territory”²⁹ and if the Shuswap, Lillooet, Bella Coola, Qaju, or Carriers did enter Tsilhqot'in lands, “they were told to leave” and if they did not want to

²⁷ *Plaintiffs' Final Argument*, paras. 1083-1091.

²⁸ Trial Transcript, April 19, 2005, Chief Ervin Charleyboy Direct Exam, at 00018, 38-47; 00019, 1-14; see also *Plaintiff's Final Argument*, at para. 1090.

²⁹ Transcript, December 7, 2004, Norman George Setah Cross Examination, at pg 16, lines 4-5, *William v. British Columbia et al*, 2007 BCSC 1700.

leave, the Tsilhqot'in would "make war on [them]".³⁰ The late Francis William, great grandnephew of war Chief Lhatsas'in,³¹ stated: "[m]y dad told me that Tsilhqot'ins long ago were fierce warriors. He told me Tsilhqot'ins would kill other native people if they tried to come onto Tsilhqot'in land."³² Several Tsilhqot'in witnesses also recounted historical wars and conflicts and consistently spoke in terms of Tsilhqot'ins protecting the land against invaders.³³

At the same time, neither the documentary record nor Tsilhqot'in oral history disclosed any incidents of warfare between Tsilhqot'in communities.³⁴ This pattern in itself revealed the operation of deeply embedded and respected legal principles, both on an international and internal domestic level.³⁵ The late Patrick Alphonse, who was born in 1920, succinctly described these governing principles. He recounted,

My great grandmother Tudud told stories about Tsilhqot'ins fighting wars with other native people when they tried to come inside Tsilhqot'in territory. Tudud never talked about Tsilhqot'ins fighting wars with each other – she said that all Tsilhqot'ins are like one family.³⁶

These accounts reflect a very small portion of the oral history produced at trial, but the message was loud and clear, the Tsilhqot'in excluded others (non-Tsilhqot'ins) from their territory. The existence and applicability of this Tsilhqot'in trespass law provided Justice

³⁰ Trial Transcript, December 7, 2004, Norman George Setah Direct-Exam, at pg 4, line 17 to – pg 5, line 19, *William v. British Columbia et al*, 2007 BCSC 1700; See also: Transcript, December 7, 2004, Norman George Setah Cross Exam, at pg 15, line 39 to pg 16, line 31, *William v. British Columbia et al*, 2007 BCSC 1700.

³¹ Exhibit 0441, Expert Report of John Dewhirst, September 2004, at 32, Chart 5, *William v. British Columbia et al*, 2007 BCSC 1700.

³² Exhibit 0158, Affidavit #2 of Francis Sammy William, April 30, 2004, at para. 61, *William v. British Columbia et al*, 2007 BCSC 1700.

³³ Exhibit 0174, Affidavit #2 of Mabel William, September 3, 2004, paras. 23, 26(i), 32, 35, 52; Exhibit 0013, Affidavit #1 of Theophile Ubill Lulua, November 20, 2002, at para. 165; Exhibit 0437, Affidavit #1 of Patrick Alphonse, April 15, 2005, at paras. 23-29; Exhibit 0439, Affidavit #1 of Cecelia Quilt, May 6, 2005, at para. 53; Transcript, September 10, 2003, Chief Roger William Direct-Exam, at pg 63, line 45 to pg 64, line 4; Transcript, September 11, 2003, Chief Roger William Direct-Exam, at pg 11, line 39 to pg 12, line 16; Transcript, March 14, 2005, Ubill Hunlin Cross-Exam, at pg 40, lines 12-40; Transcript, April 19, 2005, Ervin Charleyboy Direct-Exam, at pg 16, line 40 to pg 21, line 34; Transcript, July 10, 2002, Martin Quilt Direct-Exam, at pg 112, line 13 to pg 116, line 20 and pg 171, line 9 to pg 172, line 6.

³⁴ Exhibit 0391, Expert Report of Hamar Foster, January 2005, pg 12; Exhibit 0437, Patrick Alphonse Affidavit #1, April 2005, at para. 27; Exhibit 0176, Robert Lane, "The Chilcotin", 1981, at 407 ["Feuding occurred between Chilcotin but attacks were against specific individuals rather than entire communities"].

³⁵ Plaintiffs' Final Argument, para. 1091, *William v. British Columbia et al*, 2007 BCSC 1700.

³⁶ Exhibit 0437, Affidavit #1 Patrick Alphonse, April 15, 2005, para. 27 (emphasis added).

Vickers the knowledge to properly assess whether the Tsilhqot'in met the test of exclusivity. In addition, the existence of this law assisted Justice Vickers with the task of interpreting the available documentary record, which corroborated the oral history claim that a Tsilhqot'in law of trespass not only existed, but was enforced.

C. TSILHQOT'IN LAWS RELATED TO PAYING TOLL OR RENT

Tsilhqot'in control over their territories was further demonstrated by the fact that the Tsilhqot'in demanded, and received, payment for granting permission to enter into or settle on Tsilhqot'in lands. As described by eminent Canadian legal historian Professor Hamar Foster, “[t]he Tsilhqot'in had a long history of expecting, and requiring, payment of some kind for using their land, as the fur traders discovered when they tried to maintain Fort Chilkotin on a permanent footing”.³⁷ Chief Ervin Charleyboy expressed the same principle when he testified, “When you're using Tsilhqot'in nen [land], you have to pay”.³⁸

Tsilhqot'in expectations of payment recur as a theme throughout the Chilcotin Post journal. Once the Post was established, Chief Allaw expected payment for permitting this occupation of Tsilhqot'in lands.³⁹ There are several references in the Chilcotin Fort journal to “presents” given to Chief Allaw,⁴⁰ including a notation on October 25, 1837, which states, “The Chief Allaw has come in... I gave him his usual full present”.⁴¹ In addition to these “presents” to

³⁷ Exhibit 0391, Hamar Foster Expert Report, January 2005, pg 30; *Plaintiffs' Final Argument*, para. 1145.

³⁸ Trial Transcript, April 19, 2005, Chief Ervin Charleyboy Direct-Exam, at 00020, 44; *Plaintiffs' Final Argument*, para. 1145.

³⁹ *Plaintiffs' Final Argument*, para. 1146.

⁴⁰ In a letter to Alexr. Fisher, Esqr, William McBean reports that “I have had an interview with Allaw, the Chief giving him advices gratis on his passed [sic] and future conduct, which terminated with him making very fair promises. **I gave him the present** you wished he should have and pr. Leggings not mentioned”. (Exhibit 0156-1837/10/25.001, Chilcotin Post Journal 1837-9, at p. 2137958). On January 2, 1838, it is recorded that “These were Allaw (Chief), his first Cousin, Sapah, and two Brothers of the deceased. . . . I will remark first that, last fall, when I **gave the Chief his present**, he delivered a large Beaver Skin which is all I have received from him since”. (Exhibit 0156-1837/10/25.001, Chilcotin Post Journal 1837-9, at p. 2137971-2.)

⁴¹ Exhibit 0156-1837/10/25.001, Chilcotin Post Journal 1837-9, at p. 2137953.

Chief Allaw, the historical record shows a number of other gifts presented to Tsilhqot'in chiefs⁴² and to other Tsilhqot'ins who did business with the fur traders.⁴³

Tsilhqot'in expectations of payment for use of their lands was further demonstrated by the experience of early settlers on Tsilhqot'in lands, a few years after the Chilcotin War of 1864, which cleared the territory of all whites.⁴⁴ As Professor Foster observed, at first the very few settlers that dared enter the territory "did so only after obtaining the consent of the Tsilhqot'in".⁴⁵

Two of the settlers, Riske and McIntyre, were permitted to settle on plots of Tsilhqot'in land in exchange for payment.⁴⁶ These settlers described their situation in a letter to Governor Trutch, written in 1872:

On our coming to this place the Indians here professed themselves friendly and agreeable to our settling here, and on the whole they have acted so far towards us very peaceably. **They have always however considered the land theirs, and that we are beholden to them for it, and occupy it on sufferance.** We have always avoided arguing it with them till someone in authority could come and explain to them their duties and rights. Our all being invested here, **we have been anxious to conciliate them, and to that end we enclosed and ploughed land for them, giving Potatoes to plant and water to irrigate as also Potatoes to many out back, and the privilege of gleaning in the fields in harvest.**⁴⁷

⁴² Exhibit 0156-1830/002/13.001, Fort Alexandria Account Book 1829-1832 at p. 118595; Exhibit 0156-1825/07/20.001, Connolly's Journal Dec 19 1825 at p. 117618; Exhibit 0156-1837/10/25.001, Chilcotin Post Journal 1837-9, at p. 2137953, p. 2137958, p. 2137971-2, and p.2138107.

⁴³ Exhibit 0156-1864/10/20.001, Fort Alexandria Journal Oct 20 1864 to July 2, 1867, at p. 2139923, p. 2139924, and p. 2139944. Exhibit 156-1830/01/28.001, Letter Connolly to McDougall January 28, 1830 at 100776.

⁴⁴ Exhibit 0156-1864/08/30.001, Seymour's Despatch No. 25 to Colonial Office, at para 2. Governor Seymour wrote on August 30, 1864: "**The Chilcotens who massacred Mr. Waddington's road party at Bute Inlet... marched into the Interior where joined by other members of the tribe, and succeeding in murdering or expelling every white person from the sea to the upper Fraser.**"

⁴⁵ Exhibit 0391, Expert Report of Hamar Foster, at 16. In addition to the examples below, see: Exhibit 0407, Expert Report of Dr. Ken Coates, February 2005, at 134 quoting from Veera Bonner, Irene Bliss and Hazel Henry Litterick, *Chilcotin Preserving Pioneer Memories*, p. 109; see also Coates at 128, 138; *Plaintiffs' Final Argument*, para. 1148.

⁴⁶ *Plaintiffs' Final Argument*, para. 1149.

⁴⁷ Exhibit 0156-1872/06/06.001, Letter from Riske and McIntyre to Lt. Governor Trutch, June 6, 1872 (emphasis added).

Ten years later Riske and McIntyre were still describing themselves as “inhabitants of the Tsilhqot’in who were living at... sufferance.”⁴⁸ In other words, as Professor Foster notes, “**the Tsilhqot’in were behaving like landlords ...**”⁴⁹

In addition to “rents” for settling on Tsilhqot’in lands, the Tsilhqot’in expected and exacted what were effectively “tolls” for traversing their territory. The historical record furnishes numerous examples. In 1861, Robert Homfray, who attempted to survey Waddington’s possible route from “Bute Inlet across the Chilcotin Plains to the rich gold fields of the Cariboo”, took with him “some beads and trinkets as presents for the Indians in order that they might deal kindly with us while we were passing through their territory”.⁵⁰

Professor Hamar Foster recounts the troubles encountered by Peter O’Reilly, as a commissioner, and Marcus Smith, as a surveyor and representative of the federal government, in accessing Tsilhqot’in territories until they hired Tsilhqot’in guides.⁵¹ As summarized by Professor Foster, “[b]eginning with Robert Homfray’s expedition in 1861 ... it appears that every party that passed that way had to obtain guides and give presents in order to ensure safe passage into Tsilhqot’in territory”.⁵²

Professional Historian, Dr. Coates agreed that the most important illustrations of Tsilhqot’in law and authority were found in “the ‘newcomers’ acknowledgement of, and respect for, Tsilhqot’in control over traditional territories and their pattern of extracting payment for traversing their lands”.⁵³

⁴⁸ Exhibit 0156-1872/06/06.001, Letter from Riske and McIntyre to Lt. Governor Trutch, June 6, 1872

⁴⁹ Exhibit 0391, Expert Report of Hamar Foster, at 16. See also: Exhibit 0407, Expert Report of Ken Coates, February 15, 2005, at 125.

⁵⁰ Exhibit 0156-1894/12/22.001, Homfray, “A Winter Journey in 1861” at 2; *Plaintiffs’ Final Argument*, para. 1151.

⁵¹ Exhibit 0391, Expert Report of Hamar Foster, at 22-23; *Plaintiffs’ Final Argument*, para. 1152.

⁵² Exhibit 0391, Expert Report of Hamar Foster, at 21-22.

⁵³ Exhibit 0407, Expert Report of Ken Coates, February 15, 2005, 124. At 106, Dr. Coates notes, “[a]mong the Tsilhqot’in, the payment of fees or tolls would have been understood as recognition of their territories and, more specifically, the control exercised by specific Chiefs and Tsilhqot’in groups”; *Plaintiffs’ Final Argument*, para. 1153.

If payment for use of Tsilhqot'in land was not made voluntarily, it was sometimes taken.⁵⁴ This is a classic example of different legal perspectives colliding – what trader and settlers labelled as “theft” was, to the Tsilhqot'in, simply the enforcement of their law.⁵⁵ The challenge is to view such encounters not from one legal perspective or the other, but in their totality, in light of the fact that they occurred in a bi-judicial world.

Perhaps the most striking example was the evidence of the embittered Tsilhqot'in response to allegations of thievery that set into motion the events of the Chilcotin War of 1864: **“You are in our country; you owe us bread”**.⁵⁶ As Professor Foster observes, this can be read “simply as the words of extortionists”, but it is “much more likely the application of a legal principle”.⁵⁷

In summary, to 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”.⁵⁸ The fact that the Tsilhqot'in permitted such use and occupation of their lands, by consent, and at “their sufferance” reinforces their exclusive control over the lands that “[t]hey have always ... considered ... theirs”.⁵⁹

⁵⁴ See, for example: Exhibit 0156-1877/02/13.001, Letter from McKinlay to Premier Elliott, at 2 Edmund Elkin's brother, who had opened a store near Gwedzin Biny, was killed by a Tsilhqot'in man named Samayu after he refused to give Samayu food or other payment. Samayu took the horse he was taming for Elkins when he left. Exhibit 0157, Affidavit #1 of Francis Sammy William, March 10, 2004, at para. 16; Exhibit 0173, Affidavit #2 of Mabel William, September 3, 2004, at para. 56. There are a number of reports by fur traders that Tsilhqot'ins have ‘stolen’ goods: Exhibit 0156-1825/07/20.001, Connolly's Journal Dec 19 1825 at p. 117618; Exhibit 0156-1839/05/03.001, Chilcotin Post Journal 1839-40, at p.2138056, p.2138089-90, p.2138097; and Exhibit0156-1843/12/22.001, Fort Alexandria Journal, 1843-5, at p. 2139449-50. In Colin McKenzie's Narrative of Expedition from Alexandria to Nacoontloon, there is a reference to Chief Alexis, acting as McKenzie's guide, helping himself to McKenzie's cache. Exhibit 156-1860/10/00.001, Report by Colin McKenzie; *Plaintiffs' Final Argument*, para. 1155.

⁵⁵ Exhibit 0391, Foster Expert Report, January 2005, 10-11; *Plaintiffs' Final Argument*, para. 1155.

⁵⁶ Exhibit 0156-1873/00/00.001, Brown, “Klatsassan and Other Reminiscences of Missionary Life”, at p. 2036558 (emphasis added); *Plaintiffs' Final Argument*, para. 1156.

⁵⁷ Exhibit 0391, Expert Report of Hamar Foster, at 30, 36; *Plaintiffs' Final Argument*, para. 1157.

⁵⁸ Exhibit 0391, Expert Report of Hamar Foster, at 23.

⁵⁹ Exhibit 0156-1872/06/06.001, Letter from Riske and McIntyre to Lt. Governor Trutch, June 6, 1872. Even today, a system of tolls and rent for the use of Tsilhqot'in land is expected and recognized; see: Transcript, October 23, 2003, Chief Roger William Direct-Exam, at 00062, 24 - 00063, 12; and 00068, 35 - 00069, 9; Transcript, September 9, 2003, Roger William Direct-Exam, at 00032, 20-39; *Plaintiffs' Final Argument*, para. 1157.

The examples above are only a fraction of the evidence produced at trial, but these examples illustrate the existence and enforcement of Tsilhqot'in laws that speak directly to the legal tests for Aboriginal title (*ie.* exclusive occupation and control of the territory at sovereignty).

D. TSILHQOT'IN LAW IDENTIFIED BY HISTORICAL DOCUMENTS AND EXPERTS

1. Identifying Tsilhqot'in Law

Discerning Aboriginal laws from a documentary record presents its challenges. As Professor Foster noted in his expert report, the post-contact documentary record was typically produced by observers with little or no knowledge of the cultures they were observing, and who tended to view events exclusively through the eyes of their own culture.⁶⁰ The words used by Europeans to describe Aboriginal behaviour, or what Aboriginal people said, cannot be taken at face value. Such descriptions can be valuable, but must be approached with caution. This is because “Aboriginal legal norms often shaped behaviour that, to frightened or angry colonial eyes – and even to historians who did not see what they were not looking for – might appear simply as lawless or instinctual”.⁶¹

The operation of Aboriginal laws becomes discernable only when the documentary record is interpreted in light of the basic fact that its authors were operating in a multicultural world, with intersecting legal traditions. This means the same actions and events can hold very different meanings when viewed from these different perspectives. What was illegal in one legal system might be entirely legal, even mandated, in the other. Thus, when a source states that an Indian “murdered” a colonist, the legal historian, must ask – according to whose law? If an Indian *killed* a colonist, that act of homicide may well have been “murder” according to Russian, Spanish, French, British, Canadian or United States law. But what was it according to “Indian” law? In fact, there is good reason to believe that in many circumstances a killing that would be murder under British law would not be so classified in an Aboriginal legal system. And, although

⁶⁰ Exhibit 0391, Hamar Foster Expert Report, January 2005, 4 to 5; *Plaintiffs' Final Argument*, para. 349.

⁶¹ Exhibit 0391, Hamar Foster Expert Report, January 2005, pg 5; *Plaintiffs' Final Argument*, para. 350.

often obscured by popular rhetoric about “savages,” most experienced fur traders and colonial officials knew this.⁶²

Not surprisingly, the Plaintiff argued that the historical record was further proof that Tsilhqot’in laws relating to trespass, toll and rent existed and were enforced. However, the Crowns argued that the documentary record was proof of thievery, murder and revenge, something the Tsilhqot’in adamantly rejected. Professor Foster stated that “much of the ‘thievery’ that traders complained of was regarded by the Indians as reasonable payment for permitting them to be in their country”⁶³

2. Historical Documents Reveal Tsilhqot’in Law

The court was able to hear oral history on Tsilhqot’in laws, but as shown above the documents, and experts interpreting those documents, also provided insight into the existence and enforcement of Tsilhqot’in laws, particularly those related to land use and control. In his report, Professor Foster reviewed incident after incident collectively demonstrating beyond contention a pattern of behaviour that revealed the operation of a system of Tsilhqot’in law, broadly similar to the laws of other indigenous peoples. He concluded by stating, “the documents I have examined reveal, sometimes quite strikingly, evidence of legal principles concerning homicide, property and territory”⁶⁴.

The historical documents highlighted, *inter alia*, that before the arrival of Europeans, the Tsilhqot’in had already established a reputation for fiercely defending their lands. Neighbouring First Nations were well aware of this reputation, typically from firsthand experience, and they were reluctant to provoke reprisals. Professor Foster stated that it is clear from the historical record that neighbouring First Nations “knew where their territory ended and where Tsilhqot’in territory began”, and that Tsilhqot’in assertions of control over Tsilhqot’in lands were “backed

⁶² Exhibit 0391, Hamar Foster Expert Report, January 2005, pg 5; *Plaintiffs’ Final Argument*, para. 351.

⁶³ Exhibit 0391, Hamar Foster Expert Report, January 2005, pg 10; *Plaintiffs’ Final Argument*, para. 352.

⁶⁴ Exhibit 0391, Hamar Foster Expert Report, January 2005, pg 35; *Plaintiffs’ Final Argument*, para. 359; see also see also: Transcript, December 16, 2004, Dr. David Dinwoodie Cross-Examination, at 00025, 8 to 23.

by force”.⁶⁵ Expert anthropologist, Dr. Hudson summarized the picture that emerges from the available literature as follows:

... [I]t is clear that the Tsilhqot’in historically protected their territory including the Claim Area. Other First Nations saw the Tsilhqot’in as aggressive in both protecting their lands, and in carrying out attacks on neighbouring groups.⁶⁶

Expert anthropologist Dr. David Dinwoodie concluded that:

“the Tsilhqot’in monitored their territory and maintained exclusive control by challenging those who would trespass without permission. Generally speaking people who were not members of specific Tsilhqot’in bands were not allowed to travel, hunt, or otherwise occupy or use Tsilhqot’in territory in any sustained way without the permission of the relevant Tsilhqot’in people.”⁶⁷

...

... [T]he historical record shows clearly that the Tsilhqot’in had exclusive control over their territory and that they exerted themselves whenever necessary to maintain exclusive control.⁶⁸

In addition to providing examples of border protection, the documentary record furnished numerous examples of members of other First Nations refusing to accompany Europeans into Tsilhqot’in territory for fear of death – Tsilhqot’in borders were recognized and respected.⁶⁹ In spite of being offered a large sum of money the coast Indians refused to go with the explorers.”⁷⁰

In 1864, immediately following the events of the Chilcotin War, Chartres Brew travelled to the site where the road crew were killed just above the Canyon in the Homathco watershed and wrote to the Colonial Secretary that his guides, “the lower Country Indians [were] so scared that they would not venture one hundred yards into the interior unprotected”.⁷¹

⁶⁵ Exhibit 0391, Hamar Foster Expert Report, January 2005, pg 22-23; *Plaintiffs’ Final Argument*, para. 1094.

⁶⁶ Exhibit 0166, Expert Report of Doug Hudson, at 7; see also 15, 24, 27. See also Exhibit 0592, Hewlett, 12 [“Considerable conflict marked the relationship of the Chilcotins with neighbouring tribes].

⁶⁷ Exhibit 0224, Expert Report of David Dinwoodie, at 36; *Plaintiffs’ Final Argument*, para. 683.

⁶⁸ Exhibit 0224, Expert Report of David Dinwoodie, at 40; *Plaintiffs’ Final Argument*, para. 683.

⁶⁹ *Plaintiffs’ Final Argument*, para. 1051.

⁷⁰ Exhibit 0592, ^{Edward} Hewlett, *The Chilcotin Uprising: A Study of Indian-White Relations in Nineteenth Century British Columbia*, (M.A. Thesis, University of British Columbia, 1964), at 97-98.

⁷¹ Exhibit 0156-1864/05/23.002 at p. 115898-9, letter Brew to the Colonial Secretary May 23, 1864; *Plaintiffs’ Final Argument*, para. 1169.

While on a survey of the Homathko River and located in the same proximity of the Chilcotin War massacre site, George Hargreaves recorded in 1872 that his party's Indian guides, "will not go into the Chilicootan Country for love nor money."⁷² The same year, Marcus Smith noted that, "the Clahoose Indians were getting tired of the work and would not in any case go beyond the foot of the Canyon, as they were afraid of the Chilcotin Indians."⁷³

The conclusion to be drawn from such incidents is inescapable: non-Tsilhqot'in guides deserted 19th century explorers and government officials at the borders of Tsilhqot'in territory because they "recognized they were at a boundary, and that, without permission to enter, they risked violating Tsilhqot'in law".⁷⁴ Marcus Smith reported that even the "warlike" Eucletahs, secured by Smith as packers for O'Reilly, "threw down their loads, ran to their canoes and made for their homes with all possible speed ..." when they heard news of Tsilhqot'in approaching.⁷⁵ In Professor Foster's words, "they behaved as though a legal regime other than the British was still in place, one that was also backed by force".⁷⁶

In short, based on their own Aboriginal laws and as a unified community, the Tsilhqot'in had a strong sense of entitlement to the land, and enforced their collective right to control these lands to the exclusion of others.⁷⁷

E. TSILHQOT'IN LAW OF MARRIAGE AND ADOPTION

Permission to use or occupy Tsilhqot'in lands could also be acquired by marriage, although this was not an absolute right.⁷⁸ Several Tsilhqot'in witnesses provided examples of

⁷² Exhibit 0156-1872/06/14.003 at p. 12, *Diary of a Surveyor Engaged on the C.P.R. Survey; Plaintiffs' Final Argument*, para. 1170.

⁷³ Exhibit 0156-1872/06/14.001, at p. 113, *Marcus Smith Journey to Bute Inlet from Appendix E of CPR Report; Plaintiffs' Final Argument*, para. 1170.

⁷⁴ Exhibit 0391, *Expert Report of Hamar Foster*, at 22; *Plaintiffs' Final Argument*, para. 1171.

⁷⁵ Exhibit 0391, *Expert Report of Hamar Foster*, at 22-23; Exhibit 0156-1872/06/14.001, at p. 118, *Marcus Smith Journey to Bute Inlet from Appendix E of CPR Report; Plaintiffs' Final Argument*, para. 1171.

⁷⁶ Exhibit 0391, *Expert Report of Hamar Foster*, at 23; *Plaintiffs' Final Argument*, para. 1171.

⁷⁷ *Plaintiffs' Final Argument*, para. 685.

⁷⁸ Transcript, December 7, 2004, Norman George Setah Direct-Exam, at 00004, 17 - 00005, 31; Transcript, December 8, 2004, Norman George Setah Cross-Exam, at 00013, 16-25. Transcript December 8, 2004, Norman George Setah Redirect-Exam, at 00043, 43 - 00044, 24. Transcript, March 2, 2004, Minnie Charleyboy Direct-Exam,

non-Tsilhqot'in people gaining access to Tsilhqot'in territory through marriage,⁷⁹ including some of the first white settlers.⁸⁰ For example, settler Manning was married to a Tsilhqot'in woman,⁸¹ thereby acquiring a tolerated pass to access Tsilhqot'in land.⁸² According to Chief Ervin Charleyboy, the only reason why Manning was permitted to stay in Tsilhqot'in territory was because "he was living with Chief Alexis's daughter. That's the only reason why he was there".⁸³

During trial the Federal Crown was attempting to prove that there was indeed no exclusive occupation of the claim area, that other First Nations could enter, traverse and occupy

at 00010, 24-46; 00011, 13-32; 00013, 30-38; Transcript, March 3, 2004, Minnie Charleyboy Direct-Exam, at 00031, 38 - 00033, 6; 00047, 37 - 00048, 31; Transcript, March 24, 2004, Minnie Charleyboy Direct-Exam, at 00027, 14 - 00027, 32.

79 Tsilhqot'in oral history offers many examples of outsiders marrying Tsilhqot'ins and thereby acquiring the right to live in Tsilhqot'in territory. Thomas Squinas, a carrier man married a Tsilhqot'in woman named Celestine. (see Appendix 1: Genealogy) Through this marriage, Thomas Squinas acquired access to Potato Mountain. (Transcript, December 8, 2004, Norman George Setah Direct-Exam, 00044, 21 to 22) Through their marriage to Donna and June, who were raised by Eagle Lake Henry, Gabby and Pete Baptiste who were Shuswap came to live at Mountain House, and were permitted to harvest potatoes on potato mountain (Transcript, December 7, 2004, Norman George Setah Direct-Exam, at 00005, 20-31; Transcript, December 8, 2004, Norman George Setah Cross-Exam, at 00013, 22-25). Through his marriage to Jeannie, Carrier Charlie West and their children, were able to access Potato Mountain. Transcript, March 3, 2004, Minnie Charleyboy Direct-Exam, at 00031, 38 - 00033, 6; Transcript, April 5, 2005, Gilbert Solomon Direct-Exam, at 00049, 4-7; According to Chief William, many Tsilhqot'in had concerns about the behaviour of white settlers like Manning who cultivated the land, "but because of respect of their -- their member going with a non-First Nation, things didn't happen." Transcript, January 9, 2004, Chief Roger William Cross-Exam, at 00035, 23-29. Transcript, September 11, 2003, Chief Roger William Direct-Exam, at 00028, 29-33; Transcript, April 19, 2005, Chief Ervin Charleyboy Direct-Exam, at 00027, 39-42. Elkins was another non-Tsilhqot'in who was allowed to stay within their territory because he was married to a Tsilhqot'in. Chief ?Achig forced him to leave Lhiz Bay but Elkins was allowed to reside at what is now called Elkins Creek because he was with a Tsilhqot'in woman: Transcript, September 10, 2003, Roger William Direct-Exam, at 00027, 16-28; 00030, 43 - 00031, 40.

80 Mr. Robertson, and Mr. Skinner were both early settlers within Tsilhqot'in territory who established their right to access Tsilhqot'in territory according to Tsilhqot'in law through relationships with Tsilhqot'ins. For Skinner, see Transcript, December 7, 2004, Norman George Setah Cross-Exam, at 00038, 30-36. For Robertson, see Transcript, October 21, 2005, Dewhirst Cross-Exam, at 00047, 8-35; 00048, 34 - 00049, 16, referencing D. Dinwoodie, "Reserve Memories: The Power of the Past in a Chilcotin Community" (Lincoln: University of Nebraska Press, 2002), p. 48.

81 Transcript, December 7, 2004, Norman George Setah Direct-Exam, 00008, 14 to 44. Transcript, April 5, 2005, Gilbert Solomon Direct-Exam, at 00049, 4-7.

82 According to Chief William, many Tsilhqot'in had concerns about the behaviour of white settlers like Manning who cultivated the land, but "but because of respect of their -- their member going with a non-First Nation, things didn't happen." Transcript, January 9, 2004, Chief Roger William Cross-Exam, at 00035, 23-29. Transcript, September 11, 2003, Chief Roger William Direct-Exam, at 00028, 29-33.

⁸³ Trial Transcript, April 19, 2005, Chief Ervin Charleyboy Direct-Exam, at 00027, 39-42; *Plaintiffs' Final Argument*, para. 1139.

Tsilhqot'in lands, and therefore, the Aboriginal title test of exclusivity failed. For example, during the cross examination of Tsilhqot'in elder Norman George Setah attempts were made to establish on the record that Carrier Nation members occupied Potato Mountain within Tsilhqot'in territory and the claim area. However, Mr. Setah explained that the Carrier presence on Potato Mountain (Tsimol Ch'ed) was one particular family (the Squinas family) and, importantly, the mother was Tsilhqot'in.⁸⁴ Whether expressly intentional or not, Mr. Setah was expressing an example of Tsilhqot'in law.

V. RULING IN THE WILLIAM CASE

A. RULING IN GENERAL

The British Columbia Supreme Court (BCSC) decision in the *William* case was delivered on November 20, 2007. With respect to Aboriginal title, which was the backdrop of this paper, the BCSC stated that the Tsilhqot'in did indeed prove Aboriginal title to approximately 50% of the claim area, indicating that the Plaintiff met the test that the Tsilhqot'in exclusively occupied parts of the claim area sufficient to prove Aboriginal title. However, the court fell short of granting a declaration of title on a pleadings technicality. On June 27, 2012 the British Columbia Court of Appeal (BCCA) noting that there was no serious challenge to the findings of fact by Justice Vickers, and dismissing the pleading technicality, nevertheless overturned the decision because in their view Justice Vickers applied the wrong legal test to the facts. The BCCA's view of the law on Aboriginal title is a more narrow interpretation and in complete contrast with the BCSC, to the extent that the BCCA restricts Aboriginal title to small enclaves of land physically occupied, such as salt licks. In doing so the BCCA appears to be ignoring the Aboriginal perspective, Aboriginal laws, and the intense and exclusive Tsilhqot'in land use and occupation of large tracts of land within the claim area. The Supreme Court of Canada has granted leave to appeal and a tentative date has been scheduled for November 7, 2013.

⁸⁴ Trial Transcript, December 8, 2004, Norman George Setah Re-Exam, at pg 00044, 12-22.

VI. CONCLUSION

A. ABORIGINAL LAW DOES MAKE A DIFFERENCE

Aboriginal laws must play a central role in the just resolution of Aboriginal rights and title claims. Like other aspects of Aboriginal culture and identity, it is crucial to appreciate Aboriginal legal systems on their own terms. Like the oral histories of Aboriginal societies, their traditional systems of law “reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective”.⁸⁵ Aboriginal laws can be very effective evidence in establishing Aboriginal rights, including Aboriginal title, and therefore, *can* make a difference.

Based on the direction from the Supreme Court of Canada that the Aboriginal perspective and laws should be given equal weight to the common law, and that Aboriginal title is available to an Aboriginal claimant group that exclusively occupied a claim area pre-sovereignty, the BCSC in *William* concluded that the Tsilhqot’in proved Aboriginal title to a large parcel of land in the claim area.

However, the approach taken by the BCCA appears to ignore the direction from the Supreme Court of Canada, to the extent that the Aboriginal perspective and laws appeared to be given little to no attention. The existence and enforcement of Tsilhqot’in laws should have resulted in a decision that the occupation and control of Tsilhqot’in territory was exclusive (which was a fact proven at trial) and tended to prove Aboriginal title. However, the deciding factor in the Court of Appeal appeared to be the size of the area claimed (*ie.* what Justice Groberman found to be a territorial claim).

Supreme Court of Canada?

⁸⁵ *Plaintiff's Final Argument*, at para. 339; *Mitchell* at para. 34.