



SUPREME COURT OF CANADA

CITATION: Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

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BETWEEN:

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

Appellant

and

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

Respondents

- and -

Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlayeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatshin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 153)

McLachlin C.J. (LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis and Wagner JJ. concurring)

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Appellant

v.

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

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Interveners

2014 SCC 44

File No.: 34986.

2013: November 7; 2014: June 26.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional constraints on provincial regulation of

Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982 — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title lands — Whether the application of the Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of

sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or

otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be

outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains

open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core

areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

Cases Cited

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **distinguished:** *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915; **referred to:** *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Western Australia v. Ward* (2002), 213 C.L.R. 1; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

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Constitution Act, 1982, Part I, Part II, s. 35.

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APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Tysoe and Groberman JJ.A.), 2012 BCCA 285, 33 B.C.L.R. (5th) 260, 324 B.C.A.C. 214, 551 W.A.C. 214, [2012] 3 C.N.L.R. 333, [2012] 10 W.W.R. 639, 26 R.P.R. (5th) 67, [2012] B.C.J. No. 1302 (QL), 2012 CarswellBC 1860, upholding the order of Vickers J., 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1, [2007] B.C.J. No. 2465 (QL), 2007 CarswellBC 2741. Appeal allowed.

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Written submissions only by *Louise Mandell, Q.C., Stuart Rush, Q.C., Michael Jackson, Q.C., Terri-Lynn Williams-Davidson, David Paterson and Angela D'Elia,* for the intervener the Council of the Haida Nation.

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Tim A. Dickson, for the intervener the Gitxaala Nation.

Gregory J. McDade, Q.C., and *F. Matthew Kirchner*, for the interveners the Chilko Resorts and Community Association and the Council of Canadians.

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The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

[2] These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.
- In this case, Aboriginal title is established over the area designated by the trial judge.
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if

they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.

- In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

II. The Historic Backdrop

[3] For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

[4] Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

[5] The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xenigwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xenigwet'in. Talks between the Ministry of Forests and the Xenigwet'in ensued, but reached an impasse over the Xenigwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

[6] The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about 3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

[7] In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a

declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, [2012] 33 B.C.L.R. (5th) 260).

[9] The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

[10] In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European

settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313. Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties – mainly in British Columbia – resuming a policy that had been abandoned in the 1920s: P. W. Hogg, “The Constitutional Basis of Aboriginal Rights”, M. Morellato, ed., in *Aboriginal Law Since Delgamuukw* (2009), 3.

[11] Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* “recognized and affirmed” existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

[12] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the “pre-existing legal right” of Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J.

characterized this Aboriginal interest in the land as “an independent legal interest” (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

[13] In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a “compelling and substantial” purpose and account for the “priority” of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (at pp. 1113-19).

[14] The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown’s relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

[15] The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, “[A]boriginal title

encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures” (para. 117). Negatively, the “protected uses must not be irreconcilable with the nature of the group’s attachment to that land” (ibid.) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

[16] The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a “necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part” (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the “different” (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

[17] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown’s

duty to consult and accommodate the asserted Aboriginal interest “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (para. 24). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida*. The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown’s fiduciary duty to the group.

- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

[19] The Province, to its credit, no longer contends that the claim should be barred because of defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

[20] I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

[21] First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

[22] Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an “all or nothing” proposition (at para. 117):

The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. . . . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

[23] Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. *The Test for Aboriginal Title*

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

[25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on “occupation” prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

[26] The test was set out in *Delgamuukw*, per Lamer C.J., at para. 143:

In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[27] The trial judge in this case held that “occupation” was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot’in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

[30] Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

[31] Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1, the court stated as follows, at para 89:

The expression “possession, occupation, use and enjoyment . . . to the exclusion of all others” is a composite expression directed to describing a particular measure of control over access to land. To break the

expression into its constituent elements is apt to mislead. In particular, to speak of “possession” of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

[33] The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

[34] The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[35] The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”: B. Slattery, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

[36] The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

[37] Sufficiency of occupation is a context-specific inquiry. “[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

[39] In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135-38, Cromwell J.A (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

What, then, did one have to do to acquire a title by occupancy? . . . [I]t appears . . . that . . . a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts “being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider”. There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone. . . .

Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one’s own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used. [Emphasis added.]

[40] Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

I would adopt, in general terms, Professor McNeil’s analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner. . . . Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly . . . it is impossible to confine the evidence to

the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

[42] There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is “sufficient” use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

[43] The Province argues that this Court in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there “appears to have rejected the territorial approach of the Court of Appeal” (“Aboriginal Title and the Supreme Court: What’s Happening?” (2006), 69 *Sask. L. Rev.* 281, cited in *British Columbia factum*, para. 100). In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be “proof of sufficiently regular and exclusive use” of the land in question, a requirement established in *Delgamuukw*.

[44] The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While “[n]ot every nomadic passage or use will ground title to land”, the Court confirmed that *Delgamuukw* contemplates that “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation 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” (*ibid.*).

2. Continuity of Occupation

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

[47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had “the intention and capacity to retain exclusive control” over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the

intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[49] As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) “sufficient occupation” of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. *Was Aboriginal Title Established in this Case?*

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

[52] Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

[53] I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

[54] I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

[55] The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

[56] Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

[57] This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5-7 of the trial judge's reasons speak of

events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this finding.

[58] Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

[59] The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

- The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141 and 142).
- The trial judge relied on a map the validity of which the Province disputes (para. 143).

- The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).
- The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).
- A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).

[60] Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

[61] The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

[62] This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

[63] The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and

exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

[64] The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the mandate of a trial judge who should pronounce only on pleaded matters.

[65] In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

[66] I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes” (at para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. *The Legal Characterization of Aboriginal Title*

[69] The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson’s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to

all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation (1763)*, R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

[70] The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land . . . for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.

[71] What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in

Delgamuukw referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act*, 1982.

[72] The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title “is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts”.

B. *The Incidents of Aboriginal Title*

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

[74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it.

Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

[75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other land-owners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. *Justification of Infringement*

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

[78] The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

[79] The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

[T]he objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the

government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

[83] What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para 165]

[84] If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown’s fiduciary duty towards Aboriginal people.

[85] The Crown’s fiduciary duty in the context of justification merits further discussion. The Crown’s underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown’s fiduciary or trust obligation to the group. This impacts the justification process in two ways.

[86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

[87] Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida's* insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of

the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. *Remedies and Transition*

[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

[90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach

of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before

title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

[93] Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

[94] With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

VII. Breach of the Duty to Consult

[95] The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

[96] The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

[97] I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how?; (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title?; and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. *Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?*

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act*, 1982. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (at p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [p.43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. *Does the Forest Act on its Face Apply to Aboriginal Title Land?*

[107] Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question at this point — is always a matter of statutory interpretation.

[108] The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

[109] Under the *Forest Act*, the Crown can only issue timber licences with respect to “Crown timber”. “Crown timber” is defined as timber that is on “Crown land”, and “Crown land” is defined as “land, whether or not it is covered by water, or an interest in land, vested in the Crown.” (s. 1). The Crown is not empowered to issue timber licences on “private land”, which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is “Crown land”; (2) Aboriginal title land is “private land”; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

[110] If Aboriginal title land is “vested in the Crown”, then it falls within the definition of “Crown land” and the timber on it is “Crown timber”.

[111] What does it mean for a person or entity to be “vested” with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black’s Law Dictionary*, (9th ed. 2009), *sub verbo* “vested”.

[112] Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the

Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

[113] The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

[114] It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and

represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words “vested in the Crown” to cover at least lands to which Aboriginal title had not yet been confirmed.

[115] I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*. To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.

[116] Applied to this case, this means that as a matter of statutory construction, the lands in question were “Crown land” under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of “Crown timber” and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. *Is the Forest Act Ousted by the Constitution?*

[117] The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the *Constitution Act, 1982*

[118] Section 35 of the *Constitution Act, 1982* represents “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights” (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

[119] Section 35(1) states that existing Aboriginal rights are hereby “recognized and affirmed”. In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown’s fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. “[T]he best way to achieve that reconciliation is to demand the justification of any government

regulation that infringes upon or denies [A]boriginal rights” (*Sparrow*, at p. 1109).

Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s.35(1).

[120] Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

[121] A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

[122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three

factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (at p. 1112).

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardships, and not deny the holder of the right their preferred means of exercising it. In such cases, no infringement will result.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public

is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[127] Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of

logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

[128] The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

[129] "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over "Indians". Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative

power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

[130] First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament’s power over “Indians”, the latter would trump the former. No such inconsistency is alleged in this case.

[131] Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions: first, does the provincial legislation touch on a protected core of federal power; and second, would application of the provincial law significantly trammel or impair the federal power:

Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39, [2010] 2 S.C.R. 536 (“*COPA*”).

[132] The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over “Indians”. He placed considerable reliance on *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915, in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over “Indians”. It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

[133] The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

[134] The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[135] The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to “Indians” under s. 91(24) is somewhat mixed. While no case has held that Aboriginal rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta*. However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* – this latter proposition being inconsistent with the reasoning accepted by the trial judge.

[136] In *R. v. Marshall*, [1999] 3 S.C.R. 533, this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

[T]he federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives
[para. 24]

[137] More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

[138] Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered: does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework?; is provincial interference with Aboriginal rights treated differently than treaty rights?; and, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

[139] As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

[140] What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over “Indians” under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

[142] The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government’s powers.

[143] An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the

right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

[144] The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

[145] Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

[146] First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified

pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: how far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

[147] Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

[148] Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests

on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over “Indians” and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province’s power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

[149] This Court has recently stressed the limits of interjurisdictional immunity. “[C]onstitutional doctrine must facilitate, not undermine what this Court has called ‘co-operative federalism’” and as such “a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government” (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of “limited application” and should be applied “with restraint” (paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

[150] *Morris*, on which the trial judge relied, was decided prior to this Court’s articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *COPA*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the

proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

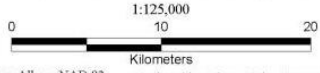
[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate

constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

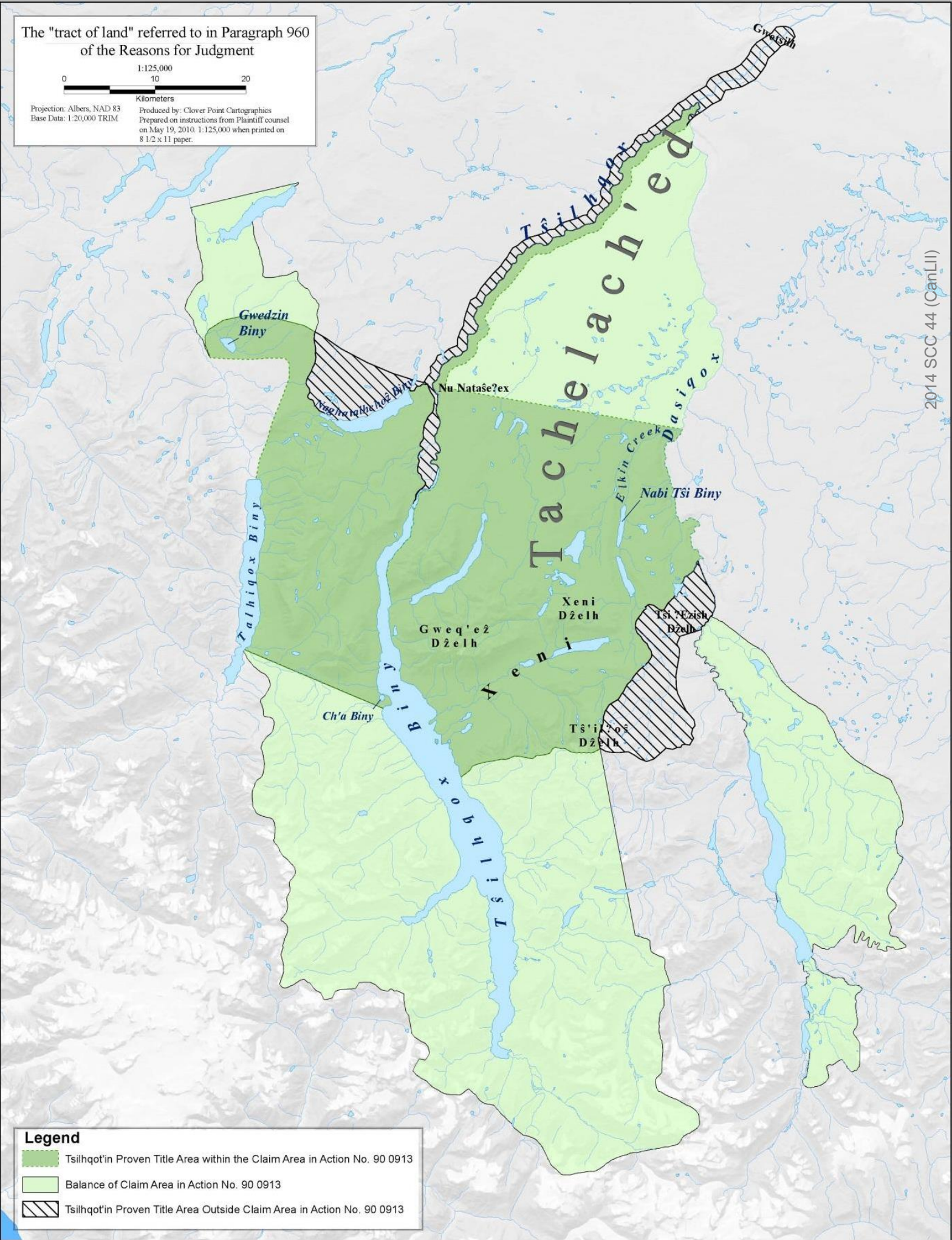
[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

The "tract of land" referred to in Paragraph 960 of the Reasons for Judgment



Projection: Albers, NAD 83
Base Data: 1:20,000 TRIM

Produced by: Clover Point Cartographics
Prepared on instructions from Plaintiff counsel
on May 19, 2010. 1:125,000 when printed on
8 1/2 x 11 paper.



2014 SCC 44 (CanLII)

Legend

- Tsihqot'in Proven Title Area within the Claim Area in Action No. 90 0913
- Balance of Claim Area in Action No. 90 0913
- Tsihqot'in Proven Title Area Outside Claim Area in Action No. 90 0913

Appeal allowed.

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*Solicitor for the intervener the Attorney General of Manitoba: Attorney
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Solicitors for the intervener the First Nations Summit: Mandell Pinder, Vancouver; Morgan & Associates, West Vancouver.

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