IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Tribes v. Canada (Attorney General),* 2025 BCSC 1490

Date: 20250807
Docket: 14-1027
Registry: Victoria

Between:

Cowichan Tribes,
Squtxulenuhw, also known as William C. Seymour Sr.,
Stz'uminus First Nation, Thỏlmen, also known as John Elliott,
Penelakut Tribe, Kwaliimtunaat, also known as Joan Brown,
Halalt First Nation, and Sulsimutstun, also known as James Thomas,
on their own behalf, and on behalf of all other descendants
of the Cowichan Nation

Plaintiffs

And:

The Attorney General of Canada,
His Majesty the King in right of the Province of British Columbia,
the City of Richmond, the Vancouver Fraser Port Authority,
the Musqueam Indian Band and the Tsawwassen First Nation

Defendants

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Plaintiffs:	D. M. Robbins D. M. Rosenberg, K.C. A. G. Murphy J. A. Proudfoot P. W. Jones I. A. Kennedy F. P. De Luca J. T. Riddell J. L. Karras A. M. Mendelson B. R. Martin A. C. Giannelia J. Boutin R. J. Garrett T. Kolawole C. C. Charlie L. E. Harris S. A. Morgan D. J. Larkin M. D. Boulton M. B. Bendle M. A. Berlin K. Lindsay M. E. Turpel-Lafond E. Smyth A/S
Counsel for the Defendant Attorney General of Canada:	S.-L. Vigneau B. C. Marleau M. L. French L.M.G. Nevens M. Bulmer J. Minkley M. Frey P. Cassidy J. E. Tross G. L. Angrove J. A. Rosenthal M. P. Seebaran K. L. Boyer W. Watson A. G. Dewitt M. E. Tessier M. Morawski

Counsel for the Defendant His Majesty the King in right of the Province of British Columbia:	K. B. Bergner G. R. Thompson K. Phillips M.-S. Poulin M. F. Volk R. L. Dickinson D.K.B. Dempster A. D. Cochran C.A.M. Jarawka N.C.C. Healey J. S. Andrews
Counsel for the Defendant City of Richmond:	B. B. Olthuis, K.C. N.P.R. Bond T. Bant K. Leung S. C. Chaster J. Hernaez C. Chamberlain
Counsel for the Defendant Vancouver Fraser Port Authority:	R. W. Grant, K.C. L. Y. Babbitt R. S. Beaton S. Ramdin C. Bant G. A. Morfopoulos P. Johnson A/S T. Duncan A/S
Counsel for the Defendant Musqueam Indian Band:	C. Y. Sharvit M. L. Macaulay A.M.J. Wilson E.R.S. Sigurdson, K.C. K.A.G. Shupe T. A. Arsenault T. Razzaghi V. C. Mathers C. Reeves S. R. Mussell C. M. Clemente M. Pongracic-Speier, K.C. G. K. Keshava K.A.K. Webber A/S
Counsel for the Defendant Tsawwassen First Nation:	G. Plant, O.B.C., K.C. S. Gyawali B. J. Oliphant M. A. Shaw

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September 9-12; 16-20; 23-27; 30, 2019
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Place and Date of Judgment:	Victoria, B.C. August 7, 2025

EXECUTIVE SUMMARY

[1] The plaintiffs, on their own behalf and on behalf of the descendants of the historic Cowichan Nation, brought this action seeking a declaration of Aboriginal title to their traditional village of Tl'uqtinus on the south arm of the Fraser River, and to its surrounding lands and submerged lands. They also seek a declaration of an Aboriginal right to fish the south arm of the Fraser River for food.

[2] The Claim Area, which the plaintiffs call the Lands of Tl'uqtinus, is located on what is now the south shore of Lulu Island, across from Tilbury Island, in Richmond, British Columbia. Today, land in the Claim Area is owned by the federal Crown, the Vancouver Fraser Port Authority ("VFPA"), the City of Richmond ("Richmond"), and private third parties. It covers approximately 1,846 acres of land, as well as certain surrounding lands held by Canada or Richmond. See the map attached to the reasons for judgment as Schedule "B", depicting the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands.

[3] Six defendants opposed the plaintiffs' claim: Canada, British Columbia, Richmond, the VFPA, Tsawwassen First Nation, and the Musqueam Indian Band.

[4] The trial commenced in September 2019. There were a total of 513 trial days. The Court heard oral history evidence and considered a substantial volume of historical documents and ethnographic evidence. Expert evidence was tendered in fields including archaeology, socio-cultural anthropology, history, ethnohistory, ethnogeography, ethnobotany, ethnoecology, genealogy, historical geography, cartography, cartology and transportation economics.

[5] The plaintiffs have established Aboriginal title to a portion of the Claim Area, including a strip of submerged lands, referred to in the reasons for judgment as the "Cowichan Title Lands". They have also established a right to fish the south arm of the Fraser River for food.

[6] This case raised complex, and in many instances, novel issues. The following is an overview of the Court's central findings:

- The Cowichan (Quw'utsun mustimuhw) were an Indigenous people comprised of 11 local groups prior to and at the time of European contact in the early 1790s, and at the time the British Crown asserted sovereignty in British Columbia at 1846 and after (at paras. 463, 498). The members of the Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, and Lyackson First Nation are the descendants of the historic Cowichan people and the 11 local groups. As the modern-day successor groups to the Cowichan as an Indigenous people, the four plaintiff bands and the Lyackson are the proper rights holder for Aboriginal rights and title in this case (at paras. 523, 1654).

- Historically, the Cowichan occupied several winter villages on the east coast of Vancouver Island from what is now Cowichan Bay to the south to as far north as Chemainus. They also had winter villages on the southern Gulf Islands, including Kuper (Penelakut) Island, Thetis Island, Valdes Island, and Willy (Halalt) Island.

- The Cowichan relied on fishing, gathering, and hunting for their food and travelled to various regions to exploit resources. Their seasonal round began in the spring on Vancouver Island and the Gulf Islands harvesting fish, shellfish and camas, plus some sea mammals, birds, and game.

- Every summer, the Cowichan travelled *en masse* to their permanent post and beam village at the Lands of Tl'uqtinus on the south arm of the Fraser River, where they lived and fished — primarily for salmon — and harvested resources together.

- The plaintiffs have established Cowichan Aboriginal title to a portion of the Claim Area, the Cowichan Title Lands. Prior to, at, and after 1846, the Cowichan sufficiently and exclusively occupied their permanent

village, its surrounding lands, and the strip of submerged lands in front of the village at Tl'uqtinus (at paras. 1241–1246, 1535–1538, 1573–1578, 1649–1653).

- In 1853, Governor James Douglas told the Cowichan that the Queen had given him a special charge to treat them with justice and humanity, so long as they remained at peace with the settlements. This was a solemn promise that engaged the honour of the Crown, which is a constitutional principle that requires the Crown to act honourably in its dealings with Indigenous peoples (at paras. 1722, 1726–1727, 1730).

- In 1859 and 1860, Douglas appropriated — essentially, meaning removed or set apart — Indian settlements from the Crown's land disposition processes (which included sale and pre-emption). These settlements were set aside for the purpose of eventual Indian reserve creation (at para. 1838).

- At that time, the Cowichan continued to occupy their village at Tl'uqtinus and its surrounding lands. It was an "Indian settlement" as colonial officials understood that term. Nonetheless, the Cowichan's settlement at Tl'uqtinus was never established as an Indian reserve for the Cowichan. Instead, the Lands of Tl'uqtinus were sold to settlers without the Cowichan's knowledge (at paras. 1817–1818).

- Between 1871–1914, Crown grants of fee simple interest were issued over the whole of the Claim Area, including the Cowichan Title Lands. The first purchase of Cowichan Title Lands was made by Richard Moody who was the first Chief Commissioner of Lands and Works for the Colony of British Columbia and was tasked with ensuring that Indian reserves were created at sites of Indian settlements. Because occupied Indian settlements were appropriated, and could not be sold,

most of the Crown grants in the Cowichan Title Lands were made without statutory authority (at paras. 2033, 2045, 2056, 2069, 2070).

- British Columbia was admitted into Canada on July 20, 1871 under the *BC Terms of Union*. The effect of Article 13 of the *BC Terms of Union* was to extend appropriation of Indian settlement lands post-Confederation, limiting the Province's ability to sell the land without first dealing with the Cowichan's interest. As a result, the post-Confederation Crown grants in the Cowichan Title Lands were made without constitutional authority because they were made under legislation that was constitutionally limited by Article 13 (at paras. 2080–2081).

- The Crown grants of fee simple interest deprived the Cowichan of their village lands, severely impeded their ability to fish the south arm of the Fraser River, and are an unjustified infringement of their Aboriginal title. Subsequent dispositions of the Cowichan's land, including BC's vesting of Richmond with fee simple interests and the soil and freehold of highways, are also unjustified infringements. Additionally, some of Canada and the VFPA's activities on the Cowichan Title Lands unjustifiably infringe the Cowichan's Aboriginal title (at paras. 2670, 2852).

- The Province has no jurisdiction to extinguish Aboriginal title. The Crown grants of fee simple interest did not displace or extinguish the Cowichan's Aboriginal title (at paras. 2188–2190).

- Aboriginal title lies beyond the land title system in British Columbia. Sections 23 and 25 of the *Land Title Act*, R.S.B.C. 1996, c. 250 do not apply to Aboriginal title. Accordingly, Richmond's reliance on ss. 23 and 25 as a statutory defence is not made out. Richmond's fee simple interests in the Cowichan Title Lands are not conclusive evidence that

Richmond is indefeasibly entitled to that land as against the Cowichan as Aboriginal title holders (at paras. 2258–2262).

- BC and Richmond advanced limitations defences, as well as equitable defences of *bona fide* purchaser for value without notice and laches. The plaintiffs' invocation of estoppel to the defences is not made out (at paras. 2881, 2890). Nevertheless, the plaintiffs' claims are not time-barred by limitations statutes (at paras. 2902–2905), and the equitable defences are not made out (at paras. 3150–3151).

- The plaintiffs have established a right to fish for food on the south arm of the Fraser River. Prior to, at, and after European contact in the early 1790s, the Cowichan fished the south arm of the Fraser River for food. This practice was integral to their distinctive culture, and continues to be so today (at paras. 3505, 3509–3511). The Cowichan's historical fishing practice was not dependent on permission from the Musqueam or any other Indigenous group (at para. 3471).

[7] Accordingly, the Court makes six declarations, which are summarized below:

- The Cowichan have Aboriginal title to the Cowichan Title Lands within the meaning of s. 35(1) of the *Constitution Act, 1982*;

- The Crown grants of fee simple interest in the Cowichan Title Lands, and the Crown vesting of the soil and freehold interest in certain highway lands in the Cowichan Title Lands, unjustifiably infringe the Cowichan's Aboriginal title;

- Except for Canada's fee simple titles and interests in certain lands (the "Vancouver Airport Fuel Delivery Project Lands"), Canada and Richmond's fee simple titles and interests in the Cowichan Title Lands are defective and invalid;

- With respect to the Cowichan Title Lands, Canada owes a duty to the Cowichan to negotiate in good faith reconciliation of Canada's fee simple interests in the Vancouver Airport Fuel Delivery Project Lands with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown;

- With respect to the Cowichan Title Lands, BC owes a duty to the Cowichan to negotiate in good faith reconciliation of the Crown granted fee simple interests held by third parties and the Crown vesting of the soil and freehold interest to Richmond with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown; and

- The Cowichan have an Aboriginal right to fish the south arm of the Fraser River for food within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[8] See para. 3724 of these reasons for the declarations of this Court. See also the map attached to these reasons as Schedule "A", which is provided as a visual aid, where the black line depicts the boundary of the Cowichan Title Lands.

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PART 1 INTRODUCTION

[1] In this Aboriginal title and rights case, the plaintiffs claim that the Quw'utsun mustimuhw (Cowichan people) had a settlement on the south arm of the Fraser River and that they fished in its adjacent waters as part of their way of life and to sustain themselves. The Cowichan settlement and fishery were located at the Lands of Tl'uqtinus, now known as the south shore of Lulu Island in Richmond, British Columbia. The plaintiffs say Tl'uqtinus is their stl'ulnup (sacred, ancient homeland).

[2] The plaintiffs seek a declaration of Aboriginal title to their traditional village of Tl'uqtinus and the surrounding lands and to submerged lands in the Fraser River. They also seek a declaration of Aboriginal right to fish the south arm of the Fraser River for food.

[3] As set out in these reasons, in 1853, James Douglas, then Governor of the Colony of Vancouver Island, promised the Cowichan that they would be treated with justice and humanity in exchange for peace. This promise was not upheld. For around 150 years, the Cowichan have been prevented from accessing their traditional village of Tl'uqtinus. In addition, government regulations have severely curtailed their access to the south arm of the Fraser River to fish.

[4] The Cowichan's village lands at the Fraser River were not set apart as an Indian reserve when reserves were being allocated in the province. Instead, the land in the claim area was sold to settlers without the Cowichan's knowledge. Between 1871–1914, Crown grants of fee simple interest were issued over the whole of the claim area. Those lands are now owned in fee simple by the federal Crown, the VFPA, the City of Richmond, and private land owners.

[5] I find that the plaintiffs have established Cowichan Aboriginal title to a portion of the Lands of Tl'uqtinus, including a strip of submerged lands (see the map at Schedule A of these reasons, which is provided as a visual aid). A central issue in this case is how Cowichan Aboriginal title impacts the fee simple interests in the same land.

[6] I also find that the Cowichan have an Aboriginal right to fish the south arm of the Fraser River for food, which is not temporally or species limited. Historically, they did not nor do they now require the permission of Musqueam to fish the south arm of the Fraser River for food.

A. PARTIES

1. Plaintiffs

[7] The plaintiffs each bring this action on their own behalf and as authorized representatives on behalf of all descendants of the historic Cowichan people, nation, or group, collectively referred to as the Cowichan Nation or the Cowichan. They claim Aboriginal title to approximately 1,846 acres of land on the south shore of Lulu Island across from Tilbury Island in Richmond, British Columbia, as shown on the map attached as Schedule A to this judgment, and the surrounding lands held by Richmond or Canada, identified on Schedule B to this judgment as the Federal and Richmond Tl'uqtinus Lands (the “Claim Area”).

[8] The plaintiff bands (Cowichan Tribes, Stz’uminus First Nation, Penelakut Tribe, and Halalt First Nation) and the Lyackson First Nation are bands within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. They say they are the descendants of the 11 local groups of the Quw’utsun mustimuhw who historically occupied the Claim Area.

[9] The Lyackson First Nation is not a plaintiff in this action. However, its members are represented as descendants of the Cowichan Nation. The Lyackson passed a Band Council Resolution affirming their support of this action, and authorizing the plaintiffs to bring the litigation on behalf of the collective Cowichan Nation.

[10] The plaintiff Squtxulenuhw, also known as William Charles Seymour Sr., is the Chief of the Cowichan Tribes, a registered Indian and a member of the Cowichan Tribes.

[11] The plaintiff Thỏlmen, also known as John Elliott, is the Chief of the Stz'uminus, a registered Indian and a member of the Stz'uminus.

[12] The plaintiff Kwaliimtunaat, also known as Joan Brown, is the Chief of the Penelakut, a registered Indian and a member of the Penelakut.

[13] The plaintiff Sulsimutstun, also known as James Thomas, is the Chief of the Halalt, a registered Indian and a member of the Halalt.

2. Defendants

[14] The plaintiffs' claims are opposed by six defendants.

[15] The defendant the Attorney General of Canada is the representative of His Majesty the King in right of Canada ("Canada"). Canada owns 11 lots in the Claim Area, and assigns administration of those lands to the Vancouver Fraser Port Authority ("VFPA"). Canada also manages the marine fisheries. Canada opposes the Aboriginal title claim. Regarding the fishing right, Canada takes the position that if the Cowichan needed permission from Musqueam to fish for food on the south arm of the Fraser River, then an Aboriginal right has not been established. If an Aboriginal right to fish is established, Canada has reached an out-of-court agreement with the plaintiffs such that the Court no longer needs to determine the issues of infringement and justification as it relates to the fishing right.

[16] The provincial Crown does not own any land in the Claim Area. His Majesty the King in right of the Province of British Columbia ("BC") opposes the title claim on the basis that the Cowichan did not sufficiently and exclusively occupy Tl'uqtinus and the surrounding land at 1846. Between 1871–1914, the Cowichan's traditional village land was granted to settlers by way of Crown grants (most of which was granted by BC after Confederation) of fee simple interest. BC says those Crown grants were validly made. If the plaintiffs establish Aboriginal title, BC says any presently exercisable right that the Cowichan may have is limited by the existence of fee simple interests as long as those incompatible interests exist.

[17] The Vancouver Fraser Port Authority ("VFPA") is an agent of Canada for the purpose of engaging in port activities referred to in s. 28(2)(a) of the *Canada Marine Act*, S.C. 1998, c. 10. The VFPA occupies land on the south arm of the Fraser River and operates port storage facilities. The VFPA owns four lots listed below in the Claim Area. I find Aboriginal title exists over some land that is owned by Canada and managed by the VFPA. I do not find that Aboriginal title exists over the four lots owned by the VFPA. The VFPA adopts Canada's position in opposing Aboriginal title.

[18] The City of Richmond ("Richmond") was incorporated as a municipality in 1879 and designated as a city in 1990. Richmond owns land in the Claim Area, including a strip of land along the shoreline of the Fraser River where I find the village at Tl'uqtinus once sat. The Cowichan have established Aboriginal title to this shoreline. Richmond obtained the land between the 1920s and 1940s by way of a municipal tax sale process which occurred when settlers failed to pay their property taxes. The lands are minimally developed. Richmond opposes the plaintiffs' Aboriginal title claim and relies on the indefeasibility protection of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], among other defences.

[19] The Tsawwassen First Nation ("TFN") are a Coast Salish people who historically spoke and speak a dialect of the Hun'qum'i'num language. TFN owns a large parcel of land south of the south arm of the Fraser River further to the Tsawwassen First Nation Final Agreement ("TFNFA") which was approved under the *Tsawwassen First Nation Final Agreement Act*, S.B.C. 2007, c. 39 and the federal *Tsawwassen First Nation Final Agreement Act*, S.C. 2008, c. 32. The TFNFA is a full settlement of TFN's Aboriginal rights and title claims. It is a modern treaty which has the status and force of law and enjoys constitutional recognition and affirmation pursuant to the *Constitution Act, 1982*.

[20] The TFN's lands are set out in the TFNFA and are depicted south of the mouth of the Fraser River. The majority of the lands are between Highway 17 and Deltaport Way, and include the former Tsawwassen reserve south of Highway 17

along the shore of the Salish Sea. The lands that TFN own are not in or near the Claim Area.

[21] TFN has other treaty rights under the TFNFA, including fishing. There is geographical overlap and engagement between TFN's modern treaty rights, as defined in the TFNFA, and the Cowichan's asserted Aboriginal title to the Lands of Tl'uqtinus and their right to fish the south arm of the Fraser River for food.

[22] TFN opposes the claim that the Cowichan were an Indigenous people at the time of European contact or sovereignty and that the Cowichan sufficiently or exclusively occupied Tl'uqtinus or its surrounding lands as at 1846. TFN says the Court should avoid a conclusion that would detract from the established s. 35 rights of other First Nations or that would otherwise discourage parties from concluding modern treaties.

[23] The Musqueam Indian Band ("Musqueam") is a band as defined in the *Indian Act*. The Musqueam are a Coast Salish people who historically spoke and speak hən̓q̓əmin̓əm̓ which is a dialect of Halkomelem. There is a long interconnectedness between Musqueam and the Cowichan through intermarriage.

[24] Musqueam today has about 1,350 members, approximately half of whom live on the Musqueam Indian Reserve No. 2. The reserve is located on the north shore of the north arm of the Fraser River, at the entrance to the Fraser River, near the Vancouver International Airport ("YVR"). It comprises about 550 acres. Musqueam's territory has not been determined by a court or treaty.

[25] In 1976, Musqueam declared that they hold Aboriginal title and rights to land, sea, and freshwaters covering the north and south arms of the Fraser River, the west coast of Lulu Island, Sea Island, Point Grey, and Burrard Inlet.

[26] Although Musqueam challenges the Cowichan's claim for Aboriginal title, I find that Musqueam did not occupy the same area of the south arm of the Fraser River that the Cowichan did and never occupied the village of Tl'uqtinus.

[27] Musqueam has an Aboriginal right within the meaning of s. 35 of the *Constitution Act, 1982* to fish for food, social and ceremonial purposes. Musqueam says that the Cowichan required its permission to fish the south arm of the Fraser River and accordingly, the Cowichan did not have an Aboriginal right to fish. I find that historically, Musqueam did not control fishing on the Fraser River and the Cowichan did not need to seek their permission to fish there.

B. DESCRIPTION OF THE CLAIM AREA AND DEFINITIONS

1. Lands of Tl'uqtinus

[28] The Claim Area lands are also described as the Lands of Tl'uqtinus, and are depicted on the map attached to this decision as Schedule B, by the outer polygon and adjacent coloured lots.

[29] The map at Schedule A was prepared by historical geographer and cartographer Dr. Kenneth Brealey who reviewed ethnohistorical, ethnographic, and official and archaeological records to provide a graphic of what this settlement looked like. He used small squares to depict 108 houses along the south shore of Lulu Island, making up the village proper of Tl'uqtinus as described by Hudson's Bay Company ("HBC") explorers John Work, François Annance, and George Barnston in the 1820s. He relied on the first survey of Lulu Island, conducted by Joseph Trutch in 1859, to show the biogeoclimatic landscape of the village, fishing station, and trails. The second largest polygon depicts what he described as the village proper. The smallest polygon circling the houses is the boundary of an archaeological site called "DgRs17".

[30] Dr. Brealey described the largest polygon as the boundary of the extended land management area. Annance described the village as housing not less than 1,000 men. Dr. Brealey inferred that such a large village would need a substantial "backyard" for resource gathering to support the families staying there over the summer.

[31] I find that the Cowichan occupied some of the Lands of Tl'uqtinus at 1846. I also find that by 1846, the village lands were not as extensive as the plaintiffs claim. The thick black line on Schedule A is provided as a visual aid to approximate the land over which the plaintiffs have proven Aboriginal title, which I define for the purpose of these reasons as “Cowichan Title Lands”. It includes a stretch of beach and submerged lands on the southern boundary between low and high tide that would have accommodated canoe launches, fisheries, and related waterfront activities.

2. Federal Tl'uqtinus Lands

[32] The “Federal Tl’uqtinus Lands” refers to land owned by Canada and/or the VFPA in the Claim Area, as described below. This is the definition the plaintiffs used in their fifth further amended notice of civil claim and for ease of reference, I use that definition in my reasons. The map attached as Schedule B shows the Federal Tl'uqtinus Lands. These lands are labelled in pink; however, if viewing the map in black and white, they appear as lighter shading.

[33] Canada admits it holds the following lands, legally described as:

a) Lot 1, Sections 27 and 22, Block 4 North, Range 5 West, New Westminster District Plan 74529, PID 007-793-464;

b) Lot 2, Section 23, B4N, R5W, New Westminster District Plan 74529, PID 007-793-499;

c) Lot 3, Sections 13 and 14, B4N, R5W, New Westminster District Plan 74529, PID 007-793-553;

d) Lot 4, Section 18, Block 4 North, Range 4 West, New Westminster District Plan 74529, PID 007-793-596;

e) Lot 5, Section 13, B4N, R5W, and Sections 18 and 19, B4N, R4W, New Westminster District Plan 74529, PID 007-793-626;

f) Lot 6, Section 24, B4N, R5W, New Westminster District Plan 74529, PID 007-793-651;

g) Lot 7, Section 24, B4N, R5W, New Westminster District Plan 74529, PID 007-793-685;

h) Lot 8, Section 24, B4N, R5W, New Westminster District Plan 74529, PID 007-793-707;

i) Lot 9, Sections 23 and 26, B4N, R5W, New Westminster District Plan 74529, PID 007-793-723;

j) Lot 2, Section 19, B4N, R4W, New Westminster District Plan BCP 15046, PID 026-137-879;

k) Lot 8, Section 19, B4N, R4W, New Westminster District Plan BCP 30824, PID 027-117-529.

[34] The plaintiffs have established Aboriginal title to the lands in Lot 1 in Sections 27 and 22, Lot 2 in Section 23 and Lot 9 in Sections 23 and 26.

[35] It is also not contested that the VFPA owns the following Federal Tl'uqtinus Lands:

a) Lot 1, Section 4, Block 3 North, Range 5 West, New Westminster District Plan 71350, PID 003-637-379;

b) Lot 2, Section 4, B3N, R5W, New Westminster District Plan 71350, PID 003-637-387;

c) South half of Lot 4, Section 32, B4N, R5W, New Westminster District Plan 8646, PID 001-722-671;

d) Lot 1, Section 32, B4N, R5W, New Westminster District Plan LMP43950, PID 024-631-736.

[36] The plaintiffs have not established Aboriginal title to these lands.

3. Richmond Tl'uqtinus Lands

[37] The “Richmond Tl'uqtinus Lands” refers to the land in the Claim Area, described below, in which Richmond holds fee simple interests or soil and freehold interests. Again, for ease of reference, I use the definition from the plaintiffs’ fifth further amended notice of civil claim. The land that Richmond holds fee simple interests in are also set out on the map attached as Schedule B. These lands are labelled in orange; however, if viewing the map in black and white, they appear as darker shading.

[38] Richmond admits it owns the following lands, for which a fee simple interest is registered under the *LTA*, legally described as:

a) Lot E, Sections 23 and 26, B4N, R5W, New Westminster District Plan 19680, PID 010-535-471;

b) Lot K, Section 27, B4N, R5W, New Westminster District Plan 19680, except Plan BCP42299, PID 010-535-519;

c) Lot 1, Section 19, B4N, R4W, New Westminster District Plan BCP 15046, PID 026-137-861;

d) Lot 1, Section 33, B4N, R5W, New Westminster District Plan LMP49461, PID 024-995-461;

e) Lot 9, Section 33, B4N, R5W, New Westminster District Plan 3447, PID 005-200-351;

f) Lot 10, Section 33, B4N, R5W, New Westminster District Plan 3447, PID 005-200-342;

g) Lot 11, Section 33, B4N, R5W, New Westminster District Plan 3447, PID 004-283-325;

h) Lot 12, Section 33, B4N, R5W, New Westminster District Plan 3447, PID 002-004-577;

i) Lot 13, Section 33, B4N, R5W, New Westminster District Plan 3447, PID 004-825-578, except Parcel “A” (Explanatory Plan 15059) and Parcel “B” (Explanatory Plan 15060);

j) Lot 14, Section 33, B4N, R5W, New Westminster District Plan 3447, PID 001-210-351.

[39] The plaintiffs have established Aboriginal title to the lands in Lots E and K.

[40] Richmond also holds the soil and freehold interest in the land described below, by virtue of it constituting a “highway” under the *LTA*, s. 107 and the *Community Charter*, S.B.C. 2003, c. 26, ss. 5 and 35(1)(a):

a) Dyke Road, Parcel A (Explanatory Plan 74643), Section 27, Block 4 North, Range 5 West, New Westminster District, as showing on Subdivision Plan 19680, PID 007-857-829;

b) Dyke Road, Parcel B (Explanatory Plan 74643), Sections 23, 24 and 26, Block 4 North, Range 5 West, New Westminster District, as showing on Subdivision Plan 19680, PID 007-857-861;

c) No. 7 Road, Sections 14, 22, 23, 26 and 27, Block 4 North, Range 5 West, New Westminster District, as showing on Subdivision Plan 19680;

d) No. 7 Road, Section 15, Block 4 North, Range 5 West, New Westminster District, , as showing on Subdivision Plan LMP 40687;

e) Parcel “2”, Section 15, Block 4 North, Range 5 West, New Westminster District, Explanatory Plan LMP 38617;

f) Blundell Road and No. 8 Road, through portions of Sections 13, 14, 23, and 24, Block 4 North, Range 5 West, and Section 18, Block 4 North, Range 4 West, New Westminster District, as showing on Reference Plan 72810;

g) Dyke Road, Section 19, Block 4 North, Range 4 West, New Westminster District, as showing on Subdivisions Plan BCP 15046 and BCP 30824;

h) Half Road Allowance, eastern boundary of Lot 9, Section 33, Block 4 North, Range 5 West, New Westminster District, as showing on Subdivision Plan 3447; and

i) The portion of road within Section 27, Block 4 North, Range 5 West, New Westminster District, as showing on New Westminster District Reference Plan BCP 42299.

[41] The plaintiffs have established Aboriginal title to the land in Sections 21, 22, 23, 26 and 27 and portions of land in Sections 20, 28 and 29. The highway lands described at para. 40 a), b), c), f) and i) above include Aboriginal title land.

4. Vancouver Airport Fuel Delivery Project Lands

[42] The Vancouver Airport Fuel Facilities Corporation was approved to construct and operate a fuel delivery project to meet fuel requirements at YVR. They received environmental assessment approval in 2013. After consulting with the plaintiffs and entering into accommodation agreements, the plaintiffs advised they did not oppose the leasing of the 12 acres for the project. The Vancouver Airport Fuel Delivery Project (“YVR Fuel Project”) relates to a portion of Section 34, B4N, R5W, New Westminster District, PID 006-408-265, and approximately 12 acres in the west of Lot 1 of the land Canada owns.

5. Private Fee Simple Lands

[43] The balance of the lands in the Claim Area that are not Federal or Richmond Tl'uqtinus Lands are owned by private landowners who are not parties to this action. Third parties have fee simple estates in Cowichan Title Lands in Sections 20, 21, 22, 27, 28, and 29.

[44] For clarity, the plaintiffs seek a declaration that the fee simple titles held by Canada, the VFPA and Richmond are defective and invalid because they say the Crown grants from which they derive were made without constitutional or statutory authority and because the Crown grants of fee simple interest unjustifiably infringe their Aboriginal title. They do not seek the same declaration in respect of privately-owned lands, or the YVR Fuel Project lands.

6. Language

[45] The Central Coast Salish people speak Halkomelem. Socio-cultural anthropologist and ethnohistorian Dr. Dorothy Kennedy explained that there are three main dialects of this language. Firstly, Island Halkomelem or Hul'qumi'num is spoken along the southeast side of Vancouver Island and parts of the northern Gulf Islands. Secondly, Downriver Halkomelem or hən̓q̓əmin̓əm̓ is spoken from the area around the mouth of the Fraser River up to Stave River. Thirdly, Upriver Halkomelem or Halkomelem is spoken along the Fraser River drainage above the Stave River.

[46] The Cowichan speak Hul'qumi'num. TFN and Musqueam speak hən̓q̓əmin̓əm̓, also spelled Hun’qum’i’num.

7. Terminology

[47] A few notes on terminology and spelling.

[48] First, the spelling of sites and groups, the names of individuals, and other Cowichan terminology will appear inconsistent in these reasons. This is because of the different spellings in the documents and testimony. I have generally used the spellings in the documents and testimony when paraphrasing from them.

[49] I use a naming convention in these reasons when paraphrasing the evidence about Cowichan Chief Shashia, also known as Chasewa, Chaseaw, Chasea, Joshua, Josua, Joshia, Hosua, Soseeah, So-cee-ah, Sasea, Soseeah, Saw-se-a, Soseiah, Tsawsiai, Tsosieten, Thoseatan, Tsau-see-âh, and Old Joe. Where these references appear in the historical record and literature, there is general agreement amongst the parties that they refer to Shashia who was a Cowichan chief.

[50] “Cowichan” is variously spelled in the historical record, including spellings such as Coweechin, Cowitchen, Cowitchin, Cowitzen, Cow-ait-chen, Cowitchian, Cawitchin, Cawechin, Cowetchin, Cowegin, Cowaitzchin, Cawaitchen, Kawitchin, and Qauitschin. I flag that there is frequent disagreement amongst the parties about whether the term Cowichan, as it appears in the historical record, refers to the plaintiffs’ ancestors or any number of groups, or to the Coast Salish more broadly. These disputes are dealt with in the reasons. However, where the various terms appear, I use the spelling “Cowichan” when paraphrasing the historical evidence.

[51] I do not employ a spelling convention for Tl'uqtinus. There is no agreement on its meaning; different pieces of evidence and testimony do not necessarily speak to the same area. Accordingly, I use the spelling found in the evidence or pleadings when paraphrasing.

[52] In these reasons, I use the word “Aboriginal” as it is used in the jurisprudence. I also use the term “Indian” only as necessary when quoting from the historical record, legislation and policy, as the word “Indian” has negative connotations and its use can be hurtful. I otherwise use the terms “First Nations” or “Indigenous peoples”, as the context requires.

[53] The Court is constrained in its ability to produce a document using the hən̓q̓əmin̓əm̓ alphabet so I have for the most part relied on the English alphabet when spelling a word in hən̓q̓əmin̓əm̓.

C. NATURE OF THE LITIGATION

[54] This 513-day trial commenced in September 2019 and finished in November 2023. The evidentiary phase required 447 days of trial. There were 2,858 exhibits entered. Less than one year into the trial, the world shut down due to the COVID-19 pandemic. This trial continued remotely from June 2020 to completion with a few weeks of personal attendance interspersed. Two weeks of trial were spent in the Cowichan territory in the City of Duncan.

[55] I would like to thank counsel who always came to court prepared and provided useful authorities and excellent submissions. There were numerous evidentiary objections and rulings but despite the adversarial legal positions taken, the atmosphere in the courtroom was calm and collegial because of counsel's professionalism. Comprehensive final written submissions were produced by all parties and final oral submissions were heard from June to November 2023. The issues are complex to say the least.

[56] I want to show my appreciation to the people who assisted me throughout the trial and throughout this writing process. First in line is Registrar Valerie Laronde who signed up for this massive undertaking in 2019 and saw it to its completion. In addition to herding numerous counsel in and out of the courtroom or over Microsoft Teams, Registrar Laronde operated multiple computer programs to ensure the proper entry and security of the exhibits. Our real-time court reporters Christy Pratt and Kelsey Fletcher provided real-time transcripts of the proceedings and with the help of their team, spent hours outside of court correcting and editing transcripts. Tawyna Watson, Manager, In-Court Operations at the Victoria Law Courts provided technical assistance and crawled under innumerable desks checking connections and came to the Duncan Courthouse to make sure the trial ran smoothly. William Huang from IT Services supported me through a steep electronic learning curve.

[57] Another unique feature of this trial is that it was conducted with digital documents loaded into an E-Trial Toolkit created by REDI Analysis which made

accessing this massive record manageable. Martin Crossman designed the E-Trial Toolkit and was always available to us for support.

[58] During the past six years, I have been assisted by law clerks and judicial staff too numerous to mention who provided helpful research, editing, and technological support.

[59] I will now set out the chronology of the litigation, and briefly review the pleadings and the issues to be decided.

PART 2 PROCEDURAL HISTORY

A. CHRONOLOGY OF THE LITIGATION

[60] By way of brief background, the plaintiffs commenced this action against Canada and BC in the Supreme Court of British Columbia on March 14, 2014. On November 3, 2014, the plaintiffs added Richmond as a defendant to the action.

[61] In November 2015, the plaintiffs sent formal notification letters to several third party First Nations, including Musqueam and TFN.

[62] Musqueam filed an application to be added as defendant to this action on January 20, 2016. Musqueam was concerned that the determination of the plaintiffs' claims would affect Musqueam's rights, particularly since they assert the Lands of Tl'uqtinus are within their traditional territory. Pursuant to a case plan order of Justice Power, the plaintiffs added Musqueam as well as the VFPA as defendants when they amended their pleadings on February 22, 2016.

[63] On April 7, 2016, Power J. heard TFN's application to be added as a defendant. The plaintiffs opposed TFN's joinder on the grounds that it would add complexity and expense to the litigation, and that TFN had no direct interest in the claim: 2016 BCSC 1660 at paras. 30, 44.

[64] In that application, the plaintiffs pointed to clause 48 of the TFNFA, arguing TFN "agreed pre-emptively to cede its treaty rights to other aboriginal groups' litigated rights under s. 35": 2016 BCSC 1660 at para. 38. That clause reads:

> 48. If a superior court of a province, the Federal Court of Canada or the Supreme Court of Canada finally determines that any aboriginal people, other than Tsawwassen First Nation, have rights under section 35 of the *Constitution Act,1982* that are adversely affected by a provision of this Agreement:
>
> a. the provision will operate and have effect to the extent that it does not adversely affect those rights; and
>
> b. if the provision cannot operate and have effect in a way that it does not adversely affect those rights, the Parties will make best efforts to amend this Agreement to remedy or replace the provision.

[65] On September 8, 2016, Power J. ordered that TFN be added as a defendant because the relief sought by the plaintiffs had the potential to impact TFN's direct interests and rights under the TFNFA: 2016 BCSC 1660 at paras. 60–76.

[66] Justice Power managed the case beginning in 2015, and I was appointed as judicial management and trial judge in early 2018. I heard many applications pertaining to procedural and evidentiary issues, prior to the commencement of the trial on September 9, 2019, as well as throughout the proceedings. I do not intend to detail every ruling in this case. From 2015 to 2023, this Court made over 100 orders, and published close to 50 decisions.

[67] The parties' final arguments completed in November 2023. I provided closing remarks later that month, on the 513th day of trial. I now render these reasons just over 11 years since the plaintiffs commenced this litigation.

B. REVIEW OF THE PLEADINGS

[68] I will first touch on principles pertaining to pleadings in Aboriginal law cases. Then, I will review the parties' positions and the issues to be decided as pleaded.

1. Relevant Principles

[69] I am mindful that as trial judge in this case, I am to take a functional approach to the pleadings. Chief Justice McLachlin in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in* SCC] found that pleadings give the parties and the court a framework for addressing the material allegations and relief sought. Where this

purpose is achieved, minor defects should be overlooked, as long as the parties will not be clearly prejudiced: at para. 20.

[70] The functional approach is grounded in certain relevant considerations in Aboriginal law trials. Firstly, “the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude”: *Tsilhqot'in* SCC at para. 21.

[71] Secondly, the claimant group’s use of the land may not be initially apparent. As this trial demonstrates, it takes time for the historical practices to be “expounded, tested and clarified” through oral history, historical and ethnographic records, and expert opinion: *Tsilhqot'in* SCC at para. 22. Further, an Indigenous group’s historic occupation may not have been based “on any precise boundaries”, and so requiring “proof of Aboriginal title precisely mirroring the claim would be too exacting”: *William v. British Columbia*, 2012 BCCA 285 at para. 118 [*Tsilhqot'in* BCCA], cited in *Tsilhqot'in* SCC at para. 22.

[72] Finally, McLachlin C.J.C. in *Tsilhqot'in* SCC said that a technical approach to pleadings in Aboriginal rights cases may not further the aims of deciding the substance of the matter in the interests of reconciliation:

> [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.

[73] I kept this in mind throughout the course of this trial.

2. Positions of the Parties

a) Plaintiffs

[74] As previously mentioned, the plaintiffs filed the originating notice of civil claim in March 2014. In line with the above principles on pleadings in Aboriginal law matters, the plaintiffs have amended their notice of civil claim several times. Their

final revisions are made out in the fifth further amended notice of civil claim, filed on February 22, 2023 (the “fifth FANOCC”).

[75] In the fifth FANOCC, the plaintiffs seek a number of declarations. I summarize them as follows, and I generally analyze the issues in this order:

a) The descendants of the Cowichan Nation hold Aboriginal title to the Lands of Tl'uqtinus, or to a portion thereof, as descendants of the historic Cowichan Nation;

b) The Crown grants of fee simple interest and the Crown vesting of soil and freehold interest in the Lands of Tl'uqtinus has infringed the Cowichan’s Aboriginal title and this infringement is not justified;

c) The fee simple titles and interests in the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands) and the Richmond Tl'uqtinus Lands are defective and invalid, in whole or in part;

d) In the alternative, Canada and/or VFPA hold the Federal Tl'uqtinus Lands, or any portion thereof, as a constructive trustee for the descendants of the Cowichan Nation;

e) BC’s vesting of Richmond with the soil and freehold of every highway in Richmond is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of Article 13 of the *BC Terms of Union*;

f) With respect to the YVR Fuel Project lands, Canada has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation reconciliation of the Crown granted fee simple interests with Cowichan Aboriginal title;

g) With respect to the Lands of Tl'uqtinus, other than the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands, BC has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation reconciliation of the Crown granted fee simple

interests and Crown vesting of the soil and freehold with Cowichan Aboriginal title;

h) The descendants of the Cowichan Nation are entitled as against BC to the Lands of Tl'uqtinus;

i) The descendants of the Cowichan Nation have an Aboriginal right to fish the south arm of the Fraser River for food; and

j) Canada has infringed the Cowichan's Aboriginal right to fish and this infringement is not justified.

[76] The relief regarding unjustified infringement of the fishing right is no longer in issue before me.

b) Defendants

[77] Overall, the defendants say the claim should be dismissed. At some points, they take diverging stances and have made admissions on various issues. Their specific positions will be set out throughout the course of these reasons.

[78] The defendants deny the Cowichan have Aboriginal title to the Lands of Tl'uqtinus. Alternatively, the Crown defendants and the VFPA say there has been no infringement of the Cowichan's Aboriginal title or that any infringement is justified.

[79] Musqueam and TFN deny the Cowichan have an Aboriginal right to fish the south arm of the Fraser River for food. Alternatively, if the Cowichan did fish the south arm at the time of contact, it was subject to permission of Musqueam, TFN, or other Indigenous groups. Canada made a number of admissions with respect to the fishing right and now concedes that, if the Court finds the Cowichan did not fish with the permission of Musqueam, the plaintiffs have established an Aboriginal right to fish.

[80] BC, the VFPA, and Richmond pleaded some defences, including limitations, laches, and acquiescence. Canada did not plead any affirmative defences, and in final argument, the VFPA relied on Canada's position.

PART 3 OVERVIEW OF SOURCES OF EVIDENCE

[81] The bulk of the evidence in this case spans centuries, particularly the period of 1790–1914. In the early part of this period, written records were sparse and incomplete.

[82] Some of the oral history evidence relates to a much earlier time period.

[83] Given the time period with which this case is concerned, there is little in the way of direct evidence like eyewitness accounts. I am tasked with drawing inferences from different types of evidence across a chasm of centuries in order to find facts on a balance of probabilities. There are few absolutes.

[84] Nonetheless, there was a substantial body of evidence before me, including oral history, historical written records, expert opinion, and ethnographic evidence. I also heard from a number of witnesses who testified about their personal observations and experiences, including the oral history witnesses.

[85] The challenges inherent to proving Aboriginal rights, which requires proof of historical facts, have long been acknowledged by the courts: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 80, 82, 1997 CanLII 302 [*Delgamuukw* SCC]; *Mitchell v. M.N.R.*, 2001 SCC 33 at paras. 27, 29 [*Mitchell*].

[86] In *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494 [*Ahousaht* 2009], rev'd in part 2011 BCCA 237, aff'd on reconsideration 2013 BCCA 300 [*Ahousaht* 2013], leave to appeal to SCC ref'd, 34387 (30 January 2014), Garson J. (as she then was) summarized the evidentiary principles informing Aboriginal rights cases:

> [58] In *Van der Peet*, at para. 62, Lamer C.J. acknowledged "the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community." He

recognized that the burden of proof must not be applied in such a way as to conflict with the spirit and intention of s. 35(1) of the *Constitution Act, 1982*. At para. 68, he wrote:

> [A] court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in.

[59] The Supreme Court of Canada has also held that owing to the difficulties in proving aboriginal rights, courts must be prepared to draw inferences from what evidence is available:

> Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society. This object gives context to the analysis. For this reason, courts must be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available.
>
> *Sappier*, at para. 33

[60] This flexible approach to the evidence does not, however, negate the operation of general evidentiary principles. In *Mitchell*, McLachlin C.J. stated, at para. 38:

> … it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law …

…

[62] From the foregoing authorities, I draw the following evidentiary principles that have special application in cases involving claims to aboriginal rights and title:

- As in all civil cases, the burden of proof rests on the plaintiff. The material facts must be proven on a balance of probabilities, with due regard to the rules of evidence.
- While evidence must be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test, it may be necessary to draw inferences where appropriate, such as inferring from post-contact activity that the same activity took place before contact.
- Traditional rules of evidence regarding the admissibility, reliability and weight of evidence continue to apply. However, the Court must also recognize the evidentiary challenges inherent in proving events and circumstances that took place hundreds of years ago, and apply those rules flexibly in a manner that is consistent with the spirit and intent of s. 35(1) of the *Constitution Act, 1982*.

- Finally, the Court must be sensitive to not only the European perspective but also the aboriginal perspective when examining evidence about aboriginal peoples as recorded by Europeans.

[87] These principles inform my approach to the evidence in this case. I will now review the various sources of evidence I have considered.

A. ORAL HISTORICAL RECORD

1. What is Indigenous Oral History?

[88] The Indigenous perspective grounds every step of the analysis of s. 35 claims: *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 50 [*Marshall; Bernard*]. Oral histories express this perspective and play a crucial role in the litigation of Aboriginal rights: *Delgamuukw* SCC at para. 84. Generally, Indigenous oral history:

a) Is the practice of transmitting information orally, handed down through the generations, as a means of recording history and preserving Indigenous knowledge.

b) Includes subjective experience, and although typically tendered to prove a historical fact, oral histories may have elements that are not entirely factual.

c) Is neither linear nor as focused on establishing the objective truth as in the non-Indigenous tradition; the ‘truth’ lying at the heart of oral history and tradition evidence can be elusive.

d) May express the “values and mores” of a culture, and may be woven with history, legend, politics, and moral obligations.

e) Is evidence of events and the context in which events took place, including the relevant laws, cultures, and traditions.

f) Demonstrates how the community establishes what happened in the past, believed to be real, is relevant to the present.

g) “[S]omething to be evaluated and something to evaluate by”.

See *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at 33 [RCAP Report]; *Delgamuukw* SCC at paras. 85–86; *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at paras. 135–137, 148 [*Tsilhqot'in* BCSC]; *Saugeen First Nation v. Canada (Attorney General)*, 2021 ONSC 4181 at paras. 53–54 [*Saugeen First Nation* ONSC], rev’d in part on other grounds *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General)*, 2023 ONCA 565 [*Chippewas of Nawash* ONCA], leave to appeal to SCC ref’d, 40978 (25 April 2024) and 40979 (24 October 2024); *Cowichan Tribes v. Canada (Attorney General)*, 2022 BCSC 933 at paras. 4–9; John Borrows, “Listening for a Change: the Courts and Oral Tradition” (2001) 39:1 Osgoode Hall L.J. 1 at 28.

2. Approach to Oral History Evidence

[89] Oral history evidence can be accommodated and placed on an equal footing with more familiar forms of evidence. Oral history evidence can be given independent weight, and is assessed on a case-by-case basis: *Delgamuukw* SCC at paras. 87, 98; *Mitchell* at para. 39.

[90] In relation to the weight assigned to evidence, it may be appropriate to inquire as to a witness’s ability to know and testify to oral traditions and history: *Mitchell* at para. 33.

[91] In *Shot Both Sides v. Canada*, 2019 FC 789, rev’d on other grounds 2022 FCA 20, rev’d in part 2024 SCC 12 [*Shot Both Sides* FC], Justice Zinn provided the following helpful comments on approaching the oral history evidence before him:

> [96] ... The assessment of the value of the oral history evidence comes down to the weight given it. In assessing that evidence, I am guided by the following. Where oral history evidence is supported by, or is consistent with written records, I give it significant weight. Where the oral history evidence is uncontradicted, I generally give it significant weight. Where the oral history evidence rings true in the context of events at the time, I generally give it

> significant weight. Where the oral history evidence reflects common sense, I generally give it significant weight.

[92] Justice Phelan in *Watson v. Canada*, 2020 FC 129 at para. 77 also suggested that documentary evidence deserves considerable weight when it is supported by oral history.

[93] I am cautious to avoid treating oral history as inferior to documentary evidence. Uncontradicted oral history deserves as much weight as uncontradicted documentary evidence and generally does not require corroboration. When oral history is challenged, documentary evidence may assist in determining how much weight should be given to the oral history. The opposite is also true. These are general principles only, as oral history must be assessed on a case-by-case basis.

3. Cowichan Oral History

[94] A number of the plaintiffs' witnesses gave oral history evidence. Dr. Kennedy provided opinion evidence on the intergenerational transfer of knowledge in Coast Salish societies. She said it occurs within families and communities, and at intervillage ceremonies. Elders are responsible for passing down history, and ensure the correctness of Quw'utsun mustimuhw history. Children are taught to listen carefully to the Elders. Knowledge can be conveyed by means of First Ancestor and other stories, experiential teaching, magical words, local group mythology, and songs, and can also be related through wooden sculptural art and ceremonial items. Some families own ceremonially-used rattles and masks, which are associated with spiritual knowledge.

[95] Multigenerational families working, travelling, and simply being together comprise the main way knowledge is currently transferred from one generation to another. Culture is shared at bighouse ceremonies and other community events. Carrying out traditional pursuits, such as berry picking, clamming, hunting, or gathering medicinal plants under the direction of an older member provides younger individuals opportunities for experiential learning. Information and stories are repeated frequently to reinforce traditional knowledge and ensure its accuracy.

a) Florence James (Thiyuas/Thiyuasulwut)

[96] I heard evidence from Thiyuas/Thiyuasulwut, who preferred to be referred to as Mrs. James. Mrs. James is a reliable source of Cowichan oral history. She is a highly-respected Elder. Mrs. James was taught by her Elders using a formal teaching method reinforced daily when she was a child. She developed her history over the years from various Elders. Her testimony was rich in detail and texture. She was cautious to only recount evidence within the limits of her knowledge, and was respectful of the limits on permission to repeat the oral history of others.

[97] Mrs. James is a registered Indian under the *Indian Act*, and has been a member of the Penelakut Tribe all of her life. Mrs. James was born in 1947. She has two traditional names, Thiyuas and Thiyuasulwut. The name Thiyuas was given to her when she was initiated in the bighouse on Penelakut. These names came from her great-great-grandmother and her great-grandmother.

[98] Mrs. James' family tree traces her ancestry back to Stutsun, one of the first Cowichan people to fall from the sky. On her father's side, her ancestry is connected with the warrior Ts'ooxilum.

[99] Mrs. James has a university degree in early childhood care and First Nations studies. She named the Penelakut daycare, helped the daycare develop traditional practices, and taught Hul'qumi'num. At the time of her testimony, Mrs. James worked at Vancouver Island University, teaching the oral history section of a First Nations Studies class based on her traditional knowledge. She has been involved with other organizations, including the Penelakut Tribe Council, the Vancouver Island Elders Council, the provincial Ministry of Education Elders Council, the Truth and Reconciliation Commission through the Tsow-Tun Le Lum Society, the Ministry of Children and Family Development, Tillicum Child and Family Services, and Chemainus Secondary School. She also participated in Tribal Journeys.

[100] Mrs. James has conducted cultural healing ceremonies, and taught traditional songs, cooking, and gardening methods. She taught Hul'qumi'num, and has helped with translations and spellings for various publications into Hul'qumi'num.

[101] Mrs. James was trained and taught oral history from her family through a rigorous process of repetition and testing as a child and throughout her life. When she was a child, she was told stories after supper at 4:30 pm every day by her paternal grandfather, Qwulthimult-hw (Fred Joe). He taught her stories and traditional practices, including about the sacred land or stl'ulnup called Tl'uqtinus on the lower Fraser River. Her grandfather was a speaker in the bighouse and was fluent in Hul'qumi'num. She was taught to be disciplined in her learning of oral history. She memorized histories, prayers, ceremonies, and spiritual words.

[102] As a child, Mrs. James went to the Fraser River with her parents, where her father worked as a gillnetter. Her mother worked at the canneries at stolo, Fraser River, which they called Shnuwiilh. Shnuwiilh is what they called the part of the Fraser River on the opposite side of the strait from their residence in the southern Gulf Islands. The name alludes to the shape of one’s inner thighs, and references the inner part of an opening on the land and ocean. There, fresh water and saltwater mix, going back and forth. The river splits like the inner thighs of a human being.

[103] Mrs. James learned from many Elders who lived traditional lifestyles, spoke Hul'qumi'num, and held oral history passed down from their families, including her mother, Pgaaltunaat (Mary Crocker) (1924–2011); her father, Vincent Joe (d. 1970s); her grandmother, Margaret Crocker (b. late 1800s at Qw’ant’us (Fort Langley)); and her grandfather, Arthur Crocker. Mrs. James’ uncle, Abner Thorne, was born in 1926 and had family roots in Somena’, Lhumlhumuluts’ (Clemclemaluts) and T’et’qe at Lyackson. He was an Elder and descended from the tu'etqe' warriors. He told Mrs. James about the warriors and about how to protect her knowledge. She also learned from her uncle, Leonard Sylvester. She was taught that keeping the history inside of her would make her strong.

[104] Mrs. James testified that, in order to maintain their accuracy, people are not allowed to change the oral history stories. The stories were never put in writing, and one had to be cautious when they shared the stories.

[105] Mrs. James' family has lived a traditional lifestyle, including fishing, hunting, harvesting, and protecting resources available from the sea and land. Her family fished using traditional technologies. They taught her how to fish, and about tides and various fishing areas. She fished for many years with her late husband, Gill James, until he passed away in 1989. Mrs. James continues to use traditional foods and medicines. She holds traditional knowledge of processing fish, shellfish, berries, and other foods, which she learned from family.

[106] Mrs. James was careful only to relate the oral histories that were hers and not from other members of her family. She explained that if one has questions about oral history, one needs to speak directly with the Elder who holds that oral history.

b) Luschiim (Arvid Patrick Charlie)

[107] I also heard from Luschiim (Arvid Patrick Charlie). Luschiim's oral history evidence was carefully told and sourced. It is reliable and highly relevant.

[108] Luschiim gave his evidence by way of video deposition in 2015. He was 72 years old at the time of his testimony. He was born in his mother's house in Quamichan, and is a registered Indian and a member of the Cowichan Tribes. He shares his name with his great-grandfather. He received his name in a bighouse ceremony at Koksilah when he was in his early 20s. His grandmother Kwul-kwal-lhamaat gave it to him, and she was a great source of oral history. His mother gave him his mask at a bighouse ceremony at Lhumlhumuluts'.

[109] Luschiim's first language is Hul'qumi'num. Luschiim was an elected Cowichan Tribes Council member for 42 years between 1971–2015. He worked as an advisor to the Cowichan Tribes Treaty Committee because of his expertise in Cowichan Tribes history. He holds an honorary Doctorate of Letters from Vancouver Island University in recognition of his knowledge and efforts to preserve the Hul'qumi'num language, the environment, and the Quw'utsun ways.

[110] Luschiim learned oral history from a number of sources. He was raised by his parents. His mother, Tth'ulxwimiye' (Violet Mary Charlie) (b. 1925), and father,

Hwiinumetse' (Simon Charlie) (1919–2005), were highly-respected Elders of the Quw'utsun community, recognized for their oral history knowledge. They were fluent in Hul'qumi'num. His father was a world-renowned carver who received the Order of Canada and the Order of British Columbia in recognition of his cultural knowledge. His father served on Cowichan Tribes Council, and also fished at the Fraser River.

[111] Luschiim's paternal great-grandfather, Qwul-thiimuluq (Abel Charlie), was very knowledgeable about the sea and the Cowichan River. He taught Luschiim how to build a canoe, and was known for harvesting resources. He had the ability to interpret the weather. He passed away in the 1960s at approximately 100 years of age. Qwul-thiimuluq owned several canoes that he made himself. Luschiim raced canoes when he was a young man.

[112] Luschiim's paternal great-grandmother Huy-shun's (Madeline Charlie) first language was Hul'qumi'num. She was a registered Indian and a member of the Cowichan Tribes, and lived across the river from where Luschiim grew up.

[113] Luschiim spent time with his great-grandparents fishing and camping. Qwul-thiimuluq and Huy-shun were regarded as Elders who were very knowledgeable about the Cowichan territory.

[114] Luschiim's maternal grandmother, Kwul-kwal-lhamaat (Celestine Sul'si'mul't-hw) was a great influence in his life. She lived until 1989. Her first language was Hul'qumi'num. She was a well-respected Elder in the Cowichan Tribes community, and very knowledgeable about territory. She was appointed to the Cowichan Tribes' Land Investigation Committee for many years. Kwul-kwal-lhamaat's parents were Luschiim (Sr.) (Louie or Louis George) and Q'atxumaat.

[115] Luschiim Sr. spent a lot of time with Luschiim and his sister when they were young. Luschiim has early memories of his great-grandfather coming to visit and staying for several days. He would take Luschiim and his sister for walks and teach them the names of different trees and rocks. When he was resting back at the

house, he would question Luschiim about the Hul'qumi'num language. He would ask Luschiim to say the different tenses of Hul'qumi'num words. Luschiim remembers walking along the river with Luschiim Sr., who grabbed a knife and cut the bark of a tree to harvest sap, and who taught him about survival foods.

[116] Luschiim Sr. died when Luschiim was four years of age. He was his first strong source of oral history, but his learning did not stop there.

[117] Another influence in Luschiim's life was his uncle, Wutth'iinthut (Abraham Casper Joe). He would visit Luschiim's father and spend a lot of time at their house, and in later years spent time sitting and talking with Luschiim. Wutth'iinthut shared stories with Luschiim about being at Shnuwiilh, picking blueberries upstream from Steveston on the Fraser River.

[118] Luschiim defined Shnuwiilh as the lower Fraser River where the river splits in two making an island, and the island is like in between the legs of the Fraser River.

[119] Siseyutth'e' (Agnes Ely), Luschiim's neighbour, was a very special person in his life and source of oral history to him. She was married to Billy Ely, who was a second cousin of Luschiim's grandfather. Their grandson, Ronnie Seymour, was Luschiim's friend. He recalled special times when he and Ronnie Seymour would go to Siseyutth'e's house. She would make tea and food and tell them stories, which went on for quite some time. She told Luschiim that one day he would be telling her grandchildren and her descendants these stories. Siseyutth'e' passed away in 1974.

[120] Another source of Luschiim's oral history was Hwulqwimut (Alphonse George), who came to Quamichan and became Siseyutth'e's husband. He spoke Hul'qumi'num. When Luschiim's mother was in the hospital and he was feeling lonely, he would sit with Hwulqwimut, who would share stories.

[121] Luschiim noted many other sources of oral history from Quw'utsun Elders, including his second cousin, Xuykwilum (Stephen Jack of Quamichan); Tth'i'tssum'tun' (Robert Thomas Sr.), his wife's uncle; his father-in-law, Sxe'wul't-hw

(Wilfred Sylvester); his uncle, Tth'utxumqun (Abner Thorne); Swayxalutsup (Ben Canute); and his father's uncle, Shhwuwul't-hw (Angus Smith).

[122] Luschiim gave detailed testimony about resource gathering, both on Vancouver Island and on the mainland. He told of fishing trips with his father at the lower Fraser River at Shnuwiilh. He learned to dip net, spear, and gill net fish. He testified about the origin of the Quw'utsun people and the groups that formed the broader Quw'utsun. He provided the meaning of various words, including Tl'uqtinus and Shnuwiilh. He gave a detailed account of how the Quw'utsun prepared to travel to Tl'uqtinus, stopping at various resource-harvesting places to gather food before the trip across the Sutl'qa'lus (Georgia Strait) to the Fraser River from various jumping off points. He described the travel by canoes rafted together with wide boards, and how the boards were used for dwellings and smokehouses when the Quw'utsun arrived at Tl'uqtinus. He also described the buildings at Tl'uqtinus.

[123] Luschiim testified that his oral history evidence related to the time period long before contact, to early contact, and up to the time reserves were created. Traditional knowledge is passed from generation to generation within the Cowichan Tribes. The more important special knowledge is passed on one-to-one, or from one Elder to several young ones. Some knowledge is passed on in a more public setting, like the bighouse. Elders notice young ones that have a keen interest in Quw'utsun history. Accuracy of traditional knowledge is maintained by testing and repeatedly checking the knowledge for accuracy.

[124] Because of Luschiim's involvement in the Cowichan Tribes Council and the Cowichan Tribes Treaty Committee, Richmond questioned how Luschiim came to understand how the plaintiffs' ancestors exclusively occupied a Cowichan village at Tl'uqtinus. Richmond says that, although Luschiim testified that he took steps to insulate himself from involvement in the litigation, he had myriad opportunities through political and legal processes to form beliefs and views of what may have happened historically. I have considered this submission in evaluating the weight to be given to Luschiim's testimony. Luschiim meticulously provided his oral history

sources throughout his testimony, and therefore I do not accept that his oral history has been influenced by recent political and legal processes.

c) Councillor Kenneth Thomas (Sum'qiinum)

[125] I heard oral history evidence from Sum'qiinum (Kenneth Thomas), who prefers to be referred to as Councillor Thomas. I find Councillor Thomas to be a reliable source of oral history about traditional fishing and about the existence of a Quw'utsun village on the Fraser River.

[126] Councillor Thomas was born in Ladysmith in 1969. He is a registered Indian and a member of the Penelakut Tribe. He shares his Hul'qumi'num name with his father and grandfather. He is a Councillor for the Penelakut Tribe. At the time of his testimony in the fall of 2020, Councillor Thomas was working as the fishery and wildlife manager for the Penelakut Tribe.

[127] Councillor Thomas grew up between Ladysmith, the Penelakut reserve on Vancouver Island, and the Tsussie Reserve near Crofton, British Columbia, where his grandparents lived. His first language was Hul'qumi'num, which he spoke until he was around five years of age. Counsellor Thomas' grandfather, Benedict Thomas, attended residential school on Kuper Island, and discouraged Councillor Thomas' mother from teaching him Hul'qumi'num because he did not want Councillor Thomas to be beaten in school for speaking the language.

[128] Counsellor Thomas was taught traditional harvesting methods and oral history, including the oral history about a big Quw'utsun village on the Fraser River from the time he was about 10 years of age. He heard stories from his grandfather, Benedict Thomas, and his great uncle, Dominic Thomas. Stories of the Quw'utsun village on the Fraser River were shared multiple times with Councillor Thomas.

d) Qwestenuxun (Ernest Wesley Modeste)

[129] In a pre-trial ruling in these proceedings reported at 2019 BCSC 1243, I admitted (with certain redactions, further to reasons indexed at 2021 BCSC 235) the affidavit of Qwestenuxun (Ernest Wesley Modeste), who died in February 2011.

Qwestenuxun swore an affidavit on September 10, 2007 in support of a petition for judicial review filed on behalf of the Cowichan Tribes.

[130] I find the evidence contained in Qwestenuxun's affidavit to be reliable. He has provided adequate evidence of his ability to know the information as passed down to him by various respected Elders.

[131] At the time he swore the affidavit, Qwestenuxun was 68 years of age. Qwestenuxun was born in 1939. He was an elected Councillor of Cowichan Tribes for five terms, and Chief of Cowichan Tribes for one term.

[132] Qwestenuxun was raised by his parents, Suhiltan (Elwood Modeste) and Mabel Modeste, whose first language was Hul'qumi'num. His great-grandfather, Suhiltan, was a hereditary Chief of Cowichan Tribes, and his uncle, Thomas Modeste, was the last hereditary Chief of Quamichan.

[133] Qwestenuxun was raised by his parents in a traditional lifestyle. He hunted and fished with his father and his paternal uncles (Thomas, Cassel, James, Elwood, and Wesley Modeste).

[134] Qwestenuxun was taught the origin of the Cowichan people who fell from the sky. He was taught the rituals conducted on initiating a person into the spirit dance, and he personally conducted those rituals, which occurred in the bighouse. At the time of swearing his affidavit, there were three longhouses (or bighouses), one each in Quamichan, Somena, and Clem-Clem-alts (Clemclemaluts). He would attend customary Cowichan ceremonies for the conveyance of traditional names from one generation to the next, for the initiating of spirit dancers, and for memorials. The ceremonies occurred at the bighouses in winter, between December and April.

[135] Qwestenuxun deposed that his father was his mentor who taught him about the oral history of the Cowichan Tribes. It usually occurred in the evening after they finished eating, during the quiet moments when they both had time to reflect. His father had been tutored by his paternal grandfather, Suhiltan, to become an orator for their family at ceremonies in the bighouse. His father taught him about his

ancestors, their villages, their annual resource exploitation, and what happened prior to the first European trading vessels appearing in the Strait of Georgia. His father taught him the traditional way of life of the Cowichan Tribes, which dated back to the generations well before the arrival of James Douglas. He was taught about the historic sub-groups or tribes with villages on the Cowichan River and in the Cowichan Bay area of Vancouver Island. He listed those villages as the Somena, Quamichan, Comiaken, Khenipsen, Clem-Clem-aluts, and Koksilah.

e) Sulipt'un (Norbert Sylvester)

[136] I heard oral history evidence from Sulipt'un (Norbert Sylvester) in January 2020 when he was 81 years old. He has since passed away. Despite the disruption in Sulipt'un's early learning of oral history, he made lifelong efforts to reconnect with his culture. His evidence was sourced to Cowichan Elders. I find his oral history evidence to be reliable.

[137] Sulipt'un was born in 1938 at Halalt. He was a member of the Cowichan Tribes and was a registered Indian. He carried the name of his grandfather, Sulipt'un (Sr.) (Gus Sylvester).

[138] Sulipt'un was an Elder and was active in the Cowichan Tribes community, working in maintenance for the Cowichan Tribes for 14 years. He served on various committees, including parks, land investigation, fishing, cultural education, and treaty committees. He was elected to the Cowichan Tribes Council for three terms. He worked as a commercial fisherman, and built and sold traditional dugout canoes. Sulipt'un was a member of the Duncan Indian Shaker Church. He was a long-standing member of the bighouse. Sulipt'un was initiated into the shulmuhwtsus (the rattle).

[139] Sulipt'un grew up in a traditional lifestyle in his early childhood, raised by his maternal grandparents and his mother until he was taken to residential school at the age of six or seven. His first language was Hul'qumi'num. As a young child, he learned traditional fishing techniques, resource management practices, and hunting. He began learning history and tradition as a young boy from his grandfather,

Stalustinum (Tth'ulusqinum, Louie or Louis Norris), who taught him to hunt and make canoes. His grandfather knew a lot of Indigenous ways and histories. He passed away in the late 1940s or early 1950s when he was nearly 100 years old. He was from a family of hereditary chiefs who lived at T'et'qe in the Cowichan Valley and on Valdes Island.

[140] Sulipt'un's grandfather taught him and his cousins oral history every other day by making them sit on a bench to learn history and the Elders' way of life. They were tested every two days.

[141] Sulipt'un's traditional lifestyle was interrupted when he was "hauled to Kuper Residential School". In residential school, Sulipt'un had to learn English because he and other students were severely punished for speaking their own language. Three of Sulipt'un's grandparents passed away while he was in residential school. Sulipt'un testified about the impact of residential school. It cut him off from his language and from access to his Elders. By the time he left residential school, he had lost his Hul'qumi'num language. He began a sustained effort to relearn his culture and language with the help of his mother, Sarah Norris, and his father, Sxe'wul't-hw. He also visited and spent time with many of the older Elders to learn about Quw'utsun history. When he got out of residential school, his father told him to go to the bighouse and to be quiet and listen in order to learn. He attended the bighouse cultural events and potlatches throughout his life. He passed his skills down to his son, nephew, and grandson.

[142] Sulipt'un named Shhwuwul't-hw (Angus Smith) as a source of his oral history. Shhwuwul't-hw and his family lived at T'et'qe on Valdes Island and Willy Island. He was a canoe and casket builder, and was knowledgeable about the Cowichan travelling by canoe and paddling songs. He taught Sulipt'un about canoe making, went hunting with him, and shared information about the history and way of life of the Quw'utsun. Sulipt'un also visited Elwood Modeste, who was from a family line of hereditary chiefs and did sacred work for the initiation of new dancers in the bighouse. Sulipt'un also cited Dennis Alphonse (former Chief of Cowichan Tribes),

Ben Canute (Elder from Cowichan Tribes), Simon Charlie (Luschiim's father), Mack Paige, and Roy Edwards as oral history sources.

[143] Sulipt'un testified about the Cowichan warrior villages and war canoes used to fight the northerners. He testified about the Cowichan people travelling by canoe to the Fraser River. He gave evidence about how to make a canoe and the many different types of canoes used by the Cowichan people before and after contact.

f) X'tli'li'ye (Lydia Hwitsum)

[144] X'tli'li'ye (Lydia Hwitsum) also provided oral history evidence. I find X'tli'li'ye to be a reliable source of oral history, which she received from various sources, but primarily from her mother, the late Amelia Bob. Her mother's Indigenous name was Sqwul'i'hwul'wut.

[145] X'tli'li'ye was born in 1964 in her grandmother's house in Quamichan. She acquired her Hul'qumi'num name in a potlatch ceremony hosted by her mother. She was raised by her mother, Amelia Bob, and has been a member of the Cowichan Tribes and a registered Indian her entire life. She lives on the Quamichan Reserve.

[146] X'tli'li'ye is fluent in Hul'qumi'num and speaks it every day. She was Chief of Cowichan Tribes between 1997 and 2001, and between 2007 and 2011.

[147] X'tli'li'ye has a Diploma in Public Sector Management and a Certificate in Administration of Aboriginal Government. She has a Juris Doctor degree from the University of Victoria. She sat on the board of the International Centre for Human Rights and Democratic Development, where she held the Indigenous Rights Portfolio and worked on the United Nations Declaration on the Rights of Indigenous Peoples from 2000 to 2006.

[148] X'tli'li'ye's mother, Amelia Bob, learned her oral history from her mother, Alice Wheatsom (who spelled her surname differently than X'tli'li'ye's), who was born in 1884. Amelia Bob was raised in the traditional way and spoke fluent Hul'qumi'num. She practised traditional resource harvesting and passed on traditional teachings to

X'tli'li'ye. She regularly sat X'tli'li'ye and her siblings on a little wooden bench by the wood stove and taught them oral history for up to two hours, covering many topics, including the history of the Quw’utsun people and how they were connected to them, and how to be a good human being in the world.

[149] X'tli'li'ye testified that knowledge is transmitted starting with your own family sharing stories, doing some work together, and sharing teachings generally. Knowledge is also passed on through ceremony. Her mother would always tell her to go to ceremony; that is where you learn people’s names and their ways. X'tli'li'ye did most of her learning by standing right next to her mother and watching her through everyday chores, ceremony, community events, and funerals. Her mother was a caregiver in the community. Every week, she would make 20 loaves of bread, and take 10 loaves to members of the community to check in and see how they were doing. She also shared her teaching of medicine. If she saw someone laying by the side of the road, she would stop and bring them home. Her lesson was that you never walked by anyone who needed help.

[150] X'tli'li'ye learned to fish from her brothers. They ate a traditional diet of deer and seafood. She also learned about traditional plant resources and medicinal plants from her mother. She was taught how and when in the season to gather plants for sustainability, how to use cedar bark for textiles, what song to sing when she approached a tree, how to gather reeds for mats, how to harvest seafood, crab, sea urchins, and deer meat, and how to dry or cook and jar it for later consumption.

[151] Amelia Bob went to residential school, and so when she was raising her children she spoke Hul'qumi'num to them in the house, but insisted that they speak English outside the house so that they would not be criticized by white people.

[152] X'tli'li'ye cites Abraham C. Joe as an oral history source who was very strong in talking about history. He taught her about the Cowichan village on the mainland. Wilfred Sylvester was another oral history source for her. He was a speaker, a renowned canoe maker, and a supporter of education in the community. They often

sat, had tea, and talked. He told her about the big canoes used to cross the open water to the big village on the mainland.

g) John Elliott (Thòlmen/Shukx'shukx'wu'lukx)

[153] John Elliott (Thòlmen/Shukx'shukx'wu'lukx) prefers to be referred to as Mr. Elliott. Mr. Elliott provided very useful information about fishing and fisheries. His oral history is limited by the fact that he has difficulty understanding the Hul'qumi'num language.

[154] Mr. Elliott was born in 1966 in Ladysmith. He is a registered Indian and is a member of Stz’uminus First Nation. Mr. Elliott received two traditional names from his paternal great-great-grandfather (Marshall Mitchell) and from his maternal grandfather (Steve Sampson). Mr. Elliott learned traditional Cowichan teachings and gained profound respect for his Elders as a child. He was involved in many community cultural events and fished from the time he was a child. He now fishes for the community, and his role is food gathering for the Stz'uminus First Nation.

[155] Mr. Elliott received a diploma from Malaspina College in aquaculture, worked as fisheries guardian for Stz'uminus First Nation for 16 years, and was Chief of Stz'uminus First Nation for 11 years.

[156] Mr. Elliott received his teachings over the years from a number of people, including his parents and his grandparents, Steve and Dora Sampson (née Modeste). He learned about tradition, culture, and traditional harvesting. He also learned about how his grandparents had to defend their land. His grandfather lived until he was 96. Although he had many opportunities to learn from him, his grandfather, who was a residential school survivor, was reluctant to teach Mr. Elliott all that he knew. He was worried about losing his grandchildren like he had lost his children. He kept his knowledge inside him and would not share it. Mr. Elliott learned from him as much as he could, and when he was elected as a leader, he learned from as many of the Elders as he could.

[157] When he was elected as Chief, Mr. Elliott sat every week for a year with Stz'uminus Elder Willie Seymour, who taught at what he called the Stz'uminus College. Willie Seymour was a Hul'qumi'num teacher and educator of culture and language. Mr. Elliott found learning the language difficult, but he learned about the traditions, culture, and history of the Stz'uminus people. Willie Seymour was a respected Elder and bighouse speaker. Families would request that he speak on their behalf at cultural events.

[158] Willie Seymour taught Mr. Elliott how important it is to be culturally strong. He taught him to always engage the Elders first and to be thankful for them. He told him about the historic villages, including the one in Oyster Bay where Mr. Elliott's grandfather Steve lived. He spoke Hul'qumi'num most of the time, and so much of the history was lost because Mr. Elliott does not speak Hul'qumi'num. He taught him who his family ties were and where he came from. He told Mr. Elliott that the Quw'utsun had a village on Point Roberts and a village site on the Fraser River called Tl'uqtinus. He talked to him about fishing and hunting. He said Mr. Elliott's people used to travel and go across with the Cowichan and Penelakut people to fish the south arm or at Point Roberts. They would go across to fish for salmon in the area where Mr. Elliott fished.

h) Chief William C. Seymour Sr. (Squtxulenuhw/Pulxetse')

[159] Chief William C. Seymour Sr. (Squtxulenuhw/Pulxetse') was tendered as an oral history witness in fairly narrow areas. He was not tendered as an oral history witness about matters to do with the Claim Area, the historic Cowichan Nation, or the territory of the historic Cowichan Nation at the time of contact or the assertion of Crown sovereignty. He was tendered as an oral history witness for the location of former villages located in the Cowichan Valley, and certain non-confidential bighouse practices. I generally accept his evidence as reliable.

[160] Chief Seymour grew up in Somena' village where he lived at the time of the trial. He was a member of the Cowichan Tribes and a registered Indian. He had two Hul'qumi'num names, one from his paternal great-grandfather, and one from his

maternal great-grandfather, who was a member of the Clemclemaluts village. Both his parents were Hul'qumi'num speakers.

[161] Until he was 14 years of age, Chief Seymour lived next to his maternal grandmother (Wushunitse) and his grandfather (Quyxuletse), who were members of the Cowichan Tribes. Wushunitse spoke Hul'qumi'num to him. His grandfather was a hereditary Chief, as was his great-grandfather, Kokaiyeth. His paternal grandfather, Swanusthut was Chief of Stz'uminus, as was his paternal great-grandfather, Squtxulenuhw.

[162] Chief Seymour's family belongs to the Sxwayxwi (mask), and his son uses the Sxwayxwi.

[163] Before Chief Seymour went to residential school, he learned family and Hul'qumi'num teachings from his mother. He went to residential school in Mission, British Columbia from Grade 8, and returned at 19 years of age feeling disconnected from his culture. His mother played a pivotal role in reconnecting him to his culture and community.

[164] Chief Seymour learned oral history from Elders in the community, including Luschiim, Philomena Alphonse, and Qwestenuxun (Wesley Modeste).

[165] Chief Seymour has been a member of the bighouse since 1979.

[166] He was elected to the Cowichan Tribes Band Council in 2005, and sat on Council until he became Chief in 2013. Prior to becoming Chief, he was a manager for the Cowichan Tribes.

4. Musqueam Oral History

[167] Several of Musqueam's witnesses gave oral history evidence. The Musqueam people transmit oral history through different practices within the community. For instance, oral history may be shared through ceremony, traditional practices, or informal kitchen table talk. Similar to the Cowichan practice, repetition

ensures that the oral history's integrity is maintained. History is shared as close to verbatim as possible, in a setting that allows for corrections and consensus.

[168] To assess the reliability of oral history, a listener may consider the reputation of the person relaying it, including whether that person is a knowledge keeper and the age of that person, as well as the knowledge and reputation of their sources. A knowledge keeper may only share history to which they hold specific knowledge.

[169] Certain individuals are identified as reputable knowledge holders. Some possess particular knowledge of the process or theory of oral history transmission. There are no rigid rules to governing oral history transmission among members. Musqueam people start to learn at infancy and everyone receives at least some oral history. The accuracy of the historical teaching is tested through recitation and repetition, which provide opportunities for correction. A person has a responsibility to share oral history truthfully and accurately out of respect for their ancestors.

[170] Morgan Guerin and sʔəyəɬəq are recognized in Musqueam as knowledge keepers. They testified about oral history transmission and gave oral history evidence. Chief Wayne Sparrow is a highly-respected member of the community who holds some oral history that has been conveyed to him.

a) sʔəyəɬəq (Larry Grant)

[171] sʔəyəɬəq (Larry Grant) provided oral history evidence. He prefers the use of his Indigenous name. sʔəyəɬəq is a well-respected Musqueam elder and knowledge holder. He was born in 1936. He had a close relationship with his mother, Agnes Grant, θəwaχəlwət. She was regarded in the Musqueam community as a sciʔeɬ (high born) woman from the lead family in Musqueam. She was considered one of the historians of sʔəyəɬəq's family. She was very reputable and known to have knowledge in cultural activity, ceremonial process, societal structure, and genealogy. sʔəyəɬəq also learned teachings from his maternal grandmother, Mary Grant (née Charlie), who was another respected knowledge holder. Mary Grant carried the name kikəli. Seymour Grant, šχʷəpqʷəlecə, was his maternal grandfather.

[172] sʔəyəɬəq carries his name from Frank Charlie, Mary Grant's elder brother. Frank Charlie was a highly-respected knowledge holder and historian. Some of the history that sʔəyəɬəq holds was passed down through the family from Frank Charlie. swəlamθət (Andrew Charlie or Andrew Charles Sr.) was Frank Charlie's half-brother. He and his wife, Christine Charles, were highly regarded in Musqueam cultural activity and genealogical and cultural history.

[173] sʔəyəɬəq also has oral history from a number of his aunties as well as məṅeʔɬ (James Point).

[174] sʔəyəɬəq's father, Hong Tim Hing, was from China. When sʔəyəɬəq's mother married him she and her children were struck off the status roll because of the *Indian Act* regulations at the time. sʔəyəɬəq and his family fought successfully to have their status reinstated in the 1980s.

[175] sʔəyəɬəq and his mother descended from the qiyəplenəxʷ line in Musqueam (Anglicized as 'Capilano'). qiyəplenəxʷ was a renowned and revered Musqueam warrior and leader who defended the Musqueam against the northern people. sʔəyəɬəq carried the name qiyəplenəxʷ and passed it on to his brother Howard E. Grant. Both Howard Grant and sʔəyəɬəq are from the sχʷaẏχʷəẏ mask bloodline and danced in various communities for naming ceremonies, funerals, and weddings. sʔəyəɬəq attended ceremonial functions at communities and bighouses throughout the Coast Salish world including on the mainland and Vancouver Island as well as the plaintiffs' communities. He has often been a witness in bighouse ceremonies.

[176] sʔəyəɬəq grew up living between Musqueam Indian Reserve 1 as a young child and Musqueam Indian Reserve 2 at his grandfather's house and in the Strathcona/Chinatown area of Vancouver. Three of the five bighouses still standing at Musqueam during sʔəyəɬəq's childhood were owned by his family members.

[177] sʔəyəɬəq was engaged in cultural activity in his youth, such as community gatherings, sharing food and stories. He would listen to the passing on of oral history, genealogies stories, and teachings of how to carry yourself. His mother

passed these stories on to him. sʔəyəɬəq's first language was hən̓q̓əmin̓əm̓. He did not go to residential school.

[178] sʔəyəɬəq, Morgan Guerin, and Chief Sparrow all cited Chief Ed Sparrow Sr. sxənəm as a highly-respected Musqueam knowledge holder. Chief Ed Sparrow Sr. was very knowledgeable about Musqueam territory, history, genealogy, and the sχʷay̓χʷəy̓ mask. He gave the history of the names sʔəyəɬəq and qiyəplenəxʷ at the naming ceremonies of Larry and Howard Grant.

[179] sʔəyəɬəq became involved in the First Nations Languages program at UBC in the 1990s and was an adjunct professor in the Musqueam Language Program at the time of trial. He has been a resident Elder at the First Nations House of Learning at UBC since 2001. He is also a resident Elder at the Justice Institute of British Columbia and a consultant with the Musqueam Language Program department at Musqueam.

[180] In reasons indexed at 2022 BCSC 933, I accepted the threshold reliability of the testimony of sʔəyəɬəq. He had extensive oral history through the teachings of his mother and other elders. I observed him to be an earnest and careful witness who was cautious only to give evidence of the knowledge that he holds. I do not change that assessment in weighing the ultimate reliability of his testimony. He admitted to having some limitations when it comes to providing dates for events. His oral history sources never had dates and he admits to not carrying dates well himself. He uses the term "before white men" and "before colonization" as that is what he was taught. When asked when colonization occurred, he thought that it was around the 1890s.

[181] Placing exact dates on events is difficult for all oral history witnesses who did not rely on calendars and it does not undermine the reliability of sʔəyəɬəq's evidence in this case. It does make establishing time depth for events challenging for a court, but this limitation is not unique to sʔəyəɬəq's testimony.

b) secəlenəxʷ (Morgan Guerin)

[182] Morgan Guerin is a Musqueam knowledge holder. His Indigenous name is secəlenəxʷ. He prefers to be referred to as Mr. Guerin. He was 45 when he testified. He is a recognized and respected source of traditional knowledge and oral history within Musqueam.

[183] Mr. Guerin served three terms as an elected Musqueam councillor and has served on the Musqueam Fisheries Commission. He was a Musqueam Aboriginal Fisheries Officer ("AFO") for 20 years. At the time of trial, he was working for Musqueam as a Marine Planning Specialist, coordinating marine enforcement activities. Mr. Guerin acts as a cultural ambassador for Musqueam. He holds special knowledge of the process of transmission and retention of oral knowledge. He holds knowledge of cultural practices, cultural teachings, and Musqueam history.

[184] Mr. Guerin has lived on Musqueam Indian Reserve 2 his whole life. His father was the late Arnold George Guerin Jr. (George) whose Indigenous name was tiyəliš. He was Musqueam. His mother, Arlene Collins was of Norwegian and English descent. Mr. Guerin's paternal grandfather, Arnold Guerin Sr., χʷənəθət, was Musqueam and his paternal grandmother was Penelakut. His father was raised at Penelakut (Kuper Island). He returned to Musqueam in his mid-to-late 20s where he stayed for the rest of his life. Arnold Guerin Sr. passed away in 2005.

[185] Mr. Guerin had a very close relationship with his paternal grandparents and lived a few houses away from their house when he was growing up. They were a source of oral history for him. His grandfather Arnold Guerin Sr. was well-respected by the community and he was regarded as a knowledge holder. He is often cited by others who convey oral history. In the 1970s, Arnold Guerin Sr. worked with knowledge holders to capture and catalogue the hən̓q̓əmin̓əm̓ language and taught hən̓q̓əmin̓əm̓ language classes. Susan Jenny Guerin, née Johnny, was married to Arnold Guerin Sr. Her ancestral name was t̓θát̓θsəlwət. She taught Mr. Guerin that as a representative of one's family, it is important to conduct oneself respectfully when in another's territory.

[186] Mr. Guerin learned oral history and traditional knowledge from his father, uncles, aunts, grandparents and other respected knowledge holders including Chief Dominic Point, təyaχʷθət, and Vincent Stogan Sr., c̓səmlenəxʷ. He also testified that məṅeʔɬ (James Point) was one of the most prominent and esteemed keepers of Musqueam history.

[187] Chief Dominic Point, təyaχʷθət, known to many as Uncle Dominic was considered by sʔəyəɬəq, Mr. Guerin, and Chief Sparrow as a very respected Musqueam knowledge holder. He spoke həṅq̓əmiṅəṁ. He was considered səy̓eṁ (a highly respected person). Vincent Stogan, c̓səmlenəxʷ, was a knowledgeable bighouse speaker. Mr. Guerin's great-grandfather, sχʷíθəl̓txʷ (Moses Johnny), kept knowledge of his history, people, and family.

[188] Mr. Guerin acknowledged some limitations in his oral history evidence related to the 1790s through the 1800s. He acknowledged that he is not comfortable with the level of oral history that he holds for the period from colonization leading into the 1800s. Mr. Guerin testified as to disruptions caused by waves of plague affecting Indigenous peoples. He heard that it was a time of great sadness and he did not "poke and prod" his Elders for oral history about that time period.

[189] I accepted Mr. Guerin's oral history as reliable with some limitations which I address when I discuss specific testimony.

c) yəχʷyaχʷələq (Chief Wayne Sparrow)

[190] Chief Wayne Sparrow, yəχʷyaχʷələq, is the Chief of Musqueam Indian Band, and since 1993, he has held elected office almost continuously. He prefers to be referred to as Chief Sparrow. He has also been involved in Musqueam fisheries management since the early 1990s.

[191] Chief Sparrow is a respected leader. He grew up traditionally and has been active in the bighouse. His grandfather, Ed Sparrow Sr., and other Elders were significant influences in his life. His areas of knowledge were the sχʷay̓χʷəy̓ mask, family connections, and Musqueam territory and history.

[192] His evidence pertains to his personal knowledge and some oral history. However, he noted that he is not an expert in Musqueam oral history or in pre-contact events. He is not knowledgeable about historical traditional fishing on the south arm of the Fraser River or about village sites on the south arm. He does have some pre-contact period oral history about the Cowichan community returning during sockeye season to fish the Fraser River.

[193] Chief Sparrow received oral history from several respected Elders: Dominic Point, Vincent Stogan Sr., Willie Seymour Sr., Peter Seymour Sr., Joe Becker, and Ernie Campbell, all of whom are now deceased.

[194] The late Joe Becker was influential in Chief Sparrow's life. Chief Sparrow gained knowledge and teachings from him. Joe Becker is a grandson of the late James Point. Joe Becker was a band councillor, chief, and Musqueam fisheries manager. He was heavily involved in the bighouse.

[195] Chief Sparrow has oral history about traditional protocol between Musqueam and the plaintiffs, including the ethic of sharing resources with family. He learned this from Chief Campbell, Joe Becker, Willie Seymour Sr., and Chief Seymour Sr. He also has personal knowledge about fishing the Fraser River and about the protocol process.

[196] As I stated in the *voir dire* ruling (indexed at 2022 BCSC 933), I am satisfied that Chief Sparrow is qualified to give oral history evidence based on his traditional upbringing, his multiple reliable sources from highly-regarded Musqueam elders, and based on the respect the community has for him as a long-time elected official and chief.

B. LAY WITNESSES

[197] In addition to oral history witnesses, the plaintiffs called Pahalicktun (Richard Thomas), the Chief of Lyackson First Nation, to testify about the circumstances of the Lyackson First Nation and about the disruption caused by residential schools. Ernest Elliott testified about the Cowichan Tribes band governance and

administration and about the importance of fishing on the Fraser River. Larry George served as the Lands and Governance Director for Cowichan Tribes and oversaw the Cowichan Tribes Fisheries department. He testified about the importance of fishing on the south arm and the efforts of the Cowichan to gain access to the south arm to fish. Richard Wilson also testified but his evidence is not relied on.

[198] Canada called Jennifer Nener, Andrew Thomson, and Rebecca Reid, directors at the Department of Fisheries and Oceans Canada ("DFO"). They testified about the management of Pacific salmon, the Pacific Salmon Treaty, the Fraser River Panel management of the sockeye fisheries, and consultation with the plaintiffs about their access to salmon.

[199] In addition, Canada called the following DFO witnesses: Brian Matts, Resource Manager; Kevin Conley, Resource Manager/Aboriginal Affairs Advisor; Kent Spencer, Aboriginal Programs Coordinator/Affairs Advisor; and Jeff Grout, Regional Resource Manager. They testified about the DFO's Integrated Fisheries Management Plan, the plaintiffs' requests to fish the south arm, and DFO's process for receiving license amendment requests.

[200] From Transport Canada, Canada called Marc-Yves Bertin, Director General of the Marine Policy Bureau; Christian Dea, Chief Economist and Director General of Transportation and Economic Analysis; and Erin Hunt, Director of Trade Policy. These witnesses testified about Canada's relationship with Canada Port Authorities, the relationship between international trade and Canada's transportation system, and the role that Transport Canada plays in promoting trade corridors.

[201] VFPA called Jennifer Natland, the Acting Vice President of the Real Estate Division. She testified about the port's infrastructure for the movement of goods and the importance of the claimed lands to the current and future operations of the Port of Vancouver. Peter Xotta, Vice President of Supply Chain, testified about VFPA's real estate holding and scarcity of industrial lands in the lower mainland and VFPA's strategic plan to acquire properties to support international trade.

[202] Richmond called a number of employees as witnesses. Jason Ho, Manager of Engineering and Planning, testified about municipal infrastructure in the Claim Area and Richmond's flood management strategy. Kenneth Barlow, Manager of Property Services, testified about Richmond's real estate holdings and acquisition of property on Triangle Road. Khadija Katie Ferland, Acting Director of Corporate Business Service Solutions, provided an affidavit and testimony describing Richmond's business licensing process. Kashmiro Kaur Chahal Licensing Inspector provided supportive evidence related to a list of business licenses exhibited in the affidavit of Ms. Ferland.

[203] In addition to their oral history witnesses, Musqueam provided affidavit evidence from three employees to verify the authenticity of recordings.

[204] BC and TFN called no lay witness evidence.

C. HISTORICAL DOCUMENTS

[205] The historical documents in this trial included public and government records, ships' logs, journals and narrative accounts, maps and charts, church records, and ethnographic fieldwork. The documents cover the time period from the 1790s to the early 1900s, many of which were source documents for expert opinions.

[206] By necessity, because of the historical nature of the plaintiffs' claim, the underlying facts are derived from hearsay evidence. While weighing evidence is the task of the trial judge, the reliability of the historical record may be informed by the expert testimony about the historical documents and evidence.

[207] The historical documents are hearsay evidence and presumptively inadmissible. They were admitted under a traditional exception to the hearsay rule or the principled approach to hearsay. The case-by-case analysis for the admissibility of a historical document as hearsay evidence requires that the document be authentic, relevant, necessary to assist the trier of fact, and reliable at the threshold level. I sometimes relied on the evidence of experts to provide me with the information needed to assess the threshold reliability of historical documents.

[208] Some historical documents were admitted as business records.

1. Public and Government Documents

[209] Documents authored by those responsible for the stewardship of government have been considered inherently reliable unless there is evidence to the contrary: *Canada (Minister of Citizenship and Immigration) v. Seifert*, 2006 FC 270 at para. 25. I considered this issue in document rulings in this case indexed at 2019 BCSC 1922 and 2021 BCSC 235. I considered and relied on correspondence authored by James Douglas in his capacity as Governor of the Colony of British Columbia (the "Colony"), and correspondence between the Chief Commissioner of Lands and Works ("CCLW") Richard Clement Moody, and other government officials including, for example, Joseph Trutch, Robert Finlayson, Joseph Pemberton, and Gilbert Sproat.

2. Ships' Logs

[210] Official ships' logs prepared by HBC employees have been admitted for hearsay purposes under the business records exception. These logs contain valuable first-hand observations of ships officers, who were bound by a duty to maintain accurate records of the ships' daily activities.

3. Journals and Narrative Accounts

[211] HBC employees recorded their daily first-hand observations while navigating the Fraser River. The first known European to travel up the south arm of the Fraser River in a canoe was François Annance who, in 1824, recorded the initial sighting of the "terrible large village" later described in the historical record as the Cowichan village.

[212] The remaining Fort Langley Journals kept by HBC officials recording the activities of Fort Langley between 1827–1830 provide a wealth of information describing contemporaneously-recorded observations.

[213] The Fort Langley Journals were edited by historian Morag MacLachlan. MacLachlan explains each year, a copy was sent to HBC headquarters. A written

record of operations at Fort Langley on the lower Fraser River was kept annually, but only the journals from these three years have survived.

[214] There are two versions: the original journal, as kept at Fort Langley and now housed in the British Columbia Archives in Victoria, and the outgoing journal copies annually made and sent each spring to the distant HBC executive at York Factory, Manitoba, now housed in the HBC Archives in Winnipeg.

4. Historical Maps and Charts

[215] Many historical maps were relied on in this case. As I noted in a ruling indexed at 2020 BCSC 1146 at para. 47, when some of these maps were created, settlers were still exploring, documenting and mapping what would become British Columbia. The sketch produced by Simpson and Barnston in 1827 aboard the schooner *Cadborough* was the first sketch of the south arm of the Fraser River and the first time the “Cowitchen” village was identified by name in a written record. The 1859 field notes of Trutch regarding the first survey of Lulu Island were also important evidence in this case.

[216] I generally accord more weight to the historical maps and charts when they were based on personal observation. The mapmaker’s other sources of knowledge may also inform the reliability of the map. Some of the maps tendered were copies or compilations of several previous maps and carried forward errors that went unchecked because the mapmaker had no personal knowledge of the region. Accordingly, knowing the context and purpose of the map-making process is important when assessing reliability.

5. Church Records

[217] Correspondence by missionaries sent back to their home churches reporting on their official work recorded first-hand observations of the missionary.

D. EXPERT WITNESSES

[218] I heard opinion evidence from eight expert witnesses. Expert evidence was tendered in fields including archaeology, socio-cultural anthropology, history,

ethnohistory, ethnogeography, ethnobotany, ethnoecology, genealogy, historical geography, cartography, cartology and transportation economics.

[219] Expert reports generally stand on their own; however, during the testimony of Morley Eldridge, it became readily apparent expert assistance was required about the context and authenticity of a historical document, and whether it was based on personal observation, in order to permit me to assess its threshold reliability: 2019 BCSC 1680.

[220] This set a precedent for examinations-in-chief of other expert witnesses in this trial. Where there was an objection to the reliability of a historical document, I allowed the party tendering the expert opinion to ask the expert questions about the role of the author of the document, the nature and purpose of the document, whether it was based on personal observation, whether it was recorded contemporaneously with the observation, and whether there were facts to support a business record assessment. Where the expert relied on a treatise, the party tendering the expert was allowed to ask whether the work had been published or peer-reviewed, whether editorial changes were made, and whether it had been translated. The expert was cross-examined by opposing parties: 2019 BCSC 1922 at para. 217.

[221] The following is a list of the names and qualifications of each expert and the identification of their reports.

1. Morley Eldridge (Archaeology)

[222] The plaintiffs' expert, Mr. Eldridge, was qualified as an expert in the field of archaeology, specifically archaeology of the lower Fraser River and archaeological uses of geographic information systems ("GIS"), including analysis and the treatment of historical charts and maps. Mr. Eldridge's main report is titled "DgRs-17, Expert Witness Report: An Archaeological Investigation". I allowed the plaintiffs some latitude in examining Mr. Eldridge in chief about the creation and purpose of the 1859 field survey notes of John (later identified as Joseph) Trutch. I agree with Mr. Eldridge that the Trutch survey notes and map are vital evidence in this case. Mr. Eldridge's opinion was reliable but his findings were limited.

2. Dr. Nancy Turner (Ethnobotany)

[223] The plaintiffs' expert, Dr. Nancy Turner, was qualified as an expert in the fields of ethnobotany and ethnoecology, including ethnobotany and ethnoecology of central Coast Salish peoples and other Indigenous peoples of coastal British Columbia. I have noted in these reasons that Dr. Turner exceeded her area of expertise upon which she was qualified in this trial to testify when she provided opinions on the occupation of Tl'uqtinus by the Cowichan. Dr. Turner provided a report entitled "Opinion Concerning the Relationship Between the Cowichan and the Lands Within and Around the Cowichan Village at Tl'uqtinus Before and at 1846 and Between 1846 and 1878". I permitted the plaintiffs to extend Dr. Turner's examination-in-chief so that she could provide evidence related to the threshold reliability of the historical documents upon which she relied. I then ruled on the admissibility of those documents in 2019 BCSC 1922.

3. Dr. Dorothy Kennedy (Socio-Cultural Anthropology)

[224] The plaintiffs' expert, Dr. Kennedy, was qualified as an expert in the field of socio-cultural anthropology, ethnohistory, ethnography, and genealogy with a specialization in Aboriginal culture and history of western North America and particularly Coast Salish social organization and Coast Salish land and resource use. Dr. Kennedy prepared a report entitled "An Analysis of the Cowichan Occupation of the 'Longshore Village', Lulu Island". I dismissed TFN's application to exclude this report: 2019 BCSC 1986. In addition, Dr. Kennedy authored responding reports to the opinions of Drs. Joan Lovisek, Molly Malone, and Theodore Binnema. Two of these reports fell away after Canada opted not to tender the opinions of Drs. Malone and Binnema.

[225] I permitted the plaintiffs to extend Dr. Kennedy's examination-in-chief so that she could provide evidence relevant to the threshold reliability of the historical documents on which she relied. I relied on Dr. Kennedy's evidence to assist me in ruling on the admissibility of those documents in a ruling indexed at 2020 BCSC 1146. Her cross-examination was extensive, covering about 22 days of trial.

[226] I found Dr. Kennedy's opinion highly reliable. She has a deep knowledge of the subject matter she opined on and for the most part I accepted her opinion with one limited exception. I did not rely on her opinion on the extent of the Cowichan village as at 1846.

4. Dr. Kenneth Brealey (Historical Geography)

[227] The plaintiffs' expert, Dr. Brealey, authored the map defining the Claim Area, a modified version of which is included in these reasons at Schedule A. He was qualified as an expert in the areas of historical geography as well as cartography and cartology with specialization in Aboriginal use and occupation of land and resources and on the interpretation of mapping sites, areas, locations, place names, events, routes, boundaries and territories referred to in historical documents and maps, and on the historical territoriality of Aboriginal peoples. Despite being diagnosed with a terminal illness, Dr. Brealey underwent about 13 days of pre-trial deposition between April and June 2019. Unfortunately, Dr. Brealey passed away in August 2019 before the trial commenced. Dr. Brealey's two reports are entitled "Historical Geography of Cowichan Land Use and Occupancy, Lower Fraser River: Map Series and Report" and "The Cowichan Village of Tl'uqtinus and the Reserve Allotment Process in British Columbia, 1859–1888: Supplemental Report". I admitted the first report without redactions and the Supplemental Report with redactions to passages which ventured into making impermissible conclusions of law: 2020 BCSC 917.

[228] I found Dr. Brealey's opinion highly reliable and I accepted his opinions with the exception of the extent of the Claim Area in 1846 and beyond.

5. Michael Layland (Cartography)

[229] The plaintiffs' expert, Michael Layland, was qualified as an expert topographic surveyor and cartographer with specialization in the field and office operations associated with mapping of hitherto little-documented regions as well as the non-Indigenous reconnaissances, surveys, and cartography of what is now coastal British Columbia from contact through the early 20th century. Mr. Layland authored a

report entitled “Response to the April 30, 2019 Report of Joan Lovisek”. He also authored a supplemental report indicating a material change in opinion based on new data, entitled “Layland Supplemental Response to Lovisek”.

[230] I relied on Mr. Layland’s interpretation of various maps and his evidence about cartographic conventions.

6. Dr. Joan Lovisek (Cultural Anthropology)

[231] Canada’s expert, Dr. Lovisek, was qualified as an expert in cultural anthropology, with specialization in ethnohistory with particular reference to the historical land and resource use of the Indigenous peoples of Canada. I noted in my ruling on her qualifications that Dr. Lovisek is not an expert in linguistics, genealogy, or kinship and that any opinions given by her in these areas would exceed her expertise. She provided two main reports: “Land Use and Occupancy of the Lands of Tl'uqtinus by the Island Halkomelem (Hul'qumi'num)” (“Land Report”); and “Pre-Contact Harvesting of Fish on the South Arm of the Fraser River”. Dr. Lovisek was permitted to give evidence on the reliability and authenticity of certain documents on which she relied. I ruled on the admissibility of those documents that were in dispute in reasons indexed at 2021 BCSC 2341. Dr. Lovisek also provided a “Response Report to the Expert Report of Dr. Kennedy”.

[232] I relied on Dr. Lovisek’s reports with some exceptions. Her opinion related to the occupancy of the Cowichan village by Musqueam and the extent of the Cowichan occupancy of the village during the fishing season was undermined on cross-examination. I did not accept her opinion on the Cowichan requiring permission from the Musqueam to occupy their village or fish the south arm of the Fraser River.

7. Dr. Theodore Binnema (History)

[233] Canada’s expert, Dr. Binnema, was qualified as an expert historian with experience reviewing and interpreting historical documents. Dr. Binnema prepared an initial report which was not tendered at this trial. Canada narrowed his

instructions and he revised his report to focus only on the establishment of the Port of New Westminster and its evolution into the Fraser River Harbor Commission through to 1986 and Canada's acquisition of portions of the Lands of Tl'uqtinus beginning in the 1980s.

[234] For the limited purpose it was tendered, I relied on Dr. Binnema's evidence.

8. Dr. Michael Tretheway (Transportation Economics)

[235] The VFPA's expert, Dr. Michael Tretheway, was qualified as an expert in transportation economics including economic impact analysis, multiplier analysis, input-output models, and the national system of product accounts which provide the data structures for the analysis. I concluded that Dr. Tretheway's career has focused on aviation and so he did not have a specialty in economics of ports and their supply chain. However, this did not mean that he lacked sufficient expertise as a transportation economist to give an opinion on the economics of ports and their supply chains. Dr. Tretheway's company InterVISTAS had conducted studies for the VFPA prior to this trial.

[236] His report appended the studies previously prepared for the VFPA and the plaintiffs raised issues related to his independence and impartiality. I found that the InterVISTAS studies were prepared to measure the economic impact of the port and not for any other purpose. I accepted that Dr. Tretheway did not and would not permit any adjustment to the figures in the interest of studies or permit a misapplication of the economic impact methodology: 2022 BCSC 104. Ultimately, the reports were of little use to the Court because they were not tailored to the Claim Area and did not provide specific evidence about the economic impact of the VFPA's activities in the Claim Area.

E. ETHNOGRAPHY

[237] The evidence before the Court included anthropological, ethnographic and ethnohistorical evidence.

[238] Ethnography is a description of a particular culture based on observation and participation, and on interviews with members of that culture. Ethnohistory complements ethnography by drawing on historical documents to reconstruct a description of Indigenous life and events in historic times.

[239] Ethnohistorical documents include field notes, manuscripts, and publications compiled by past and present ethnographers, historians, and linguists, and observations by government and non-government individuals, including explorers, missionaries, and local pioneers.

[240] Placing oral history in specific timeslots can be difficult without complementary historical data that can clarify such issues. Renowned anthropologist and linguist Dr. Wayne Suttles expounded on the importance of using historical documentation to complement ethnography in his article, *The Ethnographic Significance of the Fort Langley Journals*.

[241] Dr. Kennedy explained that it can be difficult to ascertain whether ethnographic information reflects the life of Indigenous people at the time of contact, at 1846, at 1878, or later. Time is an issue when relying almost exclusively on ethnographic data. References to events that happened “several hundred years ago”, for instance, make it difficult to pinpoint actual timeframes. Dr. Kennedy said such references can highlight the existence of historical events, but this is not how Indigenous people measured the passing of time. The witnesses I heard linked time to events like when the white man came, and to resource harvesting seasons, like the time for harvesting camas or when the sockeye arrived. Dr. Kennedy observed that the availability of certain resources at certain times of year was captured in the naming of the months in at least one account of the Cowichan calendar.

[242] Dr. Lovisek noted that there are a number of difficulties, both temporal and methodological, in determining the exact nature of historical Indigenous societies. By assessing the modern ethnographic descriptions of the Island Halkomelem (Hul'qumi'num) to the chronologically-organized historical record, it is possible to

infer relative time periods when certain activities described in the ethnographic records as “traditional” may have existed.

[243] Dr. Lovisek reported that many early ethnographers studied the pre-contact period. The information obtained was usually based on the memory of elderly informants, and it was difficult to determine whether they conflated historical periods.

[244] Dr. Lovisek referenced the work of historical geographer Cole Harris, who pointed out that as a result of the smallpox epidemic of 1782, “[g]eneration after generation of the elderly died, cultures changed, and, eventually, oral traditions thinned”. This is why whenever possible, historical and archaeological data are critical to assessing the temporal context of the ethnographic data.

[245] TFN submits that it is important to distinguish between on the one hand, the texts, draft manuscripts, and interstitial editorializing of ethnographers, and on the other hand, the notes made of their interviews with the informants themselves. The former inevitably glosses across gaps and inconsistencies, or introduces opinion into their readings of what they were told by their informants. The latter, however, represent something closer to unfiltered direct statements of recollection and belief, although even those need to be read carefully because they are notes made by non-Indigenous persons trying to write down — either contemporaneously or latterly — some of what was said to them, and the documents were not written for publication.

[246] TFN submits we almost never know what questions were asked, and we do not know what the Indigenous people understood to be the expectations associated with these encounters.

[247] TFN submits that the fact that this material is found in files containing notes and rough drafts demonstrates it was not necessarily intended to ever see the light of day. The plaintiffs and their experts rely heavily on these materials, and therefore they need to be reviewed and tested against the plaintiffs’ claims. TFN adds that this

evidence is fragmentary, often inconsistent, geographically imprecise, and its time depth is almost always uncertain.

[248] I made a number of rulings during the trial in which I largely admitted the observations, field notes and factual statements of ethnographers. Where an ethnographer expressed an opinion, I generally admitted that evidence to the extent it was adopted and relied on by an expert at trial, and not as stand-alone evidence.

[249] I have not examined any piece of evidence in a silo, and have attempted to assess the historical, ethnographic, and oral history evidence as a whole. I am guided by McLachlin C.J.C.'s comments in *Mitchell* at para. 27, that although "Aboriginal right claims give rise to unique and inherent evidentiary difficulties ... the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection". The standard of proof here is on a balance of probabilities. It is an appropriate exercise of the Court's fact-finding role to draw inferences that are most compelling based on the totality of the record. In *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 [*West Moberly* 2020], leave to appeal to SCC ref'd, 39292 (21 January 2021), then Chief Justice Bauman, writing for the majority, said:

> [295] This case is one of competing inferences. A twenty-first century court has no ability to question those individuals who were party to the treaty's signing in 1899. The trial judge instead had to examine what records remain from before and after the treaty was signed to determine what the parties intended the metes and bounds clause to mean.
>
> [296] What my colleague calls errors of law and fact in my view amount to contentions that the judge should have drawn alternative inferences from the record. That he drew the inferences he found most compelling is not an error but rather an appropriate exercise of his fact finding role.

[250] The fact-finding mission I have been tasked with has not been guess work or assumption. It is much like stitching a quilt back together, assembled with evidentiary fabrics of various colours and textures to determine how they fit together and complement one another. It is not a creative exercise but rather a reconstruction. It cannot be put together perfectly; some of the past is simply unknown. However, what has emerged is the fact of a thriving historic Cowichan

fishing village on the south arm of the Fraser River that was and is of significant importance to the way of life of the Cowichan people.

[251] Next, I provide a brief chronology of the key historic events relevant to this case.

PART 4 CHRONOLOGY OF KEY EVENTS

[252] At this stage, I do not detail every key event, but simply outline the major occurrences to provide a frame of reference for the issues that follow:

Time Immemorial	Coast Salish peoples live, fish, and harvest resources on the south arm of the Fraser River.
Late 1700s	Smallpox epidemic causes depopulation of Coast Salish peoples.
Early 1790s	Spanish and English explorers navigate the Gulf of Georgia and encounter Indigenous persons about the Fraser River mouth.
1808	Simon Fraser leads an expedition at the Fraser River.
1824	François Annance and John Work descend the lower Fraser River via the south arm and record an Indigenous village at the Claim Area.
1824–1827	HBC conducts expeditions around the Fraser River with a view to establishing a fort. George Barnston recorded his first sighting of the Cowichan villages and notes the three villages of Saumause, Pinellahutz and Quomitzen.
Summer–Fall 1827	Fort Langley is established.
1827–1830	Fort Langley Journals record daily operations at the Fort and record HBC officials' interactions with Indigenous people.
1843	Fort Victoria is established.
June 15, 1846	Crown sovereignty is asserted in British Columbia pursuant to the Oregon Boundary Treaty.
1849	Colony of Vancouver Island is established.
August 1851	James Douglas is appointed Governor of the Colony of Vancouver Island.

January 1853	Douglas meets with the Cowichan and records in his journal that he told them the Queen had given him a special charge to treat them with justice and humanity as long as they remained at peace with the settlements.
Pre-1855	Battle of Maple Bay, where the Coast Salish people, including the Cowichan, defeat the Lekwiltok.
1858	Start of the Gold Rush in British Columbia; an influx of gold seekers arrive at the Fraser River.
1858	Mainland Colony of British Columbia is established.
1858–1864	Douglas appointed Governor of the mainland Colony of British Columbia and establishes early colonial policy with respect to Indian reserves and sale of surveyed land.
1859	Richard Moody appointed as Chief Commissioner of Lands and Works and becomes responsible for the sale of surveyed lands.
1859	Joseph Trutch surveys Lulu Island, including the Claim Area, identifying an “Indian village”.
1863	Moody purchases land in the Claim Area.
1864–1871	Trutch becomes CCLW. Frederick Seymour succeeds Douglas as Governor, who is then succeeded by Anthony Musgrave. Colonial Indian reserve creation continues.
1866	Colony of Vancouver Island and the mainland Colony of British Columbia merge to form the unified Colony of British Columbia.
1867	Dominion of Canada is established. Canada assumes jurisdiction over “Indians, and Lands reserved for the Indians”.
July 20, 1871	British Columbia joins Confederation under the *British Columbia Terms of Union*.
1871–1914	Parcels of land in the Claim Area are granted to settlers, including Moody and other government officials.
1870s	Canneries are established along the lower Fraser River.
1876	Canada enacts the *Indian Act*.

1876–1877	Canada splits the Cowichan people into five administrative Indian bands.
1877	Cowichan complain to Commissioner Sproat of the Joint Indian Reserve Commission that their fishing station on the lower Fraser River was sold.
1878	Canada implements the first fisheries regulations in British Columbia.
1894	Canada requires Indigenous persons to obtain permission to fish for food.
1908	Canada prohibits any fishing with nets except under license.
1917	Canada begins fixing the terms of Indigenous food fisheries.
1920	Canada requires all “Indian” children between ages 7–15 to attend residential school.
1978	Canada formalizes its practice of only licensing Indigenous persons to fish where their band has fished in the previous 25 years.
1981	Canada adopts a communal band licensing system for fishing.
1982	Section 35(1) of the *Constitution Act, 1982* recognizes and affirms Aboriginal rights.
May 31, 1990	SCC recognizes the Musqueam’s right to fish for food in *R. v. Sparrow*, its first decision applying s. 35.
1990–2007	Post-*Sparrow* fishery regime is in place. Canada acknowledges Indigenous peoples could have fishing rights in areas not near or adjacent to their reserves.
2004	BC vests Richmond with the soil and freehold of the Richmond Tl'uqtinus Lands (Highway).
2008–2019	Modern fishery era. The Cowichan are largely prevented from accessing the south arm of the Fraser River to fish.

[253] I now turn to the first issue in this case and determine whether the plaintiffs have established Aboriginal title to the Lands of Tl'uqtinus.

PART 5 ABORIGINAL TITLE

A. THE PROPER RIGHTS AND TITLE HOLDER

1. Introduction

[254] The plaintiffs claim the members of the Cowichan Tribes, Stz'uminus, Penelakut, Halalt, and Lyackson are the descendants and present-day Aboriginal rights and title holders of the Cowichan Nation. The plaintiffs bring this action on their own behalf and on behalf of all descendants of the historic Cowichan Nation.

[255] Aboriginal rights are communal rights, grounded in the existence of an historic group who shared customs, traditions, and a collective identity: *R. v. Powley*, 2003 SCC 43 at paras. 23–24 [*Powley*]. To assert title or claim to a more restricted Aboriginal right, modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely: *Marshall; Bernard* at para. 67.

[256] The plaintiffs submit that prior to, at, and after 1846, the Quw'utsun mustimuhw (Cowichan people) comprised 11 local groups. Following Crown imposition of reserve lands, these groups continued as the four plaintiff bands and the Lyackson.

[257] Below, I discuss the following issues:

a) Was there a recognized Cowichan community or organized society that was the Cowichan Nation in the early 1790s and 1846? I find that there was.

b) Did that group have a distinct collective identity, share a common way of life, and live together in the same geographic area of southeast Vancouver Island, the southern Gulf Islands, and the south arm of the Fraser River? I find that it did.

c) Are the members of the plaintiff bands and the Lyackson the descendants of that collective and the proper rights and title holders? I find that they are.

2. Positions of the Defendants

a) Canada

[258] Canada acknowledges that the four plaintiff bands, and the Lyackson, are the descendants of the 11 local groups and are the modern rights holders for any Aboriginal rights and title held by those groups.

[259] Canada takes no position on whether the 11 groups comprised a single rights-holding collectivity at contact or at the assertion of sovereignty.

[260] Canada admits each plaintiff is duly authorized to bring this action as a representative on behalf of each plaintiff and their members as descendants of the Cowichan Nation. Canada says whether the plaintiffs, or any of them, are authorized to bring the action as representatives on behalf of “all other descendants” of the historic Cowichan Nation is outside its knowledge.

b) BC

[261] In final argument, BC conceded that the present-day members of the five bands are descendants of the 11 local groups making up the Cowichan Nation, and that the plaintiffs are authorized to represent this community.

[262] BC takes no position as to whether:

a) the Cowichan Nation was a rights-bearing community at the time of contact and the assertion of sovereignty;

b) the present-day members of the five bands are all of the descendants of the Cowichan Nation; and

c) the present-day members of the five bands are the successors to the Cowichan Nation.

c) Musqueam

[263] Musqueam denies that the plaintiffs and the Lyackson are the descendants and present-day Aboriginal rights and title holders of the Cowichan Nation.

[264] Musqueam says the written historical record does not assist the plaintiffs in establishing the scope of what they say is the historical collective because of the overbroad use of the term ‘Cowichan’ in the historical record to describe any number of groups.

d) VFPA

[265] The VFPA says the facts regarding the existence of an historic Cowichan Nation and its continuation and descendants are outside its knowledge. The VFPA relies on the submissions of Canada with regard to the rights-holding collective.

e) Richmond

[266] Richmond says the plaintiffs have failed to establish that they are the appropriate rights-bearing collective. Richmond denies the facts alleged regarding the composition of an historic Cowichan Nation, and denies that the plaintiffs are its descendants or present-day Aboriginal rights holders. Richmond says whether each plaintiff brings this action on their own behalf or as an authorized representative on behalf of all descendants of the historic Cowichan Nation is outside its knowledge.

[267] Richmond also submits that uncertainty exists regarding the meaning and usage of ‘Cowichan’ in the historical record.

f) TFN

[268] TFN denies that there was at any material time a people, nation, or group known as the ‘Cowichan’ or ‘Cowichan Nation’. TFN submits there was never a recognizable polity, collective or organized society that was the Cowichan Nation.

3. Law

[269] Before analyzing the evidence, I review the legal principles.

[270] There is little disagreement between the parties about the law, with one exception. BC submits that, in a claim for Aboriginal title, the historic rights-bearing community must have shared the land in question according to the community's own internal rules. I do not see this reflected in the case law. Although sharing of territory between the groups that make up the historical community may contribute to shared identity, it is not an additional requirement but part of the common threads of language, customs, traditions, and shared history, which I describe below: *Tsilhqot'in* BCSC at paras. 457, 469–470.

[271] Section 35(1) of the *Constitution Act, 1982* provides a framework that acknowledges that Indigenous peoples lived in distinctive societies for centuries prior to the arrival of Europeans in North America, with their own practices, traditions, and cultures, and reconciles this with the sovereignty of the Crown: *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 30–31, 1996 CanLII 216 [*Van der Peet*].

[272] As BC submits, the courts have not set out a definitive test or a list of criteria for finding an historic rights-bearing community, but the case law provides guiding principles and core requirements for such a finding.

[273] In *Powley*, the Métis plaintiffs claimed an Aboriginal right to hunt for food. The Court defined a Métis community as a group of Métis with a distinctive collective identity, living together in the same geographic area, and sharing a common way of life in terms of customs and traditions: at paras. 12, 23.

[274] There, the Court recognized that different groups may have lacked political structures and may have experienced shifts in self-identification. However, the existence of an identifiable community must be demonstrated with some degree of continuity and stability: at para. 23. The Court said at para. 24:

> Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community.

[275] In *Powley*, the Court set out a two-step test to identify the proper rights holder. The first step is to identify the historic community that exercised the right based on the historical evidence. The second step is to identify the contemporary rights-bearing community.

[276] *Powley* sets out the following guiding principles for the purpose of establishing membership in a rights-bearing community. The claimant must:

a) Self-identify as a member of an Indigenous community. The self-identification should not be of recent vintage — not static or monolithic, but not made belatedly to benefit from a s. 35 right: at para. 31;

b) Present evidence of an ancestral connection to the community. This does not require a minimum “blood quantum”, but does require evidence that the claimant’s ancestors belonged to the historic community by birth, adoption, or other means: at para. 32; and

c) Be accepted by the modern community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute that community’s identity and distinguish it from other groups: at para. 33.

[277] Only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, as individuals are only entitled to exercise Aboriginal rights by virtue of their ancestral connection to — and current membership in — the Aboriginal community: *Powley* at para. 34.

[278] In *Tsilhqot'in* BCSC, Justice Vickers concluded that the Tsilhqot’in were the proper Aboriginal title and rights holders: at para. 470. The Tsilhqot’in led a semi-nomadic life, somewhat similar to the plaintiffs’ ancestors here, and did not have an organized social structure. Nonetheless, the common threads of language, customs, traditions, and a shared history remained constant: at para. 457. I find the

facts that Vickers J. relied on in coming to his conclusion informative, and review them below.

[279] Justice Vickers applied the two-step process from *Powley* to identify the proper rights holder: at paras. 441–444. Justice Vickers added that identification as a member of a community is not external; “[i]t should always be the particular Aboriginal community that determines its own membership”: at para. 444. A critical inquiry is determining “an ancestral connection to the relevant community extant at contact in the case of rights, or at sovereignty, in the case of title”: at para. 445.

[280] In *Tsilhqot'in* BCSC, BC argued that the proper historic and modern rights holders should be found at the band level. Justice Vickers rejected this, noting that while band level organization “may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot’in people”: at para. 469.

[281] Language was the strongest bond shared by the Tsilhqot’in people: at para. 340. Common culture was of relatively less importance. There were variances between bands in the telling and the details of legends: at paras. 341–342.

[282] The Tsilhqot’in were less stratified than neighbouring First Nations. This may partly have been due to their mobility, which made both accumulation of wealth and rigid organizational structures unwieldy: at para. 356. The enforcement of conformity to behavioural norms occurred at the family or encampment level: at para. 357. Individuals had a high degree of autonomy, in theory: at para. 357. The Tsilhqot’in people who lived in bands had a chief. There was no single person who was the chief of the entire Tsilhqot’in people: at para. 363.

[283] Because the Tsilhqot’in frequently moved, there appeared to be little time for art. There were no totems. There was also no evidence of a crest system, named ceremonial groups, or an honorific ranking system. Oral history provided the binding social fabric: at para. 363. The legends told by elders carried underlying messages or morals. They set out the value system and rules of conduct: at paras. 433–434.

[284] The Tsilhqot'in had a stronger attachment to winter residences than to sites used in other seasons, likely due to the longer period passed at the winter sites and the more sedentary nature of the activities carried on in this season: at para. 378.

[285] Their semi-nomadic lifestyle changed over time as a result of declining fur prices and changing social order. Some still went out on the land to hunt, fish, and gather roots and berries in all seasons, but much less in the winter months: at para. 379. There was a predictable seasonal round of resource gathering.

[286] The Tsilhqot'in people were deeply spiritual: at para. 418. They showed respect for the earth, plants, and animals: at para. 419.

[287] They considered the land to be their land, and had a concept of territory and boundaries: at para. 429. They had laws against taking the property of others and creating a disturbance in the community, and offenders were punished: at para. 431.

[288] The Tsilhqot'in were a rule-ordered society, tied by language, kinship, and customs. Although they no longer lived as their ancestors, the land continued as a central theme, providing continuity and stability: at para. 436.

[289] Justice Vickers noted at para. 457 that the Court's recognition SCC in *Powley* that "different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification" applied equally to Tsilhqot'in people. The political structures could change, and self-identification could shift from band identification to cultural identification, depending on the circumstances.

[290] I now turn to two additional cases that inform my assessment. In *Ahousaht* 2009 rev'd in part 2011 BCCA 237, aff'd on reconsideration *Ahousaht* 2013, leave to appeal to SCC ref'd, 34387 (30 January 2014), the plaintiffs claimed their predecessors (the Nuu-chah-nulth Nations) were organized and self-governing culturally related groups that shared common distinctive features, including language, customs, practices, traditions, laws, economies, spiritual beliefs, and culture: at para. 7. The people had strict customs of ownership of territories and resources, and strict notions of boundaries: at para. 412. Justice Garson was

satisfied that the sub-groups fished within discrete coastal territories: at paras. 411–414. She found that the plaintiffs descended from the historic sub-groups, and declared that they held Aboriginal fishing rights within their territories: at para. 909.

[291] Justice Garson found that proof of connection to the historical Nations would primarily be based on a geographical identification: at para. 292. The plaintiffs shared common language, culture, and history. They did not then have, nor did they ever have, a single governing authority. Each plaintiff identified as an autonomous nation, and claimed it was the proper group to hold Aboriginal rights: at para. 299.

[292] There was turmoil and instability in the historical groups, which resulted in a significant population decline amongst the Indigenous peoples of the west coast of Vancouver Island. The local groups existing in the late 19th century were considered to be a fraction of those which existed at the time of contact: at para. 301.

[293] Justice Garson concluded the plaintiffs were connected to the pre-contact groups or to the groups that occupied the territories at contact: at paras. 323, 336, 344, 354, 365.

[294] In *R. v. Desautel*, 2017 BCPC 84 [*Desautel* BCPC], aff'd in part 2017 BCSC 2389, aff'd 2019 BCCA 151, aff'd 2021 SCC 17 [*Desautel* SCC], the court considered the descendants of the Sinixt's claim to an Aboriginal right to hunt. The Sinixt were known to have lived, travelled, hunted, fished, and gathered in the relevant area for thousands of years: *Desautel* BCPC at para. 1. They had a long tradition and practice of hunting game in the northern part of their territory: at para. 77. An expert witness reviewed historical records and traced the modern-day descendants of 21 Sinixt families living in British Columbia prior to 1830: at para. 58. Most of the descendants of these families live in the United States: at para. 59. Judge Mrozinski concluded that there are people living today in both Canada and the United States that are ancestrally connected to the Sinixt living in British Columbia, likely at the time of contact: at para. 62.

[295] On appeal, the SCC reaffirmed that Aboriginal title arises from the possession of land prior to sovereignty and the prior social organization and distinctive cultures of Indigenous peoples on that land: *Desautel* SCC at para. 28. The Aboriginal rights and title doctrine looks first back to the practices of groups pre-sovereignty, and then expresses those practices as constitutional rights held by modern successor groups within the Canadian legal order: at para. 22.

[296] With these legal principles and approaches in mind, I now turn to a review of the oral history of Cowichan Elders, the written historical and ethnographic record, and the expert opinion evidence relevant to the issue of the proper rights and title holder. I engage with some points of contention raised by the parties in relation to this evidence. I note that some of the evidence not included in this summary is addressed later in the respective analyses.

4. The Historical Community

a) Distinct Collective Identity

[297] I conclude that the Cowichan had a distinct collective identity. The evidence establishes that the Cowichan were identified collectively from both Aboriginal and non-Aboriginal perspectives.

[298] In reviewing the evidence, I kept in mind the evidence and submissions that the historical record is sometimes confused with an overbroad use of the term ‘Cowichan’, which may include other Central Coast Salish groups.

[299] I provide a summary of the evidence introduced on the issue of distinct collective identity below.

b) Oral History

[300] The evidence included the oral history of Cowichan Elders, namely Luschiim, Mrs. James, X’tli’li’ye, and Councillor Thomas.

[301] X’tli’li’ye was taught the words Quw’utsun mustimuhw (Cowichan peoples).

[302] Luschiim testified that the Quw'utsun mustimuhw were an Indigenous people that have been here since time immemorial. Quw'utsun has a special meaning in Hul'qumi'num. When you are warming your back to a heat source, you are shquw'utsun'. That is how the Quw'utsun people got their name.

[303] The Cowichan Elders testified that the broader Quw'utsun mustimuhw existed prior to *Indian Act* bands, were all one, and included the plaintiff bands and the Lyackson. One of the places the Quw'utsun mustimuhw lived was at Tl'uqtinus on the Fraser River, where they harvested and lived together.

[304] Mrs. James and Luschiim spoke of the strong presence of Quw'utsun in the area of Valdes, Galiano, and Penelakut Islands before settlers, and the great number of bighouses in that area.

c) Historical Record

[305] The written historical record includes the records of the first Europeans to explore the Fraser River delta (1791–1792); Simon Fraser's journal (1808); Work and Annance's records of the 1824 McMillan expedition; George Simpson's journal (1825); Alexander McKenzie and John Scouler's accounts of the McKenzie reconnaissance expedition (1825); Aemilius Simpson's unofficial remark book recounting the second McMillan expedition (1827); the Fort Langley Journals (1827–1830); Father Blanchet's report of his trip to Fort Nisqually (1841); James Douglas' correspondence (1849–1856); Hills' journal on board the *HMS Virago* and *HMS Portland* (1852–1853); Wells' survey of the Cowichan Valley (1859); and Kennerly and Gibbs' records from the Northwest Boundary Survey ("NWBS") (1857–1858). It also includes censuses prepared by Yale (1839); Finlayson (1845), as shared with Warre and Vavasour; Douglas (1856); and Heaton (1860).

i. 1791–1792: Spanish Explorers

[306] The first Europeans to explore the area of the Fraser River delta were the Spanish navigators Francisco de Eliza and José Narváez in 1791, and Dionisio

Galiano and Cayetano Valdes in 1792, as well as the English navigator George Vancouver in 1792.

[307] On July 1, 1791, Narváez sailed into the Georgia Strait up the mainland coast to roughly 49.5° north, about to what is now the entrance to Burrard Inlet. Narváez did not make landfall on the mainland, but noticed 'sweet water' in the offshore area (likely from the Fraser River), and on July 2, 1791, met a great number of "Indians" in canoes in the neighborhood of Bocas de Carmelo and Islas de Cepeda. Dr. Brealey included in his report that the references to 'Bocas de Carmelo' and 'Islas de Cepeda' were to Howe Sound and Point Roberts, respectively. Neither Narváez nor de Eliza identified these Indigenous people by name, noting that they were different from those at Nuca (Nootka). In Dr. Brealey's opinion, it is possible that the "Indians" by Point Roberts were Cowichan.

[308] On cross-examination by TFN, Dr. Brealey agreed that neither Narváez nor de Eliza had enough direct contact experience to be more specific about who "these Indians" may have been. It was possible, based on the record alone, that they could have been Nanaimo or Saanich peoples.

[309] Narváez then sailed to Vancouver Island, and identified an "Indian" village on the southeast shore of Gabriola Island. He noted (and de Eliza mapped) the gap between Valdes and Galiano Islands, naming it Boca de Poliel. It later became known as Cowichan Gap by early explorers, and is now called Porlier Pass.

[310] On June 13, 1792, Galiano and Valdes sailed through Boundary Bay, around Point Roberts, and up Sturgeon Bank. They missed the mouth of the Fraser River, and were carried by tidal and riverine currents across the Georgia Strait to the east shore of Galiano Island. On June 15, 1792, they came to the narrow saltwater passage between Galiano and Valdes Islands, mapped the previous year by de Eliza as Boca de Poliel. They noted the following, as they:

> ... were entering, an archipelago of low and small islets came into view in two principal inlets, one which led to the east and the other to the west ... In these inlets there are various abandoned villages, and one occupied one, [which is] on the west shore of the entry, and from which five canoes came off, with two

> old men and nineteen lads, all very robust, well favoured, and of good appearance.

[311] Galiano and Valdes did not suggest any ethnographic affiliation of the two old men and 19 lads, but they invited the explorers to visit their village.

[312] TFN agrees that the first Europeans to see the Salish Sea were de Eliza and Narváez in 1791, and Galiano, Valdes, and Vancouver, in 1792. These early explorers did encounter Indigenous people, but none were identified by name. Drs. Kennedy and Brealey opined that the inhabitants of the one occupied village seen in Porlier Pass were Cowichan. TFN submits this is conjecture.

[313] Dr. Kennedy opined that “this meeting of the Spaniards and the Natives in Porlier Pass in the summer of 1792 marks the first clear encounter between the Cowichan and Europeans”.

[314] Dr. Kennedy further opined that the presence of the old men and 19 lads, but no able-bodied fisherman and female processors, supports the idea that many residents had left for the Fraser River fisheries.

[315] In Dr. Brealey’s opinion, the five canoes and the various abandoned villages, and one occupied one, recorded on June 15, 1792, were Cowichan. Valdes and Galiano passed through Porlier Pass, and as the ethnohistoric and ethnographic record later makes clear, their sightlines would have easily included several Cowichan villages in close proximity. It is likely the occupied village was th’xwemksen (Cayetano Point), and the various abandoned ones were likely t'áat'ka7 (Shingle Point) on Valdes Island and penalexeth (Penelakut) on Kuper Island, and possibly also th’axel (Cardale Point) on Valdes Island, xinepsem (Virago Point), kwoles (Reid Island), and shts'eṁínes (Kulleet Bay) on Vancouver Island. According to Dr. Brealey, these villages were only abandoned because the Cowichan had started their annual migration to the Fraser River.

[316] TFN submits the Court cannot make findings of fact based on “conjecture” and “possibility”. TFN says that, in this case, there are many Indigenous groups who could have been paddling in the Salish Sea in the summer of 1791 or 1792.

[317] Mrs. James testified that her mother’s family, the George family, comes from Penelakut Island. The west side where her mother lived is called Yuxwula'us (the eagle’s face side). Pune’luxutth’ is on the east side, and the south end of Penelakut is called Hwlumélhtsu, which is Lamalchi Bay. They all had their own bighouses.

[318] Mrs. James said the tu'etqe' and the 'uyeenwus were warriors. The 'uyeenwus were tu'etqe' people, and the tu'etqe' were Quw'utsun mustimuhw, not separate. The warriors had training in Cowichan Bay. They lived on the Cowichan River and at Valdes Island in their own separate area. These warriors protected, lived at, and moved wherever they needed to be; not only on the river, but also on the Gulf Islands. This was in the past, before her time. The stl’ulnup are the ancient grounds that they fought for. Her auntie, Mabel Alec from the Lhut’umun Tribe (Ladysmith area), said the warriors had 13 bighouses, 10 on the Pune’luxutth’ side (east side of Penelakut Island); Mrs. James’ mother’s family had 10 bighouses on the west side of Penelakut Island; and the Lamalchi had 10 bighouses on the south end, Lamalchi Bay, and only a couple on the west side of Penelakut Island. She then testified: “[a]nd the same at the Fraser River, the Shnuwiilh”. I interpret this to mean that the groups had separate bighouses at the Fraser River.

[319] Mrs. James was asked who taught her the term “Cowichan Gap”, now known as Porlier Pass. She testified that it was mainly her youngest uncle.

[320] Mrs. James and a lot of her family were born and lived on Galiano Island. Her grandmother delivered her and was her teacher. The oral history has to be taught by the ones that brought you to this world. When her grandfather was a teenager, he went to a bighouse on Thetis Island, which Mrs. James named as S'a'thus. Her mother’s family were warriors. Her grandfather and grandmother taught her that the hill on Thetis Island was a lemuxun (lookout tower). The guard is the lemuxutun (the watcher). A signal would be made if there was an enemy coming towards them on

the water. They used giant kelp to make megaphones. The hill on Thetis Island was chosen because it was central; it could be seen from Pune'luxutth' and from Kulleet Bay, now called Chemainus, as well as from Willy Island.

[321] Mrs. James also mentioned their old, old village site on Xwixway (Thetis Island) where all the people died from a sickness. Thetis and Kuper (Penelakut) Islands used to be attached before the settlers detached them by making a canal.

[322] Before the time of settlers, Mrs. James' father's family — the Crocker family and the Norris family — lived on Valdes Island.

[323] Mrs. James testified about Xix'nupsum on the east side of Galiano Island. Xix'nupsum was a smaller portion of the village where people lived and stayed so they could travel back and forth to Shnuwiilh, the Fraser River.

[324] Luschiim deposed that the Cowichan might use Porlier Pass when they traveled from Tl'uqtinus, and that some of them would stop at Xix'nupsum. He said the Xinupsum village of our people had a place on the north end of Galiano Island at Porlier Pass, and some call it Xix'nupsum.

[325] Given the oral history evidence from Luschiim and Mrs. James, in particular about the Cowichan villages on Valdes and Galiano Islands — and even Penelakut Island — since time immemorial, I find it more likely than not that the Indigenous people seen by the Spanish explorers in June 1792 around Porlier Pass were Cowichan. This is because of the strong presence of Quw'utsun in the area of these Islands before settlers, and the great number of bighouses in that area. I accept the opinions of Drs. Kennedy and Brealey on this point.

[326] I also note an observation made many years later in 1852 by William Henry Hills in his journal aboard the *HMS Virago* and *HMS Portland*, August 8, 1852–July 8, 1853, where he reported on the archipelago to the east of Vancouver Island (the Gulf Islands). He noted several ship channels between the islands, and said:

> ... Capt. Stuart, who acted as our pilot, offered to take the vessel into one of the openings where a good view of the islands and channels could be had.
>
> … This is called on the chart the Porlier River, but is a mere opening between two Islands, and is called by the Hudson's Bay Officers the Cowitchin Gap, having on its North side a village of Cowitchin ... Indians who are the next tribe to the North of the Victoria or Songas.

ii. 1792: George Vancouver and Menzies

[327] As far as we know, Captain George Vancouver did not enter the Fraser River. In 1792, Dr. Archibald Menzies reported about Vancouver landing at a village at southeast Point Roberts:

> ... Here they landed to dine near a large deserted Village capable of containing at least 4 or 500 Inhabitants, [though] it was now in perfect ruins — nothing but the skeletons of the houses [remained], these however were sufficient to shew their general form structure & position. Each house [appeared] distinct & capacious of the form of an oblong square, & they were [arranged] in three separate rows of considerable length; the Beams consisted of huge long pieces of Timber placed in Notches on the top of supporters 14 feet from the ground, but by what mechanical power the Natives had [raised] these bulky beams to that height they could not conjecture. Three supporters stood at each end for the longitudinal beams, & an equal number were arranged on each side for the support of smaller cross beams in each house.

[328] Although Vancouver did not encounter the Cowichan, he did note that a practice with Coast Salish houses was to leave the frames in place and move wall boards or roof planks from location to location. It is possible that is what was seen here.

iii. 1808: Simon Fraser

[329] In 1808, Simon Fraser of the North West Company led an expedition down the Fraser River and back. At the fork, he was conveyed by a guide to the north arm, rather than the south arm. There are two versions of Fraser's journal. The quotes that follow are from the typescript edited by W. Kaye Lamb. The passage from July 2, 1808 reads:

> The Indians advised us not to advance any further, as *the natives of the coast or Islanders* were at war with them, being very malicious, and will destroy us.
>
> [Emphasis added.]

[330] And later:

> ... Even our Little Fellow would not embark, saying that he was also afraid of *the people at the sea*.
>
> ...
>
> We proceeded on for two miles, and came to a place where the river divides [at New Westminster] into several channels. Seeing a canoe following us we waited for its arrival. One Indian of that canoe embarked with us and conducted us into the right channel [the North Arm of the Fraser River].
>
> [Emphasis added.]

[331] On the journey back up the Fraser River to the Thompson River on July 4, 1808, Fraser wrote:

> ... The people of the village were greatly surprised to see us return, and enquired with impatience if we *had been to the Islands*, and how we had the good fortune to escape the cruelty of the *Masquiamme* — meaning *the nations at the sea shore*.
>
> [Emphasis added.]

[332] The L.R. Masson version, which is a manuscript with several interlineations, crosses out the words “people at the sea” and interlineates “Ka-way-chin or Indians of the sea”. Dr. Kennedy agreed on cross-examination that this change was not made by Fraser and was likely later added by Roderick McKenzie or Senator Masson. Dr. Kennedy agreed that when Fraser referred to the people at the sea or nations at the sea shore he would likely be referring to the Musqueam. The earlier reference to “natives of the coast or Islanders” does not fit the description of the Musqueam, but fits the description of the Cowichan. Dr. Kennedy sees the reference to “if we had been to the Islands” and “escape the cruelty of the Masquiamme — meaning the nations at the sea shore” as two separate clauses. The reference to nations at the sea shore expressly states this is a reference to the Musqueam but the reference to the Islands does not.

[333] Dr. Brealey deposed that Fraser’s account was the first reference to the Cowichan on the mainland side of the Georgia Strait, but agreed that it is entirely possible that Fraser’s original account does not make reference to the Cowichan. He

said it is possible, but not likely, that the reference to “the people at the sea” or the “Indians of the sea” was to the Musqueam.

[334] Despite the fact that the Masson version of Fraser’s journal interprets “the people at the sea” as the Cowichan, I am not convinced because the latter entry explicitly describes the Musqueam or Masquiamme as meaning “the nations at the sea shore”. However, the first passage I quoted above references “the natives of the coast or Islanders”. I accept Dr. Kennedy’s opinion that the “Islanders” could not be Musqueam, and is likely a reference to the Cowichan. We know from later expeditions that the Cowichan came from the Islands to the south arm of the Fraser River.

iv. 1824: McMillan Expedition: Work and Annance

[335] Between 1824–1827, the HBC conducted several expeditions to the Fraser River with a view to establishing a fort on the lower Fraser River. The journals kept by HBC officers provide proof of the Cowichan on the Fraser River.

[336] The first HBC reconnaissance expedition to the lower Fraser River was in December 1824, led by Chief Trader James McMillan. His Clerk, John Work, recorded on December 7, 1824 in his expedition journal that they stopped at a village of the Nisqually Nation, getting two men and one woman to act as interpreters and guides for them. The men were both of the Snohomish Tribe. At least one of them understood the language of the “Coweechins”.

[337] On December 9, 1824, Work recorded:

> One of our interpreters, being afraid to proceed any farther remained at this house where some of his friends resided. This man since he has been with us frequently boasted of his bravery and showed us how he would kill the Coweechins, the tribe who inhabit the entrance of the river of which we are in quest, and who are represented as a barbarous and wicked people. They are so wicked that the most of the Indians are unwilling to trust themselves among them even under our protection.

[338] On December 13, 1824, the boats crossed the entrance of a little bay, continued along the main shore to another bay (Boundary Bay), and proceeded to

the entrance of a small river (the Nikomeckl/Nicomekl River). Work explained that the “Indians” represented that they were taking them to the “Coweechin River”. According to Dr. Brealey, this suggests that the “Indians”, in representing the name of the River as “Coweechin”, were effectively acknowledging that the Cowichan were the dominant presence on the River, or at least of its lower reaches.

[339] On December 15, 1824, Work noted that, having reached the portage at the head of the Nikomeckl River, Indians of the Cahoutetts Nation (a 19th century name for the Kwantlen, also referred to as the Cahantitt) came to them. On December 16, 1824, the expedition descended the Salmon River a distance of about eight miles to its discharge into the “Coweechin River”. The portage took them out near the site of the first Fort Langley, and they proceeded upriver from there. He described the “Coweechin River” as “a fine looking river at least as wide as the Columbia at Oak Point, 1,000 yards wide”. From the size and appearance of the River, Work recorded that “there is no doubt in our minds that it is Fraser’s”.

[340] The next day, the party travelled up the Fraser River by McMillan and Crescent Islands to an encampment at Hatzic Slough (two miles above Mission Station). François Annance, Clerk, recorded on December 18, 1824: “Rain without mercy”.

[341] The party decided it made no sense to proceed further upriver at that time of year, so the next day they reversed course and paddled down the Fraser River proper, passing what were later named McMillan, Barnston, and Manson (now Douglas) Islands. The party reached where the River splits into the north and south channels and entered the south channel, becoming the first Europeans documented on the south arm of the Fraser River.

[342] Annance noted: “Saw the site of several villages, we came to the beginning of the marshy ground. Here we looked for a place most eligible for a Fort”. Having found one, they “marked HBC on the trees on the water side and pushed off ... Little below HBC we saw a deserted village nearly a mile long”. I note a discrepancy in the

record with regard to the “HBC” reference; although the record looks like Annance wrote “IB”, I accept the evidence of Dr. Brealey that this should be “HB”.

[343] Annance then recorded:

> Finding no good place below we came back to this village to encamp. This is a terrible large village! The natives are scattered about in the small rivers catching salmon. This must contain not less than a thousand men. The houses are very high; the roofs horizontal. There was several channels near the mouth of the river and the ground marshy and full of little ponds and small trees. Near the village there is a beautiful forest of cypress trees.

[344] Because the country was so swampy, they had “to turn back some distance to our present situation, which, though the site of the Old village, is a quagmire”. Work described the old village:

> ... We passed the site of several old villages, the one where we are now encamped extends at least 3/4 of a mile along the shore, while passing it I counted 54 houses but on *coming near* they are found to be so situated that not more than the 1/2 of them were counted.
>
> [Emphasis added.]

[345] A transcription error was found. Dr. Kennedy testified that the original journal says “coming ashore”, and not “coming near”.

[346] Dr. Brealey noted that the “quagmire” reference was because they were there in December, at the height of the winter rainy season on the lower Fraser River. I also note Annance’s aforementioned “Rain without mercy” comment.

[347] Upon reaching the mouth of the River, the party turned south, facing the shoreline as far as Point Roberts, where Work wrote:

> ... Where we are now encamped is the Birch Bay of Vancouver.
>
> ...
>
> Saw a canoe with six Indians near the entrance of the river, on being called to by our Indian they approached to within a short distance of the boats but could not be prevailed upon to come nearer. On some further conversation with our Indian they pulled ashore to bring their chief who had landed, but the boats pushed on and did not wait for them. These people are of the Coweechin tribe and had just crossed from Vancouver’s Island where they now live ... they were armed with long spears.

[348] Work and Annance did not note a connection between the Cowichan canoes near the mouth of the south arm and the occupants of either village.

[349] Dr. Brealey was of the opinion that the "terrible large village", "at least 3/4 of a mile along the shore", was the multi-seasonal Cowichan village subsequently confirmed by a number of cartographic and documentary authorities after 1824 and through to 1872. Given the evidence that follows, I accept his opinion.

v. 1825: Simpson Journal

[350] In 1825, HBC Governor George Simpson, who had instructed the 1824 McMillan expedition and received its reports, wrote in his journal that the Fraser River was called "by the Natives 'Cowitchen' deriving its Indian Name from the Tribe occupying its mouth known all along the Coast as the Cowitchen Indians".

vi. 1825: Alexander McKenzie Reconnaissance Expedition Aboard the William and Ann

[351] HBC Officers Alexander McKenzie, Clerk, and John Scouler, Naturalist and Surgeon, were on a reconnaissance expedition aboard the brig *William and Ann*. They travelled up to the mouth of the Fraser River in August of 1825.

[352] On August 20, 1825, Scouler wrote that their "old acquaintances from Saugtch [Saanich] & Lummie" warned them that they "would soon be visited by two very powerful & dangerous tribes, the Cowitchen & Yakulta, who would surprise the vessel if possible & would poison the fish they sold us". Shortly, the canoes of "the Cowitchen & their allies appeared", and they described them as friendly and peaceable.

[353] On August 20, 1825, McKenzie wrote that "a large Canoe with 14 Men were observed coming along the North Shore", and were informed by "[a] few Indians ... they were the Cowitchins". The party came along side and "the Chief of the Cowitchins a tribe at present residing on the banks of Frazers River Indian name Quotlin a Short distance from its entrance, was pointed out"; "[h]is Name is Chaseaw [Shashia]" (emphasis in original).

[354] On August 21, 1825, McKenzie wrote:

> We have been Visited by about 70 of the Cowitchen Tribe who appear only to reside at Frazer River during the Salmon Season & then return to Vancouver Island in a direction almost opposite the Entrance of this River.

[355] During one of these exchanges, a promise was made to visit Shashia the Cowichan Chief at his village.

[356] On August 22, 1825, Shashia appeared with a warning that a plan for the expedition's destruction was in action.

[357] On August 24, 1825, the Captain received instructions to proceed to the Columbia River. Shashia was informed that they would not be able to visit him. He was given a "certificate of his Character" to use in the event of his working with "Whites" in the future.

[358] The *William and Ann* did not enter the south arm of the Fraser River. The McKenzie expedition encountered Shashia and the Cowichans while anchored seven or eight miles south of the River.

[359] Some confusion regarding the colloquial name for the Fraser River has arisen because of a conversation McKenzie had on August 10, 1825, questioning whether the McMillan expedition the previous year had been in the Cowitchin River (Fraser River), and suggesting they had actually been in the Quotlin River (Kwantlen River).

[360] Musqueam contends that Work's December 13, 1824 reference to the "Coweechin River" was in error, as learned in 1825.

[361] Dr. Kennedy explains that the Work and Annance party did go to the Kwantlen (or Pitt) River first the previous year, and then turned south and went down the south arm to the sea. Dr. Brealey says the River may have had two names. Above the forks, it was referred to as the Quotlin River because the Kwantlen were dominant. Below the forks, the local people referred to it as the Cowitchin River because the Cowichan were dominant. The McMillan expedition went to both parts of the Fraser River in 1824.

[362] Anthropologist and linguist Dr. Wayne Suttles wrote about this confusion regarding the name of the Fraser River in his article *The Ethnographic Significance of the Fort Langley Journals*:

> The presence of this large and formidable "nation" [referring to the Cowichan] on the Fraser must have been reason for an early disagreement about the name of the river. Reporting on the expedition of December 1824, both James McMillan and John Work indicate that the Natives [identified] the Fraser as the Cowichan River. But in August 1825 Alexander McKenzie was told, evidently by the Snohomish trader Waskelatchee, that the 1824 expedition had not been at the "Cowitchen" River but at another farther south called the "Quotlin" River ... On reaching what clearly was the Fraser, he recorded that its Indian name was "Quotlin".

[363] I accept the experts' explanations for this confusion. I find that the McMillan expedition was on the Fraser River, and that the local people referred to the area near the old village as the Cowichan River.

[364] They left the area on August 24, 1825, heading for the Columbia River.

[365] On August 25, 1825, they came across the Kwantlen leader Whotleakenum at Point Roberts, who expressed to McKenzie that he wished the expedition would consider his people as "entirely distinct from the Cowitchins [Cowichan], who he said ... have no business with the Quotlin [Kwantlen] River" (emphasis in original).

vii. 1827: Simpson Expedition Aboard the Cadborough

[366] In 1827, Chief Factor James McMillan led a second expedition to locate a permanent fort on the lower Fraser River. Aboard the schooner *Cadborough* (also spelled *Cadboro*) were Captain Aemilius (sometimes spelled Emelius or Emilius) Simpson and company Clerk George Barnston.

[367] In his unofficial remark book on July 10, 1827, Simpson recorded that "Indians of the Clallam Tribe ... advised us not to visit the Cowitzen whom they described as a ferocious & bad set of Indians".

[368] Aided by Barnston, Simpson drew the first HBC sketch of "Fraz̶sers River taken on board the [Honourable] Hudsons Bay Company's Schooner Cadbore in

July 1827 by Emilius Simpson assisted by Mr. Barnston H.B.C. Service", identifying the Cowitchen Villages in July 1827.

[369] On July 15, 1827, Simpson wrote in his remark book that they were visited by "one Cowitzen chief, Joshia [Shashia] whom we are informed is the principal one". Later that day, they "[c]ontinued to Work up for Frasers River" and "the Indians flocked about [them] in great numbers".

[370] The journal kept by Barnston of this same expedition was recorded in the Fort Langley Journals and described below.

viii. 1827–1830: Fort Langley Journals

[371] The remaining Fort Langley Journals edited by historian Morag MacLachlan cover June 27, 1827 to July 30, 1830. Three HBC Officers kept the journal during this period: first, George Barnston (June 1827 to February 1828), followed by James McMillan (February 1828 to October 1828), and finally Archibald McDonald (October 1828 to September 1830).

[372] The men in charge of the HBC fur trade post were required to keep a daily journal or assign that responsibility to a clerk. The weather, trading transactions, visitors, and the work done were to be noted. Other information was inevitably recorded, as the writers commented on activities within the Fort, and made observations about the landscape and natural resources. They also recorded their interactions with the Indigenous people and speculated about their activities.

[373] Aemilius Simpson recorded his observations on July 15, 1827 in his remark book, which is excerpted above. Barnston's observations of the same day refer to "Shashia [referred to as Joshia by Simpson] a Cowitchen Chief" being taken on board the *Cadborough*.

[374] Barnston recorded his first sighting of the Cowichan villages on July 23, 1827, noting that they "passed the Cowitchen Villages Saumause [Somenos] Pinellahutz

[Penelakuts] & Quomitzen [Quamichan]". Barnston noted that "[t]he Population of the Cowitchen Villages may be at a rough guess nearly 1500 Souls".

[375] Dr. Suttles commented on this passage in *The Ethnographic Significance of the Fort Langley Journals*, where he noted that the Cowichan had a row of summer villages on the main channel shore of Lulu Island. After passing these villages, Barnston identified them with names we can identify as Somenos, Penelakuts, and Quamichan, three of the largest Cowichan villages; the first and third on the Cowichan River, and the second on Kuper Island in the Gulf Islands.

[376] On July 24, 1827, Barnston noted a small village on the south side where there were two trees marked 'HBC', which was done by the party under McMillan in 1824–1825 (recorded by Annance, above). Later in the entry, he noted that when they were abreast of the north channel or fork that runs into the gulf not far from Point Grey, they passed a very small village on the south side. Later that day, they were opposite the Quoitle (Kwantlen) or Pitt's River, and subsequently anchored close to the north bank half a mile above Pine Island.

[377] The next day, Barnston compared the Nanaimo village to the Cowichan villages, writing that the "Nanaimooch village, which at a moderate computation may contain 400 Souls", had small houses that "appear cleaner and more neatly constructed than those of the Cowitchen Tribe".

[378] In response to the submission by various defendants that 'Cowichan' was used in an overly broad sense, the plaintiffs submit Barnston was able to identify the "Cowitchen" as a distinct Indigenous group, relative to other named groups.

[379] I agree with the plaintiffs' submission after reviewing the entries made by Barnston, and noting the entries where Barnston distinguishes between different Indigenous groups. He does not appear to be using an overly broad description of the Cowichan. He appears to be specifically referring to them, as opposed to the Musqueam, Sinahomes, Nanaimo, Chilcocooks, and Tlalam.

[380] Donald Manson, Clerk, left Fort Langley on February 17, 1828 with a packet including Barnston's journal, which brought Barnston's journal to a close.

[381] McMillan kept the journal after Barnston's departure, until McMillan left the Fort on October 8, 1828.

[382] The plaintiffs also submit McMillan variously referenced the "Cowitchen", "Cowitchin", or "Kawitchin" (Cowichan) as an Indigenous group distinct from other named groups. I have reviewed McMillan's journal, and note there are entries where McMillan did distinguish between the Cowichan and the Chiliquiyouks, Kutche, Penault, Clallams, Musqueams, Quaitlands, Nanimous, Yeukeltas, Quo-quals, Whooms, Squaals, Coutinemuns, and Shishals.

[383] After making distinctions between these various Indigenous groups, the defendants submit the entry from September 22, 1828, which referenced 150 Cowitchen families and 345 canoes of Cowitchens, was not specific to the Cowichan. The version of the journal kept at the Fort is essentially the same, with some punctuation and capitalization differences.

[384] Leading up to that entry, McMillan noted various Indigenous groups passing up the river to the rapids to fish, and various canoes full of Indigenous people coming down the river. For example, on July 17, 1828, McMillan wrote "Indians passing in great numbers up to the fisheries", but on July 19, 1828, he noted 250 Cowitchens passing up. On July 20, 1828, he noted "Indians passing up" by the hundreds. It appears that when McMillan was using a generic label, he used the word "Indians", not Cowichan. I find that this passage emphasizes the great volume of Cowichan people who were on the river fishing in 1828, and that McMillan was specific when referring to the Cowitchens and generic when referring to "Indians".

[385] McMillan's last entry was on October 8, 1828. McDonald's entries begin on October 10, 1828, and continue until the last journal in existence was completed on July 30, 1830.

[386] The plaintiffs say McDonald identified the “Cawaitchin” or “Cawaitchen” (Cowichan) as a distinct Indigenous group, relative to other named groups.

[387] I have reviewed the journal, and make particular note of the entries where McDonald distinguishes between the Cowichan and the Quatline or Quaitlines or Quoitlin (Kwantlen), Lekwiltok, Scadchads, Nanimoos or Nanimous, and Yewkaltas.

[388] There is, however, an interesting entry on February 26, 1829:

> The Quaitlines here all moved off to Some distance above where it is Said they will more easily procure the means of Subsistence — When we Say the Quaitlines we very often mean any one of the distinct Tribes Called among themselves — Quaitlines, Musquams, Kitchis and at a distance even the whole collectivity are better known by the appellation of Cawaitchens as that Tribe is the leading nation in this quarter.

[389] This entry supports Musqueam’s position that the term “Cawaitchens” was sometimes used in an overly broad sense and inaccurately.

[390] Dr. Brealey points out that this passage was not in the original journal, but was added by McDonald to the copy sent to the HBC executive. Dr. Brealey opines that McDonald did so because the HBC executive knew the Cowichan were the leading Nation on the lower Fraser River about Fort Langley because of all the intelligence gathered from the earlier accounts of the Spanish and English navigators in 1792, Fraser in 1808, and Work and Annance, and McKenzie and Scouler, in 1824 and 1825.

[391] The original journal entry kept at the Fort for February 26, 1829, says: “Nothing Stirring - the Indians of the vicinity have moved off Somewhere to live, where Sturgeon is caught”.

[392] I agree with Musqueam that in the copy sent to the HBC executive, the overly broad term “Cawaitchens” was used to reference “the Indians of the vicinity”.

[393] Dr. Kennedy recognizes that in documents compiled between 1829 and 1873, the term Cowichan was used more broadly, usually in communications with distant audiences. She believes this reflects the dominant regional position of the Cowichan

people. She notes the differences between the journals kept at the Fort, and those forwarded to management. She explains McDonald's February 26, 1829 entry by saying he would have known the requirements of the Governor and Council, and the necessity of generalizing his terminology when writing to them at a distance. She notes that James Douglas sometimes used 'Cowichan' in a generic sense when writing to HBC offices in London. For example, on October 14, 1839, Douglas wrote from Fort Vancouver to advise the HBC management that the "Cowegins" around Fort Langley were beginning to cultivate soil. This is inaccurate because the people around the Fort were in fact Kwantlen, and not the Cowichan.

[394] This appears to be a plausible explanation. I have read numerous entries made by McDonald where he uses the term "Quaitline", but it is usually in reference to the Quaitline Chief, Doctor, or Village, or to the Quaitline visiting another named Indigenous group. Generally, when he is referencing the Cawaitchens, he is referencing the Cawaitchen Chief or Cawaitchen canoes. It appears to me that when keeping the local copy, McDonald does distinguish between various Indigenous groups, but he uses more generalized terms when reporting to head office.

ix. 1839: Yale Census

[395] The 1839 Yale census identified the Cowaitchin as a Tribe and distinguished them from other named groups. It shows the Cowichan as having a total population of 1,143 people, compared to the Musqueam at 154 people and the Kwantlen at 375 people. The only Tribe with a larger recorded population in the census was the Lillooet at 1,211 people.

x. 1841: Father Blanchet

[396] In a letter to the Bishop of Quebec dated February 23, 1841, Father François Blanchet, a Roman Catholic priest, reported on his trip to Fort Nisqually in May and June 1840: the "Yougletas" (Lekwiltok) "live[d] on the large Vancouver Island", and the "Kawitchins" (Cowichans) lived "on an island in the Fraser River".

xi. 1845: Finlayson Census at Fort Victoria

[397] On January 11, 1845, Roderick Finlayson was the HBC Clerk and Officer in charge of Fort Victoria, established in 1843. He was instructed by head office to take a census of the Indigenous people "belonging to Fort Victoria and who live in its neighbourhood". He did report back, but the census has gone missing. It is believed that the census was shared with Henry Warre and Mervin Vavasour, British Army officers undertaking surveillance work in the Oregon Territory. Dr. Brealey notes that excerpts of Finlayson's census were reproduced by Warre and Vavasour in 1845. Accordingly, I conclude the Warre and Vavasour census was derived from that made by Finlayson.

[398] Warre and Vavasour sought to obtain accurate knowledge of the Oregon Territory, including information on Indigenous tribes. On October 26, 1845, they authored a dispatch report that enclosed a census of the "Indian" population in the Oregon Territory, derived from HBC trading lists "that was compiled, with great care, from the best authorities we could obtain, and from the trading lists lent us by the kindness of the gentlemen in charge of the H.B.Co." A handwritten copy of this census is in evidence, which Dr. Kennedy testified is the closest that we have to the original. It includes seven tribes of "Cowitchin", totalling 1,763 people. There is also a notation that three tribes were not yet ascertained, and an estimate of their population at 300. This document records "Challams" and "Cowaitchins — 24 Tribes speaking the Challam & Cowaitzchin Languages", located from "Lat 50° along the Coast South to Whitby Island in Lat 48° part of Vancouvers Isld & the mouth of Fraser's River". Dr. Kennedy opined they used the term Cowichan as the name for the Halkomelem language in its entirety, using the name of the leading Nation within the speech community.

[399] Warre and Vavasour authored a further report dated June 16, 1846, later copied on November 3, 1846. The fair copy indicates it enclosed the census of the "Indian" population in the Oregon Territory. A fair copy of this census lists the "Clallam" and "Cowaitchins" situated in "part of Vancouvers Island & Frasers R." as 3,176 males, 3,383 females, and 2,868 slaves (total 9,427). On the next page, the

"Cowitchin" were separated out, totalling 542 males, 636 females, no slaves, 585 children under 12 years, and 300 persons representing three tribes not yet known.

[400] The "Kawitchins" Tribes are listed later in the fair copy with their respective Chiefs and populations. I have inserted in brackets the anglicized versions of the Tribe names, as provided by Dr. Kennedy:

1) Tat-cha [Tataka]; Chief Tsa-se-ye [Shashia]; population 199;

2) Cometchen [Quamichan]; Chief Tsough elum; population 500;

3) Tsimenis [Chemainus or Stz'uminus]; Chief Whoop-cu latche; population 327;

4) Pin aluchut [Penelakut]; Chief Sa-chutitch; population 324;

5) Themu-litch [Clemclemaluts]; Chief Tse-aul-soot; population 239;

6) Yuchu-los [Yekwolas]; Chief Il tauch seet; population 81; and

7) Skalaltuch [Halalt]; Chief Swoo tun; population 93.

[401] There is also a note that "[t]here are still three tribes of the Kawitchins [Cowichan] not as yet ascertained and two of Tlalams [Klallams] – RF". Dr. Kennedy presumes the "RF" stands for Roderick Finlayson.

[402] These names, once translated, are similar to the names of the 11 historical local groups listed by Luschiim discussed later in these reasons.

[403] Finlayson subsequently identified an eighth Cowichan group, the Sawmenah (Somenos), which appeared in George Gibbs' fieldnotes of 1855.

[404] The Finlayson census set out the Crown's understanding of the presence of the Cowichan people shortly before June 15, 1846, when the Crown asserted

sovereignty over what became British Columbia with the Oregon Boundary Treaty with the United States.

xii. 1849–1856: Douglas Correspondence

[405] In January 1849, Queen Victoria established the Colony of Vancouver Island by letters patent. In October 1849, James Douglas was the HBC's Chief Factor stationed at Fort Victoria. He reported a quarrel between the Indians around Fort Victoria and the Cawitchin Tribe, which indicates his awareness of the Cowichan. He was an agent of the Crown identifying the Cowichan as a distinct group.

[406] Douglas was appointed Governor of the Colony of Vancouver Island in August 1851. He directly communicated with Indigenous tribes to get information about their location and the number of Indigenous people. The Douglas correspondence contains his first-hand observations and indicates that he recognized the Cowichan as a distinct people comprised of several local groups.

[407] In August 1852, Douglas travelled from Fort Victoria along the east coast of Vancouver Island to Nanaimo Harbour to examine the country and communicate with the "native Tribes". On August 27, 1852, he noted the Cowichan lived in several villages, "each having a distinct chief, or head man, who cannot be said to rule the community". He observed that the chiefs did not possess the power or means of maintaining a regular government, but their personal influence was nevertheless very great with their followers. He described the "Cowegins" as a "warlike people mustering about 500 fighting men" among a population of "about 2100 Souls".

[408] About 10 miles north of the "Cowegin" River, Douglas noted the "Chemanis River enters the Canal de Arro". It was "inhabited by a branch of the Cowegin Tribe".

[409] In January 1853, Douglas sailed from Fort Victoria to Cowichan Bay to take a Cowichan man into custody, then to Nanaimo to take a Nanaimo man into custody, both believed to have killed an HBC shepherd. The Cowichan people ultimately delivered the accused to Douglas.

[410] Between August 1853 and July 1856, Douglas made several trips to Fort Langley and the Gulf Islands. In September 1856, he visited the Cowichan for a third time, marching inland up the Cowichan River on Vancouver Island. On September 6, 1856, he reported that the Cowichan could “bring into the field about 1400 warriors but nearly 1000 of those were engaged upon an expedition to Fraser’s River, when we entered their country”, and that “[a]bout 400 warriors still remained in the valley”.

[411] In a dispatch dated October 20, 1856, Douglas forwarded his census of the “Native Tribes” of Vancouver Island. He listed the Cowichan Tribes as follows, and I have inserted in brackets the anglicized names, as provided by Dr. Kennedy:

1) Komiakun [Comiaken];

2) Thlimthemelitz [Clemclemaluts];

3) Quamichan;

4) Tataka;

5) Penalahats [Penelakut];

6) Saumina [Somenos];

7) Chemanus [Chemainus];

8) Lumlumalcha [Lamalcha];

9) Whe-whulla [Yekwolas]; and

10) Akmanis [Sicameen branch of the Halalt].

[412] The total population is 5,879.

[413] Governor Douglas did not count the Koksilah, as he did not get to the Koksilah River.

xiii. 1857–1858: North West Boundary Surveys

[414] In October 1857 and April 1858, the NWBS reconnaissance party travelled by canoe about 20 miles up the south arm of the Fraser River past Fort Langley. Caleb Kennerly was on board, and on October 20, 1857, wrote they passed large deserted villages where the Cowichan and other tribes would reside during fishing season.

[415] In March 1858, the party travelled up the main channel of the Fraser River, accompanied by a Sumas Chief and other Indigenous people. Upon arriving at the mouth of the Sumas River (tributary to the Fraser River), Kennerly noted that the Cowichans "are a very powerful tribe living on Vancouver's Island & these Indians here [the Sumas] ... are very much afraid of them or doing anything to offend them".

[416] In April 1858, Gibbs acquired census data from Chief Trader James Yale at Fort Langley. In his journal, Gibbs listed "Indian" places at or near the lower Fraser River, one of which was on the south arm, "Klik-a-téh-nus", the Cowichan fishery. He did not specify its location, but earlier in his journal he had referenced it as the large camp on the northern side of the river below the Squamish camp.

xiv. 1859: Wells Survey

[417] In 1859, Oliver Wells conducted a survey of the Cowichan Valley. Wells was the only surveyor to locate and comment on the village of Koksilah. In discussing the Indian population in the Cowichan Valley, Wells wrote:

> Along the rivers there are nine Indian villages, as follows: — three Clemclemaluts, two Comiaken, one Taitka, one Quamicham, one Somenos, and one Kokesailah. The number of families, after careful investigation, has been set down at 250, and the whole population at about 1,000 to 1,100 souls.

xv. 1860: Heaton Census

[418] In 1860, George Heaton, Sheriff of Vancouver Island, prepared "a census of the Indian population of the Districts of Cowichan and Nanaimo" at Governor Douglas' request. In June 1860, he reported having "considerable difficulty" obtaining the census, as result of the "Indians, as is usual at this season, being scattered in all directions for the purpose of fishing". Heaton recorded 1,705 people

for the groups he identified as Cowichan, Chemainis, and Kuper Island. This number was corrected to 1,695.

[419] I accept Dr. Kennedy's opinion that this population information likely understates the total Cowichan population. She observed that the figure for these groups is less than Finlayson's 1845 census return and Gibbs' 1855 corrected record. Dr. Kennedy also noted that Heaton's enumeration is undoubtedly underestimated because he visited the area in early June, when as he stated in his covering letter to the Colonial Secretary, an unknown number of individuals were away fishing.

[420] Likewise, Dr. Brealey reported Heaton's census data for these groups as obviously too low. Heaton did not mention the Kokesailah.

[421] Both Drs. Kennedy and Lovisek noted that the Penelakut refused to be enumerated. Heaton received an estimate of their numbers from a Penelakut person at Nanaimo.

[422] Drs. Kennedy, Brealey, and Lovisek noted Heaton's admission of the difficulties in obtaining the census.

d) Ethnographic Record

[423] In 1952, anthropologist Wilson Duff reviewed the typed notes of Dr. Suttles from Big Joe of Chemainus and prepared a draft manuscript entitled *Notes on the History of the Cowichan Band*. Duff hand-corrected the draft manuscript. He described the ancestors of the present Cowichan Band as the people who from time immemorial occupied the Cowichan Valley and the shores of Cowichan Bay. Although they were known to their neighbours by the collective name "Cowichan", they were not in any political real sense a single tribe or nation, but occupied a number of distinct and independent villages. When settlers began to come to the Cowichan area (about 1860), there were seven villages:

1) Somenos, on the Cowichan River;

2) Quamichan;

3) Comiaken;

4) Clemclemaluts, lower down Cowichan River;

5) Koksilah, on the Koksilah River;

6) Kenipsim, on the north shore of Cowichan Bay; and

7) Kilpaulus, on the south shore of Cowichan Bay.

[424] Duff inserted that there may have been more villages in earlier times.

[425] Duff wrote that the Cowichan were very closely related to the people directly to the north, who were generally known as the “Chemainus” tribes. These were the people of the villages on Kulleet Bay (Chemainus), Ladysmith Harbour (Sicameen), Willy Island at the mouth of the Chemainus River (Halalt), Valdes Island (Lyackson, Tataka), and Kuper and Thetis Islands (Penelakuts, Yekoloas, Lilmalche). These people shared with the Cowichan the same dialect of the Halkomelem language.

[426] Duff wrote that in the summer, many people moved out to camps on the saltwater, along the western shore of Salt Spring Island and at other places in the Gulf Islands. Every summer, large numbers of people crossed the Gulf to the south arm of the Fraser, where they (and the Chemainus people) had camps at Tleketines, on Lulu Island. From there, they went up the river as far as the canyon above Yale for sockeye salmon, and up to Pitt Meadows to dig wapato or “Indian potatoes”.

e) Expert Opinions

[427] Dr. Kennedy concluded that the Cowichan were an Indigenous people prior to, at, and after 1846. The Cowichan comprised 11 named local groups, which had a unity known to themselves and to others as the “Cowichan”. The regional Indigenous perspective was that the term “Cowichan” applied to a fierce people whom they dreaded, and who resided on Vancouver Island, the Gulf Islands, and the lower

Fraser River. Shashia was a well-known war chief, and from his perspective, his people were collectively the Cowichan. Dr. Kennedy's evidence is also that, from the perspective of early non-Indigenous observers, the Cowichan were recognized as a large people who occupied a village on the south arm of the Fraser River, as well as those on southeastern Vancouver Island, Stuart Channel, and the Gulf Islands.

[428] Dr. Brealey's evidence is that there was an identifiable "Cowichan territory" on the lower Fraser River at first contact in 1792 and as of the Oregon Treaty in 1846. The Cowichan were a distinct "trans-Georgia Strait" Coast Salish nation. In historical geographical terms, the Cowichan were an Indigenous nation united by origin, ancestry, common language, genealogical interconnectivity, a shared and common historical experience, and collective and deliberate activity over a defined space.

[429] According to Dr. Lovisek, depending on context, the term "Cowichan" in the historical and ethnographic record has been applied generically, flexibly, linguistically, and specifically to a single named group.

f) Conclusion: Distinct Collective Identity

[430] Based on the evidence introduced on the issue of distinct collective identity, I agree with the plaintiffs that a distinct collective identity of the Cowichan has been established, both from an Aboriginal and non-Aboriginal perspective.

5. Living Together in the Same Geographic Area

[431] I conclude that the Cowichan people prior to, at, and after 1846 were comprised of 11 named local groups or communities living together in the same geographic area. What follows is a summary of the evidence speaking to the issue.

a) 11 Local Groups

[432] The origin stories of the 11 local groups are different but hold similar central themes, such as the descent of First Ancestors from the sky to a mountain or lake, and the Cowichan people inhabiting the warm land and sun-basked environment.

[433] Most of the local groups have been identified in the censuses listed above, and I now identify each of the 11 local groups.

i. Taatka (T'et'qe')

[434] The evidence indicates that the Taatka were a group of the Cowichan with villages on southwest Valdes Island near Cowichan Gap opposite the south arm of the Fraser River and at the mouth of the Cowichan River.

[435] Luschiim and Mrs. James testified that the Quw'utsun included the Taatka. Mrs. James learned that the Taatka lived at Valdes Island and on the Cowichan River. Sulipt'un was also told there were places called T'et'qe in the Cowichan Valley by Clemclemaluts and on Valdes Island. Chief Seymour learned of a T'et'qe' village site in the Cowichan Valley just past the Lhumlhumuluts' (Clemclemaluts) village. X'tli'li'ye was taught that T'et'qe' was a village site in the Cowichan Valley.

[436] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the anthropological, ethnographic, and historical record, also trace the identity of the Taatka, and locate Taatka villages on the Cowichan River and on Valdes Island.

ii. Quamichan (Kwa'mutsun)

[437] Luschiim and Mrs. James testified that the Quw'utsun included the Quamichan. Luschiim lived at the Kwa'mutsun village site on the Cowichan River. Qwestenuxun learned that the Quamichan had a major village about the Cowichan River and Cowichan Bay area of Vancouver Island.

[438] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the anthropological, ethnographic, and historical record, also trace the identity of the Quamichan as a Cowichan local group, and locate the Quamichan village on the lower Cowichan River.

iii. Chemainus (Stz'uminus)

[439] Luschiim testified that the Quw'utsun included the Stz'uminus (Chemainus). Chief Seymour learned that Stz'uminus had a village site in the Cowichan Valley. Mr. Elliott learned of having a village site on the Cowichan River.

[440] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the ethnographic and historical record, also trace the identity of the Chemainus as a Cowichan local group, and locate the Chemainus villages on the lower Chemainus River and at Kulleet Bay, and a former village on the lower Cowichan River.

iv. Penelakut (Pune'luxutth')

[441] Luschiim and Mrs. James testified that the Quw'utsun included the Penelakut. Mrs. James identified the Penelakut as one of the three groups on Kuper (Penelakut) Island. Councillor Thomas testified that the Penelakut had a village on the east side of Penelakut Island prior to contact.

[442] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the ethnographic and historical record, also trace the identity of the Penelakut as a Cowichan local group, and locate the Penelakut village on Kuper (Penelakut) Island near Cowichan Gap (Porlier Pass).

v. Clemclemaluts (Lhumlhumuluts')

[443] Luschiim said the Quw'utsun included the Clemclemaluts. Qwestenuxun learned that the Clemclemaluts had a major village around the Cowichan River and Cowichan Bay area of Vancouver Island. Sulipt'un identified Clemclemaluts as being where the Cowichan and Koksilah Rivers meet on the old highway. Mrs. James noted a place called Tlulpaa'lus at Cowichan Bay where the warriors trained.

[444] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the ethnographic and historical record, also trace the identity of the Clemclemaluts as a Cowichan local group, and locate multiple Clemclemaluts villages in the lower Cowichan Valley and one on south Valdes Island at Cowichan Gap (Porlier Pass).

vi. Yekwolas (Yuxwula'us)

[445] Luschiim and Mrs. James testified that the Quw'utsun included the Yekwolas. Mrs. James testified that the Yekwolas were one of the three groups on Kuper (Penelakut) Island. Her mother was born and raised on Yuxwula'us (the west side). Sulipt'un testified there was a village on Penelakut Island called Yuxwula'us, and Sulipt'un's uncle identified Yuxwula'us as Cowichan land on Kuper (Penelakut) Island.

[446] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the ethnographic and historical record, also trace the identity of the Yekwolas as a Cowichan local group, and locate the Yekwolas village on west Kuper (Penelakut) Island.

vii. Halalt (Xul'el''t'hu)

[447] Luschiim testified that the Quw'utsun included the Halalt. Sulipt'un identified a place in the Cowichan Valley called Aha'Halalt. Chief Seymour learned that the Halalt had a village at one time on the Cowichan River.

[448] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the anthropological, ethnographic, and historical record, also trace the identity of the Halalt as a Cowichan local group, and locate the Halalt villages at the Cowichan River, Willy Island, Chemainus Bay, and Sibell Bay.

viii. Somenos (Somena')

[449] Luschiim and Mrs. James testified that the Quw'utsun included the Somenos. Qwestenuxun learned that the Somena had a major village about the Cowichan River and Cowichan Bay area of Vancouver Island.

[450] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the anthropological, ethnographic, and historical record, also trace the identity of the Somenos as a Cowichan local group, and locate two Somenos villages on the Cowichan River.

ix. Comiaken (Qu'umiqun)

[451] Luschiim testified that the Quw'utsun included the Comiaken and Khenipsen or Green Point. Mrs. James also identified the Xinupsum (Green Point) as part of the Quw'utsun. Qwestenuxun learned that the major villages around the Cowichan River and Cowichan Bay area of Vancouver Island included the Comiaken and Khenipsen.

[452] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the anthropological, ethnographic, and historical record, also trace the identity of the Comiaken as a Cowichan local group, and locate the two Comiaken villages on the north arm of the lower Cowichan River.

x. Lamalcha (Hwlumélhtsu)

[453] Luschiim testified that the Quw'utsun included the Lamalcha. Mrs. James testified that the Hwlumélhtsu were one of three groups on Penelakut Island and part of the Quw'utsun mustimuhw, and also identified the south end of Penelakut Island as Hwlumélhtsu. Councillor Thomas said there were three villages on Penelakut Island pre-contact, including Lamalcha on the south end.

[454] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the ethnographic and historical record, also trace the identity of the Lamalcha as a Cowichan local group, and locate the Lamalcha village on southwest Kuper (Penelakut) Island.

xi. Koksilah (Hwulqw'selu)

[455] Luschiim testified that the Quw'utsun included the Xwul'qw'selu (Koksilah). Mrs. James identified the Koksilah as a group within the Quw'utsun. Qwestenuxun learned that the Koksilah had a village about the Cowichan River and Cowichan Bay area of Vancouver Island.

[456] The evidence of Drs. Kennedy, Brealey, and Lovisek, and the anthropological, ethnographic, and historical record, also trace the identity of the Koksilah as a Cowichan local group, and locate the Koksilah village on the lower Koksilah River.

b) Geographic Area

[457] In the myth of Sowittan the Grumbler, he ended up on the north arm of the Fraser River. The Transformer gave Sowittan a slingshot to shoot off the tops of mountains and form the interior Gulf Islands. He gave him slate to convert swampy land to plain. Dr. Kennedy thinks this may explain how Lulu Island became drier and habitable. Dr. Brealey concluded that the myth of Sowittan establishes the creation of the Gulf Islands, and also that the lower Fraser River is Cowichan territory. Dr. Turner also reported that the Sowittan myth links the Cowichan to the Fraser River.

[458] The Abandoned Boy story explains the creation of salmon from a boy's special cape. Dr. Kennedy's opinion is that this accounts for the different types of salmon in the Fraser River, and for the Cowichan travelling back and forth across the Georgia Strait to a residence on the River. She says that the Cowichan stories explain their knowledge of salmon migration.

[459] Dr. Kennedy observed that anthropologist Brian Thom discussed the Indigenous authority derived from the mythological landscape, and property relations as experienced through social configurations of kin and residence, which in turn are configured from myth, ancestor, spirit and history. She concluded the above myths show that the authority described by Thom related to a predominant Cowichan presence within a large territory that included winter villages on the Cowichan River, the Stuart Channel, and the Gulf Islands, and also a permanent village on the south arm of the Fraser River.

[460] Moreover, the Fort Langley Journals identify the Quaitlines (Kwantlens), Musquams (Musqueams), Kitchis (Katzies), and Cawaitchens (Cowichans) each as Tribes, with the Cowichan Tribe being the "leading nation in this quarter". Dr. Suttles said these Tribes had home territories in which their winter villages were situated.

[461] Dr. Lovisek agreed that the Cowichan as a collective seasonally migrated to the Fraser River with their planks. As previously noted, Dr. Brealey said the Cowichan were a "distinct 'trans-Georgia Strait' Coast Salish nation".

[462] The experts agree that the Cowichan travelled as a collective. Luschiim, Mrs. James, X'tli'li'ye, Sulipt'un, Councillor Thomas, and Qwestenuxun spoke to the Quw'utsun mustimuhw travelling together to the Fraser River.

c) Conclusion: Living Together in the Same Geographic Area

[463] I conclude that, at the time of first contact with Europeans in the early 1790s and at the British Crown's assertion of sovereignty in 1846, the Quw'utsun mustimuhw were made up of 11 local groups:

1) Taatka (T'et'qe'; Tu'etqe');

2) Quamichan (Kwa'mutsum; Kwamutsun; Qwamutsun);

3) Chemainus (Stz'uminus);

4) Penelakut (Pun'e'luxutth'; Pune'luxutth');

5) Clemclemaluts (Lhumlhumuluts');

6) Yekwolas (Yuxwul'a'us; Yuxwula'us);

7) Halalt (Xul'el''t'hu);

8) Somenos (Somena'; Somuna);

9) Comiaken (Qu'umiqun);

10) Lamalcha (Hwlhumelhtse'; Hwlumélhtsu); and

11) Koksilah (Xwul'qw'selu; Hwulqw'selu).

[464] Drs. Kennedy, Brealey, and Turner's opinions regarding Cowichan mythology, Drs. Lovisek and Brealey's opinions on their collective seasonal migration to the Fraser River and their existence as a distinct trans-Georgia Strait Coast Salish nation, as well as the anthropological and historical record, support the conclusion that the Cowichan lived together in the same geographic area.

[465] The experts agree that the Cowichan travelled as a collective. Furthermore, the plaintiffs' oral history witnesses said that the Quw'utsun mustimuhw travelled together to the Fraser River.

[466] I conclude that the Cowichan people prior to, at, and after 1846 lived together in the same geographic area of southeast Vancouver Island, the southern Gulf Islands, and the south arm of the Fraser River, sharing both history and territory.

6. Common Way of Life

[467] I am satisfied that the Cowichan people shared a common way of life. What follows is a summary of the evidence speaking to this issue.

a) Shared Language

[468] Dr. Kennedy's evidence is that the Cowichan people shared a common language known today as Halkomelem, and particularly the Island Halkomelem dialect (Hul'qumi'num) of this language. Hul'qumi'num is spoken along the southeast side of Vancouver Island (and including parts of the Gulf Islands) from the area of Nanoose to the Malahat/Saanich Inlet.

[469] There are a few references to language in the historical literature, found in: Work's record of the McMillan expedition (1824); Douglas' correspondence (1852); and the handwritten Warre and Vavasour census (1845), in which Dr. Kennedy opined they used the term Cowichan as the name for the Halkomelem language in its entirety, using the name of the leading Nation within the speech community.

[470] Luschiim and Mrs. James are fluent in Hul'qumi'num, as were their ancestors. X'tli'li'ye speaks Hul'qumi'num, and her mother was fluent. Sulipt'un's first language was Hul'qumi'num. Qwestenuxun's parents' first language was Hul'qumi'num. Councillor Thomas learned Hul'qumi'num from his mother and spoke it fluently until he was six years old. Chief Seymour's grandmother spoke Hul'qumi'num, and he learned Hul'qumi'num teachings from his mother before going to residential school.

[471] I conclude that the 11 local groups or communities spoke Hul'qumi'num as a common language.

b) Customary Dwellings

[472] The Cowichan traditionally lived in villages located along the riverbank and the seashore. These villages were comprised mostly of multi-apartment, shed-roof houses constructed with permanent post and beam frames.

[473] Luschiim, Mrs. James, Sulipt'un, Chief Seymour, Mr. Elliott, and Councillor Thomas testified about bighouses and how they were built. Luschiim and Mrs. James spoke about the bighouses that the Quw'utsun lived in, and about their construction. Sulipt'un learned that people on Kuper (Penelakut) Island lived in bighouses in the old days, and about the use and transportation of planks for housing. Chief Seymour learned about bighouses from his Elders, who received these teachings from their grandfathers' grandfathers' grandfathers. Mr. Elliott's grandmother was born in a bighouse. Councillor Thomas learned that Penelakut members lived in bighouses along the shore at the village site of Tl'uqtinus.

[474] There are references to dwellings in the historical record. In 1824, Annance described the houses he observed on the Fraser River as being very high with horizontal roofs. In 1856, Governor Douglas gave his observation about "large dwelling houses ... strongly constructed, of rough plank", having just visited the Cowichan villages in the Cowichan Valley.

[475] Dr. Suttles wrote that shed-roof houses were usually built on the riverbank or seashore. He also described the observations of shed-roof plank houses by Simon Fraser in 1808, and said this type of house was usual in winter villages and also at some seasonal camps. He wrote about the houses in the Cowichan and Nanaimo summer villages on the Fraser. Dr. Lovisek addressed how the wall planks were fastened to the permanent posts.

[476] I conclude that the Cowichan customarily and traditionally lived in villages along the riverbank and the seashore comprised mostly of shed-roof houses

constructed with permanent post and beam frames, known by the Cowichan as s-thaw't-hw or bighouses.

c) Social Organization

[477] The Cowichan did not have a highly structured society, but came together for harvesting and defence purposes.

[478] The oral history record from Chief Seymour and Sulipt'un indicates that the Quw'utsun had a system of hereditary leadership. Luschiim testified that there were different leaders for different purposes.

[479] I note Dr. Kennedy's opinion that the entity anthropologists called a "tribe" is better described as a "people".

[480] According to Drs. Kennedy and Brealey, winter villages contained members of all three social strata (titleholders, commoners and slaves), and households would provide mutual defence. Neighbouring villages may cooperate in mutual defence or aggression.

[481] Moreover, high-class men hosted the first salmon ceremony on behalf of those who fished with them. Headmen depended on the support of families, and earned their status through respect and deference, rather than as elected chiefs.

[482] Drs. Kennedy, Brealey, and Lovisek relied on Dr. Suttles' work.

[483] Dr. Suttles described "Native society", where groups shared residence or territory at the family, household, local group, winter village, and tribe levels, with the largest social group being tribes. However, the levels were not always distinct, and people could move from one group to another. A small local group could consist of a single household, or a small tribe of a single village. Tradition suggests that before population decline, most tribes consisted of several winter villages.

[484] The expert opinions and published ethnographic work indicate that winter village households, neighbouring villages, or tribes would come together in mutual

defence, although the local groups or houses might act independently in disputes between individuals in different tribes. Coordinated political organization was required for a Central Coast Salish tribe uniting in defence.

[485] Among the Coast Salish of this region, a chief was at most the head of one of the local groups that formed a tribe, and there were references to more than one chief of a tribe. These groups or their heads and not the tribe owned houses and rights to resources. At the time of the Fort Langley Journals, Shashia was only one among several Cowichan chiefs.

[486] I find the Cowichan came together for summer harvesting on the Fraser River and for defence purposes, although they did not have a highly structured society.

d) Customary Law

[487] Dr. Kennedy's opinion is that Cowichan society was based on customary law beyond property law, as found in Cowichan mythology.

[488] Based on the expert evidence, and the anthropological and historical record, possession of property was important in the region, and the Cowichan recognized property interests. Each village had a territory within which its members could move freely, and members of Coast Salish villages held vested or proprietary interests in their residential land and surrounding environs. Access to specific resources throughout the Northwest Coast (including the lower Fraser River area) was regulated by a concept of ownership, and territory was associated with residential groups. Villagers were conscious of interest in a larger territory, the lands and waters associated with a specific tribe. Villagers had to respect each others' property rights, and permission would be sought prior to using a particular area or resource. Obtained property rights were extraterritorial (held through marriage, kinship, and permission) and perpetual (maintained through annual use, intimidation, and force).

e) Canoes

[489] The evidence of Luschiim, Sulipt'un, Mrs. James, and Dr. Kennedy indicates that the Cowichan travelled by canoe. They crossed from Vancouver Island to the

Fraser River in canoes. They moved their wall planks by laying them across two canoes, resembling a catamaran, and loaded their possessions and supplies on top. Quw'utsun would sing paddling songs, in part to identify themselves.

f) Seasonal Round

[490] Based on the evidence of Luschiim, the expert evidence, and the ethnohistorical and ethnographic record, I find that the Cowichan relied on fishing, gathering, and hunting for their food, and this required travelling to various regions to exploit resources. On Vancouver Island and the Gulf Islands, the Cowichan harvested clams, cockles, and various species of fish. They also harvested camas from various sites. They hunted sea mammals, birds, and some game. The seasonal round and annual pattern of movement between resource harvesting sites included Vancouver Island, the Gulf Islands, the Fraser River, and Tl'uqtinus specifically. As part of their seasonal round, they travelled to the Fraser River and resided at the Cowichan village at Tl'uqtinus as a collective. The pattern of Cowichan seasonal movement was consistent from early times until the 1870s, and the Cowichan village on Lulu Island on the south arm of the Fraser River was regularly occupied by Cowichan families through the 1800s.

g) Conclusion: Common Way of Life

[491] I conclude that the term "Cowichan" referred to a cluster of local groups that resided on southeast Vancouver Island and the southern Gulf Islands, and on the south arm of the Fraser River. They spoke a dialect of the Hul'qumi'num language. They held traditions and customs that linked them to a common area. They did not have a highly structured society, but did come together for summer harvesting on the Fraser River and for defence purposes. They shared a common way of life.

[492] TFN says the following points indicate that there was never a recognizable organized Cowichan society:

a) The categories that anthropologists have used to identify these groups are primarily linguistic, rather than territorial. They are certainly not political. Halkomelem is not a nation, but a language.

b) Lines drawn on maps by non-Indigenous scholars were intended mainly to show where languages and dialects were spoken, not to delineate the boundaries of “nation states”. Political boundaries were absent, and there is no clear evidence of social or cultural boundaries.

c) “Tribes” were not groups united by any political institutions, although there were times when alliances could be formed for common defence. As Dr. Kennedy wrote, “[t]here was no hierarchy of political offices that tied neighbouring winter village communities into a well-defined polity”.

d) Central Coast Salish/Halkomelem-speaking peoples spent the largest part of the year in what anthropologists called their winter villages, where there were permanent houses, ceremonies, and group life. The rest of the year, they ventured out to obtain resources elsewhere in what anthropologists call the seasonal round.

e) Access to resources could depend on kinship (that is, family relationships), or in some cases may simply have been based on the proposition that anything to eat was for everyone. Some resource sites were owned by families. Movement of people, brokered by kinship, provided for the exchange of resources.

[493] While I take no issue with these points, I disagree with the conclusion that TFN asks the Court to draw. The fact that the communities were loosely organized does not mean that they cannot be a rights-bearing community. The evidence above shows that they shared language, customs, and traditions, and that there was a collective identity of the Quw’utsun mustimuhw. They shared a common way of life, and lived together in the same general geographic area of southeast Vancouver Island, the southern Gulf Islands, and the south arm of the Fraser River.

[494] The 11 local groups had their separate villages, but came together for resource harvesting and defence. The oral history evidence of Luschiim supports the conclusion that the Quw'utsun were a large group of people. One of the places they lived was Tl'uqtinus. They harvested together, they lived there together, and they defended their territory together. Their origin stories differ, but have similar central themes. They self-identified and were known by other Indigenous people and Europeans as the Cowichan. The fact that the Quw'utsun mustimuhw were comprised of several groups does not detract from the fact that they were a recognized society. I must refrain from importing colonial notions of community or leadership into the analysis; a single, "small decision-making body for one particular purpose is not necessarily the hallmark of a community": *Tsilhqot'in* BCSC at para. 451.

[495] Similarly, in *Tsilhqot'in* BCSC, Vickers J. found that the Tsilhqot'in people did not have an organized social structure with one leader. There were, however, common threads of language, customs, traditions, and a shared history that formed the central "self" of a Tsilhqot'in person: at para. 457. I find the same result here.

[496] As in *Tsilhqot'in* BCSC, the Cowichan's strongest bond shared between the 11 local groups was language. As in *Tsilhqot'in* BCSC, the Cowichan have differences in the telling and details of legends, which vary from band to band. Again, like the Tsilhqot'in, the Cowichan had no one leader and no rigid social organization. There were several headmen and no overseeing chief.

[497] Similarly, in *Ahousaht* 2009, Garson J. found that the plaintiffs shared a common Nuu-chah-nulth language, culture, and history. There was never a single overarching governing Nuu-chah-nulth authority: at para. 299.

7. Conclusion: Historical Community

[498] I am satisfied that the Quw'utsun mustimuhw or Cowichan were an Aboriginal people, nation, or group at the time of contact and at the assertion of Crown sovereignty in 1846. The Cowichan had a collective identity, shared a common way of life, and lived together in the same geographic area of southeast Vancouver

Island, the southern Gulf Islands, and the south arm of the Fraser River. They were a Coast Salish people who spoke the common language of Hul'qumi'num, otherwise known as Island Halkomelem. The Cowichan people comprised a rights-holding collective sufficient to support the site-specific Aboriginal rights and title claim advanced in this case.

8. The Modern Title and Rights Holder

[499] Once the historic community that exercised the right is identified, the law requires that the contemporary title or rights-bearing group be identified. The common law "first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order": *Desautel* SCC at para. 22. Modern day claimants must establish a connection with the pre-sovereignty group whose history and practices they rely on to advance their Aboriginal title claim: *Marshall; Bernard* at para. 67.

[500] In *Tsilhqot'in* BCSC, Vickers J. considered the Crown imposition of reserve lands, and concluded that the Tsilhqot'in were the proper rights and title holders: at paras. 469–470.

[501] The historical records and related expert evidence support my finding that the 11 local groups of the Quw'utsun mustimuhw are continued today within the Canadian legal order by the Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, and Lyackson First Nation.

[502] Dr. Kennedy opined that the Cowichan Tribes, the Stz'uminus (Chemainus) First Nation, Penelakut Tribe, Halalt First Nation, and Lyackson First Nation are the continuation of the Cowichan people existing prior to European contact in the early 1790s, and continuing through 1846 and Indian reserve creation.

[503] Dr. Brealey concluded that the Taatka, Quamichan, Chemainus, Penelakut, Clemclemaluts, Yekwolas, Halalt (including Sicameen), Somenos, Comiaken,

Lamalcha, and Koksilah were as of 1846 local groups comprising the Cowichan Nation and the ancestors of the modern-day Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, and Lyackson First Nation.

[504] Dr. Brealey observed that after 1858, as a consequence of colonization, older early contact discourse (1824–1858) that ordered the Cowichan people by tribe or sub-tribe was, through the 1860s and in governmental circles, increasingly replaced by a newer discourse. That discourse, while allowing one to track the continuity of identities of Cowichan groups from before, through and after 1846, also had the effect of reclassifying and disaggregating the Cowichan by area or location.

[505] For administrative convenience, during Indian reserve creation, the Crown bifurcated the Cowichan people by area or location, informed by colonial land districts. For example, this drew an artificial distinction between "Chemainus Indians" to the north (associated with the Chemainus district of land) and the "Cowichan Indians" to the south (associated with the Cowichan District of land).

[506] As described below, the evidence shows that the 11 local groups which comprised the Cowichan people prior to, at and after 1846 continued through Crown creation of Indian reserves at a sub-national level after 1858 and into five bands established under the *Indian Act*. The Cowichan local groups, their village sites that are within or partially within Indian reserves, and the modern bands are set out below.

[507] The Taatka at Taatka on the lower Cowichan River became members of the Cowichan Tribes. The Taatka at Lyackson (Shingle Point) on Valdes Island became members of the Lyackson First Nation.

[508] The Quamichan at Quamichan on the lower Cowichan River became members of the Cowichan Tribes.

[509] The Chemainus at Siskain on the lower Chemainus River and at Chemainus on Kulleet Bay became members of the Stz'uminus First Nation.

[510] The Penelakut at Penelakut on northeast Penelakut (Kuper) Island became members of the Penelakut Tribe.

[511] The Clemclemaluts at Clemclemaluts on the lower Cowichan River, at Kilhpahlas on south Cowichan Bay, and at Theik on southwest Cowichan Bay became members of the Cowichan Tribes. The Clemclemaluts at Th’xwemksen on Valdes Island became members of the Lyackson First Nation.

[512] The Yekwolas at Yekwolas on west Penelakut (Kuper) Island became members of the Penelakut Tribe.

[513] The Halalt at Tsaokum on Willy (Halalt) Island became members of the Halalt First Nation, whereas the Halalt at Shell Beach on Sibell Bay became members of the Stz'uminus First Nation.

[514] The Somenos at Somenos on the lower Cowichan River and at Saatlaam on the Cowichan River became members of the Cowichan Tribes.

[515] The Comiaken at Comiaken on the lower Cowichan River and at Xinupsum on the lower Cowichan River became members of the Cowichan Tribes.

[516] The Lamalcha at Lamalcha on Lamalcha Bay, southwest Penelakut (Kuper) Island became members of the Penelakut Tribe.

[517] The Koksilah at Koksilah on the lower Koksilah River became members of the Cowichan Tribes.

[518] Accordingly, the Cowichan Tribes, which is a band under the *Indian Act*, is a continuation of the six Cowichan local groups or communities that existed prior to, at, and after 1846: the Quamichan (Kwa'mutsun); Clemclemaluts (Lhumlhumuluts'), but for the Clemclemaluts from Valdes Island; Somenos (Somena'); Comiaken (Qu'umiqun); Koksilah (Hwulqw'selu); and Taatka (T'et'qe'), but for the Taatka from Valdes Island. The Crown set apart the lands of Cowichan Tribes Indian Reserves in the lower Cowichan Valley of southeast Vancouver Island in common for these groups (including lands of their respective villages). As such, the Crown-created

amalgam of Cowichan local groups or communities became a “band” within the meaning of the *Indian Act*, as amended.

[519] The Stz'uminus First Nation is a band within the meaning of the *Indian Act*. The Stz'uminus First Nation is a continuation of two Cowichan local groups or communities that existed prior to, at, and after 1846: the Chemainus local group and the Halalt from Sibell Bay.

[520] The Penelakut Tribe is a band within the meaning of the *Indian Act*, and is a continuation of three Cowichan local groups that existed prior to, at, and after 1846: the Penelakut, Yekwolas, and Lamalcha.

[521] The Halalt First Nation is a band within the meaning of the *Indian Act*, and is a continuation of one Cowichan local group that existed prior to, at, and after 1846; the Halalt, but for the Halalt from Sibell Bay.

[522] The Lyackson First Nation is a band within the meaning of the *Indian Act*. The Lyackson First Nation is a continuation of two Cowichan communities that existed prior to, at, and after 1846: the Taatka from Shingle Point, Valdes Island, and the Clemclemaluts from Th’xwemksen, Cowichan Gap, Valdes Island.

[523] In conclusion, the current members of the Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, and Lyackson First Nation are the direct descendants of the historic Cowichan people or nation that existed in the early 1790s and 1846. They are collectively the continuation of the 11 local groups. I find that Cowichan Tribes, Stz’uminus, Penelakut, Halalt and Lyackson are the modern-day successor groups to the Cowichan as an Aboriginal people and the proper claimant and rights holder for both Aboriginal rights and title in this case.

[524] Now, I consider their claim for Aboriginal title, which is a collective title grounded in the historic community. If established, it will be “held not only for the present generation but for all succeeding generations”: *Tsilhqot'in* SCC at para. 74.

B. THE TEST FOR ABORIGINAL TITLE

[525] Aboriginal title is a *sui generis* interest, grounded in the regular and exclusive use of land. If proved, the claimant group retains the right to use and control the land and to reap any benefits flowing from it. Incursion by the Crown can only occur with the group's consent, or if its activities are justified by a compelling and substantial public purpose and are not inconsistent with its fiduciary duty to the group: *Tsilhqot'in* SCC at para. 2.

[526] The test for Aboriginal title is part of Canadian Aboriginal law. Aboriginal law must not be equated with Indigenous law. The former encompasses the Canadian body of law imposed on Indigenous peoples. The latter comprises the legal orders of Indigenous peoples themselves, that pre-date colonization: Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 6, Canada's Residential Schools: Reconciliation (Montreal: McGill-Queens University Press, 2015) at 45–47.

[527] Aboriginal rights and interests are enshrined in s. 35 of the *Constitution Act, 1982*. Aboriginal law governs the conditions under which the court recognizes rights and interests arising under Indigenous legal orders. In this process, a court is not defining the boundaries of Indigenous legal orders themselves, nor could it. As Justice Rowe said in *Desautel* SCC:

> [86] In my view, the authoritative interpretation of s. 35(1) of the *Constitution Act, 1982*, is for the courts. It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices.

[528] The authorities counsel judicial restraint against forcing ancestral practices too narrowly into frameworks of common law property: *Tsilhqot'in* SCC at para. 32; *Marshall; Bernard* at paras. 48–50. Altered rules of evidence are permitted to address the inherent evidentiary difficulties in litigating Aboriginal rights and title claims: *Marshall; Bernard* at para. 68; *Delgamuukw* SCC at para. 82. However, a tension in the doctrines persists. Although the idea that the common law may recognize interests arising under other legal orders is inherently pluralist, it is

common law notions of proof (albeit with some modification) that appear to control the exercise.

[529] At common law, Aboriginal title is conceptualized as a species of Aboriginal rights (*Delgamuukw* SCC at para. 137), but a critical difference between Aboriginal rights and title relates to proof. To qualify as an Aboriginal right, an activity must be shown to be "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right": *Van der Peet* at para. 46.

[530] Proof of Aboriginal title is different — the claimant group must show that it occupied the lands at the time the Crown first asserted sovereignty: *Tsilhqot'in* SCC at paras. 24–26; *Delgamuukw* SCC at para. 143; *Marshall; Bernard* at para. 40. In *Tsilhqot'in* SCC, Chief Justice McLachlin expressed three general requirements of occupation (earlier set out in *Delgamuukw* SCC):

> [50] ... 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.

[531] The requirements are "not ends in themselves, but inquiries that shed light on whether Aboriginal title is established". They "provide <u>useful lenses</u> through which to view the question of Aboriginal title": *Tsilhqot'in* SCC at para. 32 (emphasis added).

[532] Another point of difference between Aboriginal rights and title is the time period in which the interest arises. In regard to Aboriginal rights, the relevant time is first contact with Europeans: *Van der Peet* at paras. 60–61. In regard to Aboriginal title, the relevant time is at Crown assertion of sovereignty in the territory: *Tsilhqot'in* SCC at paras. 25–26, 75. This is so for three reasons, as explained in *Delgamuukw* SCC at para. 145. Firstly, this point marks the beginning of the relationship between the common law and pre-existing Indigenous legal orders. Secondly:

> ... aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not

> necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans.

[533] Thirdly, practically speaking, the date of asserted sovereignty is often more certain than the date of first contact.

[534] The Oregon Boundary Treaty of 1846 is considered to have established Crown sovereignty in British Columbia: *Delgamuukw* SCC at para. 145. Justice Vickers in *Tsilhqot'in* BCSC relied on the date it was signed, which is June 15, 1846: at paras. 258, 601. For reasons set out below, I accept this as the date of the British Crown's assertion of sovereignty and as the date when Aboriginal title arises.

[535] Before applying sufficiency, exclusivity and continuity of occupation to the facts at hand, I will say a little more about each. The parties draw my attention to different aspects and articulations of each of these lenses.

1. Sufficient Occupation

[536] Several issues arise under the lens of sufficiency. The plaintiffs submit the presence of a permanent village in the Claim Area constitutes sufficient occupancy.

[537] Canada submits that sufficient occupancy requires that the plaintiffs used the lands and the village in such a way to communicate to third parties that they held it for their own purposes. Canada says the plaintiffs cannot establish sufficient occupancy or exclusive control because the plaintiffs' ancestors used the lands seasonally and were distant from the Claim Area for most of the year.

[538] BC and Richmond submit the plaintiffs have not adduced sufficient evidence of the intensity and frequency of use of the land, manifesting itself in acts of occupation that can reasonably demonstrate the land belonged to the Cowichan.

[539] TFN submits the plaintiffs need to demonstrate that their physical presence on the land was more than merely transitory. In other words, TFN argues that there must be proof that the Cowichan ongoingly occupied the village itself.

[540] Musqueam takes a culturally sensitive approach to sufficiency, recognizing the differences between the common law concept of possession and the Indigenous perspectives on land holdings. Musqueam says sufficiency requires that the plaintiffs' ancestors historically communicated to third parties that they held the land for their own purposes. Quoting from *Tsilhqot'in* SCC at para. 38 (excerpted below) they submit that the standard of proving sufficiency does not demand notorious or visible use akin to proving a claim for adverse possession.

[541] I agree that generally speaking, the Court is required to consider in a culturally sensitive manner whether the occupation resembles common law notions of possession: *Tsilhqot'in* SCC at para. 41; *Marshall; Bernard* at para. 54. It must have been physical: *Delgamuukw* SCC at para. 149; *Marshall; Bernard* at para. 56.

[542] In *Tsilhqot'in* SCC, McLachlin C.J.C. described sufficient occupation:

> [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.

[543] The question is approached from both the common law and Indigenous perspective: *Tsilhqot'in* SCC at paras. 34–36; *Delgamuukw* SCC at paras. 147–149. The laws, practices, customs and traditions of the claimant group are relevant to this question, as are the common law concepts of possession and control.

[544] For example, the common law recognizes that one may be in possession of land while using it only intermittently or sporadically: *Marshall; Bernard* at para. 54.

Hence, it can also recognize Aboriginal title interests to lands that were "regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control": *Tsilhqot'in* SCC at para. 50. Aboriginal title is not restricted merely to settlement sites: *Tsilhqot'in* SCC at para. 54. Nomadic and semi-nomadic groups may claim title, as "possession at common law is a contextual, nuanced concept": *Marshall; Bernard* at para. 66. However, "not every passing traverse or use grounds title": *Tsilhqot'in* SCC at para. 33; *Marshall; Bernard* at para. 66.

[545] Clearly, prior to the arrival of European settlers, Indigenous peoples in Canada occupied lands for different purposes, at different times. As such, the "sufficient occupation" inquiry is context-specific: *Tsilhqot'in* SCC at para. 37; *Delgamuukw* SCC at para. 149. It considers these differences in circumstances, and land uses of the claimant group, including the "group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 758 ["Understanding Aboriginal Rights"] (quoted in *Tsilhqot'in* SCC at para. 35, and in *Delgamuukw* SCC at para. 149).

[546] In *Tsilhqot'in* SCC, the Court rejected the notion that the claimants must have used the land "intensively" in order to prove sufficient occupation: at paras. 27–29, 56. What matters is that the claimant group used the land regularly. Here, the Cowichan need not show that they continuously occupied the Claim Area: *Tsilhqot'in* SCC at para. 54. Seasonal use of a site for hunting, fishing or gathering resources can ground a title interest, so long as the use corresponds with the requirements of sufficiency and exclusivity. However, more often, such use will translate into an Aboriginal right to those activities: *Marshall; Bernard* at para. 58.

[547] Thus, to the extent Canada, BC and Richmond submit sufficiency requires a permanent physical presence of the plaintiffs' ancestors themselves and not just their dwelling at the Claim Area, I disagree. This ignores the reality that many Indigenous peoples were semi-nomadic and travelled to fish, hunt and gather food

on a permanent annual round which was regular and not sporadic: *Tsilhqot'in* SCC at paras. 38, 44, 54–56.

[548] In relation to the concept of control, Justice Kent considered that the "effective control" and "exclusive stewardship" dimensions of sufficient occupation referred to in *Tsilhqot'in* SCC seem fairly analogous: *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 at para. 257 [*Saik'uz* BCSC], rev'd in part 2024 BCCA 62, leave to appeal to SCC ref'd, 41241 (10 October 2024). As such, it may be that a court's assessment of control turns much on questions of exclusivity: see *Marshall; Bernard* at para. 77; see also *The Nuchatlaht v. British Columbia*, 2023 BCSC 804 at para. 428 [*Nuchatlaht*]. This is the lens I explore next.

[549] In *Tsilhqot'in* SCC, McLachlin C.J.C. concluded:

> [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.

2. Exclusive Occupation

[550] The plaintiffs submit exclusivity turns on whether they had the intention and capacity to retain exclusive control of the Claim Area. Control can be demonstrated even if other Indigenous people were present or frequented the area. The lower Fraser River was a hive of activity in the post-contact and early sovereignty years. They say that an act of trespass, if isolated, would not undermine a finding of exclusivity if the Indigenous group intended to and attempted to enforce their exclusive occupation, relying upon *Delgamuukw* SCC at para. 156. They say that if the Indigenous group had trespass laws, this may point toward exclusivity.

[551] The plaintiffs submit that evidence of actual exclusion is not required. Instead, they must demonstrate the effective control of the land by the group, from which a

reasonable inference can be drawn that it could have excluded others had it chosen to do so: *Marshall; Bernard* at para. 70. The fact that history insofar as it can be ascertained discloses no adverse claimants may support this inference.

[552] Canada submits the plaintiffs have not shown that the lands were exclusively theirs, or that their ancestors physically excluded other groups from the Claim Area. Evidence of acts of Cowichan aggression merely evinces a complex system of relationships between Coast Salish groups that is not reflective of dominance and control. Further, the plaintiffs' ancestors' seasonal presence in the area weighs against a finding of exclusivity.

[553] BC relies upon Canada's arguments in relation to exclusivity.

[554] Richmond also submits the evidence does not reveal that the plaintiffs' ancestors occupied the territory as "theirs", or to the exclusion of others.

[555] Musqueam submits the evidence falls short of establishing the plaintiffs had exclusive or exclusionary control of the Claim Area as against Musqueam or other hən̓q̓əmin̓əm̓ speaking peoples on the Fraser River.

[556] I do not agree with Musqueam that the fact the plaintiffs' ancestors could consent to their Musqueam relatives using the land or water out of kinship means that they cannot prove exclusive possession. The giving or withholding of permission to access lands may show intention and capacity to control the land: *Tsilhqot'in* SCC at para. 48.

[557] The group must have had "the intention and capacity to retain exclusive control" over the lands: Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 204 (quoted in *Tsilhqot'in* SCC at para. 47, and *Delgamuukw* SCC at para. 156). Because "[t]he common law right to title is commensurate with exclusionary rights of control", proof that the group exhibited similar exclusionary powers is required: *Marshall; Bernard* at para. 77.

[558] The Indigenous perspective, and the context and characteristics of a claimant group, play a role under this lens: *Tsilhqot'in* SCC at para. 49; *Marshall; Bernard* at para. 64; *Delgamuukw* SCC at para. 156. For example, occupation may have been exclusive despite other Indigenous groups being present: *Delgamuukw* SCC at para. 157. Though not necessarily required, if other Indigenous groups sought permission from the claimant group's ancestors to do so, this would affirm that those ancestors exhibited forms of exclusive control required by the common law.

[559] In *Tsilhqot'in* SCC, the exclusivity requirement was met because the Tsilhqot'in "repelled other people from their land and demanded permission from outsiders who wished to pass over it": at para. 58. However, overt acts of exclusion are not the only manner of demonstrating control. As McLachlin C.J.C. said in *Marshall; Bernard* at para. 64: "the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion". Each case will turn on the context and characteristics of unique claimants. She continued at para. 65:

> ... All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.
>
> [Emphasis added.]

[560] Evidence of an Indigenous group's reputation of fierceness can support a finding that they had the capacity to exclude. Indeed, this informed the finding of Aboriginal title in *Tsilhqot'in* BCSC at paras. 915, 920–921, 929–944.

[561] For example, evidence was led about the Tsilhqot'in's military practices, such as killing all but a few opponents and allowing the survivors to spread the message of their warriors' fierceness: *Tsilhqot'in* BCSC at para. 920. Moreover, "non-Tsilhqot'in Aboriginal guides refused to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in people": *Tsilhqot'in* BCSC at para. 921.

[562] After pointing to certain HBC records, Vickers J. was willing "to infer there were no large numbers of invaders on the edges of Tsilhqot'in territory": at para. 923. A neighbouring Indigenous group would have been unlikely to move into the land previously (seasonally) exploited by the Tsilhqot'in because those resources would not be available for at least another year. To the same effect, in a year where the salmon run failed, "there would be no possibility that any other group would move into such a distressful situation": *Tsilhqot'in* BCSC at para. 924. Justice Vickers thus rejected the notion that it was "impossible for Tsilhqot'in people to maintain exclusive control over their traditional territory": *Tsilhqot'in* BCSC at paras. 922, 929.

[563] Lastly, even though the evidence mostly illustrated conflicts between the Tsilhqot'in and other Indigenous peoples outside the claimed area, a reasonable inference could be drawn that the Tsilhqot'in could have excluded others within the claimed territory: *Tsilhqot'in* BCSC at paras. 929, 931, 935.

[564] In my view, these passages are illustrative of what the SCC later deemed to be central considerations of exclusivity — namely, the importance of considering "the nature of other groups in the area, and the characteristics of the land in question", and how "the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control": *Tsilhqot'in* SCC at para. 48.

[565] In *Saugeen First Nation* ONSC, Justice Matheson applied the *Tsilhqot'in* SCC test to submerged lands and considered activity of other Indigenous groups in other parts of the region: at para. 575. Justice Matheson concluded that the plaintiffs did not have a strong presence that would demonstrate exclusivity: at para. 586.

[566] Justice Matheson looked to evidence about the Anishinaabe Nation as a whole: at para. 458. She inferred that customary laws could be gleaned from the shared practices of the Anishinabek, with the understanding that local differences existed.

[567] Justice Matheson noted that the French travelled freely from one French fort to another. The plaintiffs had not shown that settlers sought permission to travel between forts: at paras. 493, 577–579. There was no evidence that the plaintiffs' ancestors impeded Indigenous or non-Indigenous travel, as is the case with the Cowichan on the Fraser River. However, I note that the Cowichan do not base their title claim on control of access to the Fraser River generally.

3. Continuity

[568] The plaintiffs submit they are not required to prove continuity because they are not relying on present occupancy of the land. Continuity arises where the claimant relies upon present-day occupation of the lands as inferential proof of pre-sovereignty occupation: *Delgamuukw* SCC at para. 152; *Tsilhqot'in* SCC at para. 45.

[569] Several defendants argue against this interpretation of continuity in the context of this case, relying upon the concept of "substantial connection".

[570] Canada submits it is clear from the jurisprudence that regardless of whether an Indigenous group intends to rely on present occupation to establish pre-sovereignty occupation, the group must demonstrate that it has maintained a substantial connection with the land since sovereignty. Canada submits that a lengthy absence from the Claim Area is inconsistent with the nature of Aboriginal title, which is intended to be held for future generations. Moreover, Canada says that reconciliation militates towards the requirement of a substantial connection.

[571] BC submits *Desautel* SCC has resolved uncertainty on the issue of continuity in Aboriginal rights by distinguishing it from the threshold inquiry concerning identity of the rights-holding community. They rely on paras. 51–54 of *Desautel* SCC to argue that continuity may play a role in the proof of pre-contact and pre-sovereignty practices. Continuity is required to establish that the claimed Aboriginal right is connected to and reasonably regarded as a continuation of pre-contact practice.

[572] BC further says Aboriginal title is a form of Aboriginal right, and in order to maintain coherence within that conceptual framework, a substantial connection requirement of Aboriginal rights informed by the concept of continuity must also play a role in proof of Aboriginal title. They argue that there must be a demonstrable connection between the pre-sovereignty practice and asserted modern rights.

[573] Richmond takes issue with the plaintiffs' position that they are not required to prove continuity because they do not rely on present occupation. Richmond submits it does not make sense to impose a stricter standard on Indigenous groups who are occupying the land than those who are no longer occupying the land. Richmond submits the inherent limit — that land cannot be put to use which is irreconcilable with the nature of the occupation that gave rise to Aboriginal title — precludes a declaration of Aboriginal title because the current state of the land is not compatible with its historical use.

[574] The VFPA submits continuity is a requirement, and the Court must consider the historical context. This includes the nature, duration, and permanence of the plaintiffs' alleged occupation of the lands and whether, for instance, local Indigenous communities were displaced from traditional territories, before sovereignty assertion, as a result of colonial disruptions, such as European-sourced epidemics.

[575] TFN submits the inquiry into whether Aboriginal title has been established involves something more broad-reaching than an examination of a moment of occupation on June 15, 1846. TFN says sufficient and exclusive occupation requires that there be a measure of continuity — something intentional, regular and deliberate, rather than casual, opportunistic, or peripheral.

[576] TFN submits the Court needs to be able to confidently infer that what was observed to be so at one moment continued to be so at another moment. This is particularly crucial, given that the gaps in data points in this case are not measured in hours or days, but in years and even decades. TFN points out that the plaintiffs' case is premised on unbroken continuity, in the sense that they assert Cowichan occupation from time immemorial until decades after the first observation of the

village in 1824. TFN says this argument is untenable in light of the disruption and change in what is now the Lower Mainland of British Columbia.

[577] In my opinion, the answer to many of these submissions lies in a careful reading of *Delgamuukw* SCC at paras. 150–151 and *Marshall; Bernard* at para. 67. The term “continuity” has been given different meanings by different courts. I conclude that continuity is fulfilled where a claimant group establishes that they are the descendants of the Aboriginal rights-holding groups, and establishes sufficient pre-sovereignty occupation.

[578] In *Delgamuukw* SCC, Chief Justice Lamer began laying the foundations for the role of “continuity”, “substantial connection” and “central significance” in his description of an inherent limit on Aboriginal title. Aboriginal title land cannot be used by claimants in a manner irreconcilable with the nature of the claimant’s attachment to the land: at para. 125. This provides useful context for Chief Justice Lamer’s following remarks:

> [126] ... prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.
>
> [127] I develop this point below with respect to the test for aboriginal title. The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.
>
> [Emphasis added.]

[579] Chief Justice Lamer’s remarks on “central significance” and “substantial connection” then appear later in his discussion of the test for Aboriginal title: see paras. 150–154. Chief Justice Lamer noted the requirement of Aboriginal rights that a practice, custom or tradition be a “central and significant” part of the claimant

society's distinctive culture (see *Van der Peet* at para. 55) and continues to operate in Aboriginal title: at para. 150. In explaining the requirement for pre-sovereignty occupation, he observed:

> [150] ... As I said in *Adams*, a claim to title is made out when a group can demonstrate "that their connection with the piece of land ... was of a *central significance* to their distinctive culture" (at para. 26).
>
> [151] Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

[580] Next, Chief Justice Lamer explained that if present occupation is relied on as proof of pre-sovereignty occupation, there must be a continuity between present and pre-sovereignty occupations:

> [152] In *Van der Peet*, I explained that it is the pre-contact practices, customs and traditions of aboriginal peoples which are recognized and affirmed as aboriginal rights by s. 35(1). But I also acknowledged it would be "next to impossible" (at para. 62) for an aboriginal group to provide conclusive evidence of its pre-contact practices, customs and traditions. *What would suffice instead was evidence of post-contact practices, which was "directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact*" (at para. 62). The same concern, and the same solution, arises with respect to the proof of occupation in claims for aboriginal title, although there is a difference in the time for determination of title. *Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a* <u>*continuity*</u> between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.
>
> [153] *Needless to say, there is no need to establish "an unbroken chain of continuity" (Van der Peet, at para. 65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed*

> *to respect" aboriginal rights to land* (*Côté*, *supra*, at para. 53). In *Mabo*, *supra*, the High Court of Australia set down the requirement that there must be "*substantial maintenance of the connection*" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.
>
> [154] I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that the fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a *substantial connection* between the people and the land is maintained. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.
>
> [Underline emphasis in original; italics emphasis added.]

[581] I interpret Lamer C.J.C.'s comments to mean that continuous occupation is not required unless the claimant group relies on present occupation as proof pre-sovereignty occupation. Where present occupation is relied on, showing maintenance of a substantial connection between the claimant group and the land is sufficient to establish continuity. He recognized this is difficult to prove given the historical nature of the evidence and lack of written record. Continuity is a solution to an evidentiary problem. Where continuity is established, present occupation is evidence of pre-sovereignty occupation. Contrary to Richmond's submission, it does not impose a more onerous standard on a claimant, but rather provides an additional, but not necessary, means through which a claimant may establish pre-sovereignty occupation.

[582] In *Marshall; Bernard*, after a discussion of the concepts of exclusion and whether nomadic or semi-nomadic peoples can claim Aboriginal title to lands, McLachlin C.J.C. referred to the above passages of *Delgamuukw* SCC in her description of continuity. The Chief Justice said:

> [67] The third sub-issue is continuity. <u>The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders</u>. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. <u>Continuity may also be raised in this sense</u>. To claim title, the group's connection with the land must be shown to

> have been “of a central significance to their distinctive culture”: *Adams*, at para. 26. If the group has “maintained a substantial connection” with the land since sovereignty, this establishes the required “central significance”: *Delgamuukw*, *per* Lamer C.J., at paras. 150–51.
>
> [Emphasis added.]

[583] At para. 70, McLachlin C.J.C. summarized her remarks: “Continuity is required, in the sense of showing the group’s descent from the pre-sovereignty group whose practices are relied on for the right”.

[584] The Court squarely clarified the test for Aboriginal title in *Tsilhqot'in* SCC. The terms “substantial connection” and “central significance” do not appear in the test outlined by the SCC, nor anywhere else in that judgment.

[585] Both concepts were mentioned by Vickers J. in *Tsilhqot'in* BCSC during his consideration of prior jurisprudence at paras. 440, 549, 553, 579, 1151 and 1170. In his outline of the Aboriginal title test, he considered continuity to be a non-mandatory element of proof that arises only when the plaintiffs rely upon current occupation as proof of pre-sovereignty occupation: at paras. 547–553.

[586] At the SCC, McLachlin C.J.C. found that Vickers J. articulated and applied the correct legal test: at paras. 51, 61–63, 66. Chief Justice McLachlin dealt with the concept of continuity in two paragraphs:

> [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 <u>rooted</u> in pre-sovereignty times. This is a question for the trier of fact in each case.
>
> [Emphasis added.]

[587] The term “rooted” is the same terminology used by Lamer C.J.C. in *Van der Peet* at para. 62 and his discussion of the requirement of continuity in Aboriginal

rights claims. This suggests that where a claimant seeks to prove Aboriginal title through post-sovereignty occupation, they need to show that their present occupation is "rooted" in pre-sovereignty occupation of the same land.

[588] In *Desautel* SCC, the Court found that a resident of the US could claim Aboriginal hunting rights in Canada. Justice Rowe (for the majority) addressed the concept of continuity in the Aboriginal rights test at paras. 51–55, applying the *Van der Peet* test:

> [52] This analysis has been elaborated in detail in this Court's jurisprudence. For present purposes, it will suffice to comment on the role of continuity in the analysis. Continuity is about whether a modern practice is a continuation of a historic practice. It is different from the threshold question discussed earlier, about whether a modern group is a successor of a historic group. It plays a role both at the second and the third stages of the *Van der Peet* analysis.

[589] Justice Rowe noted that continuity may play a role in the assessment where a present-day practice is relied on to ground an inference of pre-sovereignty practice: at para. 53. He then said:

> [54] At the third stage, the question is whether the modern practice which is claimed to be an exercise of an Aboriginal right is connected to, and reasonably seen as a continuation of, the pre-contact practice. At this stage, continuity with the pre-contact practice is required in order for the claimed activity to fall within the scope of the right. It serves to avoid frozen rights, allowing the practice to evolve into modern forms (*Van der Peet*, at para. 64; *Mitchell*, at para. 13). The right claimed "must be allowed to evolve", because "[i]f aboriginal rights are not permitted to evolve and take modern forms, then they will become utterly useless" (*Sappier*, at paras. 48–49).
>
> [Emphasis added.]

[590] A question that flows from the above extract is whether this third stage of the *Van der Peet* analysis plays a role in Aboriginal title, and if so, how. In my view, the requirements of continuity described in *Desautel* SCC are already accounted for in the Aboriginal title test outlined in *Tsilhqot'in* SCC.

[591] Canada argues the law is unclear respecting how Indigenous groups can establish that they have maintained a substantial connection to the land, and cites *Desautel* SCC at paras. 63–64, where the Court said: "we are asked to hold that an

Aboriginal right can be lost or abandoned by non-use ... It is better not to decide the issue here": at para. 64. In my view, this excerpt does not support Canada's position on this point. *Desautel* SCC clearly states that "an ongoing presence in the lands ... has never been part of the test for an Aboriginal right": at para. 63. The inquiry here is not whether the plaintiffs have lost title due to non-use. There is no requirement of present occupation in the test for Aboriginal title.

[592] In my opinion, the proper interpretation of these passages of *Delgamuukw* SCC and *Marshall; Bernard* (read in light of *Tsilhqot'in* SCC) is as follows:

a) "Central significance" of land is assumed where sufficient and exclusive pre-sovereignty occupation is shown.

b) Because it may be difficult to prove pre-sovereignty occupation outright, claimants may bring proof of current occupation to establish an inference of pre-sovereignty occupation.

c) Where current occupation is relied on as proof of pre-sovereignty occupation, there is a question of whether or not that current occupation is "rooted" in the pre-sovereignty occupation.

d) The "substantial connection" inquiry goes to whether or not any present occupation is "rooted" in pre-sovereignty occupation, and hence, whether "central significance" is shown. In other words, if a plaintiff can show a "substantial connection" has been maintained to lands they presently occupy, this helps establish the inference that those lands were occupied to the requisite degree at the assertion of sovereignty.

[593] I do not accept Canada's submission that Myers J.'s analysis of substantial connection in *Nuchatlaht* is inconsistent with SCC jurisprudence. In *Nuchatlaht* at paras. 409–415, Justice Myers interpreted the above passages of *Delgamuukw* SCC and *Marshall; Bernard* as applying to continuity in the sense it was used in *Tsilhqot'in* BCSC (i.e., where present occupation is relied upon as proof of

pre-sovereignty occupation). He reached a similar conclusion as I when reviewing that jurisprudence. As I expand upon below, he also identifies the reconciliation issues that arise if “substantial connection” is interpreted in the manner some of the defendants presently suggest.

[594] Specifically, Myers J. determined that the plaintiffs were not required to show a continuing and present connection to the claimed land. He concluded the reference in *Delgamuukw* SCC at para. 151 to maintaining a substantial connection to land was intended to address the case where present occupancy is relied on as proof of occupancy at sovereignty: at para. 410. He found that in *Marshall; Bernard* at para. 67, McLachlin C.J.C. first discussed how continuity is established through a connection between the modern claimant and pre-sovereignty group, and then secondly, where present occupation is relied on as proof of pre-sovereignty occupation where the claimant demonstrates maintaining a substantial connection to the land.

[595] I agree with his analysis. The focus of continuity is that the claimed modern right is connected with the pre-sovereignty practice of the claimant’s ancestors (compare, for example *Marshall; Bernard* at para. 67; *Desautel* SCC at paras. 51–54; *Tsilhqot'in* SCC at paras. 45–46). A title claimant must show they are the descendants of those who sufficiently and exclusively occupied the claimed land, and as such this bridge between the past and present exercise of what the common law recognizes as Aboriginal title already exists. A clear line is thereby drawn between the title interest claimed in the modern day and the title interest enjoyed by ancestors who occupied the territory to the requisite common law standard in the past, and the claimants, as modern descendants of those ancestors, claiming that same interest. Second, where present occupation is relied on, continuity may be demonstrated through the claimant group showing maintenance of a substantial connection to the land: *Delgamuukw* SCC at para. 153.

[596] Additionally, in *Nuchatlaht*, Myers J. addressed reconciliation concerns through paras. 411–414 and alluded to a hypothetical case similar to the one now before me:

> [414] As Cromwell J.A. pointed out in *Marshall*, it would be illogical to recognise that Aboriginal peoples have been displaced or forcefully relocated, while at the same time requiring that a substantial connection to the land be maintained to the present. Consider, for example, a claim to an area that has been urbanized, or, in the alternative, a claim to a remote area that cannot be easily accessed or has become largely uninhabited: what type of substantial connection to the land should be expected?

[597] Reconciliation has always been the purpose of s. 35 and its recognition of Aboriginal rights: see *Van der Peet* at paras. 30–31, 43; *Delgamuukw* SCC at para. 148; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 44 [*Mikisew*]. Reconciliation is to be approached honourably and in good faith: *Delgamuukw* SCC at para. 186; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paras. 67–68, 76 [*Manitoba Metis*]. It is based on promoting a mutually respectful long-term relationship between Indigenous peoples and the Crown: see *Desautel* SCC at para. 112 and *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 34, both quoting *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 10 [*Beckman*].

[598] In my view, both the case law and the principle of reconciliation do not support the understanding of continuity and substantial connection advanced by some of the defendants.

4. Circumstances Surrounding Sovereignty

[599] The VFPA asks three questions relating to Cowichan occupation of the Claim Area around the time the British asserted sovereignty in what is now British Columbia:

> (1) What is the legal significance of the date of Crown sovereignty assertion (whatever that date may be) to Indigenous-Crown relations and to claims of Aboriginal title against the Crown?

> (2) What is the legal significance, if any, of the date of Crown sovereignty assertion to relations amongst Indigenous peoples and to competing claims of Aboriginal title asserted by distinct Indigenous peoples today?
>
> (3) In what circumstances, if any, is the acquisition of territory by violence, force of arms, and intimidation a legally sound basis for resolving competing Aboriginal title claims in modern Canadian Aboriginal law?

[600] The VFPA submits these questions are provoked by a novel issue in this case: the fact the plaintiffs' claim is contested by two other Indigenous nations. In sum, the VFPA argues it makes little sense to award the plaintiffs title because they say that their presence in the Claim Area was brief, occurred close to the date of asserted sovereignty, and was only successful through violent displacement of more local Indigenous populations in the wake of a smallpox epidemic.

[601] The VFPA says that the circumstances of this case call for an adjustment to the Aboriginal title test of occupation at sovereignty. The VFPA says that "the date of Crown sovereignty assertion is of little or no significance when assessing the proof of Aboriginal title, in the context of competing claims". The submission is that I should look to the surrounding circumstances in the period leading up to and after sovereignty in order to properly assess the plaintiffs' claim, and that Cowichan aggression leading up to this period militates against a finding of Aboriginal title.

[602] I do not agree that the date of sovereignty assertion lacks relevance in this case. Though Musqueam and TFN urge me not to accede to the plaintiffs' claim, neither ask that they instead be awarded title or another interest. However, both Musqueam and TFN put their occupation of the Claim Area factually in issue, asserting that the Cowichan did not sufficiently and exclusively occupy the Claim Area because Musqueam and TFN occupied it. In my view, the test for Aboriginal title and consideration of whether the Cowichan sufficiently and exclusively occupied the Claim Area prior to and at 1846 in this case will necessarily entail consideration of the circumstances leading up to sovereignty and Musqueam's and TFN's presence or lack thereof in that area.

[603] While Richmond does not contest the use of the date of sovereignty in this case, it joins in the VFPA's argument that alleged Cowichan violence and conquest should have some bearing on the plaintiffs' entitlement to declaratory relief.

[604] For the reasons that follow, I conclude that June 15, 1846 is the appropriate date of proof in this case. It may be that a court must look to the surrounding circumstances leading up to this date in order to assess whether the claimant group sufficiently and exclusively occupied the territory. The alleged aggression is not, on the arguments before me, a circumstance that would negate the plaintiffs' claim.

a) Date of Sovereignty Assertion

[605] The Oregon Boundary Treaty was entered into by Great Britain and the United States on June 15, 1846. This has been consistently used as the date of asserted sovereignty in Aboriginal title litigation in British Columbia: see, e.g. *Delgamuukw* SCC at para. 145; *Tsilhqot'in* BCSC at paras. 585–602; *Tsilhqot'in* SCC at paras. 60–61; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 65 [*Haida* SCC]; *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313 at 325–326, but see also 348, 1973 CanLII 4 [*Calder*]; *Saik'uz* BCSC at para. 172; *Nuchatlaht* at paras. 73–108.

[606] The VFPA argues that the date of sovereignty in British Columbia has not been settled by appellate authority. In particular, it relies upon *Tsilhqot'in* BCCA, wherein Justice Groberman questioned whether the Oregon Boundary treaty marked an appropriate date of sovereignty for the entire province. He said:

> [32] The Tsilhqot'in continued to occupy their traditional territory (including the Claim Area) in 1846, when the Oregon Treaty put an end to American claims to what is now British Columbia. That date has, in cases such as *Calder v. Attorney-General of B.C.*, [1973] S.C.R. 313, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, been taken to be a significant one for the establishment of Aboriginal title, on the basis that it represents a recognition of Crown sovereignty as a matter of international law. The trial judge analyzed the matter and accepted, at para. 601, that the date the treaty was entered into should be treated as the crystallization date for a claim to Aboriginal title. While it is curious that a treaty that had no practical impact on relations between the Crown and the Tsilhqot'in can be seen as the defining moment for a claim of Aboriginal title, the parties do not, in this Court,

> challenge the determination to that effect, and the determination is in accordance with earlier case law.

[607] Beyond this, the VFPA also relies upon three cases of the U.S. Supreme Court from the 19th century penned by then Chief Justice Marshall [the Marshall Trilogy]: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson*]; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. the State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester*]. The VFPA relies upon these cases for the proposition that nothing about the assertion of sovereignty fixed the boundaries between Indigenous peoples *inter se*, under those Nations' own legal systems.

[608] As Groberman J.A. indicates in the above quote, neither *Delgamuukw* SCC nor *Calder* appear to settle the date of sovereignty definitively across the entirety of British Columbia. Although Lamer C.J.C. made clear in *Delgamuukw* SCC that proof of Aboriginal title is assessed at the time of sovereignty assertion, he made no express finding that 1846 was the appropriate date beyond acknowledging that in the case before him, the parties had agreed to use this date: see *Delgamuukw* SCC at para. 145.

[609] In *Calder*, the SCC split 3:3 on whether the Oregon Boundary Treaty should be considered as establishing British sovereignty for the purposes of the novel claim before it: compare the reasons of Justice Judson at 325–326 with Justice Hall at 348–349. Accordingly, this case also left the issue unresolved.

[610] However, other authorities put more compellingly that June 15, 1846 is the date of sovereignty for the purposes of proof of Aboriginal title in British Columbia.

[611] The Court in *Tsilhqot'in* SCC at paras. 51, 61–63, 66 held unanimously that Vickers J.'s approach in this court was consistent with the correct legal test in both form and application. At paras. 585–602 of the trial judgment, Vickers J. dealt with the assertion of sovereignty in British Columbia and concluded that entry into the Oregon Boundary Treaty was the appropriate marker for asserted British sovereignty. *Tsilhqot'in* involved a land claim further north of the 49th parallel than the case before me.

[612] More recently in *Nuchatlaht*, Myers J. dealt with arguments that the date of sovereignty may be as early as 1790. He exhaustively set out the backdrop of domestic authorities on the date of sovereignty in British Columbia at paras. 73–108, and also concluded that the Oregon Boundary Treaty was the appropriate date to use in that case. *Nuchatlaht* involved a land claim on Vancouver Island of more comparable distance to the 49th parallel than the case before me.

[613] Both Vickers and Myers JJ. set out how, under international and domestic law, the British entrance into the Oregon Boundary Treaty appears to be the greatest candidate for a generalized date of asserted sovereignty in British Columbia.

[614] The VFPA acknowledges that Myers J. in *Nuchatlaht* reviewed the relevant case law, including *Calder*, *Delgamuukw* SCC, *Haida* SCC and *Tsilhqot'in* BCSC in concluding that the date for sovereignty assertion is 1846. However, the VFPA suggests Myers J.'s analysis is undermined because in *Calder* only Justice Judson, writing for himself and two other judges, took this position, rather than the whole Court. In my view, this does not undermine his reasoning as it is of little or no consequence in his overall conclusion. It is clear that Myers J. considered himself bound by other decisions, not the least of which was *Tsilhqot'in* BCSC, but also the underlying legal premises within it: see *Nuchatlaht* at para. 89.

[615] Two other authorities are worth mentioning before addressing the Marshall Trilogy.

[616] In *Tsilhqot'in* BCSC at para. 601, Vickers J. cited *Haida* SCC at para. 65 for the proposition that the weight of authorities tying the date of sovereignty in British Columbia to the Oregon Boundary Treaty appeared to be too well entrenched to permit reconsideration at the trial court level. There, a unanimous SCC mentioned that 1846 was the appropriate date in a case concerning lands as far north as Haida Gwaii: at para. 65. The VFPA argues that the SCC did not address itself to the correct date of sovereignty assertion and this reference was of little significance to the actual judgment in *Haida* SCC.

[617] I disagree. The fact of the Crown's asserted sovereignty was important to the concept of reconciliation and Crown honour espoused in that case: see paras. 26, 32. *Haida* SCC is the SCC's first word on the duty to consult. It is unreasonable to assume that, in a case where the "reality of Crown sovereignty" (at para. 26) was important to the Court's articulation of a hitherto unrecognized Crown duty, the Court's labelling of 1846 as the appropriate date was of little significance. The fact that the Crown had asserted sovereignty in British Columbia was (and still is) critical to the honour of the Crown, and the principle of reconciliation that underlies the duty to consult set out in that case.

[618] In *Tsilhqot'in* BCSC at para. 599, Vickers J. also referred to *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388, 1984 CanLII 138. This was a reference case addressing whether British Columbia or Canada had superior proprietary interests in the lands, minerals and other resources of the seabed and subsoil covered by the waters between Vancouver Island and mainland British Columbia.

[619] In that case, Dickson J. (as he then was) considered the history of British Columbia prior to its entry into Confederation: at 402–406. He described how previous cases had considered a border delineation to be enough to render certain territories within the boundaries of the Province, and continued at 405–406:

> ... The Oregon Treaty, however, is more than simply a border delineation. It is the resolution of the competing British and American claims to ownership over the entire "Oregon Territory". The demarcation of the 49th parallel and the mid-channel point in the Straits as the international boundary constitutes a recognition by each signatory of the claims of the other to proprietorship over all "the territories" up to that boundary. The arrangements as to navigation rights, wherein each party purports to grant to the other navigation rights in certain of the waters on its side of the new boundary can simply be viewed as a further confirmation that both parties addressed their minds to the ownership of these waters and were asserting proprietary rights therein. If there is any doubt that the acts of Captains Meares and Vancouver in the late 1700's amounted to a claim of proprietorship over the subject waters, as well as over the islands, there can be no doubt that after 1846 these waters were part of British territory.

[620] In my opinion, Dickson J. says in the above extract that while other dates might possibly be proffered as the date of sovereignty in British Columbia, on whatever analysis is taken, the British assertion of sovereignty was certainly completed by the time the Oregon Boundary Treaty was entered into. While Dickson J. considers (without deciding) other alternative dates corresponding with "the acts of Captains Meares and Vancouver in the late 1700's", Vickers J. later rejected these acts as establishing sovereignty in *Tsilhqot'in* BCSC: see paras. 590, 596–602.

[621] Each of the above authorities leads towards the conclusion that I should take June 15, 1846 as the date of British sovereignty assertion for the purposes of applying the Aboriginal title test espoused in *Tsilhqot'in* BCSC and *Delgamuukw* SCC.

[622] I find the Marshall Trilogy of little assistance in this analysis. These decisions are becoming of questionable precedential value in Canadian law.

[623] The jurisprudence within rests in part on the proposition that the Crown acquired sovereignty over the lands now comprising the United States and Canada under the doctrine of discovery (see e.g., the extract of *Johnson* in *Calder* starting at 380). A corollary of the doctrine of discovery is that the lands of North America were to Europeans, *terra nullius*: see John Borrows, "The Durability of *Terra Nullius: Tsilhqot'in Nation v. British Columbia*" (2015) 48:3 UBC L. Rev. 701 [Borrows, "The Durability of *Terra Nullius*"]; ***Saik'uz*** BCSC at para. 187.

[624] In *Tsilhqot'in* SCC, McLachlin C.J.C. said at para. 69: "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* of 1763". In ***Saik'uz*** BCSC, Justice Kent pointed out at paras. 187–193 that the Truth and Reconciliation Commission of Canada, and the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 [Canada *UNDRIP* Act] have decried both the doctrines of discovery and *terra nullius*.

[625] It is true that the early stages of Canadian Aboriginal law involved some citation to the Marshall Trilogy: see *Saik'uz* BCSC at para. 193. For example, the SCC cited *Johnson* and *Worcester* while expressing that Aboriginal title arises from Indigenous occupation of lands, rather than mere Crown benefaction: see *Van der Peet* at paras. 35–37; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 75 [*Wewaykum*].

[626] The point is that our laws have moved on from the Marshall Trilogy. Indeed, modern statutes and jurisprudence seem to condemn or consider inapplicable the doctrinal basis upon which many of those cases stands. Relying on the Marshall Trilogy in the modern day seems apt to lead into legal error.

i. Application

[627] Returning to the *obiter* comments expressed by Groberman J.A., even if it were arguable that another date might be appropriate for, say, communities in British Columbia along the Alaskan border, in this case the Oregon Boundary Treaty is particularly appropriate given the Claim Area's proximity to the 49th parallel.

[628] For certainty, to the extent that the VFPA submits that the circumstances leading up to and perhaps after this date may weigh upon my assessment of sufficiency and exclusivity of occupation as at June 15, 1846, I agree. This is because the concerns expressed by the VFPA as to the surrounding circumstances at sovereignty already have some application in the Aboriginal title test through its established lenses.

[629] To the extent the VFPA suggests that the date of sovereignty espoused by the authorities as appropriate for this case is unimportant, I disagree. This date is the appropriate time period for consideration of Aboriginal title: *Tsilhqot'in* SCC at paras. 30, 50; *Delgamuukw* SCC at para. 145; *Marshall; Bernard* at 38–40, 61. To overlook this in favour of an unbounded inquiry would be contrary to established authority.

[630] It would also be impractical. In *Delgamuukw* SCC at para. 145, practicality was the third and final reason Lamer C.J.C. gave to justify the date of sovereignty assertion as the appropriate time period for the assessment of Aboriginal title. He said:

> ... Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture. I note that this is the approach has support in the academic literature: Brian Slattery, "Understanding Aboriginal Rights", *supra*, at p. 742; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 196.

[631] Using the date of sovereignty as the marker for proof of Aboriginal title was desirable in *Delgamuukw* SCC because of the certainty it provided, once that date was established. Abandoning this date in in a vague search for other potentially relevant periods would encourage the problems Lamer C.J.C. sought to remedy in the above passage of *Delgamuukw* SCC: see also *Nuchatlaht* at paras. 106–107.

[632] In summary, as above, June 15, 1846, the date of the Oregon Boundary Treaty, has consistently been relied on as the date the British Crown asserted sovereignty over the land that would become British Columbia, including in *Delgamuukw* SCC, *Tsilhqot'in* BCSC at paras. 585–602, *Tsilhqot'in* SCC at paras. 60–61 and most recently in *Nuchatlaht* at paras. 73–108. As Justice Vickers held in *Tsilhqot'in* BCSC, the date the Oregon Boundary Treaty was signed was a watershed date that the courts have relied upon: at para. 601. There is no basis to depart from that date in this case.

b) Alleged Cowichan Aggression

[633] Would an Aboriginal title declaration be inappropriate in this case if it were shown that the Cowichan Nation occupied the Claim Area as a result of aggression or conquest in the wake of a smallpox epidemic?

[634] For this proposition, the VFPA relies upon prohibitions on the acquisition of territory through aggression, located within contemporary international human rights

law and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") implementing legislation. This includes:

a) the *UN Charter*, 26 June 1945, Can. T.S. 1945 No. 7;

b) the *Definition of Aggression*, UNGA, 29th sess., UN Doc. A/RES/3314 (1974) GA Res. 3314 (XXIX);

c) the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess., UN Doc. A/RES/61/295 (2007) GA Res. 295; and

d) domestic legislation implementing UNDRIP, namely, the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 and the Canada *UNDRIP* Act.

[635] The VFPA also relies upon more ancient British law that it says would have applied at the time of sovereignty assertion, namely *Campbell v. Hall* (1774) 1 Cowp. 204, 98 E.R. 1045 [*Campbell*]. The VFPA highlights passages at 1047: "A country conquered by the British arms becomes a dominion of the King in right of his Crown" and "the conquered inhabitants once received under the King's protection become subjects, and are to be universally considered in that light, not as enemies or aliens". The VFPA says if the Cowichan Nation conquered other Indigenous Nations in the area, they would have done so unlawfully in that they would not have followed these or analogous principles.

[636] For its part, Richmond relies more generally upon the essence of Aboriginal title as described in *Haida* SCC at para. 25 that "Aboriginal peoples were here when Europeans came, and were never conquered". They say this weighs against the making of an Aboriginal title declaration in favour of the Cowichan today.

[637] Like the Marshall Trilogy, I find *Campbell* of little use. The VFPA relies upon this case to argue that "[t]he alleged Cowichan conduct could therefore not constitute a basis in British law for ignoring or extinguishing the pre-existing legal rights of local Indigenous peoples in the Lands claimed by the Cowichan".

[638] But it is not British law that created, or would have regulated, the pre-existing Indigenous interest in land that the common law may recognize as Aboriginal title: see *Tsilhqot'in* SCC at paras. 10–14, 69–70. It is only at the "recognition" stage that the common law begins to play a role. In *Marshall; Bernard* at para. 61, McLachlin C.J.C. said "[i]t would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership". I would think it equally wrong to hold Indigenous Nations, at a time in which the Crown had not asserted sovereignty in British Columbia, to a standard of territorial acquisition set by British law.

[639] Even overlooking this, the VFPA's submissions run into an additional problem which is that *Campbell* deals with the principles applicable upon British conquest of a territory held by another European power: *Campbell* at 1046–1048. This was a Euro-centric doctrine. These principles were not thought to apply to Indigenous peoples at the time because they were not European: see Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29:4 Osgoode Hall L.J. 681 at 687.

[640] Like the Marshall Trilogy, the principles in *Campbell* are built upon notions of questionable relevance in contemporary Canadian law and society.

[641] The argument advanced by the VFPA and Richmond more generally seems at odds with the lens of exclusivity in the Aboriginal title test, under which acts of military might be seen as demonstrations of occupation: see *Tsilhqot'in* SCC at para. 48. As earlier mentioned, in *Tsilhqot'in* SCC, the exclusivity requirement was met because "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": at para. 58.

[642] The VFPA and Richmond seek to distinguish this by stressing that there is a difference between *Tsilhqot'in* SCC, in which an Indigenous community repelled attacks from outsiders, and the presently alleged situation in which one Nation acquired lands through military force, in which others also had an interest.

[643] A similar argument was considered by Garson J. in *Ahousaht* 2009 at paras. 346–352, albeit in relation to the issue of a proper rights holder. An appeal of Garson J.'s judgment was allowed in part, but not on this issue. At para. 352, Garson J. concluded that under the claimant group's traditional practices, a war with a neighbouring group resulted in a transfer of rights and privileges to the victor.

[644] It seems unfair to allow acts of force as proof that an Indigenous Nation could demonstrate exclusivity as in *Tsilhqot'in* SCC and then say that the same should be considered evidence against the plaintiffs' title claim. The reasoning in *Ahousaht* 2009 suggests that territorial acquisition, by itself, would be no bar to the plaintiffs' claim.

[645] Whether the evidence supports a declaration of Aboriginal title is a question of fact: see *Tsilhqot'in* SCC at paras. 48, 52. Even assuming these facts were proven, I see nothing in the jurisprudence that places an onus on Indigenous Nations to show how they came to occupy their claimed territories, and to demonstrate that they did so "justly" (by contemporary Canadian standards, no less). This places a near-impossible onus upon Indigenous peoples, and is contrary to the general emphasis placed upon the Indigenous perspective in Aboriginal title claims.

[646] At their highest, the arguments advanced by Richmond and the VFPA on alleged Cowichan aggression may, if shown on the evidence, have some bearing on my analysis of the established Aboriginal title test: sufficient and exclusive occupation at sovereignty. As TFN argued, the occupancy test denotes something intentional, regular and deliberate, rather than casual, opportunistic or peripheral. I agree with this submission, which in my view speaks to sufficiency of occupation. There, the complaints of Richmond and the VFPA might find root. But I see nothing in the state of Aboriginal law today that would justify withholding a declaration of title on this mere basis.

i. Contemporary International Law

[647] The VFPA points to a prohibition on acquisition of territory by armed force established in international law. While the Cowichan's use of force and intimidation

occurred prior to that prohibition, the VFPA says as the plaintiffs' claim is grounded in s. 35(1), a contemporary interpretation of that provision is required, which is informed by contemporary international law principles.

[648] From the outset, there is an awkwardness in the VFPA's attempts to apply international law that did not exist in the 19th century, backwards in time to Indigenous Nations who also did not themselves choose whether to accede to that international law. This is contrary to the general presumption that laws are non-retroactive (see, e.g., *R. v. Albashir*, 2021 SCC 48 at paras. 35–36; *Mack v. Canada (Attorney General)*, 55 O.R. (3d) 113 at para. 40, 2001 CanLII 27983 (S.C.J.), aff'd 60 O.R. (3d) 737, 2002 CanLII 45062 (C.A.), leave to appeal to SCC ref'd, [2002] S.C.C.A. No. 476).

[649] But, the VFPA says, it is these contemporary principles of international law that should bear on the Court's modern interpretation of s. 35 of the *Constitution Act, 1982*, which is engaged when the Court declares title.

[650] In my opinion, this misapprehends the Court's role. The Court is not interpreting s. 35 of the *Constitution Act, 1982 per se*, it is declaring whether an interest "recognized and affirmed" by s. 35 is capable of recognition at common law: see *Marshall; Bernard* at para. 39; *Tsilhqot'in* SCC at paras. 10–13. The Indigenous interest in land, and the common law's recognition of it, both exist without s. 35, but are placed on a constitutional footing by it: *Delgamuukw* SCC at para. 133.

[651] On this basis, I would not accede to the VFPA's submissions.

[652] In *Mikisew* at para. 44, Justice Karakatsanis said that the principle of reconciliation animates Aboriginal law, and this too should drive its development by the courts. The VFPA's submissions are contrary to this principle.

[653] It would not be in the spirit of reconciliation to hold an Indigenous Nation's conduct centuries ago to retroactive standards of international or Canadian law. It would be a curious twist of logic to find on the basis of UNDRIP that an Indigenous Nation should be denied a declaration of title because of law that did not exist at that

time. UNDRIP is premised upon the self-determination of Indigenous peoples and the continuing vitality of their legal orders: see articles 3–5. The submissions of the VFPA on British and international law and Cowichan aggression overlook this, and the Indigenous perspective more generally: *Tsilhqot'in* SCC at para. 14.

C. SUFFICIENCY OF OCCUPATION

[654] I now consider sufficiency of Cowichan occupation of the Claim Area at the time of sovereignty assertion.

[655] The plaintiffs pleaded that the Cowichan occupied the Lands of Tl'uqtinus by way of a Cowichan village (the “Village Lands”), and customary Cowichan cultivation and/or regular use of a larger area of exploited land circumscribing the village (the “Exploited Lands”). Dr. Brealey references the “extended land management area”. This includes portions of the biogeoclimatic zones mapped by Joseph W. Trutch which the plaintiffs say were most likely subject to regular horticultural activities, and that the plaintiffs submit are the Exploited Lands. I use both terms in these reasons.

[656] To determine whether the plaintiffs’ ancestors sufficiently occupied the Claim Area, I must ask whether the evidence shows that the Cowichan historically acted in a way that communicated to third parties that they held the Lands of Tl'uqtinus for their own purpose. The question is whether there was a strong Cowichan presence that could reasonably be interpreted as demonstrating that the land in question belonged to the Cowichan. The evidence shows that the Cowichan used the land intermittently but regularly for fishing and exploiting resources. It also shows that there was a permanent Cowichan village in the Claim Area.

[657] I find that the existence of a permanent village in the Claim Area is sufficient to support a finding of sufficient occupation when that village is occupied seasonally.

[658] I determine that the law does not require the plaintiffs to prove that the Cowichan maintained a substantial connection to the Claim Area when they are not relying on current occupation. The evidence is clear that the Cowichan were dispossessed of their lands between 1871 and 1914, when the lands were

transferred to settlers. Nonetheless, the Cowichan maintained a substantial cultural connection to the Claim Area, as was evidenced by the testimony of Mrs. James and Luschiim outlined below, who spoke about Tl'uqtinus being part of the Quw'utsun homeland or stl'ulnup.

1. Oral History Record

[659] The plaintiffs submit that, from an Indigenous perspective, the oral history record establishes that the Quw'utsun had a permanent village at the Lands of Tl'uqtinus prior to, at, and after 1846.

a) Florence James (Thiyuas/Thiyuasulwut)

[660] Mrs. James testified about an ancient ground on the Fraser River, which was part of the Quw'utsun homeland where the bighouses were. This was one of their stl'ulnup — they had more than one. A stl'ulnup dated back thousands of years in Quw'utsun oral history.

[661] The Quw'utsun had their own sacred lands that everyone went back to. She described Tl'uqtinus as her ancestors' homeland, at Shnuwiilh on the lower Fraser River. Mrs. James said the root word of Tl'uqtinus is tl'eq't, meaning "long", as in the shape of the land.

[662] Mrs. James' late father took her to Tl'uqtinus in his boat when she was a child. She had to sit in the stern under a canvas to avoid falling into the muddy river. She knew when they had arrived because her father would say ni tse' wulh tus 'utl Tluqtiinus. She has many memories of travelling to the Fraser River and staying there as a child. She remembers picking berries along the Fraser River. Her late paternal grandfather, Qwulthimult-hw (Fred Joe) from the Quamichan branch of the Quw'utsun people, taught her that Tl'uqtinus was a stl'ulnup — referring to the sacredness of the earth, the old earth.

[663] The Quw'utsun visited various locations where they had other stl'ulnups, including on a small island just off of Penelakut Island, and on Salt Spring Island. On the Fraser River in ancient times, there was so much salmon that you could almost

walk on it. Her great-great-grandfather, Siqua (Louie) George, used to row across from Galiano Island where he lived to the Fraser River to fish for salmon. Her grandfather fished for sturgeon at Shnuwiilh. Their ancestors would bring clams for trading and harvested blueberries.

[664] Mrs. James did not provide evidence about the specific location of Tl'uqtinus, but she did travel there recently with Councillor Thomas, and directed him from her memory. She travelled in an aluminum boat from Penelakut Island to the Fraser River. She recognized the blinking light and the muddy water at the mouth of the River. She recognized the bulrushes, which were not as thick as they were when she was a child. She said, “in my heart, it’s telling me it’s over there; you went too far up”. Councillor Thomas turned the boat and proceeded slowly, and she directed him to where she thought Tl'uqtinus was. She did not have a compass or a map, but she knew where it was. She was guided by her spiritual way. She could see there were white, red, and different coloured square boxcars stacked up on top of each other.

[665] There is evidence that a portion of Tl'uqtinus is used to store large containers of multiple colours. I infer that this is what Mrs. James saw.

[666] I set out Mrs. James’ impressive personal history in Part 3. She is a highly respected Elder whose oral history should be given considerable weight. She was traditionally raised and trained by her Elders. She was cautious in recounting only the oral history that she holds. She made it clear that it was not her place to tell others’ oral history, and that she had their permission. Some stories could only be complete if all members of the family were present to recount their portion.

[667] Canada and BC do not challenge the weight to be given to Mrs. James’ testimony. On the other hand, Richmond and Musqueam submit her evidence is not reliable. For example, Richmond submits she was unable to provide assurances about the process by which oral history was passed to her.

[668] I reject this submission. Mrs. James provided quite a bit of detail about how oral history was passed to her. She was, however, cautious to withhold certain

pieces of information that were not hers to tell. This does not taint the reliability of the history she told. If there are pieces of history that she is unable to tell and this leaves a hole in the evidence, then I will recognize the absence of evidence on that point.

[669] Mrs. James was not specific about the location of Tl'uqtinus, other than to say it was on the Fraser River. However, she did provide personal observations. She testified she had been to Tl'uqtinus on a number of occasions with her father when she was young. Mrs. James recognized the location of Tl'uqtinus from her multiple journeys there. She was self-guided back to the place for which she holds sacred oral history. There is no question that Mrs. James directed Councillor Thomas to the location of Tl'uqtinus and shared her oral history with him. Councillor Thomas recalled the trip and marked on a map the location they visited based on information he received from Mrs. James. As a result, I find that Mrs. James' oral history and personal memories are specific to the location of Tl'uqtinus.

[670] I agree with Richmond and BC that Mrs. James identified several stl'ulnups, not just Tl'uqtinus. She identified middens at Montague Harbor as a stl'ulnup, and, as previously noted, stl'ulnups off of Penelakut Island and on Salt Spring Island. She did not say that Tl'uqtinus was the only stl'ulnup of the Quw'utsun.

[671] Also, her testimony about the lemuxutun being a lookout and protecting the Quw'utsun territory was specific to the Gulf Islands, not the Fraser River.

[672] Musqueam submits Mrs. James' evidence about tending the lands of a stl'ulnup so it would not get overgrown is of limited probative value because it is not specific to the Fraser River. She did not give evidence of the Lands of Tl'uqtinus being tended by anyone. She provided evidence of traditional techniques for attending land generally. For example, her evidence of her father's practice of burning related specifically to Galiano Island and not Tl'uqtinus.

[673] While this evidence is not specific to Tl'uqtinus, it invites the Court to draw an inference that the conservation and cultivation practices of the Quw'utsun

mustimuhw were employed in all of their stl'ulnups. I am mindful of the caution against drawing inferences from facts that are not established. An inference that does not flow logically and reasonably from established facts cannot be made, and is condemned as conjecture and speculation: *R. v. Morrissey*, 97 C.C.C. (3d) 193 at 209, 1995 CanLII 3498 (Ont. C.A.) [*Morrissey*].

[674] The facts in evidence are that Tl'uqtinus was sacred Quw'utsun land. The Quw'utsun practised conservation and cultivation so that, generally speaking, their lands would not get overgrown. The Cowichan went to Tl'uqtinus to harvest food, including berries. It makes logical sense to me that the Quw'utsun would tend to this land in a way that they traditionally did with other land in their territory. I come back to this point later.

[675] Mrs. James testified about bighouses at Tl'uqtinus, but she would not offer specific history about which family occupied them. The lack of detail about the occupants does not undermine her evidence that there were bighouses at Tl'uqtinus.

[676] Musqueam challenges Mrs. James' translation of the word Shnuwiilh. In cross-examination, Mrs. James testified that the word "shnuwilh" was not the same as Shnuwiilh. I accept the evidence of Mrs. James who is a fluent Hul'qumi'num speaker.

[677] I rely on the following oral history and direct evidence from Mrs. James:

i. The Quw'utsun had ancient grounds on the Fraser River and it was part of their homeland where there were bighouses. It was a stl'ulnup. The stl'ulnup dated back thousands of years in Quw'utsun history;

ii. The Quw'utsun had a stl'ulnup on the Fraser River at Tl'uqtinus;

iii. Mrs. James went to Tl'uqtinus as a child;

iv. She picked berries at the Fraser River;

v. The root word tl’uq in Tl'uqtinus means ‘long’ to describe the shape of the land;

vi. Shnuwiilh refers to the inner part of an opening on land and ocean;

vii. The Quw’utsun had other stl'ulnup;

viii. In ancient times, the fish in the Fraser River were very abundant;

ix. Mrs. James’ great-great-grandfather fished for salmon on the Fraser River. Her grandfather fished for sturgeon at Shnuwiilh. Her ancestors brought clams to Shnuwiilh;

x. In recent times, Mrs. James travelled to Tl'uqtinus and directed the boat driven by Councillor Thomas to the location without using a map;

xi. The location had different-coloured square boxcars stacked on top of each other. I find that she was referring to the land across from Tilbury Island currently used for storage containers;

xii. The Quw’utsun had warriors called the lemuxutun who protected the Quw’utsun territory; and

xiii. The Quw’utsun practised conservation and cultivation wherever they lived.

b) Luschiim (Arvid Patrick Charlie)

[678] While growing up, Luschiim learned from his late uncle, Wutth’iinthut (Abraham Casper Joe), and from Hwulqwimut (Alphonse George) that Shnuwiilh was a place on the lower Fraser River, and Tl'uqtinus was a Quw’utsun village there.

[679] He was taught that the root of the word Tl'uqtinus is like a long chest or long beach. He explained that, at Tl'uqtinus, when you stand on the beach and look out to the Fraser River, the sta'lo, you can look a long ways up and a long ways down.

[680] Luschiim described Tl'uqtinus as being on the south arm on the main channel of the Fraser River, on an island that had a slow curve to its shoreline.

[681] Luschiim was taught by Hwulqwimut that Shnuwiilh was a place on the Fraser River where the river splits in two. On a person, the area between the legs is the shhwiil'ulh. The river splits in two, making an island; the island is in between the legs of the Fraser River at the north arm and south arm. Shnuwiilh is located on the other side of Sutl'qa'lus (Georgia Strait), the open water outside of the Gulf Islands.

[682] Luschiim drew a polygon in red on a chart indicating the location of Tl'uqtinus on the south arm, main channel of the Fraser River at Lulu Island, on the bend in the River across from Tilbury Island. He also drew a polygon in blue on the same chart indicating the wider area that was Shnuwiilh.

[683] Luschiim testified that Tl'uqtinus was a Quw’utsun stl'ulnup, which is a place where they are embedded. He said “we have our shhwa'mut there”, which is where your house is within the stl'ulnup. Tl'uqtinus is a very important place.

[684] When asked how the Quw’utsun travelled to Tl'uqtinus, Luschiim first explained how the Quw’utsun gathered food for the trip:

> ... it didn't happen in one or two days, so you prepared to go. So you went to harvest some food at different places, including Hwune'nuts. The first one we're going to mention is where you harvest some of the food such as clams. Hwune'nuts is Fulford Harbour. Si'yahwt or Si'yahwt, same one, is Ganges. Stastsa'tx is Long Harbour, part of Ganges Harbour. Hw'e'us-hwum, that's Prevost Island. These were preparation places where you went to get your food, 'aluxut your food, kwunlhnenum and then going. Then preserve it, dry it. Then you start to go to — closer to your jump-off points, meaning where you are going to go across Sutl'qa'lus from. One of those gathering places is Sum'nuw', Montague Harbour. Those weren't the only places. You harvest in many places. That's the main ones that my family talked about.
>
> Then you go off to what I'm calling the jump-off points, the last place of gathering before you go across Sutl'qa'lus, the open water. One of the ones that was mentioned the most was Tl'uqtuqsun. Tl'uqtuqsun is the East Point. It's the jump-off point for Tumbo Island, and I believe it's called Cabbage Island. And also Active Pass. If you're coming through Active Pass and you're facing Tsawwassen, the jump-off point was on the left. Some nice beaches there. Then you crossed as a group. Group or groups.

[685] The food was for the travellers and for the families that stayed at Tl'uqtinus all year round, so the Quw’utsun would bring dried clams, which were also used for trade. He learned this from his mother, Tth’ulxwimiye’; his father, Hwiinumetse’; his grandmother, Kwul-kwal-lhamaat; and his great-grandfather, Luschiim.

[686] The Quw’utsun travelled in canoes rafted together (ta'la'quum), and they brought their wide cedar boards (siil'tuhw) to use for dwellings or smokehouses at Tl'uqtinus. The rafting together of canoes like a catamaran made the canoes more stable and they could carry more cargo. The cedar boards could be wide or narrow, and some of them were cupped to keep the rain out.

[687] Luschiim testified that some of the dwellings stayed permanently at Tl'uqtinus. Some they took down when they left and brought them back home. Regarding the permanent dwellings or smokehouses at Tl'uqtinus, the main posts (qe'qun) were permanently in the ground, with a post and beam structure in the skeletal form. The boards and reed mats were used for the walls. Luschiim learned of this practice from Luschiim (Sr.), Tth’ulxwimiye, Kwul-kwal-lhamaat, and Hwiinumetse’.

[688] Luschiim also spoke to the importance of Tl'uqtinus:

> So at Tl'uqtinus, at Shnuwiilh, [Hul'qumi'num spoken]. Tl'uqtinus is very important to us. It's where we lived. It's our home. That's where we harvested many things. That's a place where the broader Quw'utsun lived together. It's very important to be able to live there again, live there again like we used to, to harvest our resources again like we used to.
>
> When I look back — when I have looked back at my own life and I think about how Elders shared knowledge with me, sitting on the banks, just on a bank, Tl'uqtinus, we'd be able to — not only me but other Elders, we'd be able to share knowledge with our family, the young ones and other people.

[689] They travelled to the Fraser River to harvest resources, including thuqi' (sockeye), haan (pink salmon), qwtaythun (sturgeon), ma'uqw (waterfowl), maal'sum (blueberries), qwum'tsal's (bog cranberries), stth'e'qun (cattails), and wool' (tule).

[690] The Quw’utsun harvested salmon for immediate use and preserved much of it for later use. They smoked the fish by the hundreds; some families would harvest thousands. They would clean fish mainly in front of the village.

[691] The Quw’utsun practised seasonal burning to provide fertilization and to control unwanted vegetation. It caused the shoots of new vegetation to come up. This practice was used on Vancouver Island, the Gulf Islands, and at Tl'uqtinus. Luschiim learned from Siseyutth’e’ that the Quw’utsun burned the maal’sum patches at Tl'uqtinus and Shnuwiilh. It was done at their stl'ulnup, the place where they looked after and managed the lands and harvested things.

[692] Luschiim described Tl'uqtinus as follows:

> ... that stl'ulnup, that shhwa'mut, Tl'uqtinus, is a very important place where we went to harvest things, whatever it may be, the s-tseelhtun [fish], the berries. It was a very good place ... Besides a good place to harvest, we lived there ...That's what shhwa'mut and stl'ulnup is all about. You live there. Since there's a very important place, it's a place we lived at and defended together. We lived there together, the Quw'utsun people.

[693] Apart from submitting that Luschiim did not say specifically where the Cowichan village was, and the polygon he drew was larger than the Claim Area, Canada does not critique the evidence of Luschiim.

[694] BC acknowledges the richness of Luschiim’s testimony, but notes it is undated. BC submits the testimony does not allow the Court to pinpoint the plaintiffs’ ancestors’ activity on the south arm of the Fraser River at the date of contact or sovereignty. The bulk of the evidence concerns resource harvesting on Vancouver Island and the Gulf Islands, and some at Shnuwiilh, which covers most of Lulu Island, including Steveston. BC notes that he refers to Tl'uqtinus as “one of our Quw’utsun villages”, and he frequently referred to the winter village on the Gulf Islands as “home”.

[695] Richmond raises a concern about Luschiim’s understanding of the Cowichan village site at Tl'uqtinus being based on a story that was told about a meeting between a Musqueam Elder, Mr. Point, and Luschiim’s great-grandfather, Qwul-thiimuluq, and his uncle, Wutth’iinthut (Abraham Casper Joe), at Steveston in the 1940s. This event took place when Luschiim was an infant being carried by his uncle. Mr. Point and Luschiim’s great-grandfather spoke. Luschiim does not have

any memory of this event, but the story was told to him by Wutth'iinthut. Musqueam makes the same submission, and urges the Court to place little weight on the story.

[696] Musqueam submits that, although Luschiim identified Tl'uqtinus as a geographic feature on the landscape, he was not taught and did not question the Elders about its boundary. He did not know the locations of the places where the people had their bighouses. His evidence was temporally open-ended.

[697] I do not accept that submission. Luschiim was asked what time period he spoke of when testifying about the Quw'utsun people. He said: "So the time period is from long before contact to early contact and at least up to the time that the reserves were being made".

[698] Musqueam submits Luschiim's evidence should not be given much weight because, for example, he said he learned most of what he knows from his great-grandfather and namesake, who died when he was four years old.

[699] Canada submits Luschiim did not specify where the village was, and the polygon he drew was larger than the Claim Area. This polygon refers to Shnuwiilh (not Tl'uqtinus). I accept that Luschiim's description did not pinpoint the location of the village itself, but he did provide a general description of its location.

[700] I also accept BC's submission that the bulk of Luschiim's evidence concerns resource harvesting on Vancouver Island, the Gulf Islands, and some at Shnuwiilh, which BC says includes Steveston. Luschiim never spoke of harvesting at Steveston, but he did speak of harvesting at Shnuwiilh, and his polygon of Shnuwiilh does include Steveston and Tsawwassen.

[701] I do not accept Richmond's critique that Luschiim came to understand that his ancestors exclusively occupied the village at Tl'uqtinus based on the story about a meeting between Mr. Point and Luschiim's great-grandfather in the 1940s. He cited many sources for his knowledge of the location of Tl'uqtinus. The oral history about this meeting is not probative of the Cowichan having exclusively occupied Tl'uqtinus. While I accept the accuracy of the oral history told to Luschiim by Abraham Casper

Joe, I cannot see how this could be time-dated to 1846, nor do I think that this story necessarily supports that the Cowichan exclusively occupied Tl'uqtinus.

[702] Luschiim did confirm in cross-examination the kinship ties between the Quw'utsun and Musqueam stretch back to pre-contact times. It could be that Mr. Point was acknowledging kinship ties.

[703] Luschiim did not question his Elders about the boundary of Tl'uqtinus, and admitted he did not know the location of where the bighouses were. He gave no evidence of births, deaths, or notable events at Tl'uqtinus.

[704] I agree it is hard to understand how Luschiim could have such clear memories of lessons he learned from his great-grandfather, who died when he was only four years old. However, it is quite likely that Luschiim (Sr.)'s daughter, Kwul-kwal-lhamaat, repeated these lessons to him. The lessons that he learned from Luschiim (Sr.) were about the forest, trees, uses of running sap on tree bark for food, and language. Luschiim cited many other sources for his oral history knowledge.

[705] Luschiim is a very knowledgeable Elder who holds oral history about Tl'uqtinus being a stl'ulnup on the lower Fraser River. I accept the following evidence as reliable:

i. There was a Quw'utsun village at Shnuwiilh;

ii. Tl'uqtinus was on the south arm and main channel of the Fraser River on an island whose shoreline had a slow curve to it;

iii. The shoreline at Tl'uqtinus was like a long chest or long beach. When one stood on the beach looking out to the Fraser River, one could look a long ways up and down;

iv. He did not specify that Tl'uqtinus was across from Tilbury Island, but he was able to draw a polygon around an area on a map marked as an exhibit in the trial. The polygon he drew was across from Tilbury Island;

v. Shnuwiilh is a place where the river splits in two, making an island. The island is between the legs of the Fraser River's north and south arm. Shnuwiilh is located on the other side of Sutl'qa'lus (Georgia Strait). I interpret this as referring to Lulu Island. I base my conclusion on his oral history and on his recollection of the location of Tl'uqtinus and his drawings on the aforementioned exhibit;

vi. Tl'uqtinus is a stl'ulnup, a very important place where the Quw'utsun are embedded;

vii. Tl'uqtinus was a place where the Quw'utsun would harvest berries;

viii. The Quw'utsun had their shhwa'mut (where your house is) at Tl'uqtinus; they travelled there together;

ix. His testimony about the Quw'utsun stl'ulnup at Tl'uqtinus extends during the time frame long before contact, to early contact, and at least up until the time reserves were being made; and

x. The Quw'utsun were an Indigenous people that have been here since time immemorial. At Tl'uqtinus, they harvested, lived, and defended their territory together.

c) Councillor Thomas (Sum'qiinum)

[706] Councillor Thomas from Penelakut Tribes testified that, when he was about 10 years old, his grandfather (Ben Thomas) taught him that the people of the Penelakut, Halalt, Lyackson, and Stz'uminus bands, along with the Cowichan River families, together had a village on the Fraser River. He could not name it. They travelled there by canoe. His grandfather told the following story over and over:

> ... we all got together and travelled ... across the water there to the Fraser River to go fishing and go be with the families ... we all travelled across to do some fishing and visiting or ... barter and trading, things like that. Our families up there and up and beyond the village site of Tl'uqtinus. They went way up to trade for wool, those little dogs that provide wool and things like that, and sheep wool. You know, we bartered and traded all along up there.

[707] Councillor Thomas' grandfather told him that his Hul'qumi'num name came from his great-great-great-grandmother on his father's side, Ts'ulsiah, who had a bighouse at the village of Tl'uqtinus.

[708] Shortly before Elder Roy Edwards passed away in or around 2015 or 2016, he shared a story with Councillor Thomas' uncle Mel about where Ts'ulsiah lived. It was one of the first bighouses in the line of bighouses as one was going up the river.

[709] Councillor Thomas' grandfather, Ben Thomas, taught him that his people travelled to the Fraser River to fish and harvest other foods along the river. There was an abundance of salmon, eulachon, sturgeon, and waterfowl, such as ducks and geese. It was near the estuary. There were a number of foods there. He talked about bartering, and his people would bring clams over.

[710] His grandfather shared these stories repeatedly over the years, primarily in the wintertime when everyone was in the house.

[711] Councillor Thomas recalled his great uncle, Dominic Thomas (his grandfather Ben Thomas' brother), sharing stories about travelling together, visiting, harvesting fish, and the big village on the Fraser River where they had family. Some lived there and some travelled there. Councillor Thomas was older when Dominic started talking about the stories. He guessed he was between 13 and 16 years old.

[712] Councillor Thomas was taught that his people had warriors stationed on either side, one on the south arm of the Fraser on the north (Lulu Island) side, and one on Canoe Pass. This was for security; they controlled who went in and out of the area. He heard the story through Sharon Cross and Mrs. James. Councillor Thomas identified Sharon Cross as Mrs. James' niece and a source of the oral history taught to him. He included Sharon Cross in the group of people within his community who are respected, knowledgeable, and trustworthy; he affirmed that he trusts the accuracy of what he was taught by each of those people.

[713] I note that when she testified, Mrs. James did not say that the warriors were on the Fraser River.

[714] Councillor Thomas was taught the story by August Sylvester that, one day, the warriors in Tl'uqtinus got together and went to the Musqueam village. They killed the chief and took his head.

[715] His grandfather taught him a story of pre-contact Cowichan warriors. His people were around Bonsall Creek at Tsussie. People from the north (the Haida) came to raid their village, so they gathered family from the Cowichan River, surrounded the warriors, and massacred them. They put their heads on sticks around the front of Tsussie to warn any others that this could happen to them.

[716] Although the following is not oral history evidence, I deal with it now for convenience. Councillor Thomas drove the band troll boat to the Fraser River to look at Tl'uqtinus with Ruth Sauder, former band administrator, and Mrs. James. They travelled from Penelakut Island, proceeding across the Strait and up the south arm in late September or early October. They travelled through Porlier Pass, straight across to the south arm. Mrs. James reminisced about where she played when she was young or where the cannery was, and where they tied up when they fished. She looked up and said “stop, stop; back up; the site’s right here, back here”. He said it looked like an industrial site, with big steel storage containers stacked up on it.

[717] Canada submits Councillor Thomas’ testimony about his understanding of the location of Tl'uqtinus is based on his own experience, and not oral history. I agree.

[718] Richmond submits the oral history evidence of Councillor Thomas does not bear the indicia of reliability, except for the stories he was told by Ben and Dominic Thomas. The remainder was communicated to him after this litigation commenced.

[719] Richmond submits the story of cutting the Musqueam chief’s head off was told to Councillor Thomas recently (since this litigation commenced) and for that reason, the Court should place little weight on this evidence. At his examination for discovery, Councillor Thomas did not know why the Cowichan warriors would have done this, but at trial, he said it was to prove dominance.

[720] At his examination for discovery, Councillor Thomas referred to Ts'ulsiah as his great-great-great-great-grandmother. At trial, Councillor Thomas referred to her as his great-great-grandmother. He testified that, after his discovery, he had a brief conversation with his auntie Florence, who told him it was three 'greats'.

[721] Musqueam says Councillor Thomas' evidence should be disregarded. In his examination in chief, he testified that his grandfather Ben and his grand uncle Dominic taught him that the Quw'utsun had a village on the Fraser River at Tl'uqtinus. Under cross-examination, he could not remember whether Ben or Dominic ever named Tl'uqtinus. He had no recollection of being given specific landmarks as to the location of the Quw'utsun village on the Fraser River. Rather, Ben and Dominic just said that "we travelled to the Fraser River", and pointed east.

[722] Mr. Edwards told Councillor Thomas that the Quw'utsun had a village site at Tl'uqtinus. Councillor Thomas testified that Mr. Edwards talked quite a bit about the village site one time, and talked about the big area where there were a lot of people and there were bighouses all along the shore there. He talked about how they caught fish. Musqueam submits this is too generic to be probative.

[723] Musqueam submits Councillor Thomas was told about Ts'ulsiah by Melvin Benedict Thomas. Mel Thomas was alive during the trial and could have testified directly; there is no explanation for why he did not. In my view, Musqueam is asking me to draw an adverse inference from the failure of Mel Thomas to testify. I am not bound to do so, particularly since the witness would have been equally available to both parties: *Thomasson v. Moeller*, 2016 BCCA 14 at paras. 34–35.

[724] I find the evidence about Councillor Thomas' great-great-great-grandmother, Ts'ulsiah, having a bighouse at Tl'uqtinus is reliable but not time dated. Although it may have been recently told to his uncle Mel, who passed it on to Councillor Thomas, this is not the first time that Councillor Thomas heard about Ts'ulsiah having a bighouse at Tl'uqtinus. Councillor Thomas testified that his grandfather talked about his great-great-great-grandmother Ts'ulsiah living in a bighouse at the Tl'uqtinus village.

[725] Councillor Thomas could not remember how many “greats” should be placed before his great-great-great-grandmother Ts’ulsiah’s name. This was inconsistent between his examination for discovery and trial. The aforementioned conversation with his auntie Florence (Florence Elliott) explains this change.

[726] Mr. Edwards was a source of oral history to Councillor Thomas. Councillor Thomas described him as being a very knowledgeable person who carried quite a bit of history and teachings. Mr. Edwards told Councillor Thomas about the village site of Tl'uqtinus and fishing areas around it. I agree that some of this evidence is generic and does not pinpoint a site for the village.

[727] Councillor Thomas was candid about the fact that he is still trying to learn his family history. He spoke quite eloquently about the ripple effect of residential school, and the fact that his father and grandfather were reluctant to pass on history.

[728] He did not know when Ts’ulsiah was born, when she died, who she married, where her parents came from, or how she came to be living at Tl'uqtinus. This does not mean that she did not live in a bighouse at the village, but what is lacking is evidence of how she got there and when she lived there.

[729] I accept as reliable the evidence of Councillor Thomas regarding the oral history sourced from Ben Thomas, Dominic Thomas, and Mr. Edwards that:

i. The people of Penelakut, Halalt, Lyackson, and Stz'uminus, along with the Cowichan River families had a village site on the Fraser River;

ii. They all travelled there by canoe across the water to the Fraser River to go fishing and to be with the families;

iii. They travelled to the Fraser River to fish, visit, barter, and trade there and up beyond the village of Tl'uqtinus;

iv. They traded for sheep wool;

v. They had bighouses all along the shore; and

vi. Councillor Thomas' great-great-great-grandmother, Ts'ulsiah, had a bighouse at the village of Tl'uqtinus.

d) X'tli'li'ye (Lydia Hwitsum)

[730] X'tli'li'ye (Lydia Hwitsum) learned from her mother, Amelia Bob, who was born in 1924 and raised in Quamichan, that the Quw'utsun had a village on the mainland. Her mother learned this from her own mother. Amelia Bob taught her that the Quw'utsun village was lined up with the Gulf Islands, and that it was accessed by canoes through the mouth of the Fraser River across the Georgia Strait. The Quw'utsun mustimuhw travelled to the village by canoe, going first through the Gulf Islands. There were big canoes next to each other and huge cedar planks between them creating a platform, which they would use to load supplies back and forth from the big village to the Gulf Islands and Vancouver Island.

[731] X'tli'li'ye also learned about the big village on the mainland from Abraham Casper Joe and Wilfred Sylvester.

[732] The Quw'utsun used large baskets to transport fish back to the Gulf Island and Vancouver Island villages. They made baskets of different sizes to measure how much food they needed. In the house where X'tli'li'ye grew up, there was a collection of baskets in a back room from her mother's mother and grandmother. These ranged in size, from a bowl to ones that were so large it was hard to get your arms around them, maybe four or five feet in diameter and three feet deep.

[733] Amelia Bob told her that they brought fish and berries back from the Fraser River.

[734] X'tli'li'ye's oral history sources did not tell her about the specific geographic location of the place they described as a big village on the mainland. They talked about how they would follow through the Gulf Islands to get to the river.

[735] X'tli'li'ye did not remember the name of the village, but remembered her mother breaking down the word and it having some reference to the shape of the

land. She did recall the old people talking to her in Hul'qumi'num, but could not remember the first time she heard the word Tl'uqtinus.

[736] Richmond submits little weight should be given to X'tli'li'ye's evidence because she was asked leading questions. I agree that some of the questions were leading to orient her to the topic, but I do not find this negates the value of the answer. I agree that her evidence did not provide a specific location for the village.

[737] I accept as reliable the evidence of X'tli'li'ye, learned from her mother, Amelia Bob, that:

i. There was a Quw'utsun village located on the mainland directly across from the Gulf Islands toward what is now known as the Fraser River;

ii. The Quw'utsun accessed the village by canoe across the Georgia Strait to the mouth of the Fraser River;

iii. The Quw'utsun used cedar planks laid across the canoes to create a platform on which they loaded their supplies; and

iv. The Quw'utsun transported fish and berries back to the village on Vancouver Island in woven baskets of varying sizes.

e) Qwestenuxun (Ernest Wesley Modeste)

[738] The late Qwestenuxun affirmed in a 2007 affidavit admitted at trial that his father, Suhiltan (Elwood Modeste), often reflected on Cowichan village sites on the Fraser River. To get there, their people would gather at Cowichan Gap (Porlier Pass), between the Gulf Islands now named Valdes and Galiano, or at the waters now named Active Pass, between Galiano and Mayne Island. They would wait for the right conditions to go across the Georgia Strait in their large canoes. The crossing was invariably done *en masse* for safety reasons, as war parties sometimes travelled the Georgia Strait. The people would tow rafts with cedar planks for their houses on the lower Fraser. On arrival, the cedar planks would be reassembled on the house frames that remained permanently at their villages there.

[739] He talked about the growing of camas on Salt Spring Island, the burning of grasses to stimulate camas growth, and the trading of camas and clams with tribes from the Fraser Valley for mountain goat wool (which represented wealth) and obsidian rocks, which the Cowichan used for knives and carving, etc. Families baled mountain goat wool to bring back across the Georgia Strait. Women spun the yarn and wove blankets that were used in bighouse ceremonies, and that were given as gifts to guests at the Potlatch.

[740] Qwestenuxun deposed that the Cowichan Tribes also harvested clams from principal places like Fulford Harbour and Ganges Harbour on Salt Spring Island. He talked about how clams were harvested, cooked, and dehydrated in the sun. Clam beds were exploited for commercial purposes as well. They strung the dried clams with cedar bark ribbons and placed them into baskets, along with their camas, that they had made to fit the inner hull of large canoes, which his ancestors used across the Georgia Strait to the Fraser River. That was mainly where they would trade.

[741] Qwestenuxun described harvesting on the Gulf Islands and the abundance of fish, shellfish, deer, grouse, seal, and migrating birds such as ducks.

[742] Qwestenuxun's father taught him how each Indigenous group controlled its own territory where it kept dwellings and regularly harvested its resource grounds. Each group willingly shared some of its territory's resources with other groups of the region, as long as they remained on good terms. In this way, they strengthened their alliances so they could rely upon each other in times of need. The neighbouring groups would invite their villages to attend winter ceremonies. The visiting group would sing a village paddle song to identify themselves to the host.

[743] When an invading party from the north was spotted by the Nanaimo but assessed to be too large to combat, the Nanaimo sent a runner down the east coast of Vancouver Island to give notice to the Quamichan near Cowichan Bay. The Quamichan sent runners to other Cowichan Tribes. The warriors from different villages gathered. Invaders were lured, attacked, and killed near Maple Bay.

[744] Qwestenuxun's father often reflected on the Cowichan Tribes village sites on the Fraser River. At the Fraser River, his ancestors harvested blueberries in late summer, dried them, and brought them back in large quantities. They harvested cattails to make down cushions, and mats for mattresses on the ground. Mats were placed over wood frames for shelter when camping.

[745] Suhiltan told Qwestenuxun about a series of meetings conducted by hereditary Chiefs of Salish peoples when he was very young. They sent leaders to see the King of England. Silpaymult, hereditary Chief of the Khenipsen, was the delegate for the Cowichan Tribes. There were also representatives of the Squamish, Bonaparte, and Katzie. They had an audience with the King, and delivered a petition regarding the presence of colonists within their traditional lands where treaties had never been established. Qwestenuxun located a copy of the petition.

[746] Canada submits Qwestenuxun did not provide any specific information about the timeframe his ancestors resided in plank houses at their village on the mainland. I accept Canada's submission.

[747] I accept as reliable the following evidence of Qwestenuxun:

i. The Quw'utsun gathered at Cowichan Gap (Porlier Pass) or Active Pass, and waited for the right conditions to travel across the Strait to the Fraser River;

ii. They travelled *en masse* for safety;

iii. They towed rafts with cedar planks;

iv. They used the cedar planks for their houses on the lower Fraser River;

v. The house frames remained permanently at their villages on the Fraser River;

vi. They traded camas and clams for wool and obsidian rocks at the Fraser River;

vii. The practice of burning maximized the quantity of camas in their camas fields on Salt Spring Island and was a cultivation tool;

viii. Each Indigenous group controlled its own territory and would share resources;

ix. Warriors from the Nanaimo, Quamichan, and other Cowichan Tribes banded together, lured an invading party from the north, and killed them near Maple Bay;

x. While the Cowichan Tribes were at the Fraser River, they harvested blueberries and cattails; and

xi. Hereditary Chiefs of Salish peoples, including the Chief of the Khenipsen, delivered a petition to the King of England to protest colonists occupying their traditional lands.

f) John Elliott (Thòlmen/Shukx'shukx'wu'lukx)

[748] John Elliott learned from Willie Seymour that his people had a village site on the Fraser River at Tl'uqtinus. He was taught that the Stz'uminus travelled with the Cowichan and Penelakut to fish in the south arm or at Point Roberts.

[749] As I mentioned earlier, Mr. Elliott admitted during his testimony that he had trouble remembering what Mr. Seymour told him because Mr. Seymour spoke mostly in Hul'qumi'num, so there was a language barrier.

[750] I find his oral history limited but what he did remember was reliable.

g) Sulipt’un (Norbert Sylvester)

[751] Sulipt’un testified he was told that his ancestors had been going to Tl'uqtinus since time immemorial. He did not explain what this understanding was based on. His ancestors would travel across to the Fraser River with two canoes tied together carrying wood planks that would be used for housing at Tl'uqtinus. Before the

sockeye season started, people gathered food there, including fish, cranberries, wild raspberries, blueberries, and material to make baskets.

[752] He believed all the villages travelled to the Fraser River, namely Cowichan, Halalt, Penelakut, Stz'uminus, and Lyackson.

[753] He described, in detail, the splitting of planks to be used for their houses at Tl'uqtinus. This was very time consuming. They used wooden wedges and weights to pull down and split the planks while the tree was still standing.

[754] They used to wait for a favourable tide to cross over into the Fraser River because that made paddling a lot easier. They waited at the Porlier Pass area and Bennett Point on Mayne Island.

[755] Sulipt'un testified that his oral history teachings were interrupted by residential school, as was his ability to speak Hul'qumi'num, but that he does hold some oral history, which he has learned from a variety of sources. I accept the following evidence as reliable:

i. The Cowichan, Halalt, Penelakut, Stz'uminus, and Lyackson travelled to the Fraser River together;

ii. They lashed two canoes together to go across to the Fraser River and carried planks across, which they used for their houses at Tl'uqtinus;

iii. The planks were very expensive in sweat equity because it took so long to split them;

iv. They travelled together because, in the old days, these communities were closer knit;

v. The Fraser River was once his people's grocery store;

vi. Before the sockeye season started, some of his people travelled to the Fraser River in the winter or fall to hunt duck, using nets in the marshy

area. He learned this from Luschiim's father, Angus Smith, and his grandfather;

vii. They would gather cranberries, wild raspberries, and blueberries, and harvested what they used to make baskets and mats at Tl'uqtinus; and

viii. They used to wait for a favourable tide to cross over into the Fraser River. They would wait for the incoming tide to cross over there because that made paddling a lot easier. They waited at the Porlier Pass area and Bennett Point on Mayne Island.

2. Written Historical Record

[756] The plaintiffs submit the written historical record between 1824 and 1859 confirms that the Quw'utsun physically occupied the Lands of Tl'uqtinus with a permanent village of bighouses. A significant issue raised by the defendants is the fact that the historical record does not make note of seeing the Cowichan in residence at the village. The question then arises as to whether the village needed to have been occupied, or whether it is sufficient that the land was occupied by a village. I find the plaintiffs must establish that the Cowichan used and occupied the Village Lands at 1846.

a) 1824 HBC Observation

[757] Drs. Brealey, Kennedy, Turner, and Lovisek, and Mr. Eldridge and Mr. Layland, all agree that Annance and Work observed and encamped at the Cowichan village at Tl'uqtinus on December 19, 1824.

[758] Annance commented that the village was deserted, which is not unexpected since it was December.

[759] As previously noted, the McMillan expedition proceeded to the mouth of the Fraser River and came upon a canoe with six Cowichan. The reason for their appearance has not been established. They could have been there with long spears for sturgeon, hunting, or, as Dr. Lovisek agreed, they might have been a war party.

[760] As noted above, neither Work nor Annance connected the village to the Cowichan. There is no evidence that the Indigenous people noted by Annance as fishing in the small rivers were Cowichan.

[761] Work and Annance did not provide the exact location of the village that they stayed at. Based on Annance's journal and as previously noted, it was apparently located downriver from where the HBC trees were marked.

[762] We know from the sketch drawn by Aemilius Simpson in 1827 that the HBC trees were on the south shore of the Fraser River across from the middle of Annacis Island, and that the villages were downstream from that.

[763] On December 19, 1824, Work described the place where they camped as not far from the entrance of the river. The next day, they continued their course downriver. Mr. Layland agreed that Work would most likely have been estimating measurements in statute miles. Work likely would have been using a compass. If Work's estimate of the distance was accurate at 11 miles to the Fraser River, then the village seen would not have been in the Claim Area. However, Mr. Layland qualified that estimating distance from a canoe is extremely difficult. I accept that the estimates of distances from a canoe may not have been accurate.

[764] TFN submits the historical record from 1824 does not support the plaintiffs' claim of a permanently *occupied* village. The best explanation is that the village was abandoned by its former occupants because of smallpox. I find that this submission ignores and is inconsistent with the oral history that I review above.

[765] I accept Dr. Brealey's opinion, based on Work and Annance's observations and subsequent cartographic and documentary authorities, that this was the Cowichan village. I reviewed the subsequent historical records, which leads me to conclude that the "terrible large village" was the Cowichan village. I conclude it was not occupied on December 19, 1824.

b) 1825 McKenzie Expedition

[766] I discussed this expedition in some detail in the section on the proper rights and title holder. In sum, McKenzie was informed that the men he observed on the river were Cowichan, they were also visited by 70 people of the Cowichan tribe, and there was some discussion about visiting their Chief, Shashia, at his village. I infer from this entry that Shashia was residing at the village at that time.

[767] The *William and Ann* had to depart unexpectedly and return to the Columbia River. They did not therefore visit the Cowichan village. Scouler and McKenzie did not travel up the Fraser River, and did not personally observe the Cowichan village to which they referred. They could provide no information about the village.

[768] I dealt with the submission that the McMillan expedition the previous year was not on the Fraser River. I found that it was.

[769] I accept Dr. Lovisek's opinion that the village reference by McKenzie was likely the Cowichan village on the south arm at the place the plaintiffs call the Lands of Tl'uqtinus. This is an inference. The entry supports the conclusion that the Cowichan did not reside on the river year-round, but were there for salmon season and then returned to Vancouver Island for the winter.

c) 1827 Simpson Expedition Aboard the Cadborough

[770] I discussed this expedition in some detail in Part 5A. Simpson and Barnston recorded on July 15, 1827 that Shashia came on board their vessel. Shashia came back the next day and slept upon the deck. There is no record of his going ashore; it appears that he slept on board and while they sailed up the south arm. Barnston recorded his first sighting of the Cowichan villages on July 23, 1827; he noted the three villages of Saumause, Pinellahutz and Quomitzen, which I quoted in Part 5A.

[771] They anchored about a mile above the villages. Barnston guessed that the population of the Cowichan villages was roughly 1,500 souls. He contrasted the Nanaimo village houses with those of the Cowichan village.

[772] On July 27, 1827, Barnston noted that “McLeod and Annance and Shashia went off up the river to look for a more eligible site for an Establishment”. The following day, a theft was noted and Shashia went ashore to recover the property.

[773] The 1827 Simpson sketch is of the south arm of the Fraser River, and depicts the Cowichan villages on the south shore of Lulu Island, across from what appears to be Tilbury Island. Barnston recorded the toponym “Cowitchen Villages” and three adjacent clusters of six rectangles along the north bank of the south arm.

[774] Drs. Brealey, Kennedy, Turner, and Lovisek, and Mr. Eldridge and Mr. Layland, all agree that the HBC’s 1827 McMillan expedition directly observed the Cowichan villages on July 23, 1827, at a location later referred to as Tl'uqtinus. I accept those opinions. The chart location of the village is consistent with earlier observations made by the 1824 McMillan expedition.

[775] It is unclear how Barnston arrived at the estimate of 1,500 souls occupying the villages. On cross-examination about Work and Annance’s observations, Dr. Kennedy opined that their population estimate was based on the number of houses. Barnston did not record seeing any Indigenous people in the village at the time.

[776] This expedition is significant — it is the first attribution in the written record of the village on the south arm of the Fraser River to the Cowichan. Barnston estimated the population at 1,500 souls, identified three clusters of houses, and named three Cowichan groups who occupied those houses. Furthermore, the 1827 sketch drawn by Simpson and Barnston establishes a location for the Cowichan villages across from Tilbury Island.

[777] I accept Dr. Lovisek’s opinion that, given the time of year, Barnston would likely have observed the village with wall planks because the Cowichan would have been occupying it in the summer, and fishing or preparing to fish in the area. There is no reference to this village being deserted, or to a skeleton of beams and posts with no walls. Moreover, while comparing the construction of the houses between

the Cowichan and Nanaimo villages in 1827, Barnston did not reference the Cowichan village as being incomplete or without wall boards, or as being deserted.

[778] There is no record of anyone from the expedition visiting the Cowichan villages on land. Simpson or Barnston did not describe any inhabitants, or any activities taking place at the village or the surrounding area at the time. Simpson reported numerous “Indians” about, but did not identify the ethnographic affiliation of those individuals. The Simpson expedition provides confirmation of the Cowichan connection to the village previously observed by Work and Annance.

d) 1827–1830 Fort Langley Journals

[779] HBC Chief Factor James McMillan personally observed the Cowichan village on December 19, 1824, and again on July 23, 1827.

[780] There are numerous references to the Cowichan on the river in all three years of the remaining Fort Langley Journals, which are summarized below. There is no direct observation of the village recorded. The focus of the journals is on activity at and around the Fort. The record keepers do record rumours of activity in the surrounding area. They were not ethnographers collecting data about Indigenous people; they were fur traders building a fort and running a business.

[781] There are a number of references by Barnston and McMillan of Cowichan people passing the Fort on their way to, or returning from, the fishery.

[782] In August 1827, Barnston recorded Cowichan passing the Fort on their way to the rapids to fish and collect winter provisions, and beginning to drop down the river in late September 1827. He noted several Cowichan in canoes laden with fish in October 1827. There is no further mention of the Cowichan until November 6, 1827, where 10 or 12 Cowichan and Musqueam were reported to be at the wharf at the Fort, with eight of them going upriver to fish sturgeon. During the months of November to February, the Cowichan would be residing in their winter villages on the Islands. In light of the Cowichan’s seasonal round, it is likely that the bulk of the

Cowichan had returned to the Islands, and a small fishing party remained at the village to fish sturgeon.

[783] In June 1828, McMillan referred to larger groups of Cowichan and Nanaimo coming to the river to fish salmon as part of their annual seasonal round, confirmed by his July 1828 report that the Cowichan were just arriving from Vancouver Island to fish for about two months. In August 1828, McMillan recorded some Cowichan returning downwards with their family because of scarcity, and also noted that some Cowichan offered dried salmon to trade at the Fort. In September 1828, McMillan observed the "Sinihooms" speaking with the Cowichan, and canoes passing down from the fisheries to their wintering grounds. Also, in September 1828, McMillan made several reports of the Cowichan passing down, and one instance of the Cowichan bringing a sturgeon to the Fort. In terms of the Cowichan passing down, he recorded a total of 59 Cowichan canoes from the 14th to the 20th of September; noted that "345 Canoes of Cowitchens [had] already passed" on the 22nd; recorded that 160 Cowichan canoes had traded salmon on the 23rd; and recorded 60 more Cowichan canoes had passed on the 24th.

[784] In December 1828, McDonald noted the Cowichan would live well for the winter with the camas and salmon they left "*in Cache* last fall". McDonald referenced a Kwantlen man known as the Doctor feeling some security near the mouth of the river because there were a number of Cowichan who came across to fish in the same vicinity. This supports the plaintiffs' assertion that there were small groups of Cowichan on the river in the winter season. In July 1830, the Cowichan were about the mouth of the river, and McDonald recorded that the majority of the Indigenous people there were "on the move towards their fishing place higher up", but he did not identify which groups.

[785] Barnston also noted a variety of Indigenous people proceeding to the fishery above the Fort while transporting luggage between two or more canoes, although these observations are not specific to the Cowichan.

[786] McDonald and McMillan also referred to Cowichan trading. In December 1828, McDonald recorded Cowichan canoes from the Island who traded, and the Cowichan were observed with their canoes loaded with camas, which McDonald believed they procured in abundance on the Island. In April 1829, McMillan reported Shashia arriving from Vancouver Island with skins, and coming to the Fort to trade for a gun and ammunition. In September 1829, McDonald reported that Shashia came to trade before departing “for Winter quarters”. He returned to trade in January 1830, and again in March 1830. Shashia also arrived at the Fort in July 1830 with nothing to trade. There is no surviving journal from July 30 to August 27, 1830.

[787] In cross-examination, Dr. Lovisek agreed that the Cowichan as a collective resided at the village at Tl'uqtinus from June until August, and then travelled up to the canyon.

[788] Shashia’s presence at and around the Fort was also noted in September 1827, October 1827, November 1827, February 1828, December 1828, April 1829, and on the river in July 1829. In July 1829, McDonald reported that a number of principal Cowichan had arrived in the river and encamped opposite the bank of the main river. They advised that Shashia “remained lower down very unwell”. I infer Shashia remained at the village which was “lower down” while unwell.

[789] McMillan and Barnston described a canoe of Cowichan, and a number of parties that included the Cowichan, who had the purpose of avenging deaths, killing, or making war upon other groups in September 1827, October 1827, March 1828, April 1828, and August 1828. The September 1827 entry refers to the Cowichan and Nanaimo retiring to their own homes after being harangued by Shashia and a Tlalam Chief. I infer from this passage that the Cowichan and Nanaimo returned to their own villages. Regarding the October 1827 entry, according to which the Cowichan and Musqueam were going up the river to attack the “Chilcoyooks”, it is likely that the Cowichan were using the village as their home base from which they organized with the Musqueam to launch these attacks. It does not make sense that they would paddle back and forth from their winter village during this time of active warfare. With

respect to the April 1828 report, which involved the Cowichan preparing to go to war against the Clallam of Juan de Fuca Strait, they likely stayed at the village after paddling across from Vancouver Island before heading up to go to war.

[790] McMillan also noted two instances of Shashia preparing attacks on other groups in May 1828. Regarding the instance of a planned attack on the Clallam, it is likely that the Cowichan were at their village. Dr. Kennedy surmised that, at the time of the murder of a Musqueam chief, the Yeukeltas were staying at the Cowichan village to meet with Shashia, who had hired them to assist in attacking the Clallam.

[791] McDonald also recorded the Cowichan camping opposite the Fort while "getting out of the way of the Yeukeltas & Quo-quals who are Coming to attack the Fort" in July 1828.

[792] The plaintiffs submit that McMillan's February 24, 1828 journal entry that "Scanawa and Rabaska went down to the Cowitchen village for a Canoe" was based on his personal observation. There is no description of the village in the entry. There have been many submissions about this passage. I agree that this passage does not place the Cowichan in residence at their village. It is quite possible that the canoe was left near an unoccupied village.

[793] There are several references to the Cowichan village. In April 1828, McMillan recorded that Mr. Manson returned from Fort Vancouver on the *Cadborough*, which he left a reach above the "Cowitchen village". McMillan also reported on June 3, 1828 that "Two Indians from the Cowitchen's Camp told us that Scanawa was killed by relations of the Indian that was drowned here last spring". I interpret this reference to the camp to be the Cowichan village. In July 1828, McDonald noted they left the ship "abreast the Cawaitchin village". In September 1829, McDonald referred to canoes from the Nanaimo and others from "the Cawaitchen Camp" in reference to those groups reconnoitering after a report of the Yewkaltas being around the mouth of the river. The reference to the "Cawaitchen Camp" suggests that the Cowichan were coming from the village.

[794] McDonald's journal notes in September 1830 reference Shashia's camp across from the Fort, that all the great men of the river were assembled there, and that the solemnizing of a marriage took place there. There is no explanation for why the solemnization of the marriage took place in Shashia's camp across from the Fort, rather than at the Cowichan village.

[795] Canada submits the Fort Langley Journals describe the seasonal Cowichan presence on the Fraser River, largely directed toward fishing salmon and sometimes sturgeon. They were reported to arrive late in June or early July, and depart sometime in September or early October. Canada says there was a Cowichan presence on the Fraser River outside these months, but it was sporadic and limited to small numbers of people. There is never a specific reference to the Cowichan residing at the village. Canada adds that Shashia had developed a close relationship with the Fort, which the HBC cultivated for the purpose of encouraging trade. Canada says that, for this reason, Shashia often stayed across from the Fort.

[796] Dr. Kennedy's opinion is that in the first few months of each year, some Cowichan, including Chief Shashia, resided on the Fraser River at least intermittently, staying at their village on Lulu Island. Shashia visited with beaver skins to trade, and presumably stayed at the village for a while.

[797] BC submits the Fort Langley Journals provide a detailed overview of the activities occurring on the Fraser River between 1827 and 1830. In my view, it is more accurate to say that the Fort Langley Journals provide a detailed overview of the activities of the establishment of the Fort and the activities around it. As I said earlier, the HBC officials were not ethnographers. They were not focused on the ways of life of the Indigenous people surrounding the Fort, but on Fort activities and any news or rumours that came to the Fort of Indigenous wars.

[798] I agree with BC's submission that the references to the landmark Cowichan village is not proof of occupation but it is evidence of occupation. When the evidence of Cowichan presence on the Fraser River in the historical written record is considered with the oral history evidence, I find it is likely that the Cowichan stayed

at their village at Tl'uqtinus sporadically throughout the year and more intensely in the summer season, prior to travelling up to the rapids in the canyon to fish in late August and early September. As set out later, the ethnographic evidence also supports this finding.

[799] TFN lists the number of passages in the Fort Langley Journals that reference Indigenous people coming to their village, and notes that there are very few references to the Cowichan village, and no references to Cowichan people coming or going to the village. I find that it is likely that the Cowichan were coming or going from the village.

[800] The lack of reference to comings and goings from the Cowichan village does not mean that it did not happen. I accept Dr. Brealey's caution that one should note the purpose of the historical source before determining what one would expect to see. The Cowichan village is eight miles south of the Fort. Few Europeans ventured into the south arm when the Cowichan as a collective would have been occupying the Lands of Tl'uqtinus. The records that did survive were not made for the purpose of recording the Cowichan presence. The historical record that survived is consistent with the Cowichan oral history of the Cowichan occupying the Lands of Tl'uqtinus with the permanent large village in settlement as part of their manner of life.

[801] There is no reference in the Fort Langley Journals to the Cowichan residing at the village outside of the summer months. That does not mean it did not occur. Luschiim and Councillor Thomas gave evidence that some stayed year-round at the village. There are also references in the written records to Cowichan fishing for sturgeon during non-summer months.

e) 1835 John Work Journal

[802] In September 1835, Work, writing from Fort Langley, noted they met a number of Indigenous people with baggage, going down the river from the fishing ground, who proceeded to cross to Vancouver Island where they generally wintered.

[803] Work recorded that Mr. Yale reported that a number of the Indigenous people who used to resort to the Fraser were going to Nisqually because they were afraid of the “Northern Indians”, which deterred them from coming to the Fraser. This statement refers to trading with Fort Langley but not fishing the Fraser River. As I later set out, the Cowichan continued to fish the south arm of the Fraser River well into the 1870s and through to the early 20th century.

f) 1842–1859 HBC Sailing Vessels and Steamships

[804] The plaintiffs submit that the surviving HBC ship logs for the period between 1842 and 1852 included HBC officers recording direct observations of the Cowichan village at Tl'uqtinus over 16 times while in sailing vessels servicing Fort Langley located upriver. The HBC officers recorded vessel positions contemporaneously as part of their daily duties, and did so relative to the Cowichan settlement. The purpose of the ship logs was not to record activity on the river or who was at the village. The logs include recordings from the *Vancouver* (1842); *Cadborough* (1845, 1847, and 1848–1850); *Mary Dare* (1850); *Otter* (1854); and *Beaver* (1859).

[805] I have reviewed the evidence from the ship logs and the opinions of the expert witnesses with regard to these logs, and accept that they include direct observations of the Cowichan village. I agree with the defendants that the references in the ship logs to the Cowichan village are references to navigational aids but even so, it is confirmation that the village existed and was visible from the water.

3. Maps and Charts

a) General Remarks About Historical Maps

[806] Mr. Layland provided some general observations about historical maps. He explained that these maps should be viewed with caution. They were made when the region was scarcely known to Europeans — including those from the United States — and are not of the technical rigour and precision that would reasonably be expected from a modern, authoritative, topographic map or marine chart. These can nonetheless contain valuable information associated with the situation as observed and/or reported at the time of their production.

[807] In his responding expert report to the report of Dr. Lovisek, Mr. Layland described the collection of cartographic documents he reviewed, including the 1827 sketch and the 1833 manuscript discussed below, as contributing “to the body of knowledge that will be incorporated into the progressively improved cartographic coverage of the area”.

[808] Mr. Layland explained that it is common for a cartographer to acquire, assess, and use the best collection of existing materials available, and so the incorporation of data from other sources was common. When interpreting a map, it is important to know the parameter of intent or purpose of the cartographic document.

[809] Cartographers use symbols and conventional signs to represent objects. An index is usually provided, but not necessarily so in historic charts and maps.

b) 1827 Simpson Sketch

[810] As stated above, the plaintiffs say the 1827 Simpson sketch, created by Simpson and Barnston while on the *Cadborough*, locates the Cowichan villages across from an unnamed island, which appears to be Tilbury Island. The sketch recorded what was observed by Barnston in his journal in 1827, as described above.

[811] BC submits little weight should be placed on the sketch. BC says it was made to be used as a navigational tool and accordingly the focus was not on the land. This is evidenced by site lines drawn toward landmarks. The Cowichan village itself was a navigational aid. It is a rough sketch and it does not include a legend providing interpretation of the symbols. It appears to be compiled by two different hands.

[812] Mr. Layland acknowledged that it is hard to say who drew the 1827 sketch. BC says it is likely a copy because there are errors in the spelling of names, such as McLeod, which shows up as “Machead”, and some of the landmarks identified may not have been assigned names yet. It is likely that the names were added later.

[813] A further sketch was created in July 1833, referred to as the "1833 Manuscript". Mr. Layland's opinion is that the 1833 Manuscript is a copy of the 1827 sketch. I accept that opinion.

[814] The 1827 sketch is a significant document. While it may well be a copy of an earlier sketch, it records (or re-records) the direct observations of Simpson and Barnston in July 1827, as indicated in the Simpson remark book and the Fort Langley Journals.

[815] Regarding the extent of the village along the riverbank, Mr. Layland's evidence is that Barnston used a group of rectangles of some 0.74 miles in extent along the 1827 sketch located directly opposite the unnamed Tilbury Island. I accept Mr. Layland's opinion that these rectangles are a symbolic representation of a collection of dwellings and do not depict individual structures. This is consistent with Work and Annance's 1824 estimate of the village being nearly a mile long. I am satisfied that Work and Annance, and Simpson and Barnston, are referring to the same "terrible large village". There is no record of another village of this size along the south arm of the Fraser River.

[816] The 1833 Manuscript relied on the 1827 sketch. The title block in the 1833 Manuscript says it was "taken on board the Honble Hudsons Bay Company's Schooner Cadbore in July 1827 by Emilius Simpson assisted by Mr. Barnston H.B.C. Service". It also says: "copied from a MS. in the possession of the Hudsons Bay Company July 1833". The spelling of Barnston's name has been corrected. Simpson's first name is still spelled with an 'E' rather than an 'Ae'. Mr. Layland said it is likely that a copy was edited by others, but it depicts the observations made by Barnston and Simpson as updated by some unknown person.

[817] Mr. Layland's opinion, with which I agree, is that when Simpson and Barnston drew 18 rectangles along the south shore of Lulu Island across from Tilbury Island, they were sketching a representation of houses. Work and Annance had suggested there were 54 houses visible from the water but on coming ashore they were found to be so situated that not more than half of them were counted. The 18 rectangles

were symbolic as it would not have been possible for Simpson and Barnston to have represented 108 dwellings at the scale of their drawing.

[818] There is no indication that Simpson and Barnston went on shore to conduct a survey, and it is likely that they made their observation from the schooner *Cadborough*. The dotted line shows the path of the schooner along the river, and so it is apparent that the ship passed the village quite closely.

[819] In cross-examination of Mr. Layland, BC highlighted the inaccuracies of the measurement of some of the distances. Mr. Layland testified that he was not saying that cartographers were poor at estimating distances, but merely that it is difficult to estimate distances from the river.

[820] On the sketch and the manuscript, there are extensive systems of soundings distinct from the schooner track. The soundings were likely obtained by a separate survey party.

[821] Mr. Layland noted that there were differences in the soundings between the 1827 sketch and the 1833 Manuscript. In the 1833 Manuscript, the track of the *Cadborough* indicated by dashed lines was omitted, but the anchorages retained.

[822] I accept Mr. Layland's opinion that it is likely that the sketch was completed once the draftsman arrived at the location chosen for the Fort because there are names included in the sketch that were not known during the voyage. The location of Fort Langley was included in the sketch but had not yet been decided then, so this annotation was added after the fact. Mr. Layland said the observations made by Simpson and Barnston were likely documented in notes and drawings, and used to prepare the sketch as they travelled up the river. It was likely completed at the Fort.

[823] I accept the evidence that there are inaccuracies in the sketch, which is understandable given that it was drawn from a schooner in 1827 when no prior maps existed. However, I find the 1827 sketch was based on the direct observations of Simpson and Barnston, who witnessed the village along the south shore of Lulu Island across from Tilbury Island and depicted three separate villages containing a

number of houses that were represented by rectangles. It is reliable evidence based on direct observation as to the existence, location and extent of the Cowichan village.

c) 1841 Wilkes Chart (US)

[824] The plaintiffs rely on a US Exploring Expedition chart entitled the "Archipelago of Arro, Gulf of Georgia, Ringgolds Channel and Straits of Fuca Oregon Territory" with the Fraser River inset identifying the "Cowitchen Village" on the south arm of the Fraser River. In reasons indexed at 2020 BCSC 1146, I ruled that this document could be admitted for non-hearsay purposes, for the fact that it was made and is evidence of Wilkes' understanding at the time, but I was not satisfied that it was drawn on the Fraser River based on first-hand information. This was supported by the fact that the *Porpoise* did not go up the Fraser River. The only potential observation came from the whale boat that was sent to Fort Langley on July 1, 1841. Mr. Layland concluded that the inset appeared to be copied from the 1827 sketch.

[825] BC submits no weight should be given to the Wilkes chart because Wilkes did not have direct observation of the village. BC argues it is no more than a navigational aid copied from another map, and therefore provides no evidence of the use and occupation of the Cowichan village at 1841.

[826] According to Mr. Layland, a compilation map includes information gathered from previous maps and works. This is usually noted in the title block. A compilation map may contain errors from previous maps, which are perpetuated. They do not confirm the accuracy of the previously acquired information, as they do not independently verify that underlying information.

[827] The Wilkes expedition did not go into the Fraser River. There are errors in the 1841 Wilkes chart, which indicates it was not based on first-hand information. Fort Langley burned down in 1839 and was rebuilt in a different location, yet in 1841, the chart depicts the Fort at its original location. Also, the map depicts a large mountain labelled "Cowitchen Peak" on the south shore of the south arm of the Fraser River,

east of Tilbury Island. This mountain does not exist. Due to the many errors in the chart and the fact that it is not based on first-hand knowledge, I do not rely on it.

d) 1849 Chart #1922

[828] In 1849, the Hydrographic Office of the British Admiralty published Chart #1922, entitled “North America West Coast Gulf of Georgia Fraser River”, recognizing the Cowichan village. This was published three months after the signing of the letters patent establishing the Colony of Vancouver Island. Chart #1922 is expressly based from a drawing by Simpson aboard the *Cadborough*. Mr. Layland’s evidence is that it is also based on at least one other source, as there are additional toponyms. The chart depicts “Cowitchin Villages” represented by three clusters of six symbols in two rows on the south shore of Lulu Island. As a copy of a previous chart, this map does not provide additional evidence that is current to 1849.

e) 1854 Pemberton Chart

[829] On February 27, 1854, James Douglas sent a dispatch enclosing a corrected coastal chart, which the plaintiffs submit shows the location of the Cowichan village (the “Pemberton Chart”). The Pemberton Chart shows the location of the Cowichan village, indicating a scatter of nine rectangles in two rows at the south shore of Lulu Island on the Fraser River’s south arm. Mr. Layland’s opinion is that the marks on the south shore of Lulu Island are clearly conventional signs indicating habitations. Dr. Kennedy’s opinion is that Pemberton received his information about the Fraser River from Douglas, who travelled to the Fraser River. In my reasons indexed at 2020 BCSC 1146, I found that it was highly likely that Douglas imparted his knowledge of the Fraser River to Pemberton: at paras. 234–236.

[830] No name is attributed to the nine dots along the south shore of Lulu Island. The purpose of the map was to correct the Strait of Georgia and Haro Strait to be used by the Northwest Boundary Survey. Neither the Cowichan village nor the south arm of the Fraser River were the focus of the chart. The Fraser River is a small excerpt of this large map. There are other places on the map with specific labels of “Indians”. The map erroneously depicts the location of the new Fort Langley.

[831] Pemberton did not go up the Fraser River. He was a surveyor of Vancouver Island, and the mainland was not his jurisdiction.

[832] Britain and the United States were trying to work out the international boundary, and Vancouver's map from 1792 was known to be inaccurate.

[833] Although it is likely that Douglas provided the information to Pemberton about the location of the Cowichan village, Douglas does not reference it in his dispatch.

[834] Mr. Layland's opinion is that Pemberton copied the Wilkes chart.

[835] Musqueam submits that, in addition to the error related to the location of Fort Langley, there are two islands that do not exist, which raise doubts about the ultimate reliability of this map.

[836] In light of the uncertainty regarding the circumstances under which it was created, I place no weight on the Pemberton Chart. It suggests some kind of habitation on Lulu Island but does not add any information, and the information it does contain is hard to interpret. Since Douglas did not make any reference to the Fraser River in this dispatch, there is no information from him of what he told Pemberton.

f) 1857 United States Northwest Boundary Survey

[837] Prior to the American NWBS members travelling to the Fraser River, Captain James Prevost of the Royal Navy sailed the *HMS Satellite* to Cowichan Bay, Vancouver Island, with United States Boundary Commissioner Archibald Campbell. They were joined by Douglas. On September 3, 1857, they proceeded upriver about 10 miles to the Somenos village and camped. Douglas engaged with the Cowichan through the next few days.

[838] Dr. Kennedy's opinion is that the objectives of Douglas' journey to Somenos was to introduce Campbell to the Cowichan, as his men would soon meet them when they surveyed the 49th parallel. This opinion is challenged by the defendants.

[839] TFN submits there is no evidence to support this opinion, and that there is evidence to the contrary. In Captain T. Sherlock Gooch's journal, he says the objective was to see how the Somenos were getting on after a man was hung for murder a few years before. It was arranged for the *HMS Satellite* to accompany the *Otter* and furnish Douglas with an escort while he was encamped amongst the Indigenous people. There was a secret objective of looking for gold in the region.

[840] Dr. Kennedy considered Gooch's journal and his view that Douglas wished to see how the community was progressing. Dr. Kennedy noted the guests invited to his camping expedition were served the finest food and beverages. She opined this suggested a more political motive to the adventure, which included Commissioner Campbell. She concluded Douglas' trip to Somenos in 1857 had several objectives.

[841] I accept Dr. Kennedy's opinion that there may have been more than one objective to this opulent camping trip than just checking on the Somenos. If the defendants wanted to challenge this opinion, they had ample opportunity to cross-examine Dr. Kennedy on Gooch's journal, and they chose not to.

[842] Not much turns on this finding of fact.

[843] In October 1857, Commissioner Campbell and his assistants P.V. Peabody and Dr. Kennerly, all part of the United States NWBS, took a reconnaissance trip by canoe up the lower Fraser River's south arm. Dr. Kennerly wrote on October 20, 1857: "We observed no~~thing~~ Indians, but passed several large but deserted villages; where the Cowitchins & other tribes resort during the fishing season, which ended only a few weeks ago" (strikethrough in original).

[844] Drs. Kennedy, Brealey, and Lovisek, and Mr. Eldridge, all agreed that the United States NWBS party observed the Cowichan village on Lulu Island at Tl'uqtinus on October 20, 1857.

[845] Canada emphasizes the words "& other tribes" in the above passage, and the fact that they noted several large but deserted villages, not just one. There was no additional information provided about the location of the village. There was no

description of the structures of the village. Dr. Kennerly did not report seeing any Cowichan people. Musqueam suggests that one of the villages Dr. Kennerly would have seen was the qiqáyt village, given that they travelled 20 miles up the river before they encamped at what would later become New Westminster, which was about 15 nautical miles (or 17.26 statute miles) above the mouth. There is no indication that Dr. Kennerly went on shore, examined the villages, or had any conception of who was included in the Cowichan villages.

[846] This entry places several large deserted villages on the south arm between the mouth of the river and 20 miles upriver. I agree with the experts Dr. Kennedy, Brealey and Lovisek and Mr. Eldridge that Campbell, Peabody and Kennerly would have observed the Cowichan village on Lulu Island at Tl'uqtinus as they paddled past it on the south arm. No Indigenous people were seen at the village as the fishing season had ended.

g) 1858 Kennerly-Gardner-Gibbs Expedition

[847] In March and April 1858, the United States NWBS party, including Dr. Kennerly and G. Clinton Gardner, as well as George Gibbs took a canoe expedition to the lower Fraser River accompanied by some Sumas people.

[848] They observed the Cowichan village. Gibbs, hired as geologist and interpreter, became the first non-Indigenous person to identify it as being Klik-a-téh-nus (Tl'uqtinus).

[849] On March 9, 1858, the expedition travelled up the south arm of the Fraser River. On March 10, Gibbs recorded that “[m]any of the Cowitchins come over from Vancouver’s I. during the salmon season & occupy a large camp on the North side of the river”.

[850] On April 7, 1858, Gibbs returned down the south arm. At the journey’s end at Camp Semiahmoo, he compiled a list of “Indian Nomenclature” along the lower Fraser River, as gathered from his Indigenous sources. He included the “Klik-a-téh-nus the Cowitchin fishery” in his list. Gibbs drew a working map, marking

“Klika-téh-nus” as extending along the north shore of the main channel at Lulu Island. To the left of the toponym there are two sets of double ‘V’s depicting structures. Gibbs’ list of nomenclature and working map spell the name of the Cowichan fishery differently. I return to this when discussing the defendants’ submissions.

[851] Drs. Kennedy and Brealey, and Mr. Eldridge and Mr. Layland, agreed that Gibbs observed and recorded the Cowichan village at Tl'uqtinus in March 1858. Dr. Lovisek testified it is likely that Gibbs’ Indigenous guide provided the name Klika-téh-nus and its identification as a Cowichan fishery. According to Dr. Kennedy, someone knew downriver Halkomelem, based on the listing of nomenclature in the Kwantlen language.

[852] Gibbs likely executed his field sketch with the assistance of Gardner, who was a surveyor. Gibbs and Gardner were in the same canoe that passed the Cowichan village on March 9, 1858.

[853] The map entitled “U.S. North West Boundary Survey, Map of Western Section” at scale 1:720,000 was prepared by order of Commissioner Campbell, who observed the Cowichan village on October 20, 1857 with Peabody and Dr. Kennerly. The map was compiled from notes of various official sources, including Gardner, Gibbs, and Peabody. It notes the toponym “Cowitchin” with three triangles parallel to the shore, and labels the island across from the toponym and triangles as “Tilbury”.

[854] Canada acknowledges that Gibbs was the first European to ascribe the name “Klika-téh-nus” to the village, which Canada calls the seasonal “camp” or “fishery”. He did not describe the village or “large camp”, or whether he saw any Cowichan people there.

[855] Canada notes that Gibbs also recorded Ovid Allard of the HBC informing him in 1857 that formerly, “all the tribes” frequented the Fraser River, but since the establishment of Fort Victoria and Nanaimo, “they got out of the habit, till this year when they went again to get out of the way of the Northern Indians”.

[856] Dr. Brealey agreed that Gibbs was noting a change in behaviour for the Cowichan travelling across to the Fraser River to Tl'uqtinus because they were going to Fort Victoria and Fort Nanaimo.

[857] Canada submits Gibbs' comments support a continued Cowichan presence at the camp on the Fraser River during the salmon season for the purpose of fishing, but does not make any observations about the size, makeup, or structure of the camp, or the number of Cowichan who stayed there.

[858] BC submits Gibbs' knowledge of the Cowichan presence on the Fraser River is not first-hand. He did not visit the large camp or encounter the Cowichan people.

[859] With respect to the plaintiffs' submission that Gibbs marked several dwellings extending along the north shore of the main channel at Lulu Island, BC submits his observations lack detail; he described the camp as large, but did not estimate the number of individuals who stayed there. He did describe the camp as a fishery.

[860] Richmond adds that Gibbs' March 10, 1858 journal entry does not identify who he learned the information from.

[861] There is no explanation for the different spellings between Gibbs' working map and nomenclature list. However, Richmond says a subsequent iteration of the nomenclature list specifies that this term was provided to him in the Kwantlen language.

[862] BC and Richmond also submit the term Klika-téh-nus is used elsewhere on a map followed by the letters 'Pr', which Dr. Kennedy speculated may be short for 'prairie'. The entry refers to a portion of shoreline near the mouth of the Nooksack River far to the south of the Fraser River. It denotes a long stretch of beach.

[863] There are other frailties with the field sketch. Mr. Eldridge confirmed it is a very rough sketch and is not to scale. It does not accurately depict the islands in the vicinity. The label 'Kli'ka-Téh-nus' is written at least one island down from what Mr. Eldridge identified as Tilbury Island.

[864] Musqueam notes that Gibbs does not use the word ‘village’ when describing the Cowichan camp or fishery.

[865] I find that Gibbs took a canoe expedition to the lower Fraser River accompanied by a Sumas chief and others. He observed the Cowichan camp or fishery along the south shore of Lulu Island and made a rough sketch indicating the presence of residences. He referred to it as a large camp. He did not attribute the village to the Cowichan, but his comments do support continued Cowichan presence at the camp on the Fraser River during the salmon season for the purpose of fishing. He did not make an observation about the size, structure, or the number of people who occupied the camp. I accept the theory that the information about the Cowichan practice and the name Klika-téh-nus was probably given to him by his Sumas guide. He did not record observing Cowichan people. It is possible that the fact that Klika-téh-nus is drawn parallel, rather than perpendicular, to the shoreline denotes its large size. Mr. Eldridge testified that this would be consistent with a cartographic convention. He estimated that the text extends two miles along the shoreline.

[866] The hand-drawn sketch is rough and inaccurate, but it does provide evidence of the existence and general vicinity of the camp. It is a rough pencil sketch drawn in the field, and I would not expect it to be more precise.

[867] The name Klika-téh-nus must refer to a geographic description of the long stretch of beach, given that the same name is used in the far south near Nisqually. Gibbs’ fieldnotes provide support for finding that Klika-téh-nus on the Fraser River related to the Cowichan fishery.

[868] Gibbs was at Camp #3 on the flat above Fort Langley when he added the comment about many Cowichan coming over from Vancouver’s Island during the salmon season and occupying a large camp on the north side of the river below the Squamish.

[869] Dr. Kennerly kept a journal of the same expedition, but did not mention the Cowichan villages in it. On March 8, 1858, he recorded being at Semiahmoo, and at the Squamish camp on March 9, 1858. On March 10, 1858 they were at the Fort.

[870] I find that he observed the Cowichan camp on March 9, 1858 with Gibbs because he was in the canoe with Gibbs. He did not write about it in a journal, but he later signed a United States Boundary Survey Office map in his capacity as assistant astronomer and surveyor, including the toponym. The U.S. North West Boundary Survey map at scale 1:720,000 noted above was prepared by order of Commissioner Campbell, who travelled with Gibbs and presumably also observed the Cowichan village on October 20, 1857 with Peabody.

h) 1859 Northwest Boundary Survey Maps

[871] The British NWBS contingent travelled to the Fraser River in June 1859. Colonel Hawkins, Royal Engineers, was the First Commissioner of the land survey. Charles Wilson was the Secretary of the British Boundary Commission. His journal indicates that on June 10, 1859, Colonel Hawkins was up the Fraser River and returned downriver to Fort Victoria on July 26, 1859. Captain Robert W. Haig, Chief Astronomer, British NWBS, travelled up the Fraser River and remained upriver through December 19, 1859. The plaintiffs submit the mapping done by the British contingent provides first-hand evidence of the Cowichan village. However, there is no reference to a Cowichan village in Wilson's journal.

i. Sheet 1, British NWBS Map

[872] The British NWBS produced maps starting from the west (Sheet 1) to the east (Sheet 7). Sheet 1 is a map labelled "British Columbia — Washington Territory" and drawn on the scale of 1:120,000. J.S. Hawkins, Royal Engineer, signed it, as did Lieutenant Samuel Anderson, Captain Haig, and Commissioner Campbell. It depicts Fort Langley on the Fraser River in the new location on the north shore, upstream from the fork. The map depicts "Cowitchen (Indian Village)" on the south arm, opposite Tilbury Island with two thin dashes (four along the river and two above).

[873] I accept Dr. Kennedy's opinion that the map schematically shows the location of the Cowichan village on the south arm based on the first-hand observations in 1858 and 1859. The rectangular dashes schematically indicate the presence of dwellings.

[874] Mr. Layland reported the map is the result of field observation by trained, experienced, and entrusted military surveyors. The Cowichan village as a described feature is in the same location as Gibbs' Klika-téh-nus.

ii. Sheet 7, US NWBS Map

[875] The American NWBS produced maps starting in the east (Sheet 1) and continued to the west (Sheet 7). Sheet 7 is entitled "British Columbia — Washington Territory", and was drawn at a large scale of 1:120,000. It depicted the "Cowitchin (Indian Village)" on the south arm of the Fraser River opposite Tilbury Island with nine rectangles in two rows, six being along the River and three above. Commissioner Campbell signed the map, as did Hawkins and John Parke, United States Chief Astronomer and Surveyor.

[876] In Dr. Kennedy's opinion, this map is based on first-hand observations that Commissioner Campbell directly observed on October 19–20, 1857, as did United States NWBS members on March 8–9 and April 7–8, 1858. Mr. Layland reported that this map was a product of first-hand observation by trained, experienced, officially appointed surveyors. He noted that the village as a described feature is in the same location as Gibbs' Klika-téh-nus. I accept these opinions.

i) 1859 Captain George Richards' Survey

[877] In 1859, Douglas requested that Captain George Richards make a survey of the lower part of the Fraser River aboard the *HMS Plumper*. The plaintiffs do not address this survey in their submissions, but do respond to BC's submissions.

[878] Captain Richards was in the service of the British 2nd Commissioner for the NWBS. Under Captain James Prevost, Captain Richards completed three survey sheets dated 1859, as well as a chart dated 1860.

[879] BC notes that in one of his 1859 surveys, Captain Richards did not record a Cowichan village in the Claim Area, or even a defined village or structure. The sheet contains no indication of the village across from Tilbury Island, nor are there any symbols or markings indicating the presence of structures in that area. Instead, Richards labeled that section of the Fraser River as “Gravesend Reach”.

[880] Richards was instructed to observe place names already given by the Vancouver and Spanish expeditions of 1792, and to note Indigenous names with their meanings. Where no toponym existed, Richards was to follow the custom or practice of honouring naval superiors, fellow officers, and members of the crew.

[881] Precise soundings were noted along the river. Mr. Layland testified that this would have required detailed survey work involving traversed and triangular surveys. Surveying a river with this amount of data is methodical and time-consuming.

[882] Sheet 2 does not make any notation indicating a village or settlement.

[883] Sheet 3 is a continuation of Sheet 2. It identifies structures, by using various rectangles, on the north shore of the Fraser River as New Westminster, a military establishment, and a revenue station.

[884] Sheet 4 depicts the “Kaitze Indian village” on the south shore of the south arm. On the north shore of the south arm, across from the most eastern point of Barnston Island, there is another shaded rectangle marking a structure.

[885] The 1860 chart notes Gravesend Reach along the south shore of Lulu Island across from Tilbury Island. This is an updated version of Chart #1922. Richards kept the journal but did not record his activities on the river in the area between Tilbury Island and the Claim Area, nor did he record any reference to the Cowichan village.

[886] In cross-examination, Mr. Layland agreed that, had Richards observed a village across from Tilbury Island, one would expect that he would have recorded it.

[887] In response, the plaintiffs submit Richards’ instructions actually say: “if possible, add the native name with its meaning if it has any”. There was no evidence

that it was possible for him to know the name Tl'uqtinus because he did not employ a local Indigenous guide in his company. Instead, he named the area across from Tilbury Island as Gravesend Reach after Gravesend Reach on the Thames River.

[888] BC submits the reason no village was recorded on Lulu Island was because there was no village. The plaintiffs say this is not a sustainable conclusion. Richards' instructions did not include any direction to record Indigenous villages, structures, or settlements. Other records from 1859 from before and after the Richards survey record observations of the Cowichan village, including the HBC *Beaver* log (from the river) and the Trutch survey of June to September (on the ground).

[889] The plaintiffs submit the fact that some structures were noted at New Westminster does not mean that there were no other structures along the river. The fact that Richards noted the Katzie village does not mean that there were no other villages. The Cowichan, Musqueam, and Tsawwassen villages were known to have existed at the time of the survey, but he did not note them. Richards' chart of the Fraser River and Burrard Inlet based on his work in 1859 to 1860 does not show any Musqueam villages on the north arm, despite sounding indicating it was surveyed. He did not depict the Kwantlen village across from Fort Langley, which was painted by James Madison Alden in 1857 and mapped and observed by Gibbs in 1858.

[890] We do not have the benefit of a journal kept by Richards in 1859.

[891] Taken on its own, the fact that Richards did not record the Cowichan village is puzzling. It is noted by a number of other historical sources during the same period. As will be shown in the next section, Trutch walked Lulu Island, surveyed it, and noted an "Indian Village" at the same time that Richard failed to note it. The only way I can reconcile the conflicting evidence is that Richards was not focused on the land, even though he may actually have had a beacon set on the land of the south shore of Lulu Island. I cannot accept Mr. Layland's evidence that if Richards had seen the village he would have noted it because there are other well-known Indigenous villages that he did not note. He was instructed to focus on the water. Richards'

notation of the Katzie village is an exception, and not reflective of his general approach and instructions.

j) 1859 Trutch Survey

[892] Trutch conducted the original land survey of Lulu Island on the Fraser River for the Crown Colony of British Columbia under contract with Colonel Richard C. Moody, Royal Engineers, Chief Commissioner of Lands and Works ("CCLW") and Lieutenant Governor of the Colony. Trutch was retained to survey and mark on the ground a square grid of points intended to provide a cadastral basis for recording property rights of anticipated settlers.

[893] His instructions from Moody are relevant in determining why he included what he did. They were based on a precedent from the United States, entitled *Instructions to the Surveyors General of Public Lands of the United States*, Washington: 1855. Those instructions included directions regarding the meandering of navigable streams, including taking care not to pass an object of topography without giving a particular description of it in its proper place in the meander notes.

[894] He was also to keep field notes that included summaries of objects and data. He was to include the precise length of every line run, noting all necessary offsets therefrom. He was to include the kind and diameter of all "bearing trees". With respect to intersection by line of land objects, he was to include the distance at which the line first intersected and then left every settler's claim and improvement; prairie; river, creek, or other "bottom"; or swamp, marsh, grove and wind fall, with the course of the same at both points of intersection.

[895] With respect to improvements, Trutch was to include towns and villages; "Indian" towns and wigwams; houses or cabins' fields, or other improvements; sugar tree groves, sugar camps, mill seats, forges, and factories.

[896] In his Field Book #11-59, Trutch noted in relation to Block 4 North, Range 5 West, an "Indian Village" and "Fisherman's Camp" in Section 23. He also noted an "Indian trail" originating from the waterfront and directed inland across the boundary

lines between Sections 26–27, 27–28 and 22–23; and 21–22, 21–28 and 23–26. Trutch drew these features on a map, which map is included in the same field book.

[897] Dr. Brealey testified that each land section surveyed by Trutch was 40 chains square, or thereabouts. Each chain amounted to 66 feet.

[898] Trutch's notes say: "5.752 Fisherman's Camp; at 15.00 Indian Village; 19.832 meander post bet[ween] 23+26".

[899] According to Dr. Kennedy's evidence on cross-examination, the first reference means that Trutch came across a Fisherman's Camp 5.75 chains (379.5 feet or 0.116 km) along the shoreline of Section 23 from the meander post where Sections 23 and 24 meet the Fraser River. The "Fisherman's Camp" was marked as a "Fishing Station" on Trutch's map, which is in the middle of Field Book #11-59.

[900] The Fisherman's Camp is to the east of the next feature, the "Indian Village". Trutch encountered an "Indian Village" 15 chains (990 feet or 0.302 km) west from the meander post where Sections 23 and 24 meet the Fraser River.

[901] The final notation means that the shoreline of Section 23 — from the meander post where Sections 23 and 24 meet the Fraser River to the meander post where Sections 23 and 26 meet the Fraser River — extended 19.83 chains.

[902] According to Dr. Brealey's testimony, there were 4.83 chains (318.8 feet or 0.097 km) between where Trutch first encountered the "Indian village" and the meander post where Sections 23 and 26 meet the shoreline of the Fraser River.

[903] Dr. Kennedy agreed that neither Trutch's field notes nor his survey map indicate that the "Indian village" or the Fisherman's Camp extended outside of Section 23.

[904] Trutch's notes indicate there was no "Indian village" along the meander line between Sections 23 and 26. Dr. Kennedy agreed that there were no structures on the meander line crossing from Sections 26 to 27, and none on the meander line crossing Sections 27 to 34. Dr. Kennedy agreed that, if the "Indian village" had

crossed the meander line in Section 23 and the meander lines along the banks of Section 26 and 27, Trutch should have noted that.

[905] In Section 27, there is no description in the field notes of anything occupying the land, despite a notation on the map that there was first-rate prairie grass there.

[906] Dr. Kennedy agreed in cross-examination that nothing in Trutch's survey suggested there was a village in either Section 27 or Section 34.

[907] At page 18 of Field Book #11-59, Trutch recorded a map showing the riverfront, along which he has written: "first rate grass prairie". Above the fold of the notebook, fully within Section 23, he wrote "Indian village", and to the west, east of the word "village", he included two inverted 'V's. Further to the east, written perpendicular to the riverfront, he wrote "Fishing Station". From the words "Indian Village" he marked a trail extending from the village inland toward "good level dry land, pine brush, blueberries, grass, moss etc." Dr. Brealey described the trails as one heading left through Block 22 and into Block 21, and the other running from Block 23 along the border between Blocks 21 and 28. I interpret the map this way: Trutch marked the second trail originating at the riverfront and extending through Sections 26, 27, and 28.

[908] Trutch certified his notes on September 30, 1859. Moody certified that Trutch had completed his survey of Lulu Island on October 6, 1859.

[909] Trutch's field notes provide confirmation of the existence of the Cowichan village in 1859. Dr. Kennedy testified that the trails he observed indicated continued use, as trails in that area could be quickly overgrown. Drs. Kennedy and Brealey opine that the two inverted triangles mean there was a village at that location. Trutch did not provide any details of what he saw or the size of the village. Mr. Eldridge is of the opinion that Trutch's notes for his right bank meander traverse indicating the "Indian village" in Section 23 probably located the village midpoint.

[910] Mr. Layland says the village with double symbols in Section 23 indicates the centre of the village, but not its configuration or extent. It is a cartographic convention that symbols indicate the centre of whatever feature is depicted.

[911] Drs. Lovisek, Brealey, and Kennedy, and Mr. Eldridge and Mr. Layland agree that Trutch's certified survey noted observing the Cowichan village at Tl'uqtinus.

[912] Canada acknowledges the importance of Trutch's survey as the first recorded on-the-ground observation of the Cowichan Village Lands since Work and Annance in 1824. The fieldnotes identified an unnamed "Indian Village" and Fisherman's Camp or Fishing Station located northeast of the "Indian village". Unfortunately, Trutch did not provide information about the size of the village or whether it was occupied or the identity of the occupants. Canada submits the village is wholly contained within Section 23.

[913] Trutch described the site's general topography and vegetation, and noticed some trails and Indian trails in the area. Various forms of vegetation are noted. He does not state who used the Fishing Station. Dr. Lovisek opined that the Fisherman's camp was likely used by non-Indigenous fishermen. I do not accept this opinion. Since there were no settlers in occupation of the land at the time, it is unlikely it was a settler's fishing station.

[914] Dr. Kennedy's opinion is that it is likely the same Cowichan fishery stand referred to by Chartres Brew the following year.

[915] Based on the measurements outlined above, Canada submits the "Indian village" occupied at most 4.83 chains of Section 23's extreme western shoreline. Both depict the two "Indian trails" referenced in the survey notes commencing from the far western shoreline of Section 23 where Trutch said the "Indian village" was located. There are only 4.83 chains between the "Indian village" and the meander post where Sections 23 and 26 meet the Fraser River.

[916] I have no reason to doubt the accuracy of Trutch's survey. What it means is that by 1859, the Cowichan village had decreased substantially in size and was

contained in a portion of Section 23. If the village extended beyond the borders of Sections 23 and 26, or 26 and 27, it is reasonable to conclude, given his mandate, that Trutch would have noted it. Based on the evidence before me, I conclude that the Fishing Station was the Cowichan's. I also accept Dr. Kennedy's opinion that the Indian trails were being used, otherwise they would have been grown over. Those trails extended into land that contained blueberries, grass, and moss, and I find these trails were used by the Cowichan who came to the village to harvest as late as 1859 and beyond.

[917] I accept Mr. Layland's evidence that the symbols indicate the centre of the village. This means that it would extend at most 4.83 chains in either direction from the two inverted 'V's that contain the village within Section 23. This was in 1859.

[918] It is difficult to extrapolate how large the village was in 1846. It was visible from the water in 1846, and may have been larger than it was in Trutch's survey. The use and occupation of the Claim Area was changing between 1846 and 1859. There is a paucity of evidence in the written historical record regarding the use and occupation of the Claim Area between 1830 and 1859. I agree with Richmond's submission that there is no evidence that the 108 Quw'utsun bighouses existed by 1859 extending 1.6 km along the riverbank in rows with multiple neighbourhoods. I agree it would be unreasonable to conclude that Trutch conducted a survey with such a village all around him and only marked two inverted 'V's within Section 23. I find that by 1859, the village size had greatly decreased compared to the huge settlement in the 1820s.

[919] It was not Trutch's job to record the existence of people in the village, and so I do not infer that his lack of reference to occupants is evidence that the village was unoccupied.

[920] It is impossible to pinpoint when the decline in size of the village occurred. As previously noted, Gibbs recorded a change in behaviour by 1857 for the Cowichan travelling across to the Fraser River to Tl'uqtinus because they were going to Fort Victoria and Fort Nanaimo.

[921] On May 3, 1859, in advance of Trutch's survey, Moody directed magistrates to prevent Indigenous people from settling down on any part of the ground near or downriver from the town of Queensborough and beyond it. He said: "[i]n case any families should have already done so, you will be good enough to give them notice and to see that they remove as they are likely to become troublesome if suffered to remain in the immediate neighbourhood". This may account in part for the decrease in size and usage of the Cowichan village.

[922] However, it is apparent that the Cowichan continued to come to the Fraser River to fish, as Gilbert M. Sproat, Joint Indian Reserve Commissioner, reported in the 1877 fishing season that about 1,000 Cowichan people stayed at their ancient fishery, despite the fact that by that date, most of the land had been granted to absentee settlers.

4. The Ethnographic Record

[923] As described above, ethnography is a description of a particular culture based on observation and participation, and on interviews with members of that culture. Ethnohistory complements ethnography by drawing on historical documents to reconstruct a description of Indigenous life and events in historic times.

[924] To assist with this task, the plaintiffs have provided chronologically-organized historical evidence. I rely on it in interpreting the ethnographic record:

i. In the late 1840s, a measles epidemic, followed by dysentery, spread within the region;

ii. Between 1850 and 1858, the Nanaimo left their village site on the Fraser River mainstream above the south arm;

iii. Approaching 1850, the Cowichan led an alliance of Indigenous peoples in the region and defeated the Lekwiltok in the battle of Maple Bay;

iv. In the mid-1850s, the Tsawwassen living up the Fraser River with the Kwantlen resettled at the village at Tsawwassen near Point Roberts off the mouth of the south arm;

v. In 1858, Britain established the Colony of mainland British Columbia with James Douglas as Governor and non-Indigenous settlement commenced;

vi. Circa 1862, a smallpox epidemic depopulated parts of the Northwest Coast;

vii. In the late 1860s, further to missionary influence and plain convenience, canvas tents and traditional mat lodges became more prevalent material for Cowichan dwellings used at the Cowichan village on the south arm, as reflected in Suttles' fieldnotes with Penelakut informants describing camping at Tl'uqtinus in mat houses;

viii. In the 1870s, the industrial salmon fishing and cannery period commenced on the lower Fraser River with canneries established on the south arm (e.g. Deas Island cannery was established in 1873). Enormous numbers of Indigenous people worked in the canneries and not at their traditional grounds;

ix. From 1871 to 1875, the Colony of British Columbia and the Province of British Columbia granted fee simple interests to the waterfront lands in the Claim Area;

x. In 1876, Canada adopted the *Indian Act*, defining a "band" as an administrative unit, namely, "a body of Indians" for whose use and benefit in common land has been set apart by her Majesty Queen Victoria (a reserve);

xi. In 1876 to 1877, the Crown's Joint Indian Reserve Commission (JIRC) in British Columbia bifurcated the Cowichan for administrative

convenience and official discourse into the “Chemainus” in the north, as comprised of the Chemainus, Penelakut, Halalt, and Lyackson bands with reserve land in or about the Chemainus District of land, and the “Cowichan” in the south, as comprised of the Cowichan band with reserve land about the Cowichan District of land; and

xii. In 1886, Canada adopted Order in Council P.C. 1886-2640, under “*The Indian Advancement Act 1884*”, ordering that the “Cowichan Indian Reserve” in the Cowichan Valley be governed by councillors elected according to two electoral systems, one including the Somenos, Koksilah, and Quamichan, and a second including the Clemclemaluts and Comiaken villages.

[925] The relevant ethnographic record in this case begins with anthropologist Franz Boas’ fieldwork with the Cowichan in 1886.

a) 1886 Franz Boas

[926] In 1886, Boas spent a week with the Cowichan. One of his informants was Big Bill from Somenos. Boas wrote an article in 1887 presenting a classification of languages spoken. He used the word “Qauitschin” as a name for what is now recognized as the Halkomelem language, which he divided into five dialect groups.

[927] The second dialect group was comprised of 11 named groups and included the people identified in 1845 by Finlayson as “Cowichan”. Dr. Kennedy testified that these 11 named groups identified by Boas are the Cowichan proper.

[928] Boas said that all the tribes of the Qauitschin dialects and the Sqchomisch went to the Fraser River in the spring to catch salmon. In Dr. Kennedy’s opinion, all of the Cowichan groups named by Finlayson in 1845 and Douglas in 1856 were noted by Boas going to the Fraser each spring to catch salmon. Dr. Lovisek agreed that Boas is a reputable and authoritative source, and her opinion is that his statement about the Cowichan seasonal round to the Fraser River refers to the time before the establishment of canneries.

[929] Canada submits Boas did not provide information about where the Qauitschin travelled on the Fraser River, nor did he speak of them harvesting any resources other than salmon. He did not provide any information about a village on the Fraser.

[930] TFN submits Boas used the broad definition of Qauitschin to include 25 groups that he identified as Qauitschin dialect speakers, including the Nanaimo, Malahat, Tsawwassen, and Musqueam. Presumably his informants told Boas these groups fished for salmon on the Fraser in the spring. He did not say where.

[931] Boas made reference to the fact that, in the first half of the century, the tribes of the Qauitschin dialect speakers were in a constant state of warfare with the Lekwiltok, who ambushed their settlements frequently. Hence, for many years, the tribes included in the Qauitschin dialect speakers lived in the inland area of the Cowichan River where they were safe from war canoes of the northern tribes.

[932] Boas also produced a map in 1887 that showed the south arm of the Fraser River as “Stauacen”, which TFN submits is Tsawwassen territory. He divided the entire Fraser River area into four groups.

[933] TFN further submits that Boas described origin myths that all relate to events on the west side of the Salish Sea. None refer to a Cowichan village or territory on the Fraser. According to TFN, this does not suggest that a village on the Fraser was in any sense a home of the Cowichan. Rather, based on these accounts, one would conclude that the Cowichan ancestral homeland was on Vancouver Island.

[934] I find that Boas’ 1887 work does support the conclusion that the annual migration of the majority of Cowichan back and forth across the Georgia Strait occurred as part of their traditional seasonal round for salmon harvesting. Boas did not establish the timeframe, and he included many other groups who also conducted the same seasonal round. He did not describe the Fraser River as being the ancestral homeland of the group he called the Qauitschin. When he used the name Qauitschin he was referring to all groups speaking what we now know as the Halkomelem Coast Salish Language.

b) 1912 Curtis — Mŭtllătsĕ (Quamichan), Tsihélĭm (Comiaken)

[935] Edward Curtis collected ethnographic information from the Cowichan and information on the seasonal round from two informants, Mŭtllătsĕ from Quamichan, and Tsihélĭm from Comiaken, who were born respectively about 1840 and 1850. Drs. Kennedy and Lovisek relied on Curtis' account of the Cowichan seasonal round. The Cowichan collectively began migrating to the Fraser River in June of each year. His description of the seasonal round is consistent with McKenzie's August 1825 journal and the Fort Langley Journals for 1827 and 1829.

[936] The plaintiffs submit this 1912 ethnographic information from Curtis supports the fact that the Cowichan seasonal round — observed and documented in the 1820s and 1830s — continued through 1846 into the early 20th century.

[937] In his 1913 publication, Curtis described the Cowichan seasonal round.

[938] Canada and TFN submit that, based on Curtis' description, the bulk of the Cowichan seasonal round was around Vancouver Island and the Gulf Islands. There are some deficiencies in his description. He does not reference migration to the Fraser Canyon for sockeye salmon. Dr. Kennedy, who relied on his work, noted his description did not accord exactly with the observations from the Fort Langley Journals, which recorded that, in some years, people remained in the Fraser until October, and in some years, they did not arrive until July. It is not clear what timeframe Curtis is describing. He did not describe the location of Tl'uqtinus, or identify resource gathering beyond fishing for sockeye and gathering huckleberries.

[939] Curtis was an ethno-photographer who published a multi-volume work entitled *The North American Indian*, which included a chapter on the Cowichan. The defendants Richmond and TFN challenged the admissibility of Curtis' work because there are countless assertions of facts that could not be within his personal knowledge and his work was replete with opinion. Dr. Kennedy testified that Curtis was interested in what is known as salvage ethnography. He talked to Indigenous people about what they had been doing in the past, as opposed to what they were

doing at the time he saw them. He brought regalia with him and had people dress up for photographs in more traditional clothing to reset them in earlier times.

[940] I was not satisfied that Curtis' work was reliable and could be admitted for the truth of its contents. Admissibility was revisited after the testimony of Dr. Lovisek, when she revealed that Curtis had interviewed two sources, Mŭtllătsĕ and Tsihélĭm, who described the Cowichan seasonal round in some detail.

[941] I find Curtis' description of the seasonal round supports the plaintiffs' assertion that the Cowichan regularly travelled to the Fraser River to harvest fish and berries. It does not provide support for the existence of a permanent village there. It also provides support for the assertion that the Cowichan winter homes were on Vancouver Island and the Gulf Islands, where they engaged in their winter ceremonies for approximately four months of the year.

c) 1930 Beryl Cryer — Mary Rice (Siamtunaat) and Captain Moses (Qwulsteynum)

[942] In the 1930s, Beryl Cryer authored a collection of stories for a newspaper, including several accounts told to her by a Penelakut woman named Siamtunaat (Mary Rice) and a Penelakut man named Qwulsteynum (Captain Moses).

[943] Cryer's stories were published in the book *Two Houses Half-Buried in Sand: Oral Traditions of the Hul'q'umi'num' Coast Salish of Kuper Island and Vancouver Island* edited by Chris Arnett, an anthropology PhD student [*Two Houses Half-Buried in Sand*]. In reasons indexed at 2020 BCSC 1146, I concluded that a critical eye is needed to determine whether Cryer is embellishing or sensationalizing. I admitted the excerpt for non-hearsay purposes only. The passage the plaintiffs rely on is:

> Every year they fished in that place for sturgeon and in the Fraser River for sockeye ...

[944] Captain Moses told Cryer in the 1930s of his people's annual movements:

> Then next month [June] they would pack and move to the Fraser River for the salmon and sturgeon there; they would smoke and dry thousands of these fish to be put away for the winter months.

[945] Captain Moses also told Cryer that at the Fraser River there were blueberries and cranberries that his people — the Cowichan — picked and dried.

[946] TFN submits Cryer had no academic training in recording Indigenous oral tradition. She published stories in a newspaper, lacked cultural understanding, held Victorian views, and took inexplicable artistic license.

[947] Dr. Kennedy does rely on several passages from Cryer. I accept that the limited passages stated are consistent with other ethnographers' descriptions of the plaintiffs' seasonal round to the Fraser River to fish for sturgeon and salmon, and to harvest berries. I disregard the vague evidence of the story of the old Chemainus woman who prophesized about the coming of the white man's ship to the Fraser.

d) 1934–1935 Diamond Jenness

[948] Anthropologist Diamond Jenness conducted field research in the mid-1930s with several Central Coast Salish communities. His unfinished manuscript was admitted for non-hearsay purposes, and his field notes were admitted for hearsay purposes. He had Indigenous sources from southern Vancouver Island, including Mr. and Mrs. Bob of Westholme (Halalt), and Mr. Johnson (Quamichan). The Bobs were estimated to be 85 years old, born around 1850, and Mr. Johnson was estimated to be 70 years old and born around 1865.

[949] The plaintiffs rely on Jenness' unfinished manuscript on the Saanich people written sometime between 1934–1935. He wrote that the Indigenous people "near Chemainus followed practically the same routine as the west Saanich; they too abandoned their villages in the middle of summer and netted sockeye and humpbacked salmon on the mainland, off the mouth of the Fraser River".

[950] TFN submits the full passage should be quoted. It reads:

> The East Saanich natives ^the Songish and those near Chemainus^ followed practically the same routine as the west Saanich; they too abandoned their villages in the middle of summer and netted sockeye and humpbacked salmon on the mainland, off the mouth of the Fraser River. The ^Cowichan^ Indians ~~around Duncan~~, however, had no fishing rights on the mainland, but only over the waters immediately adjacent to their shore and around Mayne

> and Saltspring Islands; so while many of them fished for herring, cod and halibut off these two islands during the mid-summer months, living in rush huts on their shores, others preferred to remain the year round in their villages, where they were less exposed to enemy raiders coming down from the north. Food was always plentiful, even without the sockeye and humpbacked salmon, which did not enter the Cowichan river; for the steelhead salmon began to ascend this stream in January, increased in numbers during March, and continued until June, when blue-backs made their appearance in the weirs. The blue-backs lasted until August, and were followed by the cohoe; and when the cohoe run ended in October the dog-salmon entered the river and ran until Christmas ... Deer, elk, bear and grouse abounded in the Cowichan woods and could be captured at every season of the year. There was no lack, too, of vegetable foods, since camass, fern and herring of every kind grew all about. Even rushes for mat-making were procurable in Quamichan Lake.
>
> [Underlining added; strikethrough in original.]

[951] TFN submits it appears from Jenness' perspective that the Chemainus fished for sockeye and humpback off the mouth of the Fraser River, but the Cowichan had no fishing rights on the mainland. The text clearly distinguishes the Chemainus from the Cowichan.

[952] Jenness wrote that the Saanich had an immemorial claim to fishing off Point Roberts near the mouth of the Fraser River, and:

> Similarly, the Westholme natives owned the fishing-rights at Cuwassim [Tsawwassen], and the Songhese at San Juan. The Duncan ... Indians, however, lacked any corresponding rights on the mainland, and for the most part disregarded the sockeye fishery, although they ... did catch a certain number of these salmon off Pender Island.

[953] The plaintiffs submit that some of these notes were crossed out and struck through by hand and Dr. Kennedy opined that Jenness did not indicate what he asked Mr. Johnson, or the era to which Mr. Johnson referred.

[954] TFN submits the passage is not specifically sourced to Johnson or any of the 12 other informants whose names are listed in the extract. Jenness does not indicate the passage is an opinion of Johnson.

[955] TFN further submits Jenness' evidence from his Indigenous sources is that Indigenous people near Chemainus abandoned their villages in the middle of the

summer and netted sockeye and humpback salmon on the mainland off the mouth of the Fraser River, while the Cowichan — differentiated from the Chemainus — had no fishing rights on the mainland and indeed did not need to because food was plentiful in the lands and waters around the villages on the Cowichan River.

[956] I conclude that Jenness' field notes do not support the plaintiffs' claims. He does describe the Halalt and Chemainus practice of travelling to the Fraser River to fish, but places them at the mouth of the river. He makes no reference to a permanent village, and he specifically says the Cowichan had no right to fish on the Fraser River, which contradicts much of the other evidence. I do not accept Jenness' opinion about the Cowichan having no right to fish on the Fraser River.

e) 1935–1936 Homer Barnett — Louis Underwood of Clemclemaluts; Chief Harry Joe Tsawwassen; Chief Jack Musqueam

[957] Homer Barnett conducted six months of fieldwork with Coast Salish groups, including the Cowichan, Tsawwassen, and Musqueam in 1935–1936. His Cowichan informant was Louis Underwood, born around 1867 in Clemclemaluts. His Tsawwassen informant, Chief Harry Joe, was born around 1862. No birthdate is known for Chief Jack, who was his Musqueam informant.

[958] Underwood described dwelling units in the form of shed-roof style houses on Cowichan Bay, Vancouver Island. Barnett also acquired information on the Cowichan's annual pattern of movement, including to the Fraser River. He said all the able-bodied Cowichan left for the Fraser River in July to camp on Lulu Island, based on information provided to him by Underwood. This contradicts Jenness' notes.

[959] Chief Jack told Barnett about the practice of moving wall planks. He said the Musqueam did not carry boards around with them like "Vancouver I. people". The "Island people" used to come over and trade clams for sturgeon and salmon.

[960] Barnett recorded as follows in his discussion with Chief Joe:

> Cowichan → before whiteman used to come to Lulu Is. & take sturgeon & some sockeye. They didn't bunch up with Tswasûn but had separate camp. Nanaimo & Kuper I. came over too but not Sanetch. About a mile of open space there on Lulu Is. near the Tswasûn camp. The up river people never came down to camp here. Sanetch people used to come to Boundary Bay to dry sockeye, as did Lummi.

[961] Dr. Brealey believed that Chief Joe meant that the Cowichan had a mile of open space on Lulu Island. Chief Joe did not distinguish between groups from the Chemainus and Cowichan Rivers, and noted that the Nanaimo and Kuper Island people came over too, but did not say where they camped.

[962] Dr. Lovisek agreed in cross-examination that Barnett described the Cowichan as annually resorting to Lulu Island on the south arm of the Fraser River with plank coverings for their houses and putting them on frames that remained standing.

[963] In Barnett's 1955 book *The Coast Salish of British Columbia*, he also referred to the Cowichan annually resorting to Lulu island for part of the fishing season, and with the coming of sockeye in July, all able-bodied Cowichan left for the Fraser River for two months where they camped at Lulu Island on the south arm of the river. Barnett mapped Cowichan movement across Georgia Strait to Lulu Island on the south arm. He described Tsawwassen camping around laktinus (Tl'uqtinus) and elsewhere. Barnett stated that, according to his Tsawwassen informant, nearby sites were visited by the Cowichan and the Nanaimo people in the summer. He also referred to the Cowichan, Nanaimo, and Saanich carrying plank coverings for their houses back and forth between the winter and summer sites and putting them on frames that remained standing in both places.

[964] Canada submits Chief Joe did not specify where on Lulu Island the Tsawwassen called laktinus, nor did he specify a timeframe when the Tsawwassen camped there. He did not attribute the name laktinus to the Cowichan Camp on Lulu Island. Canada submits it is not clear that Chief Joe was saying that the Cowichan had a mile of open space on Lulu Island.

[965] In his 1938 published work *The Coast Salish of Canada*, Barnett stated that the Cowichan and Nanaimo frequently came to camp on Lulu Island, either to fish for sturgeon and sockeye themselves, or to bargain for them with dried clams.

[966] Dr. Kennedy said that in Barnett's subsequent 1955 monograph, he omitted the reference to the Nanaimo and mentioned only the able-bodied Cowichan travelling back and forth to the Fraser River fishery. She described Barnett's statement in 1938 as overreaching.

[967] Canada submits that neither Barnett nor Chief Joe stated that the Cowichan had a village on Lulu Island. In his map, Barnett drew arrows showing the travel of both Cowichan and Tsawwassen to Lulu Island. The Tsawwassen arrow is slightly upstream from the Cowichan arrow. An arrow depicting the Nanaimo travel to Lulu Island was also drawn that contains a question mark on the arrow, which Canada says indicates that Barnett did not know where the Nanaimo camp was located.

[968] TFN submits Chief Joe's comments establish that there was no suggestion of territoriality, just that different groups had different camps along the open space "on Lulu Island".

[969] TFN submits it is not clear whether Chief Joe was saying that the Nanaimo and Kuper Island people were also camping on the mile of open space. He did not use the word Tl'uqtinus to describe the Cowichan camp. There is no reference to Tl'uqtinus in Barnett's interview notes of his Cowichan informant. Chief Joe said the Cowichan came to Lulu Island to "take", not to fish for, sturgeon and sockeye.

[970] TFN further submits that, while Chief Joe appeared to be speaking about the time "before whiteman", it is unclear whether this means before settlers, before the fur traders, or even earlier. Barnett described the Cowichan migration to the Fraser as seasonal, for two months commencing in July. Nowhere did Barnett describe the Cowichan fishing on the Fraser, and there is no reference to a permanently, continuously, exclusively inhabited village.

[971] My conclusions are that Barnett's work supports the existence of a long stretch of land or beach along the south shore of Lulu Island that was inhabited by the Tsawwassen, Cowichan, and Nanaimo in the summer, who came to fish or take sturgeon and sockeye. They occupied separate camps. There is a suggestion of some permanence to these camps in Barnett's observations about plank houses from his Musqueam informant. It is apparent that the Cowichan brought planks when they travelled and attached them to framework that was permanently located in an area along this mile-long stretch. There is a suggestion of territoriality in that different groups did have different camps, and they did not camp at each other's location. That is how I interpret the words "[t]hey didn't bunch up". His informant's reference to "before whiteman" could refer to before settlers, fur traders or earlier. I conclude Barnett's work supports that the Cowichan were seasonally occupying an area on Lulu Island, and that the framework for their village remained there permanently.

f) 1949–1952 Wayne Suttles — Leo Mitchell, Ruben Joe, Lucien Peter, Big Joe of Chemainus

[972] In 1949–1952, Suttles' research notes entitled the *Penelekuts Village and Penelakut Fieldnotes Relating to Subsistence* are attributed to various informants by their initials. In November 1949, Suttles interviewed Leo Mitchell (LM). In September 1949, he interviewed Ruben Joe (RJ). In September 1951, he interviewed Lucien Peter (LP). In September 1952, Suttles interviewed Big Joe Spluckton (BJ).

[973] Under the heading "Fraser River", Suttles recorded Ruben Joe, who said:

> The Penelakuts went to the Fraser River, camped at ƛəqətínəs (across from Deas Island). They caught sockeyes in gillnets in RJ's time. They lived in mat houses and sun-dried the fish.

[974] Leo Mitchell said the following:

> The Penelakuts went over to the Fraser every July. There were lots of sockeye, humpbacks and big sturgeon. They camped on the north side, across from the cannery. (Yes, ƛəqətínəs). People from Nanaimo and Saanich also camped there.
>
> Sockeye and humpies were smoked in small smoke houses. "Before" they put up mat houses every year.

[975] Lucien Peter said:

> The Penelakuts, Halalt, Chemainus, and Tataka came to ƛəqətínəs across from the Deas cannery, in July. They caught sockeye's, humpies, cohoes, dogs [?] and steelhead [?]. They use the ?əx̌símtən, a dip-net. The net was about 4 feet in diameter and 6 feet long.

[976] Big Joe said:

> The camp ƛəqətínəs [Tl'uqtinus] was on the north bank of the main channel opposite Deas Island. Four "nations" had houses there. Beginning at the upper end of the camp, they were the:
>
> 1. səq̓mín [Thuq'min] whose winter village was at Shell Beach on the east shore of Ladysmith Harbour
> 2. qəlíc at Kulleet ("Chemainus") Bay
> 3. pənél̓əx̌əz [Pune'luxutth'] at Penelakut Spit on Kuper Island
> 4. léəqsən [Láayk̲sen] on Valdes Island
>
> The camp consisted of a [single?] row of plank houses facing the river. While the whole camp was divided into these four segments, each group had several houses. [My impression is that they were standing rather closely side by side with no particular break between segments.]
>
> The x̌əléltx^w [Xul'el''t'hu] people, whose winter village was at c̓íx̌^{w}əm on Wily Island used to go with the Kuper Island people.

[977] The plaintiffs submit that Big Joe identified the following groups as having houses at Tl'uqtinus:

> i. léəqsən (Lyackson) on Valdes Island is Finlayson's #1 Tat-eka (Taatka);
> ii. qəlíc at Kulleet (formerly Chemainus) Bay is Finlayson's #3 Tsimenis (Chemainus);
> iii. pənél̓əx̌əz (Penelakut) at Penelakut Spit on Kuper Island is Finlayson's #4 Pinalachut (Penelakut);
> iv. səq̓mín at Shell Beach on Ladysmith Harbour is a branch of Finlayson's #7 Skalaltuch (Halalt);
> v. x̌əléltx^w (Halalt) on Willy Island are the balance of Finlayson's #7 Skalaltuch (Halalt).

[978] In *The Ethnographic Significance of the Fort Langley Journals*, Suttles wrote:

> The Cowichans had a row of summer villages on the main channel shore of Lulu Island. After passing these villages on the Cadboro, George Barnston identified them with the names we can identify as Somenos, Penelakuts, and Quamichan, three of the largest Cowichan villages. The first and third are on

> the Cowichan River; the second is on Kuper Island in the Gulf Islands. Presumably Cowichans from other villages either stayed in the houses of these three or had houses of their own.

[979] In Dr. Brealey's opinion, Big Joe's account of the internal settlement geography is consistent with that suggested by Shashia to Barnston in 1827. He concluded the three villages identified by Shashia to Barnston and the four nations named by Big Joe for Suttles, were in fact neighbourhoods in the larger Cowichan settlement at Tl'uqtinus. It was the Cowichan cognatic descent groups as a collective, and not the local groups themselves, that exercised jurisdiction there.

[980] Big Joe described the site at Tl'uqtinus to Suttles as being opposite Deas Island, immediately downstream from Tilbury Island. Dr. Kennedy's opinion is that Deas Island was a better-known landmark because of the Deas Island ferry, and Big Joe could have been using it as a convenient reference for Suttles, who was not familiar with the area. In her opinion, Tl'uqtinus is not directly opposite Deas Island; it is opposite and upstream from it.

[981] In 1988, Suttles prepared his "Tsawwassen Field Notes". He said most of the material came from a meeting with Big Joe on April 20, 1949, which means he had more than one opportunity to interview him. Under "Subsistence", Suttles recorded that the Tsawwassen camped at ƛəqətínəs on the north bank above Ladner, across from the Deas Island cannery, about one mile above the rice mill.

[982] Suttles recorded that the Tsawwassen was once the largest village around there. It was nearly wiped out, along with several Musqueam villages on the north shore of the north arm, by an epidemic about 100 years ago, citing Arnold Guerin Senior of Musqueam on May 8, 1949.

[983] Suttles later wrote, relying on an interview with Simon Pierre, Katzie, in July 1952:

> ƛəqətínəs 'long breast' … On the main river, claimed by Tsawwassen and by the Kuper Island, Chemainus, Nanaimo and Cowichan. When Simon was young all kinds of people were there. They got salmon and sturgeon in the winter, cranberries and blueberries in the summer.

[984] TFN submits there is no evidence that Pierre was ever at Tl'uqtinus. This is the view of a Katzie individual, not a Cowichan. From Pierre's perspective, the Kuper Island, Chemainus, Nanaimo, and Cowichan were different groups, but there was no sense that any of them, including the Tsawwassen, were excluding anyone.

[985] From these fieldnotes, TFN draws the following conclusions:

i. Tl'uqtinus is described as a camp, not a village;

ii. Big Joe thought ƛəqətínəs was situated opposite Deas Island, not downstream or upstream from Deas Island, but opposite;

iii. Four "nations" had houses there;

iv. Big Joe did not say the Cowichan had a camp there;

v. The time period is unclear; and

vi. It is unclear whether Big Joe was reporting something he actually observed or something he understood.

[986] Suttles suggested the fact that Vancouver Island tribes had permanent structures on the lower Fraser River was consistent with them fishing mostly nearby, although at least some of the tribes did go up the river to Tait country to fish from dip netting sites.

[987] Suttles observed:

> The Cowichan had a row of summer villages on the main channel shore of Lulu Island. After passing these villages on the Cadborough he wrote this. Whereas Big Joe talked about plank houses Ruben Joe and Leo Mitchell made references to mat houses.

[988] In 1955, Suttles published the *Katzie Ethnographic Notes*, based largely on his interviews with Pierre over several weeks in the summer of 1952. He described the use of the camp during the salmon season by several groups from Vancouver Island. This is consistent with his very general comments in his introduction to

Volume 7 of the *Handbook of North American Indians*, wherein he describes nearly all the Halkomelem fishing in the lower course of the Fraser in July, and then many travelling to the canyon for further fishing. In *The Ethnographic Significance of the Fort Langley Journals*, Suttles described the Nanaimo, Cowichan, Squamish, and Saanich as seasonal visitors to the Fraser River for salmon sturgeon and wapato.

[989] In 2004 in the *Musqueam Reference Grammar*, Suttles recorded names from Musqueam sources for places or features that they regarded as having been their own in recent past. Based on information from his informants Andrew Charles in the 1950s, James Point in the 1960s, and Arnold Guerin in the early 1980s, Suttles described ƛəqətínəs as place name #69 on the south shore of Lulu Island above the location of the Langley ferry. He attributed this to Andrew Charles. He attributed a reference to “Woodward’s Landing” to Arnold Guerin. He said “This was the great summer village of the Cowichan-speaking people of Vancouver Island.”

[990] On his map, Suttles marked place name #69 downriver from Tilbury Island completely outside the Claim Area. He also noted that the Nanaimo and Tsawwassen camped on Lulu Island.

[991] I conclude that several groups camped at Tl'uqtinus to fish. The Tsawwassen fished, but did not live there. There was a summer camp inhabited by the plaintiffs’ ancestors, including the Kuper Island, Chemainus, and Penelakut. The Nanaimo also came to the area to harvest. They all came for salmon, sturgeon, and berries.

[992] The location of Tl'uqtinus is unclear in the ethnographic record. Early Suttles informants say the place known as Tl'uqtinus was across from Deas Island. Maps and surveys locate the Cowichan village also known as Tl'uqtinus across from Tilbury Island.

[993] Some of the references are post-cannery. In my view, when there is a reference to a mat house, this refers to a time period post-cannery. When informants refer to rows of plank houses, these references are to a time period pre-cannery.

[994] I accept Suttles' description of the permanent structures that the Vancouver Island tribes left on location. This indicates to me that the camp was a village of permanent house structures that they visited seasonally.

g) 1952 Wilson Duff

[995] Wilson Duff conducted field work among the Coast Salish in the 1940s and 1950s. He also interviewed Pierre. In his 1952 hand-written fieldnotes, he recorded:

> Cowichans
> Woodwds Landing, on Lulu Is, little creek
> xəpaxə'nəm, up to Ewens Cannery. 1 1/2 miles
> 4 or 5 lived there yr round (Simon remembers)
> Cranberry Jack
>
> Ƛakti'nəs – that territory. Came for blueberries
> (2 kinds) and cranberries. Some stayed all year round. From
> diff Cowichan tribes. 4 tribes of Kuper Island, another
> on a little island. Common name pənɛ'ləxət [Pune'luxutth']
> Lot of Chemainus tribes too cemanus [Stz'uminus], kwəmələcn, – ,
> – Common name cəme'nəs [Stz'uminus]
> Also Cowichans, Nanaimos
> Also others on Valdes Island
> Mayne Island
>
> <u>Westholme:</u>
> Only 1 original Peter Louie now dead
> Xɛlɛ'ltx^{w}
>
> Now inhab by:
> All Valdes Is. People (all Thomases, Norrises Big Joe) none left at Valdes, Cam within 15
> layək'sən Vald Is people.
> ...
> Says Malahat is Saanich and always has been, not Halkomelem
> Says Nanoose Bay and Qualicum not Halkomelem

[996] Duff provided more information about the Cowichan village on Lulu Island. Pierre told him that people came from different Cowichan Tribes, including four tribes of Kuper Island and another on a little island, which Dr. Kennedy interprets to include the Penelakut, Yekwolas, Lamalcha, and Halalt village of Willy Island. Pierre said “a lot of Chemainus tribes too”, and then left a blank for another village, which according to Dr. Kennedy could possibly be Halalt at Sicameen.

[997] Drs. Kennedy and Brealey interpret the words “Cowichan and others on Valdes Island” as including the people from the Cowichan River on Vancouver Island and the Taatka people at Lyackson.

[998] In 1952, Duff published his book *The Upper Stalo Indians of the Fraser Valley* [*The Upper Stalo Indians*], which included a chapter called “The Stalo Tribes: a Katzie View”, setting out information Pierre told to Duff in 1952.

[999] In the chapter entitled *The Stalo Tribes*, Duff described the number of local groups or tribes who claimed a stretch of river bank or an important tributary. The list was based on information by RJ, the Chilliwack informant, with further information on specific tribes provided by other informants. Much of the information was obtained from the Fort Langley Journals. He listed the Tait, Pilalt, Chilliwack, an unnamed group of former slaves who had a separate village between Agassi and the mouth of the Harrison River, and the Scowlitz, Chehalis, Nicomen, Sumas, Matsqui, Hatzic, sxa’yəks (now extinct), Whonnock, Kwantlen or Langley, Katzie, Coquitlam, qeqa’yt, and Musqueam. Under Musqueam, he wrote that it was uncertain how far upriver Musqueam territory extended. Despite the fact that they lived on salt water at the river mouth, RJ considered them a Stalo Tribe.

[1000] Duff concluded that the Stalo population estimate between 1839 and 1951 included the Musqueam, but did not include the Cowichan.

[1001] These groups were marked on the map, and the south arm of the Fraser River contains no attribution. In cross-examination, Dr. Brealey admitted that there is no label in this section because Duff was unwilling or unable to assign anyone. Duff

drafted an earlier map where he had labelled that area “Qiqeyt”. Dr. Brealey agrees with anthropologist John Dewhirst that Duff simply neglected to name it.

[1002] Duff began the section about the “Summer Visitors” with the following:

> The foregoing list [of tribes] does not tell the whole story of native occupation of the Fraser River. Information from the Fort Langley Journal indicates that only in the dead of winter were the Stalo left in sole possession of the river. Summer brought an abundance of salmon, and in their wake many hundreds of aggressive salt-water Indians. Willingly or unwillingly, the Stalo had to share their river and its bounty with outsiders.
>
> Large numbers of Cowichan and Nanaimo Indians came over from Vancouver Island each summer to fish, and these 2 tribes had summer villages along the lower reaches of the river. When James McMillan and his party first sailed up the river in the “Cadboro” in July, 1827, they passed three Cowichan villages and one Nanaimo village. The Cowichan villages were situated on the South Arm of the Fraser about half-way between the mouth and New Westminster. They consisted of large plank houses, and McMillan estimated their combined population to be 1500 (p. 8). He gives their names as Saumni, Pinellahutz and Quomitzen, which are the names of three Cowichan villages across the Strait. The “Nanaimooch” summer village was located farther up-river, only a mile or two below the old Fort Langley. McMillan estimated it contained some 400 souls (p. 8).
>
> The Cowichan and Nanaimo made their appearance on the river about the first of July, and some time later, until mid-August, they moved up-river “to kill salmon at the Rapids” (p. 19). Toward the end of September, in laden canoes or rafts made by placing boards across two canoes, they were observed passing down-river again. On September 22, 1828, for example, McMillan noted that “there are now 345 canoes of Cowitchens already passed ...” and in the next two days an additional 160 passed down (p. 96). Soon after, the bulk of the Island people went home for the winter, but the river was never entirely free of them; visitors or raiding-parties were around the winter through.

[1003] Under the section *The Stalo Tribes: A Katzie View*, Duff described how the Musqueam:

> ... held the North Arm below the Kwantlens, most of Lulu Island, Sea Island, and the whole of Burrard Inlet to Point Atkinson. There were several permanent villages — one near Steveston, another on Sea Island, others at Capilano Creek and Seymour Creek — as well as the main Musqueam village.

[1004] Duff said the Tsawwassen were “a small tribe whose territory extended from the west side of Point Roberts to a point on the South Arm a short distance above Ladner, and included Westham Island”.

[1005] Regarding the Cowichan, Duff wrote:

> Part of Kwantlen territory on the South Arm was held in common by several Cowichan villages across the strait. The area was called ƛakti’nəs, and extended from Woodward’s Landing to Ewen’s Cannery, some mile and a half. The Cowichans came in summer for fish and berries, and some stayed the year around.

[1006] Dr. Kennedy noted that Duff’s ethnographic account is consistent with Chief Harry Joe’s 1935–1936 explanation to Barnett of the Cowichan villages on Lulu Island at Tl'uqtinus. It is also consistent with the Fort Langley Journals.

[1007] Dr. Brealey said Duff is not clear about whether, in describing this “campsite”, it is the Cowichan village proper or the larger territory between Woodward’s Landing and Ewen’s Cannery, but if it is the former, it is actually across from Tilbury Island.

[1008] Dr. Brealey opined that Barnett said the Tsawwassen fished sturgeon on Lulu Island at Tl'uqtinus. Dr. Brealey said Tl'uqtinus was a reference to the longer area between Woodward’s Landing and Ewen’s Cannery, and not to DgRs-17 (a provincially registered archaeological site) specifically.

[1009] I conclude that the Cowichan came to an area between Woodward’s Landing and Ewen’s Cannery. Dr. Brealey provided evidence that the distance between Woodward’s Landing, which is across from Deas Island, and Lion Island, where Ewen’s Cannery was located, is actually about 7.5 km. It is not clear to me what Duff meant when he wrote “some mile and a half”. He may have been saying that the village was a mile and a half long, or that the Cowichan village proper was some mile and half from Ewen’s Cannery.

[1010] The Cowichan came to fish, and picked blueberries and cranberries in the area called Tl'uqtinus. Several Cowichan villages were held in common. The Cowichan occupied the village seasonally. They fished the Fraser River in July, and

by mid-August, they followed the fish up to the rapids. By the end of September, they came down laden with food for the winter.

[1011] There was a great congregation of Indigenous tribes who came to the Fraser to fish. Many Indigenous people knew that stretch of Long Beach as Tl'uqtinus, and when they were referring to that area by name, they were not referring specifically to the Cowichan village but to the long stretch of shoreline where many came to fish. It appears that the Cowichan adopted the same Hul'qumi'num term for Long Beach — Tl'uqtinus — as the name for their village. When Tsawwassen informants said they came to Tl'uqtinus to fish, I interpret this to mean they were coming to that long stretch of shoreline. They were not saying that they went to the Cowichan village to fish.

h) 1974–1978 Rozen — Abraham Joe (K'eyexkínem), Abel D. Joe (Shmókwethet), Dave Peter (Wulsiim, Welsímten), Rose James, Agnes Thorne, Arnold Guerin

[1012] In 1978, ethnographer David Rozen authored a report entitled *Ethnozoology of the Cowichan Indian People of BC: Fish, Beach Food and Marine Mammals*. He concluded his research between November 1975 and July 1978, including interviews with Cowichan informants. Rozen regarded the Cowichan as a people occupying the Cowichan, Koksilah, and Chemainus River drainage systems, as well as Kuper (Penelakut) Island. Between 1974 and 1976, Rozen worked for Dr. Kennedy and her colleague Randy Bouchard on their "Indian" language project, describing their interviews, going through the literature of Jenness and Barnett, and classifying the information on index cards. Rozen learned to write the Hul'qumi'num language.

[1013] Dr. Kennedy testified that Rozen's report is reliable in terms of fish identification and practice. She relied on it to conclude that the overwhelming consensus is that Cowichan Valley local groups fished on the Fraser itself, as did people from Halalt and other groups residing in the Chemainus District area.

[1014] Rozen agreed that the evidence substantiated the fact that the Cowichan people travelled during the summer months to the mainland. His informant Abraham

Joe actually made that migration himself in his younger days. His informant Abel D. Joe was born at Canoe Pass at the mouth of the south arm of the Fraser, “thus proving to some degree the hereditary right to fish on the mainland side”. He noted that the majority of people from Vancouver Island migrated to the Fraser River and Point Roberts area for the salmon fishery. Rozen’s informants Abraham Joe, Abel D. Joe, and Dave Peter identified Tl'uqtinus on Lulu Island.

[1015] With respect to sturgeon, Rozen recorded they were caught by the Cowichan people at Boundary Bay, Point Roberts, Canoe Pass, and Lulu Island at the camping site called Tl'uqtinus, Long Beach. They were always caught at low tide.

[1016] Any seasonal migration made by Indigenous people from Vancouver Island to the mainland for sockeye was severely altered by the non-Indigenous commercial exploitation of salmon in the last decade of the 19th century.

[1017] There are many examples in the literature of the Cowichan, Chemainus, and Nanaimo travelling to the Fraser area for sockeye. Rozen relied on Duff’s comment about Lulu Island being located between Woodward’s Landing and Ewen’s Cannery. He said this is recognized as Tl'uqtinus, Long Beach, by the Cowichan people today, citing Abraham Joe, Abel D. Joe, and Dave Peter. Duff’s informants told him that some Cowichan stayed all year round, but most were there for the summer only.

[1018] In 1985, Rozen completed his Master’s thesis, entitled *Place Names of the Island Halkomelem Indian People*. It was admitted for hearsay purposes with the limitation that Rozen’s opinions were only admissible if adopted by an expert.

[1019] Rozen described his research methodology as salvage ethnography. Primary ethnographic fieldwork was conducted from December 1974 to August 1978. It is unclear whether his ethnographic information reported to reflect the way of Indigenous people at the time of contact.

[1020] According to Rozen, when discussing the Somenos village on the Cowichan River, he said the Somenos, like their fellow Cowichan, travelled to the Fraser and Point Roberts during the summer. Abraham Joe reported that not all the Cowichan

went to the mainland to fish in the summer. Rozen focused on Vancouver Island and some Gulf Island names.

[1021] Dr. Kennedy says Rozen did not adopt an ethnohistorian methodology, which would have considered the historical literature discussed in her report to evaluate the veracity of his assumptions. Dr. Lovisek noted that Rozen had not consulted the Fort Langley Journals, which is interesting because he did in his first publication. Rozen's study objectively focused on place names, not the historical context necessary to clarify Indigenous land use from contact through to the 1970s.

[1022] Dr. Kennedy's opinion is that it is uncertain if Rozen reported whether the ethnographic information reflected the way of life of Indigenous people at the time of contact, at 1846, 1878, or later.

[1023] Rozen included a map of the Island Halkomelem people. It depicts a large shaded area of grey on both sides of the Salish Sea. It is labeled "traditional territory of the Island Halkomelem". He does not map the south arm.

[1024] Rozen reported from his sources Dave Peter and Rose James that the Penelakut and Kuper Island people travelled to the lower Fraser River to fish sockeye and humpback salmon in the summer months. They camped at Tl'uqtinus and a place across from New Westminster called Kikeyt. Abraham Joe and Agnes Thorne told him the Chemainus from Westholme travelled to the mainland in the summer to fish for sockeye salmon on the lower Fraser River and at Point Roberts.

[1025] Rozen identified the name tl'ektines [Tl'uqtinus] as Long Beach or long-riverbank, as attributed to Cowichan band members Abel D. Joe and Abraham Joe, and Musqueam band member Arnold Guerin. Rozen situated it at the north end of the George Massey Tunnel on Lulu Island.

[1026] Rozen said:

> The Cowichan and Nanaimo came to this place during the summer months to fish for sturgeon, sockeye salmon and hump-back salmon. Originally this was probably a summer campsite of the Musqueam, but eventually their Island

> Halkomelem relatives established winter village-style houses with the permission of the Musqueam and other Mainland Halkomelem.

[1027] This passage is dealt with in more detail in the section of these reasons on exclusive occupation.

[1028] Rozen noted that the Island Halkomelem traded dried clams or other foodstuffs in exchange for sturgeon and salmon at this place. Apparently, some Island Halkomelem stayed year-round at the site, at least in historic times, citing Abraham D. Joe, Arnold Guerin, and Abraham Joe. A map of the Fraser River produced very early in the historic period (Simpson, 1827) shows at least 20 buildings at the site, with the description Cowichan villages beside them.

[1029] I conclude that Rozen's work supports the seasonal round of the Cowichan people to the Fraser to fish. I address his opinion that the Cowichan occupied the Cowichan village with Musqueam's permission when I consider exclusive occupation.

i) 1999 Daniel Marshall

[1030] In 1999, historian Daniel Marshall's book entitled *Those Who Fell from the Sky: A History of the Cowichan People* was published on behalf of Cowichan Tribes. This work is based on interview data held by Dr. Marshall, and his review of material held by the Cowichan Tribes archives.

[1031] TFN submits the bulk of the stories in Marshall's book have a geographic orientation on Vancouver Island and the Gulf Islands. TFN says there is nothing to suggest that the hub or centre of the Cowichan wheel was a village on Lulu Island.

[1032] I conclude that Marshall's book supports the Cowichan practice of making their annual migration to Lulu Island to reside on the south arm of the Fraser River seasonally.

j) 1991 Drs. Bouchard and Kennedy

[1033] The plaintiffs do not refer to this report, but TFN does. It was prepared by Drs. Bouchard and Kennedy, entitled *Tsawwassen Ethnography and Ethnohistory*. This is part of a larger report entitled *Archaeological Investigations at Tsawwassen BC*.

[1034] The report references statements made by Tsawwassen Chief Joe that assert a Tsawwassen presence at Teck-teen-us (Tl'uqtinus). In 1925, Chief Joe said:

> Teck-teen-us [tl'ektínes, on Lulu Island] is where the Chewassin band in the olden times used to go and dry sturgeon, fish and also use the place for hunting grounds and its where they used to pick and store away plenty of berries for the winter supply. All this was before the White settlers. The Chewassin tribe of Indians used to come to this Teck-teen-us in the spring and to Swhy amalth [sxwáymelh, New Westminster] in the summer and to Chewassin [stsewẏóthen, the Tsawwassen village] in the winter.

[1035] Drs. Bouchard and Kennedy wrote that the above information was subsequently confirmed in part by Barnett, who wrote (again relying on Chief Joe):

> Much of the summer fishing and gathering was done from this base [the old Tsawwassen village], but the people of Tswasan also had a camping ground on Lulu Island (laktinas) [tl'ektínes] where they caught sturgeon from May until July.

[1036] In a later statement of Chief Joe to Barnett, he identified the Cowichan at Tl'ektines, noted above, where he said they "didn't bunch up with Tswasûn but had separate camp". He referenced the Nanaimo and Kuper Island coming over as well.

[1037] Drs. Bouchard and Kennedy concluded that the data identifying Tsawwassen territory is sketchy and occasionally contradictory, and said as follows:

> It is our conclusion, from examining the relevant data, that the Tsawwassen were formerly closely related to the Kwantlen. But we cannot say with certainty if in earliest times the Tsawwassen were a separate socio-cultural entity independent from the Kwantlen, or if the Tsawwassen and Kwantlen were one entity occupying several different villages. At least from 1857 onwards ... the Tsawwassen have been identified as a distinct people.
>
> Irrespective of what the former relationship between the Kwantlen and the Tsawwassen may have been, we conclude that since the mid-1800s the territory of the Indian people identifying themselves as "Tsawwassen" included the area now known as the Tsawwassen Indian Reserve, as well as

> Westham Island, Canoe Passage and much of the South arm of the Fraser (extending upriver just past Ladner), and also the delta on the South side of the South arm, including much of Point Roberts.
>
> It is our further conclusion that outside of this above-noted territory, there were additional areas that were utilized by the Tsawwassen on a seasonal basis.

[1038] In her main report in this case, Dr. Kennedy made a stronger statement:

> ... it <u>was our opinion that</u> the village of Tsawwassen observed by members of the North West Boundary Survey in the late 1850's was a resettlement of that community, earlier devastated by the first smallpox epidemic in the late 18th century, the survivors of whom had moved upstream around New Westminster with their Kwantlen kin.
>
> [Emphasis added.]

[1039] The words "was our opinion that" have been underlined because the actual statement in the 1991 report was less conclusive, simply stating that "there is some support for the 'resettlement' theory".

[1040] TFN also references maps drawn by anthropologists. I addressed this under the maps drawn by Boas, Barnett, and Duff above.

[1041] TFN submits it is impossible to draw clear conclusions from the ethnographic evidence. It does not support the proposition that there was a collective that called itself the Cowichan. TFN says no sources suggest there was an ancestral homeland of Island Halkomelem that was placed on the Fraser River called Tl'uqtinus.

[1042] TFN submits Tl'uqtinus is a descriptive term. It refers to the long stretch of river where different groups had seasonal fishing camps. The word "camp" is invariably used, as opposed to "village". Tl'uqtinus was one place among many the people went to. It was not a central hub for the Cowichan. For all the times Chief Joe was recorded speaking about the Tsawwassen presence at Tl'uqtinus, he never once mentioned the alleged dominant Cowichan village.

[1043] I accept Dr. Kennedy's opinion that the Tsawwassen people went to Tl'uqtinus to fish in pre-contact times, but in the relevant time period between 1790 and 1846, they were diminished in size due to a smallpox epidemic and moved up

the Fraser River to live with the Kwantlen until the late 1850s. They were not occupying the Claim Area. They are not mentioned in the Fort Langley Journals.

[1044] I agree with TFN that Tl'uqtinus is a descriptive term for a geographic area describing a long stretch of river and shore. Tl'uqtinus was also the name of the Cowichan village.

k) Conclusions on the Ethnographic Evidence

[1045] Boas' work supports the annual migration of the Cowichan back and forth from Vancouver Island to the Fraser River, but gives no time frame for when this occurred. He did not describe the Fraser River as their ancestral homeland.

[1046] Curtis' work supports the seasonal round for fish and berries. He did not support the existence of a permanent village.

[1047] Jenness' work placed the Cowichan at the mouth of the Fraser River. He said that the Cowichan had no right to fish on the Fraser River. Given the bulk of the other evidence that the Cowichan came every year to the south arm of the Fraser River to fish, I do not find this evidence reliable.

[1048] Barnett's work supports the Cowichan having a separate camp at Tl'uqtinus situated somewhere along the mile of open space along Lulu Island. The long stretch of shore was inhabited by the Tsawwassen, Cowichan, and Nanaimo in separate camps. The Cowichan brought planks to attach to a permanent framework, which suggests that this camp was a permanent seasonal village, and not a temporary campsite. There is a suggestion of territoriality in the expression "[t]hey didn't bunch up", which I explore further when I consider exclusive occupation.

[1049] Suttles' work supports the existence of a Cowichan village inhabited by the Cowichan, including the Kuper Island people, Chemainus, and Penelakut. He said it was across from Deas Island on the Fraser River. I accept the maps and survey as more reliable on this point, which place the permanent seasonal village across from Tilbury Island. The permanent structures or frameworks were left on location.

[1050] Duff supports the existence of a Cowichan village on the south arm. Duff placed this village between Woodward's Landing and Ewen's Cannery, which is a stretch of 7.5 km.

[1051] The Cowichan came to fish and pick blueberries and cranberries. There was a large congregation of Indigenous people fishing in this area, but they did not occupy the Cowichan village. There was room for several campsites along the shore.

[1052] Rozen supports the seasonal round, but added that the Cowichan also fished at Boundary Bay and Canoe Pass, in addition to Lulu Island.

[1053] In summary, the ethnographic evidence supports the existence of the Cowichan village on Lulu Island consisting of plank houses, the frames of which were left there year-round and occupied seasonally by the Cowichan. Tl'uqtinus is a geographic area which was used by numerous Indigenous groups on a seasonal basis to harvest fish and berries. The Cowichan village is situated in a geographic area known as Long Beach or Tl'uqtinus. The Cowichan village in this area is also called Tl'uqtinus.

[1054] It is not clear when the transition from plank houses to mat houses occurred, but it was likely in the 1860s. At some point, the Cowichan likely transitioned to canvas tents because the material became more prevalent and was easier to use. The village itself shrunk over the years. I deal with this later, when considering the extent of the village lands.

5. The Archaeological Record

[1055] According to the plaintiffs, the archaeological remains at site DgRs-17 are consistent with the Cowichan village housing extending at least 1.5 km along the shoreline of the Fraser River prior to and at 1846.

[1056] DgRs-17 is a provincially registered archaeological site located within the Claim Area. The site location was first described in 1974 (as at Lulu Island, opposite

the middle of Tilbury Island). A 1978 site access description states that the site begins at the foot of No. 8 Road in Richmond, and extends west along the bank. The south end of No. 8 Road is directly across the Fraser River from Tilbury Island. The site location is, as of 1993, described as between the south end of No. 8 Road and Williams Road, which intersects with No. 5 Road.

[1057] Mr. Eldridge opined that the site is about 2,150 m x 50 m. It runs lengthwise along the shore, located between No. 8 Road and Williams Road. Mr. Eldridge's study concerned the following legal properties, organized from upriver to downriver:

> PARCEL IDENTIFIER: 007-793-707
>
> **LOT "8"** SECTION 24 AND BLOCK 4 NORTH RANGE 5 WEST
>
> NEW WESTMINSTER DISTRICT
>
> PARCEL IDENTIFIER: 010-535-471
>
> **LOT "E"** SECTIONS 14, 15, 22, 23, 24, 26, 27 AND 28 BLOCK 4 NORTH RANGE 5 WEST
>
> NEW WESTMINSTER DISTRICT PLAN 19680
>
> PARCEL IDENTIFIER: 010-535-519
>
> **LOT "K"** SECTIONS 14, 15, 22, 23, 24, 26, 27 AND 28 BLOCK 4 NORTH RANGE 5 WEST
>
> NEW WESTMINSTER DISTRICT PLAN 19680 EXCEPT PLAN BCP42299

[1058] Canada holds the Lot 8 title interest. It is managed by the VFPA. Richmond holds fee simple title to Lots E and K. Mr. Eldridge was not permitted by Richmond to conduct work in Lot K, and so his observations of it were limited to surface features.

[1059] In 1974, Alan Carl, Archaeological Sites Advisory Board, surveyed Lulu Island dikes. He found no actual archaeological material in the site, and suggested the village remains could be preserved under garbage and dredged river sand fill.

[1060] Archaeologist Al Mackie visited the site on March 29, 1993 as part of Millennium Research's inventory of intertidal archaeological sites for the Fraser

River Estuary Management Plan. Mackie recorded clusters of fire-altered rocks and wooden stakes within the site boundary.

[1061] Mr. Eldridge conducted fieldwork on September 17 and 18, and October 31, 2013 in the intertidal zone and uplands in preparation of his report prepared for the plaintiffs. He reported that the stakes, fire-broken rocks, and other artifacts of "Aboriginal manufacture" at DgRs-17 were consistent with village remains dating from before contact into the mid-19th century.

[1062] Much of the intertidal portion of Lots 8, E and K were covered by rip rap (large angular boulders artificially placed) or deep recent sedimentation. It was unlikely or not possible to reveal pre-contact or early historic material in that area.

[1063] Mr. Eldridge reported findings of several classes of possible cultural materials: stakes, fire-cracked rocks, lithic artifacts, and faunal remains (bones). There were wooden stakes that had evidence of shaping or damage from being pounded through resistant materials. Moreover, radiocarbon dating indicated that two of these stakes dated to the contact period, and a third dated to a wide range of possible dates (1600s to the 20th century). The upriver third of the site (about Lot 8) included an area with a stake dating to 1780–1800, over 24 instances of fire-cracked rocks, two lithic artifacts, and an ungulate bone. About Lot E (middle third of the site), Mr. Eldridge mapped a stake dating to 1765–1800, eight fire-cracked rocks, and an ungulate bone. In the downriver third of the site around the upper end of Lot K, he found one cluster of fire-cracked rocks.

[1064] Mr. Eldridge also found lithic material, one stone tool, and one waste flake.

[1065] To obtain sediment samples, Mr. Eldridge used an environmental drilling auger. He completed 49 tests within Lots 8 and E. Most of the cores went through several metres of 20th century garbage mixed with sand fill. This is consistent with past use of the Richmond landfill and Fraser River sand dredging dumping.

[1066] Mr. Eldridge said that it is necessary to consider the disturbance of the archaeological remains in the historical period. There have been extensive changes

in the landscape in the 200 years (i.e., since the area around the site was first described in the historical record). He considered erosion of the river bank, which might have removed a significant portion of the archaeological record associated with early 19th century houses and early remains. There has been 20 to 45 m of erosion of the shoreline since Trutch's survey in 1859.

[1067] Mr. Eldridge reviewed historical charts, maps, and documents. He approached his study from the perspective of an historical archaeologist, who investigates whether archaeological evidence confirms the historical records.

[1068] Mr. Eldridge found a retouched quartzite core tool and an early stage reduction flake that were Indigenous in manufacture. One would use the cores as sources from which to remove flakes for use as sharp-edged tools. Mr. Eldridge was confident that the stone tools and lithic artifacts dated to the pre-contact period, and were produced by Indigenous peoples.

[1069] In cross-examination, Mr. Eldridge agreed that a finding of six lithic artifacts is not a lot, and that these artifacts could be up to a thousand years old. One cannot draw conclusions from this evidence alone.

[1070] The fire-cracked rocks dated to the early historic or prehistoric period. They were produced by Indigenous peoples. Fire-cracked rocks were used as a pre-contact to early contact practice, replaced with metal pots in the early historic period. The fire-cracked rocks found over a kilometre length of the river were concentrated in areas where there was clear visibility on the beach.

[1071] Mr. Eldridge concluded that some — but not all — of the wooden stakes were Indigenous. Stake #1 was associated with a village circa 1780–1800 and was produced by Indigenous peoples. It lay very close to the riverbank that Trutch mapped in 1859 (about Lot E). Stake #4 had the largest probability of dating to the periods between 1725–1765 and 1834–1878. On a balance of probabilities, Mr. Eldridge concluded that it was associated with the late prehistoric contact, or historic period of a village, and was produced by Indigenous peoples. Stake #5 likely

dated from 1780–1800. In Mr. Eldridge's opinion, it is an Indigenous product. In his view, it was finely crafted and strong enough to hold a small canoe, a tent, or windbreak. Stakes #4 and #5 were located some 30 m inland of Trutch's riverbank in 1859.

[1072] Mr. Eldridge noted that his findings were more limited than what was found in 1993. Significant areas of fire-cracked rocks and stakes found in 1993 are now deeply silted in or modified by development. He did not find more archeological material upland capped by garbage and dredged sand. It appeared there was a stratigraphic unconformity that the vegetation and top soil (and possible artifacts) had been cleared prior to the refuse being placed there.

[1073] Canada submits the archaeological remains located on DgRs-17 do not support the proposition that there was a Cowichan village in the Claim Area, or that it extended at least 1.5 km along the shoreline prior to and at 1846.

[1074] Canada says Mr. Eldridge discovered limited archaeological material. He could not say whether the ungulate bones were archaeological artifacts. The lithic remains were sparse, and one could not draw a conclusion. Although he did find wooden stakes that were Indigenous in nature, he could not attribute them to any particular group, and could not see any pattern to conclude that they were part of a fishing trap or weir. The stakes were not associated with any structure.

[1075] Canada says that carbon dating of wood stakes dates to when the wood died, not to when it was made into a stake. There was no evidence of a pre-contact or early historic village upland from the shoreline. Mr. Eldridge did not sample different areas outside DgRs-17 as a control. He proceeded on the basis of his instruction, which was to assume that there was a village inhabited by Cowichan people.

[1076] BC, Richmond, and Musqueam submit Mr. Eldridge expected to find a large range of cultural material, but did not. His evidence was of limited probative value. He was instructed to assume the existence of the claimed village and see if there

were any archaeological findings consistent with that assumption. They say a finding that the archaeological record is consistent is not probative.

[1077] The defendants submit Mr. Eldridge did not find evidence of a massive permanent village, and did not adequately address a profound disconnect between his expectations and his findings as they relate to the validity of his conclusions.

[1078] Mr. Eldridge prepared his report on the basis of a general assumption that a village called Tl'uqtinus inhabited by Cowichan people existed at DgRs-17. He assumed three of the key requirements for proof of Aboriginal title. His reliance on the assumption that a village existed indicates his investigation did not involve consideration of whether the evidence supported something other than that particular type of use. He was not asked to consider alternate theories of what types of sites the material findings could indicate, such as camping or gathering areas.

[1079] Mr. Eldridge agreed the material remains in DgRs-17 do not correlate with a particular time or particular Indigenous community. They do not provide proof of the plaintiffs' micro-Aboriginal title claim. The findings were not consistent with what Mr. Eldridge expected of the village dating from late pre-contact through the mid-19th century.

[1080] I conclude that Mr. Eldridge's archaeological study is not probative. This does not rule out the existence of the village. Mr. Eldridge adequately addressed the profound disconnect between his expectations and his findings. The area has been disturbed by the removal of ground cover and the use of the lands as a garbage dump. Shoreline erosion also explains a lack of findings on the foreshore. There were more extensive findings in 1993.

6. Expert Opinions on Village Housing and Resident Population

[1081] Canada concedes that the evidence supports the existence of a Cowichan village on Lulu Island at the time of assertion of sovereignty. Drs. Kennedy, Brealey, and Lovisek opine that at 1846, the village likely consisted of permanent post and beam structure frames. Work and Annance's 1824 comments are the only

description of housing of the site based on first-hand observation. They described 108 houses at the site that were “very high; the roofs horizontal”.

a) Dr. Kennedy

[1082] In Dr. Kennedy’s opinion, the Cowichan people occupied their Village Lands at the south shore of Lulu Island in 1846 by having laboriously constructed 108 shed-style, multi-apartment bighouses built into the ground along the riverfront. They were furnished with cedar plank roofs and walls that the Cowichan transported back and forth annually across Georgia Strait on hundreds of canoe catamarans.

[1083] The plaintiffs submit the historical and ethnographic data indicates that members of all 11 Cowichan local groups identified by Finlayson in 1845–1855 used and occupied a Cowichan village at Lulu Island, and likely resided in the village.

[1084] I agree with Dr. Kennedy’s opinion that anthropologists have largely confirmed continuation of the Cowichan seasonal cycle observed and documented in the 1820s–1830s.

[1085] It is also Dr. Kennedy’s opinion that the historical evidence indicates that the number of residents fluctuated during the year. The largest concentration arrived in June and stayed through late September or early October for sockeye and humpback fishing, as well as berry picking, wapato gathering, and hunting. The Cowichan presence on the Fraser River was reported at other times of the year, during opportune times for sturgeon and eulachon.

[1086] She says in 1846, the Cowichan had a multi-neighbourhood permanent village on an approximate 1.6 km stretch of waterfront lands of the south arm of the Fraser River in an area known as Tl'uqtinus. They maintained bighouses on the south shore of Lulu Island as part of their annual round of activities. This was integral to their culture as organized resource harvesters.

[1087] I accept Dr. Kennedy’s opinion about the existence of the historical village with permanent frames that remained year-round, and cedar planks that the

Cowichan travelled with and attached to the frames. Her conclusion is amply supported by the oral history evidence that the plaintiffs led, the written historical record and the ethnographic record. There may have been some of the Cowichan in occupation year-round, but the majority were only there seasonally.

[1088] I do not accept Dr. Kennedy's opinion that the large village was still in existence in 1846. The survey of the area in 1859 suggests to me that the village had significantly diminished in size by that time.

b) Dr. Lovisek

[1089] Canada's expert, Dr. Lovisek, concluded the Cowichan village at Tl'uqtinus was a permanent village with permanent post and beam frameworks and roofs in place year-round.

[1090] Dr. Lovisek agreed that the Cowichan as a collective migrated from the villages of Vancouver Island and the Gulf Islands to the Cowichan village on the south arm at the Lands of Tl'uqtinus with their house planks prior to, at, and after 1846, beginning in June, as part of their annual pattern of movement.

[1091] Dr. Lovisek agreed that the village was first observed in December 1824 as containing at least 108 houses. The village was depicted in 1827 as extending laterally across half a nautical mile along the shore.

[1092] I accept these opinions.

[1093] Dr. Lovisek opined that the plaintiffs' ancestors continued to travel with their planks or wall boards in 1853. She based her opinion on the statement of W.C. Grant, a settler of Vancouver Island who wrote that the "Cowichan and Saanich had fishing grounds at the mouth of the Fraser". Grant stated that "to these fishing stations" they travelled in the salmon season "with their wives and families and all their goods and chattels". Grant did not explicitly describe these groups travelling with planks, but stated that they just took all their goods and chattels.

[1094] Canada submits it is not clear whether Grant's statement was based on first-hand observation. In cross-examination, Dr. Turner admitted that she did not know if Grant went to the mainland of the Fraser. Dr. Kennedy later testified that he did not.

[1095] I accept Canada's critique of Grant. He did not observe this personally. His assertion that the Cowichan still travelled like this in 1853 is not reliable.

c) Dr. Brealey

[1096] Dr. Brealey opines that the Cowichan village at Tl'uqtinus included an infrastructure of houses as part of a permanent multi-seasonal settlement prior to and at 1846, and up to and beyond the Crown creation of the Colony of British Columbia (the "Colony") in 1858.

[1097] The settlement included a permanent standing built village infrastructure of over 108 bighouses with dwellings constructed by and for the Cowichan. Due to erosion by the river, some of the houses would likely be underwater at mean tide.

[1098] I do not accept Dr. Brealey's opinion that the considerable size existed at 1846. As I said above, I find that it diminished in size by 1846.

d) Dr. Turner

[1099] I do not rely on Dr. Turner's evidence to establish the existence of the Cowichan village, as it falls outside the parameters of her qualifications for her testimony at this trial.

[1100] The plaintiffs did not ask Dr. Turner to opine on the existence of the Cowichan village at Tl'uqtinus. Where she ventured into that area, Richmond and Musqueam objected. I agree with their objections. Dr. Turner was not being presented as a historian, or ethnohistorian. She was qualified in this trial to testify in the fields of ethnobotany and ethnoecology, including ethnobotany and ethnoecology of central Coast Salish peoples and other Indigenous peoples of coastal British Columbia. The

Court recognizes that these interdisciplinary fields incorporate the analysis and treatment of historical records, ethnographic records, and linguistic records.

[1101] In preparing her opinion, Dr. Turner reviewed the historical record in some detail. She was asked to assume the Cowichan were an Indigenous people with a permanent village at Lulu Island. She was not asked to evaluate those assumptions. She was asked to provide an opinion on any land the Cowichan as a matter of custom would have cultivated and exploited regularly, within and/or around the Cowichan village prior to, at, and after June 1846, including to at least 1878.

[1102] Dr. Turner is an ethnobotanist of great renown. I rely on her evidence in areas of ethnobotany.

7. Cowichan Settlement on the Lands of Tl'uqtinus circa 1846

[1103] I found that the Cowichan seasonally occupied the Claim Area, and that their purpose for coming to Tl'uqtinus was to harvest fish for their winter food. While occupying the village, they needed to provide fresh food for consumption for over a thousand people for anywhere from two to three and a half months.

[1104] Dr. Turner provided useful evidence about the plants and trees that would have been available to the Cowichan people if they lived at the Lands of Tl'uqtinus. I found that they did live there over the summer and sometimes into the early fall, and that they would need to provide themselves with fresh food and harvest food for winter supply. Although Dr. Turner’s evidence does not prove that the Cowichan harvested these foods, I find on the totality of the evidence that it is more likely than not that they did.

[1105] Dr. Kennedy opined that at the height of the salmon season, a probable estimate of the number of Cowichan people residing at the village was 2,250. She based this on Douglas’ observation in 1856 that 1,000 warriors attended Tl'uqtinus seasonally, in combination with references in the Fort Langley Journals that the Cowichan warriors came with their wives, children, and slaves.

[1106] I accept Dr. Kennedy's opinion and find that more likely than not, a conservative estimate of the number of people to be fed occupying Tl'uqtinus seasonally as at 1846 was 2,250 people, based on 1,000 warriors attending with their families and slaves. They may have needed to manufacture twine and nets, collect moss and ferns for cleaning fish and for making wipes and bandages, cut tule for mats and temporary shelters, and cut wood for cooking and smoking food. They likely wove baskets to contain their harvest. They needed fresh berries and greens to eat while they were there, and berries to dry for winter food.

[1107] I consider the evidence to determine whether the Quw'utsun cultivated and managed the Village Lands and Exploited Lands to maximize resource production through practices such as landscape gardening and plant pruning.

[1108] I accept the defendants' submission that the Cowichan did not rely exclusively on the Lands of Tl'uqtinus for their winter food. They had several harvesting sites on the Gulf Islands and Vancouver Island as well. I analyze the evidence below for any specific evidence of the Cowichan harvesting these resources at Tl'uqtinus, and then I review the evidence of Dr. Turner to determine what would have been available to the Cowichan, who I find were in occupation of some of the Lands of Tl'uqtinus. I then consider the extent of the lands that were required for resource exploitation and the extent of the Claim Area.

a) Character of the Land

[1109] The location of the Lands of Tl'uqtinus is significant. The lands are situated on the Fraser River's main channel, where an abundance of salmon and sturgeon was available to Indigenous people prior to, at, and after 1846. In the upland areas of Lulu Island, I accept Dr. Turner's unchallenged opinion that there was a diversity of plant habitats and plants, such as grasses, stinging nettle, moss, ferns, cedar, hardhack, red alder, pine, blueberries, cranberries, crabapples, salmonberries, blackberries, raspberries, and red huckleberries.

[1110] I accept Dr. Kennedy's opinion that all species of Pacific salmon, as well as some species of trout and char, were available in the Fraser River at certain times of

the year. Spring salmon start running in the Fraser in June and continue into November. Sockeye salmon enter the river in late June and run well into September. Pink salmon start running mid-August and peak in mid-September. Chum salmon arrive around mid-September and can be caught into November. Coho salmon runs start in late September through to October and early November. The steelhead summer season is May to July, and the fall season is October to mid-November. White sturgeon and green sturgeon can be found in the Fraser River year-round. Eulachon do not run in rivers on Vancouver Island. The eulachon enter the Fraser River each year between March and May for short periods of time.

[1111] The plaintiffs say that some Cowichan caught eulachon. Canada denies this. I address this later.

[1112] Trutch's field notes recorded various types of vegetation on Lulu Island. He also noted the character of the land's surface, soil, timber, and undergrowth, and whether the bottom lands were wet or dry. Dr. Kennedy provided a table of the plant species that Trutch encountered in 1859 while surveying the lands about the south shore of Lulu Island in the environs of Tl'uqtinus.

[1113] Dr. Turner has provided a detailed table of plants that grew in this area. She attended the Claim Area in November 2012, and observed what plants were still growing in the undisturbed parts of that area.

[1114] Dr. Turner said the Indigenous people likely engaged in cultivation and management of various plant patches, wherever they harvested. She referenced plants that would have been available to the Cowichan if they were in occupation of Tl'uqtinus. I found that they were in occupation there, and infer the Cowichan accessed the local plant life that was available to them.

[1115] Trutch noted thick growths of blueberry bushes in the east and west of the Village Lands. Dr. Brealey incorporated these features into his Map 4. Trutch also noted, "Good level dry land. Pine brush, blueberries, grass, moss," mapped across various sections of the lands around the Village Lands, as mapped by Dr. Brealey,

which he calls the extended land management area. Dr. Turner's opinion is that blueberries had cultural importance in food preparation for Indigenous people.

[1116] Trutch noted moss and mossy ground including peat moss in the east, centrally, and in the west of the Village Lands and extended land management lands, as mapped by Dr. Brealey. Dr. Turner noted that this mossy ground was probably associated with cranberries and blueberries.

[1117] Prairie, grassland, and some prairie without grass was noted in various sections.

[1118] Burned ground and trees were noted in the east of the Village Lands and extended land management area. Trutch noted that he was entering a district of burnt small cedars and blueberry bushes, and scattered burnt pines and saplings with blueberries and grass in places. Dr. Turner's opinion is that this is probable evidence of landscape burning for maintaining berry production.

[1119] Conifer woods were noted in the east and west of the Village Lands and extended land management area.

[1120] Trutch noted pine thickets and pine brush in the west of the extended land management area. Dr. Turner's opinion is that the pine thickets and brush are probably associated with cranberries and blueberries.

[1121] Swamp, slough, marsh, boggy area, lagoon, and wet ground were noted. Dr. Turner's opinion is that they may have contained culturally important species, such as cattails, tule, and skunk-cabbage in the east and west, about the margins of the extended land management area.

[1122] Trutch mentioned plant species, including alder, blueberries (bog blueberries), brambles, briars, cedar, cherry, cottonwood, cranberries, crabapples, elm, fern, fir, grasses, hemlock, pines, spruce, tamarack, willows, and vines.

[1123] In addition, Dr. Turner reported that stinging nettles would likely have occurred in the dense patches around the Cowichan village houses, and red

huckleberries would likely have occurred along the edges of the conifer woods, with trailing blackberries in open areas. In her opinion, in the boggy areas, in addition to blueberries, cranberries, sphagnum moss, and lodgepole pine, she would expect to see salal and Labrador-tea, citing an 1858 Royal Engineers survey of the lands in the Fraser Lowland.

[1124] As stated above, Dr. Turner visited Lulu Island in November 2012 in the archaeological area of DgRs-17, and undertook an inventory of and photographed plants growing in the area. She noted that sparse remnants of the original vegetation types could be seen in small patches of native vegetation.

[1125] In Dr. Turner's opinion, there is reason to believe that, in many cases, Northwest Coast Indigenous societies sustained their unusually high populations by developing practices that enhanced the abundance and productivity of their resources and sustained them over generations. In many cases, Indigenous cultivation was not recognized by European newcomers. The management practices were subtle, including maintaining groves of cedar for wood and bark production; pruning berry bushes; selected harvesting and judicious weeding or "cleaning" of patches of particular resource plants; and, in some cases, even transplanting and scattering propagules (seeds and spores).

[1126] One type of landscape management used was the periodic and sporadic clearing of certain areas by fire. Dr. Turner's opinion is that it is highly likely the Cowichan engaged in cultivation or management of the native blackberry, blackcap, blueberry, red huckleberry, bog cranberry, salal, and bracken fern patches in areas surrounding their village at Tl'uqtinus through the use of periodic burning. She noted that the Trutch survey notes make many references to burning in the area. In her opinion, the burnt areas and charcoal deposits noted in the soil by surveyors probably reflected traditional landscape burning practices of the Cowichan aimed to enhance production of cranberries and blueberries.

[1127] Dr. Turner noted references to thick fog and smoke in the *Cadborough* ship logs, which is suggestive of the Cowichan burning to create habitat for berries. In

1848, Finlayson wrote about the weather of the different seasons on southern Vancouver Island, including a description of Indigenous peoples' burning in the fall:

> ... In August and beginning of September vegetation dries up from the drought of Summer and is then easily ignited, which is generally done by the Natives when passing along the Coast in their Canoes — The Weather being then very foggy still and close, the atmosphere becomes so much darked [*sic*] by the Fog and Smoke ...

[1128] This references Indigenous practices on Vancouver Island, and not Tl'uqtinus. Burning was a common traditional practice of cultivation that the Cowichan practised. It is likely they practised it at Tl'uqtinus as well. This is supported by the burnt vegetation that Trutch observed and Luschiim's oral history

[1129] In August and early September 1850, the Brigantine *Mary Dare* travelled from Fort Victoria toward Fort Langley and reported moderate breezes and dense smoke at daylight in numerous entries. This could have related to a naturally-caused brush fire, or it could have been intentional burning. Dr. Turner says these observations are significant because they locate the smoke in the vicinity of the Cowichan village at Tl'uqtinus, reflecting a strong possibility that it was Cowichan residents that were undertaking burning as part of their traditional landscape practices.

[1130] In Dr. Turner's view, it is highly likely that the Cowichan also regularly used, cultivated, and managed their cattail, tule, and stinging nettle patches at and in the areas around Tl'uqtinus by keeping them clear and routinely cutting plants in the late summer and early fall, leaving them free for regrowth the following year. Rush mats were used for various purposes, and were made from tule or cattail. Stinging nettle was used to create nets.

[1131] Dr. Turner says the Cowichan probably cultivated wapato (a tuber known as a stable carbohydrate on the lower Fraser River). There was a large growth of wapato found in Katzie territory. I accept that the Cowichan likely harvested wapato and consumed it, but the evidence is unclear as to where they harvested it from.

[1132] Dr. Lovisek concluded that, prior to and at 1846, the Cowichan used and occupied the village at Tl'uqtinus from which they harvested marine resources,

primarily sockeye and sturgeon. The occupation was part of their seasonal round and continued until at least 1858. The local environment limited the cultivation of important domesticated plants such as potatoes, although native plants would likely have been available and harvested if they were ripe at the time of occupancy.

[1133] Initially, Dr. Lovisek's opinion was that the Cowichan used the Lands of Tl'uqtinus for approximately three weeks in July. On cross-examination, she agreed that there is evidence, at least in certain years, that they remained at the Lands of Tl'uqtinus throughout the month of August before heading to the canyon.

b) Oral History Record

[1134] Luschiim's oral history is that the Quw'utsun would go to their village on the Fraser River to harvest resources, namely fish, berries, trees, plants, and fowl. He learned this from Hwulqwimut, his mother, his grandmother, and his uncle.

[1135] Luschiim testified that they fished for sturgeon, one of their favourite foods, in the back eddy across from Tl'uqtinus. He talked about gillnetting and described spearing the sturgeon in the shallow area of water.

[1136] S-tseelhtun (fish, including salmon and sturgeon) was very abundant at Shnuwiilh by Tl'uqtinus. The Quw'utsun harvested them by the hundreds, with some families harvesting thousands. They harvested canoe loads of fish, for both immediate consumption and by curing or preserving much of the fish for later use.

[1137] Luschiim learned of the Quw'utsun fishing opposite the village from Hwulqwimut. He learned about making netting from stinging nettle from his mother and his grandmother. He learned about making the hoop for the nets from ironwood or ocean spray from Kwul-kwal-lhamaat.

[1138] As a boy, Luschiim fished with his father using a net on the lower south arm of the Fraser for sockeye, pink, and spring salmon. His father taught him the Quw'utsun traditional way of using one or two canoes. He described the two-canoe fishing technique and the stationary net technique. Luschiim was taught by

Hwulqwimut that some parts of the river opposite Tl'uqtinus were good places to use a stationary net.

[1139] Luschiim spoke about catching salmon with a gaff hook made with a hemlock branch inserted into bull kelp and heated over hot rocks until the wood could be bent into shape. They also used Douglas fir to make fishing poles. They used the bracken fern to clean up anything slimy or bloody. It was used for cleaning and smoking salmon. He talked about preparing the spring, sockeye, and coho for smoking.

[1140] Luschiim saw dip netters catching eulachon on the edge of the Fraser River when he was racing canoes in early March many years ago. He learned from Ts'ulahwthut (Roger Peter) that the 'aluxut (eulachon) came to the river in late February or early March. Ts'ulahwthut told him that "we'd go there and be waiting for the oolichans to come up". When he said "go there", he meant Tl'uqtinus. The eulachon could be dried the same way that salmon was dried; split in half and dried.

[1141] Luschiim learned from his Elders about Quw'utsun harvesting sturgeon at the Fraser River. He was taught that there was a spot for fishing sturgeon at the big, slow, calm back eddy across from Tl'uqtinus.

[1142] Luschiim testified about the resources that were not available on southeast Vancouver Island and the Gulf Islands. These included sockeye salmon, pink salmon, sturgeon, and bog cranberry.

[1143] Luschiim also testified about the various uses of mosses. Some of them, like sphagnum moss, were soft enough that they could be used for baby wipes and wound care. They would mix a medicine pitch from the tree with certain fat or oils from an animal or bird, use it like antibiotic or antiseptic, and use the moss as a bandage to keep it in place.

[1144] Luschiim said the Quw'utsun people generally cleaned and dried the fish they caught on the south arm of the Fraser River right at the waterfront by Tl'uqtinus.

[1145] Luschiim spoke about burning the ground, which is the practice of yuqwunup. He learned from Siseyutth'e' that the Quw'utsun practised seasonal burning of the ground of the bog blueberry patches at Tl'uqtinus within the stl'ulnup to provide fertilization, control unwanted vegetation, and allow the blueberries and other berries to grow better.

[1146] Luschiim talked about catching waterfowl in the intertidal zone downstream from Tl'uqtinus. He also said they could catch ma'uqw (waterfowl) by the hundreds upstream from Tl'uqtinus, which he learned from his mother and Bob Thomas. The Cowichan would set airborne duck nets and block the flightpath of the ducks. They could also place a net in the water, and when the tide came up, the ducks would get caught under the net.

[1147] Mrs. James was taught by her family that her ancestors fished for salmon, sturgeon, and other fish at Shnuwiilh. She was taught about Xupi'xunum, which was the place around Tl'uqtinus where berries were harvested by combing them.

[1148] Mrs. James spoke about the practice of managing the land at the stl'ulnup, such as the stl'ulnup at Shnuwiilh, to ensure that it did not get overgrown.

[1149] Sulipt'un was taught that the Fraser River was "our grocery store". He was taught about the Quw'utsun harvesting fish, blueberries, cranberries, wild raspberries, ducks, and more on the Fraser River.

[1150] Qwestenuxun was taught by his father that, while at the Fraser River, the Cowichan harvested in the river delta, including blueberries and cattails.

[1151] X'tli'li'ye's mother spoke of the Quw'utsun travelling to the village on the mainland for winter supplies, including fish and berries.

[1152] Counsellor Thomas learned from Ben Thomas that the Quw'utsun travelled to the Fraser River to harvest fish such as salmon, sturgeon, waterfowl like ducks and geese, and other foods that were available.

[1153] Mr. Elliott was taught by Willie Seymour that his ancestors would travel with the Cowichan, Penelakut, and Stz'uminus to fish at Tl'uqtinus.

[1154] Luschiim's oral history is that the Quw'utsun traditionally made netting for their drift nets, dip nets, and stationary gill nets using stinging nettle. It was harvested during a certain time of year before late September. It was rolled up, usually into two strands, then wound together. Dr. Turner described this technique in her report, and conducted her own experiment producing rope made from stinging nettle. X'tli'li'ye harvested stinging nettle with her mother. Mrs. James' oral history is that a net could be made from stinging nettle, as well as cedar and cattail leaves. Deer sinew could also be used to make a permanent tie. Sulipt'un learned from Abner Thorne that, before Europeans, dip nets could be made from thin strands of cedar and from stinging nettle or burdock, which were woven into the nets to give them strength.

[1155] Dr. Turner reported that stinging nettle would likely have occurred in dense patches around the Cowichan village at Tl'uqtinus.

[1156] Willow bark was used for making fishing traps and nets. Dr. Turner identified willow as a plant species growing about the sections of land as noted in the Trutch survey.

[1157] Red cedar stakes were used to hang strips of fish for drying in smokehouses. The oral history evidence of Luschiim and Mrs. James is that cedar was used for a wide variety of items, including split boards, canoes, tools, and baskets. Dr. Turner identified cedar in the 1859 Trutch survey.

[1158] Luschiim's evidence is there are several different traditional uses for red alder and cottonwood, including for smoke drying salmon. Dr. Turner identified red alder and black cottonwood in the Trutch survey, and identified them as two of the species of plant the Cowichan would have used and managed at and adjacent to Tl'uqtinus.

[1159] Luschiim testified that lodgepole or shore pine was used for fire starter when smoking salmon. Dr. Turner identified pines in the Trutch survey, and as a species the Cowichan would have harvested in the lands around their village at Tl'uqtinus.

[1160] Luschiim's oral history is that two of the Quw'utsun would go to their village on the Fraser River to harvest bog blueberries and cranberries. Dr. Turner identified blueberry bushes in the Trutch survey, and emphasized that native cranberries grow together with and in the moss underneath the blueberries. Dr. Kennedy reported the two trails Trutch identified from the Cowichan village reached away from the shore to the surrounding prairie grassland and bogs where the Cowichan would have regularly harvested berries.

[1161] Luschiim testified that me'uhwulhp (Labrador-tea) was one of the plants the Quw'utsun used to make tea or medicines. Quw'utsun people also used t'eqe' (salal berry) for preserved food. As previously mentioned, Dr. Turner opined that she would expect to see salal and Labrador-tea in the boggy areas. She also found it highly likely that the Cowichan relied on salal berries and Labrador tea.

[1162] Luschiim and Mrs. James also testified about the harvest and use of other plants, including crabapple trees, salmonberry, trailing blackberry, red huckleberry, thimbleberry, cattail, tule, skunk-cabbage, and horsetail. Dr. Turner reported it is likely that the Cowichan relied on these plant species at and adjacent to Tl'uqtinus.

[1163] The Quw'utsun hunted deer, grouse, and waterfowl downriver at Shnuwiilh. Luschiim spoke about hunting deer, but his evidence was not specific to Tl'uqtinus. His evidence about harvesting ma'uqw (waterfowl) was specific to the Fraser River.

[1164] Canada acknowledges the Quw'utsun historical fishing practice on the Fraser River, but maintains that the Cowichan did not fish eulachon on the Fraser River.

[1165] Canada submits that descriptions of the Cowichan seasonal round by ethnographers places Cowichan at locations on the Gulf Islands and/or Vancouver Island during the time of the eulachon run of the Fraser River, which was approximately three weeks between March and May. Dr. Kennedy gave an opinion

that the Cowichan engaged in the practice of fishing eulachon on the Fraser, but Canada submits this opinion is based on environmental determinism. In other words, she relied on the underlying assumption that, since the fish were available and some Cowichan were on the river at the time, one must assume they harvested it. She relied on the Fort Langley Journals placing some Cowichan on the Fraser River during the time of the eulachon run. However, there is no specific reference to the Cowichan fishing eulachon. Canada submits there is no historical evidence that fishing for eulachon was a practice regularly undertaken by any Cowichan, or that they used the Claim Area as a base for eulachon fishing.

[1166] Eulachon fishing was not practised *en masse* by the Cowichan people. Small groups of Cowichan were on the south arm of the Fraser River during the year and it is likely they fished for eulachon. The same goes for herring fishing.

[1167] Canada submits there is no ethnographic or historical evidence respecting harvesting waterfowl by the Cowichan right at the Claim Area. I agree this is correct. The Cowichan did hunt waterfowl, but did so upriver and downriver from the Claim Area. They may have resided at the Claim Area during the hunt.

[1168] Canada submits the Cowichan did not hunt beaver on the south arm of the Fraser River. Canada says there are numerous historical records of Cowichan people coming to the Fort with beaver pelts, but there is no evidence of the specific location where the beaver were caught.

[1169] The plaintiffs say their ancestors regularly hunted deer and willow grouse in the Claim Area. Luschiim said meadows where new shoots and berries come up in areas that have been burned made good hunting grounds — deer would eat the new shoots and berries. Tl'uqtinus was such a place, although Luschiim did not tie the hunting of deer to Tl'uqtinus. This implies that the Cowichan hunted deer at Tl'uqtinus. I conclude that the main harvesting activity was for fish and berries and that endeavour occupied most of the Cowichan’s time during the summer months. There may well have been some incidental willow grouse, beaver, and deer hunting

while they were in the area but it was not a main activity. Fishing and berry picking on the other hand were.

[1170] Although Canada submits there is no direct evidence of Cowichan harvesting plants at Tl'uqtinus, there is direct oral history of berry picking from Luschiim and Mrs. James. Large numbers of Cowichan people were at the Claim Area in the summer months when the berries would be ripe. It makes sense that they would harvest the berries, given the proximity of the ripe berries and their need both for fresh food to feed their population and to dry and store food for the winter months.

[1171] I agree with the submission of Canada that the Cowichan were not occupying the Claim Area *en masse* in the fall, winter, and spring months, but there were sporadic visits for various reasons by small numbers of Cowichan people.

[1172] Canada submits that the large patches of wapato were owned by the Katzie, and it is likely that the Cowichan traded for wapato. Wapato harvesting, according to Suttles, was done in October and November. As I said earlier, I heard no evidence of where the Cowichan would have grown wapato, and so I accept that they may have traded with the Katzie.

[1173] With respect to cultivation, Canada submits that berries can grow without ecological management, and so it is not probative to suggest that, simply because there were berries, they must have been cultivated. However, I find that it was the Cowichan traditional practice to prune, burn, and cultivate berries elsewhere, and therefore I infer that they would do so at Tl'uqtinus where they spent most of the summer months when the berries were ripe and ready to harvest. There is oral history evidence that they did harvest berries at Tl'uqtinus. Trutch’s notes in 1859 recording that there were Indian trails moving toward the berry patches is evidence that they were still harvesting berries at Tl'uqtinus in 1859.

[1174] Dr. Turner estimated the Cowichan needed 12,000 kg of berries per year to feed 1,000 to 1,100 people. It is true that there is no direct evidence that the Cowichan harvested in such great quantities. It is also true that the Cowichan might

have had access to berries elsewhere, but it makes sense that the bulk of their berry harvesting was done at Tl'uqtinus because that is where the bulk of the Cowichan people were in the summer when the berries were ripe. I find that the Cowichan harvested berries at Tl’uqtinus.

[1175] Canada challenges the conclusion that the Cowichan were burning for cultivation. They submit the Trutch survey may reference burning, but it does not reference the cause of burning. Dr. Brealey agreed that the smoke seen in the area could have been from salmon smoking or by a controlled fire in the area. It could also be a peat fire, and does not necessarily mean the burning was for cultivation. There is no evidence of charcoal layers in Mr. Eldridge’s auger hole samples inland from the river, however several layers of soil had been scraped away. As the Cowichan used burning as a method of cultivation, I infer that they did so at Tl'uqtinus as well.

8. Central Coast Salish Property Law

[1176] The plaintiffs submit the Quw’utsun had a common way of life based on shared customary law, including property law. The Cowichan world is reflected in its mythology. The mythological narratives conveyed rules for the operation of Cowichan society and there were consequences for breaking them.

[1177] Many of their laws came to them at the beginning of time, when the world was created in the stories of the First Ancestors who descended from the sky. For example, Sialatsa (Syalutsu) told his brother to treat the natural world with respect and to take only what he needed. Sialatsa proclaimed they were put here to take care of the great natural abundance, such as salmon, deer, and bear, and that, although he would never go hungry, he must not kill for the sake of killing.

[1178] At the beginning of time, Xeel’s transformed lazy, selfish, and greedy beings into benevolent animals or changed them into rock to immortalize their misdeeds. For example, Xeel’s taught the gluttonous Spal who disobeyed instructions on how to care for and carry freshly-caught deer. Xeel’s turned the deer into decaying wood and transformed Spal into a raven.

[1179] Quw’utsun witnesses testified about snuw’uyulh (teachings and worldviews).

[1180] Chief Seymour described these teachings as virtues that affect the type of life you are going to lead, how you treat yourself, and how you treat those around you. When you follow the teachings, you learn discipline, humility, respect, and patience.

[1181] Councillor Thomas learned from his Elders that when he fished, he respected the resource and shared when he had extra. Important sharing includes sharing stories and knowledge of harvest techniques.

[1182] Mr. Elliott described listening to Elders as part of the teachings he learned.

[1183] X'tli'li'ye learned from her mother that snuw’uyulh is a body of teaching that contains language, culture, and ways of being Quw’utsun. It teaches you to be a good human being, and contains principles such as sharing, generosity, and the importance of knowing who your ancestors are.

[1184] X'tli'li'ye also spoke of the principle of nuts’a’maat, which relates to the way one approaches people to work together to make decisions or resolve issues. In the context of fishing, nuts’a’maat is the understanding that there is a responsibility to work together for the sustainability of the resource.

[1185] The plaintiffs submit the ethnographic, oral historical, and expert evidence establish that the Cowichan are proprietary people generally. Dr. Kennedy reported that emphasis on property was common to the Northwest Coast, including the Central Coast Salish region. Anthropologist Alfred Kroeber wrote: “What counts among these people is possession: possession of property, of inherited or acquired use, of privilege, of ritual”. Dr. Kennedy wrote that similar observations concerning Indigenous people’s attachment to property was noted by Douglas in a letter dated March 25, 1861, where he commented on the “distinct ideas of property in land” held by the Indigenous peoples in accordance with their own customary laws, and their mutual recognition of “several exclusive possessory rights in certain districts”.

[1186] BC submits that, although Dr. Kennedy suggests the people of the Central Coast Salish region placed considerable emphasis on property and possession, territories could not be defined with precise boundaries.

[1187] The plaintiffs submit the fact that that siil'tuhw (planks) and reed mats were brought with people as they moved from place to place indicated ownership. Bighouses, which required multiple people to build them, are identified as the property of a person or family, often the head of the family. Shhwa'mut means the place where your house sits, and were likewise owned by families. Dr. Lovisek agreed the Coast Salish families often owned the planks covering the frames of their plank houses. The permanent frame structure of the house occupied by a household was identified as the property of those who built it.

[1188] Dr. Turner's evidence is that the built structures, such as houses and smoke houses, were the property of those who built or inherited them.

[1189] Luschiim testified that smoked fish and other preserved resources were the property of the person who caught and preserved them. These items should be shared, traded, or sold.

[1190] Dr. Kennedy reported that the property controlled by elite men (si·ém̓) was both real and non-corporeal. Specific sites and resources could be held by a descent group as a whole, but access to the resource was controlled by the group's titleholder(s) or headmen. Names, ceremonial masks, songs, and dances, as well as paraphernalia used in rituals and shamanic performances, were owned. Some resource sites were owned.

[1191] X'tli'li'ye, Chief Seymour, Mrs. James, and Luschiim testified that incorporeal property, or inherited responsibilities for names and spiritual practices, were passed on through families, but had to be earned by the individual. A Quw'utsun name is controlled by a particular person in the family, and other family members need to seek that person's permission for the use of the name.

[1192] The ethnographic and oral historical record, and expert evidence, contains examples of owned resource sites among the Central Coast Salish, including the Cowichan.

[1193] Barnett recorded Louis Underwood of Clemclemaluts saying that root digging and clamming places, fish weirs, and elk pits were owned. Rozen recorded that herring spawning beds were owned.

[1194] In general, owned sites and technologies were places or items where an investment of labour was necessary to access it, or to build and maintain it. A fish weir was the property of the person who built or inherited it. Weirs required maintenance. When the traps became full of fish, the gates were lowered and the fish had to be removed with hooks. If the weir was not in use, the gates and boxes were taken out so the fish could travel upstream.

[1195] Mrs. James testified how her great-great-great-great-grandfather was the boss of a fish weir. He was responsible for putting that weir up and taking it down. He opened the trap to make sure the “lady salmon” went through. Everyone had to go to him to get the salmon caught in the weir.

[1196] The plaintiffs submit that, under Central Coast Salish and Cowichan customary law prior to and at 1846, a resident group held a common proprietary interest in the lands and waters around their village. Dr. Kennedy’s evidence is that, apart from the resource loci owned by elite families, members of a village held an interest in their residential land and surrounding environs, establishing a proprietary interest in the lands and waters. She adopted the view of Coast Salish expert, anthropologist Dr. Michael Kew, that:

> ... there were no precise boundaries setting out village or tribal districts, although occupants of villages took a general proprietary interest in lands and waters in the vicinity of their villages and would unite to repel strangers or interlopers with physical force.

[1197] BC submits there is no suggestion that this general proprietary interest referred to by Dr. Kew was akin to the ownership of resource loci by kin groups.

[1198] BC further submits Dr. Kennedy does not include seasonal camps in her discussion of land use near villages.

[1199] BC quotes Dr. Brealey:

> ... family owned property might have been a small percentage of the territory held 'in common' by the resident group, this latter usually in the vicinity of a village or major seasonal camp. In my opinion ... however, it might make more sense to see the villages or seasonal camps as determined partly by the distribution of common areas on the one hand, and by the locations of family or household owned fisheries, camas fields, berry patches, etc. on the other.
>
> What this all suggests is that within the Coast Salish, households exercised what amounted to exclusive jurisdiction over specific sites, but each of which was inserted in a matrix of territories of shared stewardship distributed somewhat further afield.
>
> [Emphasis added by BC.]

[1200] BC says Dr. Brealey did not describe any proprietary interest the residents of a village may have held in the territory of shared stewardship, nor did he say non-residents were excluded from these territories. He adopted ethnographer John Dewhirst's opinion on boundaries or territories. Dewhirst said boundaries of open areas, or 'village territories', were not precisely defined but they were:

> ... recognized or understood from the use and occupancy of the village residential groups. Proximity to the village invoked a stronger recognition of use by the resident local group, and with distance, particularly in inland areas, the 'boundaries' likely blurred. My opinion, based on Coast Salish ethnography, is that *boundaries between tribes were obviously recognized, therefore land use areas of local groups or village groups were very likely recognized or understood as well*.
>
> [Emphasis added by Dr. Brealey.]

[1201] BC submits the tribal territories of Central Coast Salish society did not form geographic puzzle pieces, and there were no precise boundaries to mark their limits. BC says they must be understood within the context of the social continuum and kinship networks described. Boundaries or limits did exist, but they are better comprehended as boundaries of identity, rather than of land use and ownership.

[1202] Jenness also pointed out that each village had a territory within which its members could move freely.

[1203] Barnett wrote about the common use of Cowichan territories, saying it was "[v]ery likely they all travelled over the same territory according to the season but recognized, as did other groups elsewhere, more particular property distinctions at the various common resorts".

[1204] Dr. Kennedy testified that it is Cowichan customary law that the resident group had ownership of their village.

[1205] Several of the plaintiffs' witnesses described a stl'ulnup as a specific place. It is the sacred land and "homeland" that they managed and defended, a place that goes back thousands of years, where they were embedded with their bighouses.

[1206] Luschiim testified that huliitun is something that sustains you; your food, your place, your stl'ulnup, your children.

[1207] Luschiim testified in cross-examination by BC that, in the time before there were Crown reserves, there were areas of land that were owned by tribal groups, and this was recognized by the groups comprising the Cowichan.

[1208] In 1850, Douglas advised that the Cowichan wished to sell their land to the Crown on the basis that they would not be disturbed in the possession of their village sites, and would be at liberty to continue hunting and fishing as they did before the arrival of settlers. Although Douglas was not in a position to buy the land, he anticipated that the "Indians" would be claiming payment for their land in the future.

[1209] In 1959, Douglas wrote that much excitement prevailed among the Cowichan Tribes when a detailed survey of the Cowichan Valley was being conducted. The Cowichan had a general belief that their lands were to be immediately sold and occupied by white settlers. According to Dr. Kennedy, this letter indicates that Douglas recognized that the Cowichan held a property interest in their lands.

[1210] In his address to the House of Assembly and Legislative Council on March 1, 1860, Douglas said that the House of Assembly would have to provide a means for extinguishing, by purchase, the "native Title" to the lands in the districts of Cowichan,

Chemainus, and Salt Spring Island, which were then open for settlement. He said that the purchase should be effected without delay, as the Indigenous people may otherwise regard the settlers as trespassers and become troublesome. This passage related to Vancouver Island and Gulf Island lands, but also supports the assertion that the Cowichan held a proprietary interest in land, which I accept.

[1211] In March 1861, Douglas noted Indigenous peoples' attachment to property. He commented on the "distinct ideas of property in land" held by Indigenous peoples in accordance with their own customary laws. Further, due to their mutual recognition of "several Exclusive possessory rights in certain Districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary Tribes, as national wrongs". In Dr. Kennedy's opinion, Douglas was referring to the Cowichan, among other groups. Dr. Lovisek said in her response to the Kennedy report that the Cowichan were insistent about their claims to land on Vancouver Island and the Gulf Islands. She agreed however that people with property concepts take these concepts with them to other areas.

[1212] Dr. Kennedy's opinion is that, in 1846, the south shore of Lulu Island was the site of a multi-neighbourhood village of the Cowichan people. The Cowichan owned a village located at Tl'uqtinus in which they held a collective interest. They put a massive investment of labour into constructing this village, with permanent post and beam frameworks for over 108 houses. They maintained their property interest in their residential land and surrounding environs at Tl'uqtinus through the construction of large plank houses and a network of trails to harvesting areas. As with other Central Coast Salish villages, and in accordance with their laws, the resident villagers took a proprietary interest in the lands and waters about their village.

[1213] The plaintiffs submit there is evidence in the historical record of the Cowichan proprietary interest in the village at Tl'uqtinus. Shashia joined the Simpson expedition aboard the *Cadborough* and identified the Cowichan villages at Tl'uqtinus as the Somenos, Penelakut, and Quamichan. An argument could be made that

Cowlitz leader Scanawa identified the villages, but it makes more sense to me that Shashia would have done so, given that they were Cowichan villages.

[1214] Dr. Kennedy reported that documents compiled before and after 1846 indicate that a large village situated on the south shore of Lulu Island at Long Beach was acknowledged as belonging to the Cowichan. Dr. Lovisek agreed it is always referred to in the historical record from 1827 to 1858 as the Cowichan village or villages. I find that this suggests a proprietary interest as recognized by third parties.

[1215] There is evidence that the Cowichan regarded the land on the south arm as their own in 1874. William Ladner and William Smith, settlers at Canoe Pass, described an altercation with some Indigenous people identified to them as Cowichan. Ladner reported that the “Indians” came around and threatened violence, saying “‘twas the Indian’s land they had more right to it than the whites”.

[1216] In 1877, the Cowichan asserted their rights to the land and fishery at Tl'uqtinus. Joint Indian Reserve Commissioner Gilbert Sproat wrote: “they complained that they had heard that white men had bought the fishing station on the Lower Fraser River, where they had always been accustomed to get their winter food”. Sproat said “it is stated to be true that the old fishery station on the Fraser known as the ‘Cowichan Fishery’ and annually used by them from time immemorial in getting fish for winter food, has been sold many years ago”. Sproat described the fishery as “[t]he ancient fishing ground on the Lower Fraser of the Cowichan nation”.

[1217] The transfer of ownership to white non-resident owners under colonial law did not prevent the Cowichan from continuing to occupy their village. In 1878, Sproat reported: “The owner being an absentee, there has been no trouble about the land as yet. About one thousand Indians encamped there last season”.

[1218] In 1890, Indian Agent W. H. Lomas wrote from Quamichan that the:

> Indians here claim that they have a reserve on the Fraser which ought to entitle those of them who had fishery licenses last year to a renewal. They say the Reserve known as Kluck-tins and runs up the river from Findlay, Durham & Brodie’s cannery.

[1219] Dr. Lovisek testified in cross-examination that this cannery was located on the northern tip of Deas Island, and that the Lands of Tl'uqtinus were located upriver from Deas Island on the north shore of the south arm.

[1220] In 1906, Cowichan Chief Silpaymult and other Indigenous leaders petitioned King Edward VII directly, with Simon Pierre (Wayne Suttles' Katzie informant) acting as their interpreter, regarding land grievances in British Columbia based on "Indian title" and insufficient allotment of reserves. Pierre subsequently told Suttles that Tl'uqtinus was claimed by the Tsawwassen, Kuper Island, Chemainus, Nanaimo, and Cowichan.

[1221] In 1911, the Cowichan petitioned the Premier of British Columbia, requesting that the issue of their Aboriginal title be submitted to the courts. They also petitioned King Edward VII in person again through their Chief Tsilpaymilt (or Silpaymult), who travelled to England seeking a reference to the Judicial Committee of the Privy Council. This accords with Qwestenuxun's previously-mentioned 2007 affidavit evidence, where he deposed he had learned the Salish Chiefs sent leaders to see the King, and referred to Chief Silpaymult being the delegate to the Cowichan Tribes. In 1913, Chief Tsilpaymilt wrote to the Prime Minister to inquire of the petitions they had laid before the Crown. No Crown fiat was ever issued allowing the Cowichan to access the courts based on their Aboriginal title.

[1222] The plaintiffs submit that other Indigenous groups recognized the Cowichan proprietary interest in the Lands of Tl'uqtinus, including Work's interpreter of northern Puget Sound, Cowlitz trader Scanawa, and the Musqueam who reported in May 1828 that the Yeukeltas had killed a Musqueam Chief down at the Cowichan summer village. The people of southern Puget Sound told Father Blanchet in 1841 about the "Kawitchins on an island in the Fraser River". Moreover, the Sumas guide who accompanied Gibbs up the Fraser River in 1858 provided Gibbs with the Indigenous name Klik-a-téh-nus. Tsawwassen Chief Joe recognized the Cowichan presence at Tl'uqtinus. As previously noted, he told Barnett in the 1930s that, at Tl'uqtinus, the Cowichan had a camp that may have extended about a mile of open

space on Lulu Island, or that it was located on a stretch of open space on Lulu Island that was about a mile long. Pierre of Katzie told Duff in 1952 that Tl'uqtinus was held in common by several Cowichan villages across the Strait; the Cowichan came in the summer for fish and berries, and some stayed year-round.

[1223] BC submits that title to land is not a seasonal right, but is a permanent one conferring ownership year-round. The occupation necessary to establish title must evince an intention to hold or possess the land at all times. Put another way, the acts of occupation must demonstrate that the land in question belonged to the claimant group, wholly and completely, not just for a few months of the year. The kinds of acts necessary to do so — the intensity and frequency of the land use required — will depend on the circumstances, including the manner of life of the people asserting title and the character of the land: *Tsilhqot'in* SCC at paras. 37–38.

[1224] I find that the existence of permanent structures indicates a consistent presence on the land and an intention to hold possession at all times, even though the structures were not inhabited year-round.

[1225] BC submits that, when Suttles spoke of perpetual rights of whole tribes, he was referring to fishing rights and he did not apply this concept of rights to land.

[1226] BC does acknowledge that the evidence indicates that the Cowichan may have shared land as a collective in the Claim Area during the salmon season.

[1227] I accept Dr. Kennedy's evidence that, if I take into consideration the full population and compare it to Douglas' 1856 report of 1,000 of 1,400 warriors being at the Fraser River to fish, then members of several groups must have gone to Tl'uqtinus.

[1228] Musqueam witness Morgan Guerin gave evidence about the governance practice regulating people coming over to "Musqueam territory", and requiring permission before going into other's territory as a sign of respect. I find this suggests that Musqueam agrees with the principle of land ownership to one's village.

[1229] Canada takes no position with respect to the plaintiffs' assertion that Central Coast Salish property law supports their proprietary interest in the Lands of Tl'uqtinus.

[1230] I find that Canada's denial that other Indigenous people recognized Cowichan property interest in the Lands of Tl'uqtinus fails to consider Central Coast Salish perspectives. While the sources in the record did not use the term "ownership", the fact they identified a Cowichan place or Cowichan fishery suggests ownership.

[1231] Musqueam submits that the hən̓q̓əmin̓əm̓-speaking people of the lower Fraser River had a proprietary interest in the Claim Area and Tl'uqtinus. The plaintiffs submit there is no evidence to support this assertion. It was never put to Dr. Kennedy, whose opinion was that the Cowichan had a proprietary interest in their village at Tl'uqtinus. They also say that Musqueam's position is inconsistent with the evidence about Coast Salish property law.

[1232] Central Coast Salish villagers held a proprietary interest in the lands and waters around their villages. Dr. Kennedy says the Cowichan's regular presence affirmed perpetual rights that were independent of any kinship with those who resided elsewhere on the lower Fraser River. They came to Lulu Island and formed a collection of neighbourhoods that together held the village site in perpetuity. They did not cross the Strait and disperse among other mainland residents.

[1233] On my review of the evidence, I conclude that other than a small village on Tree Island at the mouth of the Pitt River, there is no evidence of the hən̓q̓əmin̓əm̓-speaking people having permanent villages on the south arm. They likely had campsites. There is also no evidence that Central Coast Salish people took a proprietary interest in campsites. There is no evidentiary support for Musqueam's submission that hən̓q̓əmin̓əm̓-speaking families would designate sites for their relatives to camp and access fish with their permission. The only evidence about designated sites came from Chief Sparrow's oral history, which was about designated sites mostly for Musqueam women who married into Cowichan Tribes.

[1234] The plaintiffs do not argue that the Cowichan owned or controlled the entire Fraser River fishery; they submit they owned and controlled the Lands of Tl'uqtinus.

[1235] Musqueam argues that the plaintiffs' claim to a proprietary interest in the Claim Area is contradicted by numerous admissions and representations made by the plaintiffs' leadership, captured in protocol letters sent to Musqueam to facilitate access to the south arm. The plaintiffs submit Musqueam did not put a single protocol letter to Dr. Kennedy in cross-examination. They argue that requests for modern fishing access should not be linked to the application of Indigenous law to historic occupation of land. Musqueam does not plead a permissive power in relation to the Cowichan's occupation of land; it does so only in relation to the pre-contact practice of fishing. The plaintiffs say the modern protocol letters were mandated by the Department of Fisheries and Oceans ("DFO"), and have no bearing on Coast Salish law in 1846.

a) Application

[1236] The Cowichan society was based on customary law, as found in Cowichan mythology. The Cowichan were a proprietary people with proprietary laws. Concepts of ownership were integral to their society. The Cowichan had recognized property interests. Specific resource sites were owned. Villagers had to respect each others' property rights. Dr. Kennedy opined that it is one of the customary laws of the Cowichan that the resident group has ownership of their villages. This is consistent with the oral history evidence that the Cowichan were embedded in their stl'ulnup. It was a place they managed and defended.

[1237] The oral history and testimony of the plaintiffs' witnesses makes clear that they consider the Quw'utsun *stl'ulnup* on the Lands of Tl'uqtinus as the collective property of the Quw'utsun people.

[1238] Shashia was proprietary when he pointed out the village. The village was identified to settlers as belonging to the Cowichan. It was identified that way by other Indigenous groups as well.

[1239] Based on the evidence before me, I find that Musqueam's submission conflates the laws of access to resources with ownership of land.

[1240] I am satisfied that Central Coast Salish and Cowichan customary property law included law regarding proprietary collective ownership of villages. I accept that under those laws, the Cowichan had a recognized proprietary interest in the lands and waters in the vicinity of their village at Tl'uqtinus.

9. Conclusion on Sufficiency of Occupation

[1241] As I previously noted, Tl'uqtinus (spelled different ways by different groups) is a geographic area and the Cowichan village is situated within this geographic area. Many Indigenous people knew that stretch of Long Beach as Tl'uqtinus. Their references to that area by name were to the long stretch of shoreline where many Indigenous people came to fish, not specifically to the Cowichan village. It seems the Cowichan adopted the term Tl'uqtinus for their village.

[1242] There was a permanent Cowichan village in the Claim Area. The evidence reviewed above establishes that this village existed on the Lands of Tl'uqtinus prior to, at, and after 1846, through to 1859. As I set out later, I find the Cowichan continued to return to their village every summer through to the 1870s and beyond. They collectively moved with their wall planks until they transitioned to mat houses. The annual migration of the majority of Cowichan back and forth across the Georgia Strait occurred as part of their traditional seasonal round. There were sporadic visits for various reasons by small numbers of Cowichan people outside the summer months.

[1243] I estimate that about 2,250 Cowichan occupied the village on the Lands of Tl'uqtinus in season as at 1846. The character of these lands meant an abundance of diverse plant and animal resources were available at the time. The Quw'utsun stl'ulnup on the Lands of Tl'uqtinus was a huliitun — a place that sustained and kept them alive.

[1244] The Cowichan physically occupied a portion of the Lands of Tl'uqtinus prior to, at, and after 1846, through 1859 and onward. They did so through regular use, management and cultivation of the land as part of their traditional way of life.

[1245] The Cowichan's occupation of their village demonstrated a permanent and regular presence on the Lands of Tl'uqtinus. They physically occupied the land through the construction of a village comprised of permanent post and beam frames. They occupied the land seasonally, en masse, as a collective, year after year. This communicated to other Indigenous groups and settlers that the village belonged to the Cowichan. From an Indigenous perspective, the evidence shows the village at Tl'uqtinus was inexorably tied to the Cowichan's way of life, culture and seasonal round. It was the Cowichan's stl'ulnup where they gathered to fish and harvest to sustain themselves through winter. From the common law perspective, the Cowichan possessed the land through their permanent village, cultivated land, and physical presence.

[1246] Accordingly, I am satisfied the plaintiffs have proven sufficient occupation of a portion of the Claim Area.

[1247] The extent of the Claim Area that the Cowichan occupied will be discussed below in the section dealing with extent of the lands.

D. EXCLUSIVITY OF OCCUPATION

1. Positions of the Parties

a) Plaintiffs

[1248] The plaintiffs submit prior to, at, and after 1846, the Quw'utsun had the intention and capacity to retain exclusive control of the Lands of Tl'uqtinus as their settlement lands and stl'ulnup. The character of the lands assisted the Quw'utsun in maintaining exclusive control over them. The Cowichan had this capacity in terms of strength in numbers, particularly relative to other Indigenous groups in the Gulf of Georgia and the lower Fraser region. They had a reputation of fierceness, and had war chiefs, warriors, and war parties equipped with large war canoes, weapons, and

a central war village in the Gulf Islands across the Strait from the mouth of the south arm of the Fraser River.

[1249] The plaintiffs submit the Cowichan's intention and capacity to control the lands applied to the Musqueam and Tsawwassen prior to, at, and after 1846. They submit that there is no evidence that the Tsawwassen ever used or occupied the Lands of Tl'uqtinus.

[1250] The plaintiffs submit there is no evidence in the historical record between 1824–1859 of any other Indigenous peoples occupying the Lands of Tl'uqtinus. Occasional isolated acts of trespass are consistent with the Cowichan controlling the lands. They say the Cowichan intentionally used intimidation and force to persuasively control Tl'uqtinus and secure their interests on the lower Fraser River and the Gulf of Georgia relative to any other Indigenous group in the region.

[1251] Regardless of the Lekwiltok raiding the Gulf of Georgia, the plaintiffs submit the Cowichan's intention and capacity to control the Lands of Tl'uqtinus on the south arm of the Fraser River remained in place. They submit there are no historical records of any challenges to the Cowichan occupation of the Lands of Tl'uqtinus.

b) Canada

[1252] Canada submits the plaintiffs have not established exclusivity. There is no evidence of the Cowichan repelling or excluding others from the Claim Area in and around 1846. The plaintiffs adduced no evidence as to why their seasonal use and occupation of the Claim Area required that use and occupation to be exclusive.

[1253] The general acts of Cowichan aggression and intimidation do not establish exclusivity. Instead, the evidence demonstrates a complex system of relationships between Coast Salish groups that is not reflective of dominance and control over the Fraser River by the Cowichan.

[1254] Canada further says the Cowichan did not treat, and could not have treated, the Claim Area as exclusively theirs, given their absence most of the year. Any

Cowichan presence on the Fraser outside the summer was small, intermittent, and brief.

[1255] Canada submits that many of the resource harvesting sites on the Fraser River were used by numerous Coast Salish groups.

[1256] Canada further submits that Coast Salish norms and laws with respect to access to resources and territory are important elements to consider.

c) BC

[1257] BC adopts Canada's position on exclusivity, and adds that residents of the lower Fraser River were not insular collectives with clearly-delineated and exclusive 'tribal' territories. The area was shared by a variety of Coast Salish peoples during the salmon season; this land use was not subject to the Cowichan's permission or control. Access to the land and resources was mediated through custom and residential and kinship networks, which created a complex web of connections within a social continuum. Exclusivity is inconsistent with these customs.

[1258] BC also submits there is no evidence the Cowichan actively excluded others from the Claim Area or attempted to exclude access to the river. There is no evidence the skirmishes between Indigenous groups were for territorial purposes.

[1259] Further, BC submits there was no need for exclusivity because of the abundance of resources in the area. The Claim Area, outside of the summer months, was available to others.

[1260] BC does not suggest that continuous presence is required. However, they say the Cowichan were not in an immediate position to mediate access to the land except in the summer. Meanwhile, the land was available for resource exploitation and other groups were present on the lower Fraser River year-round.

[1261] It is not clear that the Cowichan had the capacity to retain exclusive control even in the summer months. BC says that even if the Court accepts the plaintiffs'

theory that use of the Claim Area was mediated through force and intimidation, that does not mean the Cowichan had the capacity to exert exclusive control.

d) VFPA

[1262] The VFPA denies that the Cowichan had continuous or exclusive occupation or control of the Claim Area, or that the Cowichan had the intention or capacity to retain exclusive control. Apart from limited submissions with regard to proof of Aboriginal title, the VFPA relies upon the submissions of the other defendants.

e) Richmond

[1263] Richmond references an opinion given by Drs. Kennedy and Bouchard in 1991 wherein they wrote that the “terrible large village” described by Annance was Tl'uqtinus, which was the site the Tsawwassen used to camp at and claimed as their own (on the south side of Lulu Island near the north entrance to the present-day Deas Island highway tunnel). Richmond further submits the Cowichan and Musqueam shared deep kinship ties and cultural traditions, stretching back to pre-contact times. They shared resources pursuant to these kinship ties between their respective territories. This is sufficient to establish that the Cowichan could not have exclusively occupied the village site.

[1264] Richmond submits that the Cowichan viewed the mainland as Musqueam territory. They say that Rozen’s informant Agnes Thorne acknowledged the Fraser River was outside the Cowichan’s geographic and linguistic territory. This was recognized by Willie Seymour at a meeting, who stated that the Cowichan would historically come over to the Fraser River pursuant to their prior understanding and relationships with Musqueam.

f) TFN

[1265] TFN submits no tribe of the Coast Salish peoples was wholly self-sufficient or occupied its territory to the complete exclusion of others. TFN says, while the Cowichan were a strong group, they were not a singularly dominating group who feared no one and controlled the river and the lands.

g) Musqueam

[1266] Musqueam says the plaintiffs have not discharged the burden of proving exclusivity over the Claim Area, especially in relation to Musqueam or other hən̓q̓əmin̓əm̓-speaking peoples on the Fraser River. Musqueam submits they have been at the mouth of the Fraser River and on the south arm since time immemorial. They say it is contrary to the oral history and shared kinship-based social structure of Coast Salish life to suggest that the Musqueam could have been excluded from their own territory by the Cowichan. Musqueam welcomed families of the 11 local groups as part of their sustained common culture over the millennia.

[1267] Musqueam says if the Cowichan fished the south arm of the Fraser River at contact, they did so with Musqueam's permission and the permission of other hən̓q̓əmin̓əm̓-speaking peoples. This will be addressed in Part 10 dealing with the Aboriginal right to fish.

2. Overview

[1268] Exclusivity of occupation means that the Indigenous group had the intention and capacity to retain exclusive control over the land: *Tsilhqot'in* SCC at para. 47, citing *Delgamuukw* SCC at para. 156. This question of fact depends on various factors, such as the characteristics of the claimant group, the nature of the other groups in the area, and the characteristics of the claimed land: *Tsilhqot'in* SCC at para. 48.

[1269] Below, I review the evidence related to the Cowichan's intention and capacity to control the Claim Area. In this case, that inquiry focuses on the following factors:

1. The character of the Lands of Tl'uqtinus, including its geographic distance from the Cowichan's winter villages and its seasonal use;

2. The characteristics of the Cowichan as a group, including their strength, relative population size, and reputation;

3. The Cowichan's intention and capacity to exclude others from the Lands of Tl'uqtinus while residing on Vancouver Island for most of the year;

4. The Cowichan's perpetual right to the Lands of Tl'uqtinus, including Quw'utsun and Coast Salish customary law with respect to the Lands of Tl'uqtinus and access to the fishery on the south arm; and

5. The Cowichan's intention and capacity to control the Lands of Tl'uqtinus relative to other groups in the region, including the Lekwiltok, Tsawwassen, Nanaimo, and Musqueam.

3. Character of the Land

[1270] The plaintiffs submit the Village Lands were capable of housing in the order of 1,000 Cowichan warriors at the riverfront. The Village Lands and Exploited Lands and the south arm provided an abundance of resources capable of feeding a large number of people, at least 2,250 Cowichan in season every year. This number provides for Cowichan warriors coming with their wives, children, and slaves.

[1271] The Lands of Tl'uqtinus included the sloping north bank of the south arm, providing high ground to resist intrusion from the river. The lands were surrounded by a natural bog and slough, which deterred intrusion. The freshwater sloughs and marsh lands surrounding the Cowichan village provided additional security.

[1272] Most importantly, the Lands of Tl'uqtinus are strategically situated on the bend of the river, allowing long Cowichan views up and down the south arm and across the channel, preventing any enemy canoe-based surprise.

[1273] I find that these features do not mean that other Indigenous groups could not access the Lands of Tl'uqtinus, but they deterred uninvited visitors and made it easier for the Cowichan to detect their arrival.

[1274] I accept Dr. Kennedy's opinion that the Village Lands were more inhabitable than the land downstream, which is demonstrated by the fact that the 1824 McMillan expedition returned to the village to camp. It also is demonstrated by the massive

investment of labour that the Cowichan put into constructing the village, with permanent posts and beams for over 108 houses that were observed in 1824.

[1275] Canada argues that the abundance of resources on the Fraser River made it unnecessary to exclude others. I accept the plaintiffs' response that this conflates capacity to control the *land*, with capacity to control *fishing and harvesting*. The plaintiffs do not claim that they ever had the intention or capacity to control the latter.

[1276] I find the Cowichan investing an enormous amount of labour in establishing their bighouses in itself indicates an intention to control that settlement land for their own purposes. Unlike the Musqueam, the Cowichan do not claim they controlled access to the Fraser River, nor do they claim that anyone was required to ask them for permission to fish. That would be unnecessary, and perhaps impossible, for one group to try to exclude others from the abundant Fraser River fish runs.

4. Characteristics of the Cowichan as a Group

[1277] The evidence, reviewed below, shows that the Cowichan had a large population relative to other Indigenous groups in the area, and engaged in periodic raiding. I find the Cowichan's reputation as fierce warriors significantly contributed to their ability to exercise control. Many defendants challenge this reputation.

[1278] An issue arises as to the Cowichan's use of intimidation and force on the Fraser River. I explore whether evidence of aggression must be in relation to the Claim Area, or whether the fact that the Cowichan were a nation feared by others generally can support a finding of exclusive control.

[1279] It is well-established that the Lekwiltok were the common enemy of the Coast Salish people, including the Cowichan. The defendants submit this detracts from the Cowichan's reputation of fierceness. I next explore whether the fierceness of the Lekwiltok undermined the Cowichan's reputation for fierceness and their capacity and intent to control their land.

a) Oral History

[1280] Mrs. James' oral history is that the Quw'utsun people had warriors, the tu'etqe'. Some of these warriors were the 'uyeenwus, who were "braver than brave". They lived separately in their own village site or owned bighouses at the Cowichan River and at Valdes Island. They were similar to modern-day soldiers. They were trained in how to speak in a certain way, how to be brave, and how to fight. The warriors came together and trained in Cowichan Bay. The Quw'utsun warriors protected the Quw'utsun people and moved around wherever they needed to be.

[1281] Mrs. James also testified that the warrior group fought for the stl'ulnup, the ancient grounds. She said it did not "matter if it was northern tribe, First Nation or our southern tribe; they still went to war". Shnuwiilh on the south arm was a place that was spoken loudly about and defended, that the warriors would train to defend.

[1282] She was taught that me'luqwa is what would happen to people if captured; warriors would cut a person's head off, to show they could not come to this territory.

[1283] Canada says this is not specific in place or time. Mrs. James said this was before her time. She referred to Shnuwiilh as a place the warriors defended.

[1284] Sulipt'un's oral history is that the Quw'utsun who lived at Yuxwula'us on Kuper (Penelakut) Island were lookouts who kept watch for the northern people. Mrs. James testified there is a hill on Thetis Island that the Quw'utsun used as the lookout. The person who watched was called the lemuxutun (watcher), and their purpose was to make a warning signal if there was an enemy coming. They were trained to stay awake, give warning signals, and recognize family canoe types, paddles, and crests. When the warning came, the people worked together and had to go to war. Messages were sent by trained runners. When another group of Quw'utsun warriors (the stommish) got a signal from the lemuxutun that the enemy was approaching, they would gather together in their canoes and defend their lands.

[1285] Qwestenuxun said large numbers of northern warriors came to Cowichan territory. A runner was sent from the Nanaimo village to notify the Quamichan, who sent runners to other Cowichan communities. This led to a battle near Maple Bay.

[1286] Councillor Thomas was told that people from Bonsall Creek were attacked by Haida raiders from the north. The Bonsall Creek community sent a runner through Crofton to Mount Tzouhalem to get warriors. The warriors from Mount Tzouhalem surrounded the Haida raiders and massacred them. The heads of the Haida warriors were cut off and put on sticks all around the estuary in front of the present-day Tsussie reserve as a warning of what could happen if raiders tried this again.

[1287] Councillor Thomas said the Quw'utsun warriors at Tl'uqtinus went to the Musqueam village on the river, killed a chief, and took his head. He said that is how it was back then to show dominance or strength. It was a grisly act of deterrence.

[1288] Musqueam submits the oral history is insufficiently specific in time and place. They suggest Councillor Thomas' evidence about the killing of a Musqueam is not relevant and is missing context. I find that evidence of Cowichan intimidation practices generally is relevant in assessing the characteristics of the Cowichan.

[1289] Luschiim's oral history is that, before there were Crown reserves of land, there were areas of land controlled by tribal groups, and this was recognized by the Quw'utsun. The Quw'utsun would expect people from other Indigenous groups to respect their rules when in Quw'utsun territory. A serious consequence for not following those rules was chopping off their head and putting it on a stick.

[1290] Luschiim relayed that the northern people came to war with the Cowichan at Shnuwiilh, Tl'uqtinus. Luschiim was told that many of his people were killed and enslaved, but some paddled across to "this side, this part of Quw'utsun", and that "we got together, all the Quw'utsun people, along with our friends the Shshenuts [Saanich] and Snuneymuhw [Nanaimo], and ... warred back on them at Tl'uqtinus". They defeated them and took back their stl'ulnup and their village at Tl'uqtinus.

b) Historical Record

[1291] As previously set out, the first documented reconnaissance expedition in the Fraser River region was the McMillan expedition in 1824. On December 19, 1824, they stayed at the village extending at least three quarters of a mile along the shore — which I found to be the Cowichan village — and ventured to the mouth of the river the next day, where they were met by six Cowichan people in a canoe. Work observed that "[t]hese people are of the Coweechin tribe and had just crossed from Vancouver's Island where they now live". Work wrote that "they pulled ashore to bring their chief who had landed". Dr. Brealey opined that there is a strong possibility this was Shashia. Dr. Lovisek agreed that this canoe party may have been a war party.

[1292] A Snohomish interpreter from Puget Sound for the McMillan HBC reconnaissance expedition identified the Cowichan as a barbarous and wicked people inhabiting the entrance of the Fraser River. Particularly, on December 9, 1824, Work remarked on one of their male interpreter's fears of "the Coweechins, the tribe who inhabit the entrance of the river of which we are in quest, and who are represented as a barbarous and wicked people. They are so wicked that the most of the Indians are unwilling to trust themselves among them even under our protection".

[1293] Based on this record, Dr. Brealey concluded that it was clear the Cowichan in general possessed at least a considerable power of persuasion on the lower Fraser.

[1294] On August 20, 1825, during the HBC's second reconnaissance expedition, the *William and Ann* was approached near the mouth of the Fraser by a large canoe with 14 Cowichan men. Shashia was described as displaying "the appearance of a Chief and his Manly Countenance would command respect any where". One of McKenzie's guides turned down a guiding assignment over fear of the Cowichan and the Lekwiltok. The plaintiffs suggest that this canoe may have been guarding the entrance to the Fraser. That is one possible interpretation. The entry does support the submission that the Cowichan were feared by other Indigenous people.

[1295] On August 20, 1825, Saanich and Lummi persons told the HBC “that [they] would soon be visited by two very powerful & dangerous tribes, the Cowitchen & Yakulta”.

[1296] On July 15, 1827, the 25-man HBC expedition to establish Fort Langley identified Shashia as the principal Cowichan Chief, and took him on board the *Cadborough*. He travelled with them up the south arm of the Fraser River. They passed the Cowichan villages. Shashia engaged in an upriver site selection for Fort Langley. Dr. Kennedy says Shashia was presented with a blanket and a few fine beads for his assistance. Shashia also retrieved goods that were stolen from the HBC. Dr. Brealey says Shashia’s retrieval of stolen goods demonstrated the influence he had over Indigenous affairs on the lower Fraser River.

[1297] Musqueam challenges whether Shashia was a principal Chief or even a warrior. They submit the HBC was primarily concerned with those who could show up with furs and trade with them. Those who could held a position of some importance. They say Shashia was a fur trader and he usually travelled with a small party of other traders, not with a large group of the Cowichan. For the reasons that follow, I reject this characterization of Shashia. The record shows that he was a Cowichan leader and principal man. Shashia was an influential man, a warrior, and a fur trader. He led raids and coordinated the battle of Maple Bay.

[1298] On October 3, 1827, Clerk Barnston at Fort Langley noted Snohomish alarm and fear of the Cowichan:

> The [nine] Sinahomes bartered their Furs ... These fellows are at present somewhat alarmed at a report that the Cowitchens intend cutting them off, and we have some difficulty in dispelling their fears, as they were not long ago at variance with that people.

[1299] On October 18, 1827, Shashia led a war party of Cowichans and Musqueam to attack the Chilliwack. The war party returned downriver the next day, having killed two Sumas and taken several prisoners to become slaves. Barnston observed the Cowichan party passing Fort Langley:

> The head of one of their Victims was pendant at the Bow of the largest Canoe, presenting a spectacle as dismal and disgusting as can well be imagined — a spectacle, the most shocking to humanity, that this land of Barbarism can well produce.

[1300] Barnston's note supports a finding that Shashia was a war Chief, in addition to being a well-known trader and middleman in trading with the Fort. It also supports the oral history evidence of the practice of me'luqwa being used on the Fraser River at the relevant time period.

[1301] Dr. Kennedy testified the purpose of cutting heads off, hanging them on the bow of a canoe and holding them up, was intimidation and reputation maintenance. Dr. Lovisek agreed that this intentional act provided a deterring effect on other Indigenous people by installation of fear.

[1302] On March 13, 1828, McMillan recorded a Cowichan war party headed by Lammus passing up the river going to kill the Chilliwack. They were 150 men in 10 canoes. They met with Shienten, the Musqueam Chief, who was with his wife and two daughters on the river. The Cowichan war Chief took Shienten's eldest daughter, and menacingly threatened that if the Musqueam Chief did not keep quiet he would kill him and make slaves of his family.

[1303] I find that, even though this may be the act of one war Chief acting in his own self interest, it is evidence of the Cowichan's fierceness.

[1304] On March 19, 1828, three Katzies informed McMillan that the Cowichan war party had passed downriver having killed 10 Pilalt and taken a number of their women and children as slaves. McMillan noted:

> This warfare keeps the Indians of this vicinity in Such Continual alarm, that they Can[n]ot turn their attention to any thing but the care of their family ... While the powerful tribes from Vancouver's Island harass them in this manner, little hunts Can be expected from them.

[1305] On May 24, 1828, McMillan recorded that the Cowichan brought news that Shashia was preparing a war party to kill the Quaitland (Kwantlen). On June 12, 1828, McMillan reported that the Musqueam who were visited by the Lekwiltok at the

Musqueam village were running away upriver, having lost three men and 30 women and children. He noted the “Country her[e]abouts is in [a] Continual State of fear by their powerful and Blood thirsty enemies from the Gulf of Georgia and Johnston’s Straits”. I accept Dr. Brealey’s opinion that the Cowichan were these enemies from the Gulf of Georgia and that the Lekwiltok were from Johnstone Strait.

[1306] On July 6, 1828, McMillan recorded that the Cowichan killed two Kwantlens a few miles below Fort Langley and five Katzie from Pitt River, such that “[t]he poor tribes of this quarter Cannot attend to any thing like hunting while their Powerful Neighbours from Van. Island are allowed to Murder and Pillage them at pleasure”.

[1307] HBC Governor Simpson visited Fort Langley in October 1828. In his March 1829 dispatch to the HBC executives in London, he noted that, in reference to the interior country, “[i]ts permanent occupants, however, being few in number, are intimidated by the large and powerful bands that come to the [Fraser] River from Vancouvers Island and the Coast, for the purpose of [f]ishing”.

[1308] On August 1, 1829, McDonald reported the “Quaitlines [Kwantlens] having no great love for the Cawaitchins, or a desire of being at all in their neighbourhood they moved off from here today to higher up”.

[1309] Based on this historical record, Dr. Brealey opined that the Cowichan could secure their interests on the river by military means when necessary. These are examples of the Cowichan using psychological warfare to maintain their advantage. There are numerous references in the Fort Langley Journals between 1827 and 1830 to the fact that the Cowichan were feared by other Indigenous groups on the lower Fraser River. I accept Dr. Brealey’s opinion in this regard.

[1310] The Fort Langley Journals end in 1830. Thereafter, there are limited historical records about the Cowichan until around the mid-1840s.

[1311] In 1847, Finlayson recorded in the Fort Victoria Journal a war party of Cowichan passing in the strait and firing on some Clallam who were crossing.

[1312] In 1849, Chief Factor Douglas referred to the Cowichan as “having never been brought under our influence”, and as having “lost nothing of their naturally savage character”.

[1313] In October 1849, Douglas reported a quarrel between the Indians of Fort Victoria and the Cawatchin Tribe. The Cowichan were sending out war parties to avenge the loss of a nephew of a principal Cowichan Chief, “keeping us in a constant state of alarm”.

[1314] In August 1852, Douglas described the Cowichan as a warlike people. He described the Nanaimo as not having the reputation of being so numerous or warlike as the Cowichan.

[1315] In September 1852, HBC Clerk Joseph McKay, Nanaimo Post, wrote Douglas advising that Shashia had arrived with 40 armed “natives” in four canoes. McKay enquired of him his intention in coming in such a war-like matter. Shashia informed him that he had just returned from the Fraser River, and that he had come over from his village, which is about 15 miles distant, on a complimentary visit to the Nanaimo who were his relations and friends. Leaving the harbour, they shot an Indigenous person. Drs. Kennedy and Brealey opined that Shashia’s village was on southwest Valdes Island near Cowichan Gap, which is opposite the south arm.

[1316] In November 1852, Douglas reported to London that:

> ... an event occurred which I fear may lead to serious difficulties with the Cowegin Tribe ... Messengers were despatched to the Cowegin [Chiefs] ... and they have just returned accompanied by Soseeah [Shashia] the Chief, who possesses the greatest degree of influence with that people.

[1317] In January 1853, Douglas travelled to the Cowichan district to arrest a Cowichan person accused of murder and met a Cowichan force of 200 men in war canoes “chanting their warlike songs, whooping like demons, and drumming on their canoes by turns, with all their might”. More will be said later about this incident, which was resolved peacefully, but Douglas described the Cowichan as “the most numerous and warlike of the Native Tribes on Vancouvers Island”.

[1318] In May 1853, William E. Gordon of the Royal Navy observed the Cowichan war village on Southwest Valdes Island near Cowichan Gap. The war village was a stockade construction in imitation of Fort Victoria.

[1319] In June 1860, Sheriff Heaton, Colony of Vancouver Island, visited the Cowichan River and identified a Taatka village while noting that Shashia or “Old Joe” was the Chief and considered the principal man of all the Cowichan “Indians”.

[1320] In April 1861, Chartres Brew, Chief Inspector of Police, New Westminster, wrote to Colonel Moody and described the Cowichan as “well able to protect themselves and ... as strong as any tribe on Vancouvers Island”.

[1321] I find the oral history supports the plaintiffs’ submission that their ancestors had an organized armed force of warriors who were capable of defending their territory, including on the Fraser River. The oral history about lookouts on Thetis Island must relate to the Cowichan’s Vancouver Island and Gulf Islands territories, as this lookout could not see as far as the Fraser to protect that territory. There are some incidents of military force being exercised on the Fraser in historical times.

[1322] Further, I find that the historical record supports my conclusion that the Cowichan were fierce raiders of other Indigenous groups on the Fraser River, and had the reputation of being powerful and dangerous. They kept the Indigenous people in the vicinity in a state of continuous alarm.

c) Expert Evidence on Exclusivity

[1323] Dr. Kennedy’s opinion is that the large population and military prowess of the Cowichan intimidated Indigenous groups living further up the Fraser River. Cowichan force and intimidation was a significant factor in contributing to the Cowichan’s ability to maintain their controlling presence on the south arm of the Fraser River from at least the time of contact through the 19th century, beyond 1846. She concluded that, in 1846, the Cowichan were in effective control of their Village Lands and environs at Tl'uqtinus. Their reputation of being ferocious was

well-deserved, and their numerical strength permitted them to maintain effective control of the south arm generally. I accept Dr. Kennedy's opinion.

[1324] Dr. Lovisek's opinion is that Hul'qumi'num use and occupancy of the Lands of Tl'uqtinus prior to, at, or after 1846, up to and including the present day, was not exclusive. She opined that the historical and ethnographic records do not provide evidence that the Hul'qumi'num demonstrated an intention of excluding others, even though they had the capacity, or that they excluded others from the Lands of Tl'uqtinus. Dr. Lovisek concluded that, based on ethnographic data, Hul'qumi'num use and occupancy of the Lands of Tl'uqtinus prior to, at, or after 1846 was subject to protocol arrangements which required kinship relationships such as intermarriage and permission. For reasons that I set out below, I do not accept this opinion.

d) Cowichan Raiding and Reputation

[1325] Canada submits the Court should not infer from the Cowichan's periodic raids on other Indigenous groups and general reputation of aggression that the Cowichan had the intention and capacity to exclude others from the Claim Area. Canada says the evidence does not establish that the Cowichan controlled the Claim Area through fear and domination; there is no evidence that their predatory raids against weaker Indigenous groups were carried out with the goal of intimidating neighbouring Indigenous groups and preventing them from accessing the Claim Area. The raids were not organized military endeavours to enforce effective control of exclusive territory. They were carried out by individual warriors or chiefs who largely acted in an opportunistic way for their personal wealth and prestige. Canada also argues that raiding was pervasive in the region, and not just by the Cowichan.

[1326] Suttles emphasized the distinct status and traits of warriors in Coast Salish culture. He said although Shashia led one expedition, he did not seem to have had the character of a warrior, but the war leader Lammus did.

[1327] Musqueam submits that, in the three years the Fort Langley Journals were kept, the Cowichan were generally motivated by revenge, heading up the river to pillage or take slaves. They submit this is not evidence that the 11 local groups had

a collective intention and capacity to control the Claim Area, and they were not the only group to engage in these practices, including cutting off heads.

[1328] The Cowichan often acted in concert with other resident groups to wage war on other groups. Musqueam says this detracts from their reputation of being dominant. Musqueam also submits that any finding of fact about intimidation and force should be limited to controlling the Claim Area and not the river generally. They suggest that some of the descriptive terms of the Fort Langley Journals should be discounted because they are rumours and opinions from non-Indigenous people.

[1329] Although I accept that the raids documented in the Fort Langley Journals were not to claim or defend territory, I find that they were one means through which the Cowichan deterred challenges to their presence on the south arm. The entries in the Journals support a conclusion that the Cowichan instilled fear in other Indigenous groups. I accept that the Cowichan sought to instill fear to protect their interests, which would include their territory. The reputation of the fierce Cowichan supports a finding of exclusive occupation of the Lands of Tl'uqtinus.

e) Acts of Exclusion

[1330] Canada agrees that exclusivity can be proven without evidence of overt acts of exclusion if the claimant group can demonstrate effective control. In *Marshall; Bernard*, the majority of the SCC identified two examples where factual evidence of exclusion may be hard to find, including where an area is sparsely populated such that the need to exclude rarely arises, or where a peaceful people exercises control through sharing rather than exclusion: at para. 64. Justice Vickers noted a third category in *Tsilhqot'in* BCSC, where natural barriers prevent intruders from accessing land: at para. 930. The examples given were not an exhaustive list and do not apply to this case. As above, I am satisfied that evidence that the claimant group was feared, and engaged in acts to deter other groups from interfering with their territory, may indicate that the group exercised control over the claimed lands.

[1331] The only evidence of an act of physical exclusion from the Claim Area is the oral history evidence from Luschiim, set out above. I am satisfied that this evidence

relates to a time period prior to the establishment of Fort Langley, but it is otherwise not possible to determine at what time frame this event occurred.

[1332] There is no evidence in the written historical record between 1824 and 1858 of any Indigenous peoples other than the Cowichan (and Scanawa for one night in 1827) occupying the Lands of Tl'uqtinus. Dr. Lovisek concluded in error that the Musqueam were occupying the Cowichan village on May 8, 1828, when the Musqueam Chief was killed at the Cowichan village. She agreed in cross-examination, which is discussed below, that this was an error.

[1333] Further, until 1859, the historical record includes only one instance of a European presence at the village. This occurred on December 19, 1824, when the McMillan expedition stayed at the Cowichan village overnight when the village was deserted. This was an isolated act of trespass.

[1334] Exclusive occupation is not negated by occasional acts of trespass where the claimants have intention and capacity to control the land. I do note that, the next day, the McMillan expedition met a group of Cowichan, which included a Chief, likely Shashia, at the mouth of the river. The presence of Cowichan near their village in late December is an example of the Cowichan maintaining a presence on the lower Fraser River outside of the summer months.

f) Size of the Cowichan Nation

[1335] The plaintiffs say that prior to, at, and after 1846, the Cowichan had by far the largest population of Indigenous people in the Gulf of Georgia and the lower Fraser River (below the Fraser Canyon). They submit the Cowichan had the capacity to control the Lands of Tl'uqtinus in terms of strength in numbers, particularly relative to the other Indigenous peoples in the Gulf of Georgia and lower Fraser River region. In support of this position, the plaintiffs rely on the census evidence and the opinion of Dr. Brealey with respect to same. The census evidence is set out earlier in these reasons. I do not repeat it here, except as necessary.

[1336] Dr. Brealey reviewed the various censuses and said that, assuming that on average margins of error would have been equally spread across all groups being enumerated, the Cowichan in every case far outnumbered their neighbours by a ratio of anywhere from about 2:1 to 8:1. He opined that in terms of raw numbers, socio-political influence, and the ability to control territory, the Cowichan were the dominant presence on the lower Fraser River below Fort Langley from contact to at least the creation of the Colony of British Columbia. I accept Dr. Brealey's opinion.

[1337] Musqueam submits the census data is disconnected from the Claim Area. The censuses from 1830 and 1839 were collated from counts made at Fort Langley. The census in 1845 was collated from intelligence collected at Fort Victoria closer to the Cowichan territory and southeast Vancouver Island. The Yale census represents the total population of each community, not an enumeration of those who went to Fort Langley. Musqueam suggests that one would have to assume that an equal proportion of each group went to Fort Langley, which is not a reasonable assumption. Musqueam says Dr. Brealey's opinion compares numbers across censuses, not just within them.

[1338] In response, the plaintiffs submit Dr. Brealey expressly compared census numbers, both within and across censuses, from McDonald's census in 1830 through to Douglas' census in 1856. This is a comparative range across censuses: from 2:1 to 8:1. I accept the plaintiffs' position on this point.

[1339] Irrespective of the expert evidence, I am satisfied that the censuses support the conclusion that the Cowichan were the largest Indigenous group in the Gulf of Georgia and lower Fraser River region at the relevant time. Each census represents a snapshot in time of a specific region, and does not represent the whole picture. The censuses were carried out by persons in respect of groups that they may not have fully understood. The identification of persons belonging to specific communities at a specific point in time, at a specific place, is subject to these frailties. But across time and censuses, a theme emerges about the relative size of

the Cowichan to the other groups that I find to be reliable proof that Cowichan numbers substantially exceeded those of the other groups.

[1340] The later censuses do not give the Cowichan population of the Fraser River because the numbers were obtained from Fort Victoria. However, I find that the evidence is still overwhelming that the 11 Cowichan groups constituted the largest Indigenous group in the Gulf of Georgia and the lower Fraser River. Additionally, I note that in 1856, according to Governor Douglas, about 1,000 warriors were on an expedition to the Fraser River, with about 400 warriors remaining in the valley. On cross-examination, Dr. Lovisek agreed that the only purpose for which 1,000 Cowichan men would be on an expedition was as part of the Cowichan seasonal round. I find it likely that many of their wives and children were with them. These numbers far exceed those of the other Indigenous groups counted at the Fraser.

[1341] The numbers do not tell the whole story. But, when I consider the reputation of the Cowichan as fierce warriors, together with their large numbers, these factors support a finding that they had the capacity and intention to control their land on the south arm of the Fraser River.

5. Exclusivity and Seasonal Use of a Permanent Village

[1342] Canada submits any intention to exclude could only be seasonal. Whether a nomadic or semi-nomadic people enjoyed sufficient physical possession to establish title to land is a question of fact: *Tsilhqot'in* SCC at para. 44, citing *Marshall; Bernard* at para. 66. I found that the construction of the large permanent village on the land that was regularly used is sufficient physical possession. Even though the Cowichan spent the bulk of the year geographically distant from the Claim Area, they consistently returned *en masse* for their regular annual seasonal round, and various smaller groups did attend the Claim Area for various purposes throughout the year.

[1343] The Claim Area is located on a stretch of the Fraser River where a great number of other Indigenous groups historically came to harvest in the summer

months. There is a lack of reliable evidence of those other Indigenous groups occupying the Claim Area.

[1344] It is true, as Canada submits, that the Claim Area has no significant natural barriers that would prevent other Indigenous groups from accessing it. However, there were practical and psychological barriers in place because of the Cowichan's reputation, numbers, and capacity for raids.

[1345] The plaintiffs submit that intention to control the land can be established through a group's practice of using persuasive force such that its occupation of land will be respected by other Indigenous peoples whether the group is present or not.

[1346] I find that the Cowichan maintained a presence on the Fraser River outside of the summer by virtue of their permanent village, and the fact that various small groups frequented the Fraser and used the village in the winter. As I review later in these reasons, the Cowichan held a perpetual right to the village and had a proprietary interest in it — as a matter of Coast Salish law, the land was not regarded as available to others when it was vacant during parts of the year. The Cowichan's concept of ownership "elucidates what the practice 'on the ground' was likely to have been and allows inferences to be drawn about exclusivity": *Nuchatlaht* at para. 260.

[1347] There is no evidence of any Indigenous persons or groups occupying or trespassing at the Cowichan village during the summer months or at any other time of the year. The village of Cowichan warriors was directly across the strait from the mouth of the Fraser River, and the Cowichan warriors could appear at any time.

[1348] The view that Aboriginal title requires year-round presence of the people on the land was rejected by the SCC in *Tsilhqot'in* SCC. I find that the principles established in *Tsilhqot'in* SCC with respect to occupation by semi-nomadic groups are informative in this case. Although I would not characterize the Cowichan as semi-nomadic, they travelled regularly to the same locations to harvest every year.

[1349] A lack of challenges to occupancy may support an inference of an established group's intention to control the land: *Tsilhqot'in* SCC at para. 48.

[1350] In response to the Lovisek Land Report, Dr. Kennedy said that the historical record demonstrates the Cowichan intentionally used intimidation to secure their controlling presence on the south arm. Historical and ethnographic evidence references Cowichan mythology, possession, control, and concepts of — and interests in — property, and permission to use particular areas or resources. This in my view supports a finding that the Cowichan intended to maintain their proprietary interest in their villages as a matter of customary law.

[1351] BC submits there was no need to maintain exclusivity outside the summer months because the Cowichan made little use of the Claim Area during that time, and use by others would not have affected the seasonal abundance. I disagree. There is no evidence that the land in the Claim Area was used by others. According to the ethnographic evidence discussed above, during the salmon season other Indigenous groups seasonally occupied a long strip of shoreline across from Deas Island, and referred to it as ƛəqətínəs and laktinŭs. I find that, although close in proximity, this area is downriver and to the west of the Claim Area.

[1352] BC relies on McLachlin C.J.C.'s words in *Marshall; Bernard* at para. 58: "the season over, they left, and the land could be traversed and used by anyone". I find the distinguishing factor here is that the Cowichan had a permanent village and a reputation of fierceness that provided a clear message that it was owned by them. While they were not there *en masse* in the winter months, they could appear at any time. In addition, some Cowichan were present during the year for various reasons. The presence of the large permanent village announced to others: 'this is Cowichan land'.

6. Cowichan Perpetual Right to the Lands of Tl'uqtinus

[1353] The plaintiffs submit the Cowichan held an exclusive perpetual right to the Lands of Tl'uqtinus as a matter of Indigenous law. They maintained their perpetual right to occupy the land, and harvest resources through their annual use and

occupation, and through force and intimidation. Their ability to do so was aided by the abundance of the Fraser River fish runs, and later by the depopulation of other Indigenous groups on the river due to the 1770s–1780s smallpox epidemic. This perpetual right was independent of any extraterritorial family right of access to specific resource loci obtained through marriage or permission.

[1354] The plaintiffs are not claiming that they controlled fishing on the south arm of the Fraser River. Their claim of exclusivity relates to the village and its surrounding land, as well as submerged lands contiguous with the dry land portion of the Lands of Tl'uqtinus.

[1355] Dr. Kennedy opined that there were three common ways Central Coast Salish people obtained rights, apart from those gained at birth: marriage and kinship; permission; and force or intimidation. Dr. Kennedy adopted Suttles' analysis in *The Ethnographic Significance of the Fort Langley Journals* that, on the Fraser River, fishing rights were not simply rights of families dependent on continuing kinship, but were rights assumed in perpetuity by whole tribes. Suttles said:

> ... Ethnographic work suggests that an extraterritorial seasonal right was originally granted, through intervillage marriage, by a family in one village to relatives in another village, and that it was maintained through the continued acknowledgement or renewal of kinship ties. However, on the Fraser, it appears that fishing rights were not simply rights of families dependent on continued kinship but were rights assumed in perpetuity by whole tribes. Whether they had earlier depended on family ties is unclear. At any rate, the size and abundance of the Fraser fish runs probably would have made any attempt to control access to them difficult and perhaps pointless. Moreover, whatever the earlier situation had been, it was probably complicated by the virtual disappearance of some tribes in the earlier epidemics, opening access to their sites to others.

[1356] Drs. Brealey, Kennedy, and Lovisek agreed that, on the Fraser River, fishing rights were not rights of families dependent on kinship ties, but were assumed in perpetuity by whole tribes.

[1357] The plaintiffs submit Suttles' discussion of rights assumed in perpetuity should be considered alongside what he said about the Cowichan in the same article. Suttles said:

a) The Cowichan were a large and formidable “nation” present on the Fraser;

b) The Cowichan had a row of summer villages on the main channel shore of Lulu Island. These were permanent summer villages;

c) The Cowichan had large summer villages of permanent structures on the mainland, where they stayed during the summer and into early autumn, and from which they made excursions upriver; and

d) Fishing could take place in the lower course of the River without infringing on property rights, and the fact that the Vancouver Island tribes had permanent structures was consistent with them doing most of their fishing nearby.

[1358] Dr. Kennedy’s opinion is the Cowichan held perpetual rights to a specific settlement on the south arm of the Fraser, and fished and harvested resources on the south arm and about the mouth of the Fraser. These rights were independent of extraterritorial rights of access obtained through marriage or permission.
Dr. Kennedy opined that earlier marriage alliances may have been, in some way, responsible for the perpetual right developing, but an inability to prevent access by the Cowichan, the Cowichan’s ability to exclude others, resource abundance, and regional depopulation contributed to the Cowichan’s access to the Fraser River and establishment of a perpetual right.

[1359] The plaintiffs submit that kinship-based access arrangements were meant to address food shortages in a given year and facilitate sharing of abundant resources. Dr. Lovisek agreed that the Central Coast Salish kinship-based permission was not granted for resource location use over the long term.

[1360] The plaintiffs say there is no Quw’utsun oral history indicating they required permission from anyone to live at their stl'ulnup. They submit that it makes no sense that they would have to ask permission to live in their ancient homeland where they

invested time and labour, embedded themselves into the ground with permanent house posts, and where they returned year after year to fish.

[1361] Luschiim had no oral history about Tl'uqtinus being shared with anyone other than Quw'utsun, and no oral history of other Indigenous people using Tl'uqtinus outside the summer months.

[1362] Sulipt'un, Qwestenuxun, and Chief Seymour had no oral history about their people having to ask for permission to occupy Tl'uqtinus.

[1363] Dr. Lovisek agreed in cross-examination, which I accept, that there is no historical record of the Cowichan asking for or requiring permission from Musqueam or Tsawwassen, or anyone else, to fish on the south arm or to occupy their village.

[1364] Dr. Kennedy found no evidence of anyone asking or giving permission to the Cowichan for their establishment or maintenance of the village, or for resource harvesting. Dr. Brealey concluded the Cowichan may not have exercised their jurisdiction on a daily basis, but that is irrelevant because such exercise would have been at their discretion, and no one else's.

[1365] I accept the plaintiffs' submissions that the Cowichan did not stay with relatives or other tribes while on the south arm, or dispersed among mainland residents. They held a proprietary interest in their village and surrounding lands. They did not require permission from other groups to occupy their village and surrounding lands. The Cowichan were numerically stronger than the tribes with winter villages on the Fraser, such as the Musqueam, Katzie, and Kwantlen. Their intimidation of other tribes on the Fraser is inconsistent with the Cowichan being present pursuant to kinship ties. Except for two raids by the Lekwiltok before contact, their force and intimidation allowed them to use and occupy the south arm unchallenged.

[1366] This is not to say that the Cowichan did not have kinship ties with other tribes who also had villages on the Fraser River. They were part of the Coast Salish

network and they were tied together through intervillage marriage, but that does not mean that their use of their village on the south arm was dependent on kinship ties.

[1367] I also accept that kinship-based permission operated at the family level, not at the tribal or collective level. It was also provided on a temporary and conditional basis, depending on kinship ties, and not permanently or as part of an annual round. Kinship permission was specific to owned resource sites, not the entire Fraser River.

[1368] I conclude that the plaintiffs have established that, by virtue of their repeated use of their village and surrounding lands, and their capacity and intention to exclude others, the Quw'utsun held a perpetual right to occupy the portion of the Lands of Tl'uqtinus that included their village and surrounding lands accessed by trails as a matter of Cowichan and Coast Salish customary law. Their proprietary interest in their permanent Village Lands evinces an intention to control the land, and supports a finding of exclusive use and occupation of land in the Claim Area. It did not depend on permission from others.

7. Cowichan Intention and Capacity to Control the Lands of Tl'uqtinus Relative to Other Groups in the Region

a) Lekwiltok

[1369] The Lekwiltok of Johnstone Strait at northern Vancouver Island raided Indigenous peoples of the Gulf of Georgia and Puget Sound to capture slaves, killing people in the process, including some Cowichan. The plaintiffs submit the Cowichan responded by protecting themselves with force as needed. There are historical records describing the Cowichan retreating to safety near Fort Langley to avoid Lekwiltok attacks. The plaintiffs submit, however, that their intention to control the Lands of Tl'uqtinus on the south arm of the Fraser River remained in place, despite the menacing Lekwiltok raids.

[1370] Luschiim shared oral history he received from Siseyutth’e’, who learned from her Elders, that the htwuyul (Northern people) came twice and warred on the Quw’utsun people at Shnuwiilh, Tl'uqtinus. Many people were killed and enslaved. Some got away and paddled west across Georgia Strait to that part of Quw’utsun

territory. All the Quw’utsun people got together with their friends from Saanich and Nanaimo, and went back and warred on the Lekwiltok at Tl'uqtinus. They defeated the Northern people and took back the Quw’utsun stl'ulnup and village at Tl'uqtinus.

[1371] Luschiim testified that his evidence relates to the time period from long before European contact through to at least the time of Crown reserve making.

[1372] The plaintiffs submit the Lekwiltok did not take the Lands of Tl'uqtinus from the Cowichan. According to the plaintiffs, they never expanded their territory south of Quadra Island. Luschiim’s oral history indicates the Cowichan successfully repelled the Northerners when they attacked the Cowichan stl'ulnup at Tl'uqtinus.

[1373] There were times when the Cowichan appeared to be aligned with the Lekwiltok.

[1374] On one occasion, on April 26, 1828, McMillan recorded a Cowichan party passing upriver, reporting that the Cowichan were preparing to go to war on the Clallam, on account of the death of Shashia’s father. On May 4, 1828, two Nanaimo advised that the Lekwiltok and Kwakiutl were employed by Shashia to assist him.

[1375] On May 8, 1828, 50 Musqueam canoes that had been camped opposite Fort Langley came across the river and told McMillan that the Lekwiltok had killed a Musqueam Chief down at the Cowichan village. They sought shelter at the Fort.

[1376] Dr. Brealey interpreted from this record that Shashia was not only at Tl'uqtinus at the time, but was able to enlist the Lekwiltok and Kwakiutl to assist him. In this context, Lekwiltok killed a Musqueam Chief, possibly a Cowichan ally, at the Cowichan village. Dr. Kennedy opined that the Cowichan occasionally sought support from other groups. In 1828, for example, Shashia allied with Lekwiltok and Kwakiutl to assist in attacking the Clallam. It was the Musqueam, not the Cowichan, who sought shelter at the Fort.

[1377] Dr. Lovisek said the May 8, 1828 entry indicates that Musqueam were occupying the Cowichan village before the Lekwiltok raided it. In cross-examination,

Dr. Lovisek accepted that Dr. Suttles' work was reliable, and that the April 26 and May 4 entries indicated an alliance between Shashia and the Lekwiltok. She agreed that the May 3 entry indicated that most of the Musqueam were camped opposite the Fort at the time. She also accepted that the May 8, 1828 entry did not say that the Lekwiltok raided the Cowichan village or that the Musqueam ever occupied it. This was the one entry she relied on for her conclusion that the Musqueam occupied the Cowichan village, and she agreed that this conclusion was wrong.

[1378] The plaintiffs suggest that a Lekwiltok mercenary who was meeting Shashia at the Cowichan village killed a Musqueam Chief on May 8, 1828. Canada submits further context is required to understand these events. On May 7, 1828, McMillan noted a cry of "Yeaukeltas was heard from all quarters" and that the women and children in the camp went up the little river and hid themselves in the woods. The next day, he reported that "[t]he Indians Came across in great numbers — told the Yeukeltas had killed a Musquiam Chief down at the Cowitchin Summer Village".

[1379] Canada submits the violence against the Musqueam Chief recorded on May 8, 1828 is one in a series of Lekwiltok attacks on the Musqueam in the spring of 1828. Contrary to the plaintiffs' assertion, there was no evidence that a Musqueam Chief was visiting Shashia at the Cowichan village at the time he was murdered. McMillan did not refer to any Cowichan presence at the village during this timeframe, and Canada says there is no record of Shashia being on the Fraser River between February 14, 1828, and July 17, 1828. Canada submits it is more likely that the killing of the Musqueam Chief was a continuation of violence against the Musqueam through the spring of 1828.

[1380] The Lekwiltok fired upon and were repulsed by the HBC in March 1829. McDonald described the Lekwiltok as the common enemy. On April 23, 1829, he reported that the Lekwiltok had committed dreadful havoc on Puget Sound and the Cowichan on Vancouver Island. On April 24, 1829, McDonald recorded that the Lekwiltok returned in 18 canoes, and on April 15,1829 had butchered the Kwantlen Doctor and two Cowichan at Canoe Pass. They continued south to the Skagit, and

took a number of women and children. On their return northward, they took a few Cowichan. The Cowichan were determined to retaliate, and Shashia came to the Fort and purchased a gun and 300 rounds of ammunition for distribution among his followers, already armed. This may have been a ruse. In July 1829, McDonald suspected that Shashia obtained the ammunition for trade or alliance with the Lekwiltok. This opinion was never verified. I accept this as evidence of an alliance between Shashia and the Cowichan, and the Lekwiltok.

[1381] On September 24, 1829, McDonald recorded that the Cowichan were making a move against the Lekwiltok. Two canoes of Nanaimo and Cowichan, with 30 warriors in each, got underway with that intention, but returned in the afternoon with news that the enemy was on the coast, but not so near as was suspected.

[1382] During July 19 to 21, 1830, McDonald recorded a wounded Cowichan man arriving at the Fort, who reported a Lekwiltok attack at Point Roberts. Four Cowichan and one Nanaimo were killed. The Cowichan and their allies were prepared to respond to the Lekwiltok attacks reported in April 1829 and July 1830, although they were not entirely successful.

[1383] On September 20, 1830, in his letter book, McDonald recorded great preparations for war against the Lekwiltok to retaliate for the attack at Point Roberts in July and “to revenge the butchery Committed on So many of the Cawaitchins & Nanimoos”. A war party was on the move, comprised of 44 canoes with upward of 500 men from the Cowichan and Nanaimo, as well as Whoomes and Chishalls. Most of the canoes returned between October 2 and October 10. They were successful against a small detached Lekwiltok village that was destroyed, but the main body of Lekwiltok pursued and surprised them. McDonald recorded that 45 men were either killed or starved to death, as well as three Chiefs: one Cowichan, one Nanaimo, and one Musqueam.

[1384] In Dr. Brealey’s opinion, the balance of power with the Cowichan and Kwakwaka’wakw (Lekwiltok) to the north was, depending on the circumstances, a “saw-off”. The Lekwiltok centered their attacks in the marine area, where military

force could be constituted quickly. The river was a different story. None of the entries in the Fort Langley Journals recorded military campaigns against the Cowichan on the lower Fraser; there are at least eight documented incidences of Cowichan campaigns against other Indigenous groups. In Dr. Brealey's opinion, three years of observations in the Fort Langley Journals, although fragmentary, is enough to show that Cowichan power on the river was not a one-off, but part of a larger pattern of asymmetrical territorial control on the lower Fraser River.

[1385] In February 1841 on his trip to Fort Nisqually, Father Blanchet was told that to the north of Puget Sound, the Lekwiltok, a "fierce and barbarous nation", lived on Vancouver Island, and the Cowichan on an island in the Fraser River.

[1386] Dr. Lovisek agreed that through the 1850s, Lekwiltok expansion of territory by warrior or military means did not occur south beyond Campbell River at the northern tip of Georgia Strait. She concluded that prior to, at, and after 1846, the Cowichan's occupation of the Lands of Tl'uqtinus provided some security in numbers from the Lekwiltok raiding.

[1387] Dr. Lovisek agreed the Cowichan and their allies, a coalition of various Coast Salish groups, decisively defeated the Lekwiltok in the battle of Maple Bay on southeast Vancouver Island. Relying on Dr. William Angelbeck's work, Dr. Lovisek reported this final decisive battle occurred sometime between the late 1830s and 1855, with the date closer to 1855. This put an end to the Lekwiltok raiding. In cross-examination, Dr. Lovisek agreed that the Cowichan outnumbered the Lekwiltok in the 1848 and the 1856 censuses.

[1388] The plaintiffs submit that most accounts ascribed to the Cowichan a central role in calling the council of war that defeated the Lekwiltok.

[1389] Dr. Kennedy reported that historical accounts indicate Shashia lived at the Taatka village on Valdes Island. So great was his role in the final battle, a Saanich informant told Diamond Jenness in the mid-1930s that the Lekwiltok made peace by presenting Shashia and another leading Cowichan warrior each with a young wife.

[1390] Canada submits the Lekwiltok were the most dominant and violent raiders in the area, and that the evidence of Lekwiltok dominance undermines the plaintiffs' claim of dominance. Canada agrees the Lekwiltok concentrated their raiding along the coastline and the mouth of the Fraser River, and not up the river.

[1391] The plaintiffs say the raids, killings, and slave-taking by the Lekwiltok did not undermine their ancestors' intention and capacity to control the Claim Area. In response, Canada submits the evidence shows the Cowichan were unable to successfully retaliate against the Lekwiltok, except for the incident described by Luschiim and the battle of Maple Bay.

[1392] Canada says the Lekwiltok raids had the same character as the Cowichan raids. They were non-territorial. The raids were for the purposes of revenge, and obtaining personal wealth and prestige.

[1393] With respect to the plaintiffs' submission that their ancestors were able to protect their national security in relation to the Lekwiltok, they rely on Luschiim's oral history evidence that the Northern people attacked the Claim Area. Consistent with the battle of Maple Bay, Canada says this incident demonstrates the inability of the Cowichan to protect their interests against the Lekwiltok without assistance from other Indigenous groups such as the Saanich and Nanaimo.

[1394] I conclude that, although there were recorded observations of the Cowichan going on a war excursion against the Lekwiltok, there is no evidence until the battle of Maple Bay that they had much success in their retaliation excursions.

[1395] I turn to Canada's suggestion that the involvement of the Nanaimo and Saanich in taking Tl'uqtinus back from the Lekwiltok undermines the Cowichan's exclusive occupation. I accept the plaintiffs' submission that the Cowichan's ability to enlist allies to defeat an adversarial people is consistent with intention and capacity to control their lands. I accept Luschiim's evidence, and find that this event occurred some time before 1827, as it does not appear in this historical record.

[1396] Canada seeks to juxtapose the fear of the Coast Salish people relative to the Lekwiltok with their reaction to the presence of the Cowichan on the Fraser River. The plaintiffs submit this is consistent with the Lekwiltok being the common enemy of the Coast Salish until their defeat at the battle of Maple Bay. They say, unlike the Lekwiltok, the Cowichan were the largest and most powerful group with a presence on the lower Fraser River. They were embedded in Coast Salish life, and the fact that the Lekwiltok were a common enemy does not detract from their position.

[1397] The Lekwiltok were coming to kill and take slaves. Canada agrees the plaintiffs and Lekwiltok's raiding did not result in territorial expansion. The Cowichan had intention and capacity to retain exclusive control of the Claim Area, aided by their attacks upriver. Canada conflates the Lekwiltok situation in the Georgia Strait with the situation on the Fraser River. On the Fraser River, the Cowichan were the most frequent aggressors.

[1398] I accept that the Lekwiltok were the common enemy feared by the Coast Salish, including the Cowichan. However, I do not agree that Lekwiltok raiding and fear of the Lekwiltok detract from Cowichan intimidation of other Indigenous groups on the Fraser River, and the related ability of the Cowichan to control land in the Claim Area. The Lekwiltok raiding was not in relation to the Lands of Tl'uqtinus.

[1399] I find that the Cowichan ability to enlist allies in support of military operations is a sign of strength, not weakness, and was one means through which the Cowichan protected their interests. It does not detract from the Cowichan intention and capacity to control their land. The Cowichan did not need to be the strongest or fiercest group to have the capacity to control their land provided the fiercer group did not challenge the ownership of their land. A lack of challenges to occupancy may support an inference of an established group's intention and capacity to control: *Tsilhqot'in* SCC at para. 48.

[1400] In *Nuchatlaht* at para. 489, Myers J. noted that the province interpreted capacity to control as the ability to defend it militarily from trespassers or invaders, and that the Nuchatlaht had little capacity to exclude others given their relatively

small population. At para. 490, Myers J. said the analysis is more nuanced. He referenced *Tsilhqot'in* SCC at para. 48, and then quoted *Marshall; Bernard* at para. 64, which reads in part: “To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair”.

[1401] While a group must demonstrate they could have excluded others had they chosen to do so, *Nuchatlaht* says:

> [491] ... the Supreme Court did not posit a scenario where an Aboriginal group must demonstrate that it had something akin to an effective and organized militia.
>
> [492] There is no evidence of incidents where the Nuchatlaht *had* to defend their territory from others or that they fought wars which they lost ... The fact is that whatever “system” was in place appeared to have worked because there is no evidence of attack against the Nuchatlaht.
>
> [Emphasis in original.]

[1402] Justice Myers’ analysis of the system in place for the Nuchatlaht is applicable to the Cowichan situation when it comes to establishing capacity and intent to exclude others. Aside from the incidents described by Luschiim, there is no evidence of Lekwiltok challenges to the Cowichan’s land on the south arm. In the circumstances of this case, this supports an inference that the Cowichan had the capacity and intention to control their land.

b) Tsawwassen

[1403] The plaintiffs reiterate that the Tsawwassen were a small branch of the Kwantlen during the relevant time period. TFN did not bring any oral history evidence. The plaintiffs submit the historical record does not include any evidence of Indigenous groups living at Tsawwassen on the Georgia Strait until the 1850s, after the Cowichan led the alliance that vanquished the Lekwiltok. The HBC reconnaissance missions to the mouth of the Fraser River in 1824 and 1825 do not record any Tsawwassen people or village. In 1827, no Tsawwassen village was mentioned by the HBC or in Captain Simpson’s remark book. Tsawwassen is not mentioned in the Fort Langley Journals. They do not appear in the 1830 or 1839 HBC censuses, or in the HBC sailing logs between 1842 and 1852.

[1404] The first references to the Tsawwassen in the written historical record as a separate group are in 1857 and 1858. Gibbs noted in March 1857 that Father Lootens had advised that a small village of Kwantlen on the south side of the mouth of the Fraser River was stockaded for fear of the Lekwiltok.

[1405] In September 1857, Gibbs recorded information from the HBC's Ovid Allard (born 1817), who had previously served at Fort Langley in the 1840s, that the "Tso-wah-sen" was located between the south arm and Point Roberts. It was where there was a small tribe who formerly lived with the Kwantlen for protection from the Lekwiltok and only recently returned to live near Point Roberts. In March 1858, Gibbs noted the "Chewassen" were a band of the Kwantlen of Fort Langley "who split off from the rest some few years since".

[1406] Dr. Kennedy's opinion included the 1857 to 1858 record of Tsawwassen. She reported that the village of Tsawwassen was a resettlement of that community, earlier devastated by the first smallpox epidemic in the late 18th century, the survivors of whom moved upstream around New Westminster with their Kwantlen kin. It is likely that the Tsawwassen remained there until 1857.

[1407] Tsawwassen Elder Joseph Splockton, born in 1877, informed Suttles that the Tsawwassen people came from Langley (Kwantlen). They moved to Tsawwassen during his mother's time, before she married. Dr. Brealey's analysis regarding the Tsawwassen concludes that they were not an Indigenous people in the 1790s or at 1846. Rather, they were a small branch of Kwantlen, and had no capacity or intention to control the Cowichan, nor the Lands of Tl'uqtinus. Suttles wrote in his field notes that he suspected that "Tsawwassen is in fact an old village, and that the move from Langley that Joe mentioned was a recent resettlement of the old site".

[1408] In 1914, Simon Pierre was Tsawwassen Chief Harry Joe's interpreter when he addressed the Royal Commission on Indian Affairs for the Province of British Columbia. Chief Joe provided a petition regarding a place where he said his father used to have a house. Chief Joe testified he did not recall the place being sold to any white man, and said the place was surveyed for "the Indians". Pierre pointed the

area out on the Agency map and Indian Agent Byrne described it as Lulu Island, between Deas Island and Annacis Island. Chief Joe was asked if there were any “Indian houses there”, and he answered “[t]here used to be”.

[1409] Chief Joe produced a handwritten statement that was received by the Royal Commission on Indian Affairs on May 1, 1914, regarding two places he had mentioned during the previous meeting. The first place was called Tla tee ness (Tl'uqtinus), which the Tsawwassen wished to have included in their Reserve, as it “was the home of our ancestors from time immemorial or as a camping ground when they are in quest of their living”. He claimed this place at Tl'uqtinus was given to the Tsawwassen by Indian Agent McTiernan 30 years or more ago. Chief Joe also noted his ancestors had their usual camping ground there from time to time in early spring, from March to June. The claim was denied as the land had been Crown granted.

[1410] Dr. Brealey was cross-examined on the materials related to the 1914 Tsawwassen claim, which did not change his opinion that the Tsawwassen were not on the Point Roberts Peninsula from 1791 to the 1850s.

[1411] On cross-examination, Dr. Turner did not agree that there was a Tsawwassen village on Lulu Island. Dr. Turner gave evidence that the Tsawwassen were part of the Kwantlen, moved to their current location fairly recently, and were a small group of about 50 people. She stated that they may have used a stretch of river as well.

[1412] In April 1925, Chief Joe provided a written history of the Tsawwassen for Indian Commissioner Ditchburn. He spoke about the homeplace of his ancestors and included Tl'uqtinus. He said it was called Tl'uqtinus because it was like a prairie where trees are not seen growing for quite a big area. He said the Tsawwassen band used to go and dry sturgeon, and also used it for hunting, picking, and storing berries, all this before the white settlers. Dr. Kennedy noted the Tsawwassen’s sturgeon fishery was near Woodward’s Landing on the north shore of the south arm near the junction of No. 5 Road and Dyke Road, opposite the south end of Deas Island, given Chief Joe’s statement to anthropologist Homer Barnett in the 1930s.

[1413] From 1935–1936, Barnett did a six-month field study with Coast Salish groups, including the Tsawwassen. Chief Joe was his informant, and as mentioned above, informed Barnett of a Tsawwassen summer camp “at an open ... place Laktinŭs (on Lulu Is.) from May to July for drying sturgeon”. He also said that the “Cowichans before white man used to come to Lulu Is. & take sturgeon & some sockeye. They didn’t bunch up with Tswasûn but had separate camp. Nanaimo & Kuper Is. came over too”.

[1414] Dr. Brealey says this is an important statement because it makes it clear that the Cowichan lived in a separate area of Tl'uqtinus from the Tsawwassen. Barnett’s notes from Chief Joe illustrated the importance of Tl'uqtinus, and confirmed the Cowichan had a mile of open space on the land to which upriver people never came.

[1415] In 1949, Splockton informed Suttles that the Tsawwassen camped on the north bank above Ladner, across from the Deas Island Cannery, one mile above the rice mill. Suttles included a question mark beside this entry, which Drs. Lovisek and Kennedy opined indicates a lack of clarity about what was being questioned. Dr. Kennedy said this rice mill was at Woodward’s Landing on the north shore of the south arm near the junction between No. 5 Road and Dyke Road. This place where the Tsawwassen camped was well west of the Cowichan village. Dr. Brealey agreed the Tsawwassen camp was well downriver of the Cowichan village.

[1416] In July 1952, Suttles noted Pierre’s 1952 statement that Tl'uqtinus was claimed by the Tsawwassen and by the Kuper Island, Chemainus, Nanaimo, and Cowichan. Dr. Kennedy indicated this infers a separate and distinct use of the site by the Cowichan groups.

[1417] Also in 1952, Duff recorded an interview with Pierre. He noted that people came from different Cowichan tribes and included four tribes of Kuper Island — the Penelakut, Yekwolas, and Lamalcha villages — and another on a little island — the Halalt village of Willy Island. He also said a “[l]ot of Chemainus tribes too”.

[1418] In *The Upper Stalo Indians*, Duff recounted that Pierre said part of Kwantlen territory on the south arm was held by several Cowichan villages across the strait. Tl'uqtinus extended from Woodward's Landing to Ewen's Cannery. The Cowichan came in summer for fish and berries; some stayed the year round. Duff published a map with a labelled Tsawwassen territory which included none of Lulu Island, and an adjacent, unlabelled territory which depicted the central arm and south-central Lulu Island.

[1419] A question arises as to why Pierre said the broad area was within the Kwantlen territory. Dr. Kennedy opines that by the time he said this in 1952, Pierre regarded the broad area as having become Kwantlen territory, and the Cowichan did not receive a reserve at Tl'uqtinus.

[1420] Canada submits the oral history evidence of many ethnographers' informants supports the use and occupation of the Claim Area by other Coast Salish groups.

[1421] Canada admits Chief Joe did not specify the location on the south arm where the Tsawwassen stayed (although he called it laktinŭs) nor did he specify the time frame this occurred. He did not attribute the name laktinŭs to the Cowichan.

[1422] The statements by Chief Joe and Joseph Splockton support a finding that the Tsawwassen did come to an open place on Lulu Island to harvest sturgeon, but this place is located across from Deas Island west of the Cowichan village. This is not evidence that the Tsawwassen ever occupied the Cowichan village.

[1423] Based on this evidence, I accept Dr. Brealey's opinion that the Tsawwassen did not use or occupy the Claim Area in the last decade of the 18th century through to 1846. I find the Tsawwassen were devasted by smallpox in the late 18th century, at which time the few remaining Tsawwassen moved upstream with their Kwantlen kin, where they remained until after 1846. They did not use or occupy the Claim Area. At those dates, their occupation was centred on the main channel of the Fraser, upriver from the forks.

[1424] Chief Joe's written history to Indian Commissioner Ditchburn in 1925 supports the existence of a Tsawwassen camp on Lulu Island at a place called laktinŭs. I also accept Dr. Kennedy's opinion that the Tsawwassen occupied the western portion of the 8 km south shore area of Lulu Island known also as Tl'uqtinus or laktinŭs, where they had a sturgeon camp in the latter half of the 19th century.

[1425] I conclude that the ethnographic evidence regarding the Tsawwassen speaks of the time before depopulation in the 1790s, and the time of resurgence in population in the 1850s and beyond. By then, the Tsawwassen reclaimed their village and were present again at the mouth of the Fraser River, fishing for sturgeon and salmon. The Fort Langley Journals make no mention of the Tsawwassen.

c) Nanaimo

[1426] Musqueam submits the ethnographic record places Indigenous groups like the Snuneymuhw, Tsawwassen, and Sto:lo using or occupying lands "proximate" to the Claim Area, or camping with some of the 11 local groups at the Claim Area.

[1427] Leo Mitchell provided information that the Nanaimo and Saanich also camped at ƛəqtinəs every July. ƛəqtínəs was described as being on the north side across from Deas Island. Mitchell said this was "'[b]efore' they put up mat houses every year". The plaintiffs submit this coincides with the cannery period.

[1428] Musqueam submits Mitchell's information that Tl'uqtinus was where multiple groups came and camped is consistent with Barnett's ethnography about the Cowichan and Nanaimo camping at Lulu Island together.

[1429] Musqueam relies on Chris Arnett's book, *Two Houses Half-Buried in Sand*, which edits Beryl Cryer's stories and interviews of Indigenous people. As previously mentioned, I ruled that excerpts of it were admissible for non-hearsay purposes only. I found Dr. Kennedy's interpretation of these documents to be of assistance.

[1430] Joe Wyse, an informant from Nanaimo, described to Cryer that Tschuck-teenus [ƛəqtinəs] (Steveston) was a long piece of land that Nanaimo

communities occupied. When he said different tribes from about this part of the country went to that place Tl'uqtinus for salmon, Dr. Kennedy interpreted him to be speaking of other local groups of the Nanaimo. He said “[t]here was a long piece of land, and all along it were the camps of these people”. She also noted in her report that the Nanaimo man Joe Wyse referred to Tl'uqtinus at Steveston.

[1431] In his 1938 article, Barnett said that the Cowichan and Nanaimo frequented a camp on Lulu Island for sturgeon and sockeye fishing. Dr. Kennedy identified that Barnett later revised the statement by deleting the reference to the Nanaimo, and stated instead that all able-bodied Cowichan travelled to the Fraser. In her opinion, Barnett’s first statement was overreaching. Dr. Kennedy relied on information from Big Joe to explain away Barnett’s initial statement. Big Joe told Suttles that the Cowichan and Nanaimo had separate camps.

[1432] Dr. Kennedy says that, about between 1850 and 1858, the Nanaimo village site on the Fraser River mainstem observed by Aemilius Simpson in 1827 became occupied by a local group of the Katzie. Dr. Kennedy acknowledges two possible theories for evidence associating the Nanaimo with the Cowichan village. First, and in her view, more probably, the Nanaimo moved downstream to set up an occasionally-occupied camp on some part of ƛəqtinəs, separate from the permanent Cowichan village. The second view is that the Nanaimo stayed with the Cowichan according to the laws of kinship and permission.

[1433] Ovid Allard said the Nanaimo got out of the habit of frequenting the Fraser River fishery after Fort Victoria was established. He told Gibbs in 1857 that they had reactivated their use of the fishery to “get out of the way of the Northern Indians”.

[1434] Musqueam submits Suttles’ notes are consistent with other ethnographic and oral history evidence, and some Cowichan and Nanaimo frequently camped together on the Fraser. There is no indication this was subject to Cowichan permission.

[1435] In response, the plaintiffs say Big Joe recognized that the Nanaimo had a separate camp, but did not know where. There is no expert evidence that supports

Musqueam's interpretation that Mitchell suggested that some Penelakut, Nanaimo, and Saanich came to the Fraser and camped together prior to and after the arrival of the canneries. This is inconsistent with other ethnographic evidence. Further, Musqueam did not cross-examine any expert with this theory. Musqueam cites Barnett's 1938 reference to Cowichan and Nanaimo camping together on Lulu Island but the expert evidence indicates that this was in error and was corrected by Barnett in 1955; Andrew Charles (who does not mention Nanaimo or Saanich); and James Point (who does not mention Cowichan, Penelakut, Nanaimo or Saanich).

[1436] I conclude that before the Nanaimo abandoned their village, they stayed at their own village and fished the south arm of the Fraser River. After that, it is unclear whether they stayed with the Cowichan at their village or fished in the large area west of the Cowichan village, also referred to as Tl'uqtinus. The record shows that the Nanaimo and Cowichan were friends and kin. They raided together and visited with one another. For example, as noted above, in September 1852, McKay recorded that Shashia informed him that he had just returned from the Fraser River, and that he had come over from his village, which is about 15 miles distant, on a complimentary visit to the Nanaimo, who were his relations and friends. Accordingly, it is quite possible that after the Nanaimo ceased to occupy their own village on the Fraser River, they fished together at Tl'uqtinus on invitation by the Cowichan.

d) Analysis Regarding the Presence of Other Indigenous Groups in the Claim Area

[1437] The ethnographic evidence is somewhat inconsistent, but there are common themes. First, informants are understandably focused more on the activities of their own people. Second, informants consistently report that a long stretch of beach west of the Claim Area from Woodward's Landing up as far as the site of Ewen's Cannery was used by many Indigenous groups to fish for sturgeon and salmon. The groups included the Tsawwassen, Musqueam, Cowichan, Nanaimo, and Saanich. Many informants reference the use of campsites, not villages. Some informants suggest the campsites were separated, and may have had a more permanent dwelling with post and plank roofs and mat sides. Aside from reports of a Cowichan village, there

is little suggestion of ownership of the sites on this stretch of shoreline, and few reports of conflict between the Indigenous people who came to harvest. It appears they all came to harvest resources that were abundant, and they did so in cooperation with one another.

[1438] The timing of the ethnographic literature is always challenging. For example, although the ethnographic evidence places the Tsawwassen and Musqueam at the mouth and on the south arm of the Fraser River regularly pursuing their seasonal round of harvesting, the historical record suggests that, from 1790 to 1846, their numbers were very small. In Tsawwassen's case, they had moved upriver to live with the Kwantlen. The ethnographic evidence does not place the Kwantlen fishing at the mouth of the south arm of the Fraser River.

[1439] I conclude that other Indigenous people, including Musqueam and Tsawwassen, may have camped and fished on the south arm of the Fraser River but not at the Cowichan village.

e) Musqueam

i. Musqueam's Pleadings

[1440] I first address a threshold matter related to Musqueam's pleadings and the plaintiffs' submission that evidence of Musqueam control over access to and stewardship of the Fraser River is not relevant to Cowichan exclusive occupation and cannot be relied in relation to that issue.

[1441] Musqueam pleads they occupied and used Lulu Island, including the Claim Area and the lands known to Musqueam as ƛəqtinəs. They say the Cowichan did not have the intention and capacity to exclude the Musqueam.

[1442] Musqueam pleads that it has an Aboriginal right to fish for food, social, and ceremonial purposes in the Fraser River estuary, which includes the south arm. In relation to the plaintiffs' claimed fishing right, Musqueam denies the Cowichan fished the south arm of the Fraser River at the time of contact, but if they did, they did so

with permission, pursuant to Musqueam and other hən̓q̓əmin̓əm̓-speaking peoples' authority to share access in this portion of the Fraser with kin and allies.

[1443] Musqueam only pleads permission in relation to fishing. However, in final argument, Musqueam said any occupation of the Claim Area was subject to permission from Musqueam and other hən̓q̓əmin̓əm̓-speaking peoples. This is a new argument without a firm foundation in Musqueam's pleadings. In final submissions, Musqueam also submitted that "other hən̓q̓əmin̓əm̓-speaking peoples" occupied and used the Claim Area.

[1444] Musqueam does not plead that it controlled access to the Fraser River, but some of its witnesses testified to that, and in final argument, Musqueam submits they had an ability to control their territory, including the south arm.

[1445] Musqueam led evidence about its use of areas of the south arm as part of its seasonal round. This is relevant to its pleading that Musqueam occupied and used Lulu Island and the lands known to them as ʔəqtinəs, and that the Cowichan did not have the intention and capacity to exclude Musqueam from those lands.

[1446] The relevance of Musqueam village sites outside of the Claim Area has been dealt with in a discovery ruling indexed at 2019 BCSC 1107, and addressed again in the Musqueam oral history *voir dire* ruling indexed at 2022 BCSC 933.

[1447] In response to the discovery application, Musqueam submitted it did not claim permissive power at the Lands of Tl'uqtinus. Rather, it pleaded that its right to fish in the south arm included a right to share access with kin and allies, and its right to give or deny permission to fish as an exercise of its Aboriginal right to fish. Musqueam submitted it had not put into issue its use and occupation of areas outside of the Lands of Tl'uqtinus or Lulu Island, nor had it put into issue its permissive power over any lands as an expression of Aboriginal title. Musqueam resisted the production of audio and video tapes about the north and middle arm of the Fraser River, stating they were not at issue in this proceeding.

[1448] I am not inclined to now entertain Musqueam's submissions in final argument that any occupation of the Claim Area by the Cowichan was with permission of Musqueam, which has not been pleaded, and which Musqueam has expressly denied pursuing. I note that Musqueam amended its pleadings in January 2022 to include that the Cowichan fished with permission of other hən̓q̓əmin̓əm̓-speaking peoples, but not in relation to use and occupation of land. A functional approach should be applied to pleadings in Aboriginal title cases because it may be difficult to frame the pleadings with exactitude, and evidence about how land was used may be uncertain at the outset: *Tsilhqot'in* SCC at paras. 20–22. However, this is a significant shift in Musqueam's position that has taken the plaintiffs by surprise.

[1449] Nevertheless, the plaintiffs led evidence that there were two categories of obtained property rights: extraterritorial rights held by means of kinship-based permission, and perpetual rights maintained through annual use, force, and intimidation. The Cowichan assert a perpetual right maintained through annual use, force and intimidation and say they did not require permission from the Musqueam to occupy their village or surrounding lands. Therefore, I consider Musqueam's submission that the Cowichan occupied the Claim Area with permission. The question of whether the Cowichan fished with Musqueam's permission is set out later in the section on an Aboriginal fishing right. Although the timeframe for occupation is focused on 1846, and the timeframe for a fishing right is focused on the early 1790s, there is significant overlap in the evidence relevant to each issue.

[1450] The plaintiffs submit that prior to, at, and after 1846, the Musqueam were a small Indigenous people living primarily at the mouth of the north arm of the Fraser River. They had a small village at Tree Island on the main channel near the mouth of the Pitt River tributary. The plaintiffs say Musqueam had no intention or capacity to control the Cowichan or the Lands of Tl'uqtinus on the south arm. They say there is no evidence that Musqueam used or occupied the Lands of Tl'uqtinus then, or ever.

ii. Musqueam presence on the south arm of the Fraser River

[1451] I first address several disputes about evidence that the plaintiffs rely on in support of their submission that Musqueam's presence on the south arm related to a different time and to land outside of the Claim Area.

[1452] The plaintiffs submit the only written record of Musqueam war parties is when the Cowichan assembled a war party that included the Musqueam. In 1829, Chief Trader McDonald described the Cowichan as "the leading nation in this quarter".

[1453] Musqueam submits the plaintiffs neglect to mention the evidence that the Musqueam chased Simon Fraser off the north arm. Dr. Kennedy admitted that Fraser visited the Musqueam village on the north arm of the Fraser River, and they were hostile to him. Dr. Kennedy describes Fraser's hasty and frightful visit to the Musqueam village at the mouth of the north arm.

[1454] The plaintiffs submit the historical record from 1824 to 1859 does not record the Musqueam exercising control or seeking to control the Lands of Tl'uqtinus, or any part of the south arm. There is one incident of the Musqueam trying to exercise control over others in the lower main channel, well upriver from the south arm, in a failed attempt to subjugate an HBC canoe party of five men on route to Fort Langley.

[1455] In his 1858 canoe journey of the Fraser River, Gibbs, with the Sumas Chief, observed that the "Mis-kwe-um a small tribe living chiefly on the north channel, have a village on a small island [Tree Island] at the mouth of the Kwee-kwut-lum".

[1456] Dr. Brealey said the Musqueam were an Indigenous people in the last decade of the 18th century, and as at 1846. However, Musqueam's use and occupation of the main channel of the Fraser River was above the forks of the south and north arms, and centred on Tree Island.

[1457] In 1870, the Colony surveyed an Indian Reserve at Musqueam on the north arm for the Musqueam as a band. Unlike the Cowichan, the Musqueam did not complain to the JIRC about land at Tl'uqtinus.

[1458] Dr. Kennedy's opinion is that the Musqueam Elders interviewed in the second half of the 20th century reflected land use dating back to the time after Tsawwassen resettled, circa 1857. This is consistent with Dr. Kennedy's conclusion that, in the latter 1800s, the Musqueam camped with or near the Tsawwassen at Woodward's Landing on the western end of Tl'uqtinus, and not on the Lands of Tl'uqtinus. The plaintiffs submit the Musqueam ethnographic record is one of wrong time and place.

[1459] Musqueam member Andrew Charles told Suttles in 1957 that, for fishing sturgeon in the river at Steveston, the Musqueam, Tsawwassen and Cowichan all camped at ƛəqtinəs (Tl'uqtinus), above where the Ladner ferry is located. Suttles' notes do not relate to a specific time. Dr. Kennedy reported that the ferry ran between Ladner and Woodward's Landing located at the far west end of Tl'uqtinus.

[1460] James Point, born 1879, advised Dr. Kew in 1968 of place names in the Musqueam language. He identified ƛəqtinəs (Tl'uqtinus) as meaning "long bank", and as a large campground for Musqueam, Tsawwassen, and "up-river Indians". It began about three-quarters of a mile above the Deas Island tunnel on Lulu Island. This entry does not relate to a specific time, but the fact that Musqueam and Tsawwassen were camping there is consistent with this taking place after Tsawwassen's resettlement in the 1850s. There is no mention of the Cowichan.

[1461] The plaintiffs note that the statement that Tl'uqtinus was a large camping ground that included "up-river Indians" is inconsistent with Chief Joe's statement in 1935–1936 to Barnett that "up river people never came down to camp here".

[1462] In 1991, Ed Sparrow, born in 1898, told Musqueam archivist Pat Berringer while they were standing on Deas Island that the Musqueam had a camp across the river and around what is now No. 5 Road in Richmond, but he did not know the exact spot. He said "later on, it became a campground for people on the coast ... like Vancouver Island and all those people, and some from up river ... They call it ƛəqtinəs". There is no time frame specified.

[1463] I accept the plaintiffs' submission that the canneries drew many Indigenous people to work on the Fraser River and not in their traditional territories.

[1464] The 1976 Musqueam Declaration locates "7uqtinus" at Woodward's Landing. The symbology does not claim it as a village or campsite.

[1465] I find that Woodward's Landing on Lulu Island is west of the Claim Area.

[1466] Big Joe said the camp at ƛəqətínəs was opposite Deas Island, downriver from the Claim Area. He said the Nanaimo had their own camp on the river, but was not sure where. The plaintiffs maintain these accounts by Mitchell coincided with the cannery period because they speak only of mat houses, which suggests this history postdates the permanent plank houses. Musqueam denies there was a permanent village. They interpret Mitchell's evidence to suggest that some Penelakut, Nanaimo, and Saanich came to the Fraser River and camped together in mat houses prior to, at, and after the arrival of the canneries.

iii. Musqueam's Stewardship of the Fraser River

[1467] Morgan Guerin's oral history is that Musqueam has always been at the mouth of the Fraser, going back to the time before the north, middle, and south arms even existed.

[1468] Musqueam claims that the entire south arm of the Fraser River is part of their territory. They rely on the declaration that Musqueam issued in June 1976 setting out what they understood to be their territory.

[1469] Musqueam's main village is on the north arm of the Fraser River. sʔəyəɬəq's oral history is that in the winter, Musqueam who lived in outlying communities in different little villages would come and congregate in the main village to be together for sharing food, passing on oral history, and conducting cultural ceremonies. In the spring, summer, and fall, the Musqueam dispersed in family groups to specific fishing camps, shellfish beaches, berrying grounds, and hunting locations.

[1470] Musqueam says they used and occupied various locations on the south arm of the Fraser River, as evidenced by their oral history of Musqueam place names and of activities associated with these places. They submit the oral history shows Musqueam families travelled, camped, hunted, and fished up and down the south arm. They led evidence about particular harvesting sites on the south arm, namely Garry Point, Canoe Pass, and səẃq̓ʷeqsən (Suwqw'eqsun), to show that they were on the south arm at the same time the Cowichan were. These areas are not in the Claim Area, but the evidence does refute the plaintiffs' submission that Musqueam was a small tribe only on the north arm.

Garry Point and Surrounding Areas

[1471] Musqueam's place name for Garry Point is q̓ʷeyaʔχʷ. It is located in the southwestern part of Lulu Island, where Musqueam submits Musqueam camped for parts of the year to harvest and hunt. The ethnographic evidence is inconsistent as to whether q̓ʷeyaʔχʷ was a permanent village or a campsite.

[1472] sʔəyəɬəq gave oral history from his mother that, before contact, Musqueam lived at q̓ʷeyaʔχʷ, and they would come to the main village on the north arm in the winter. The family that lived at q̓ʷeyaʔχʷ became known as the Points. sʔəyəɬəq understood that they were there going back prior to colonization, somewhere around the 1880s or the 1890s. Accordingly, the plaintiffs maintain that sʔəyəɬəq's oral history of Musqueam occupation of Garry Point is post-colonization, not post-contact. Musqueam submits this mischaracterizes the evidence of sʔəyəɬəq, and that the reference to the 1880s or 1890s is not part of his oral history.

[1473] James Point stated that, when the Points left q̓ʷeyaʔχʷ, they were invited to return to Musqueam.

[1474] In 1896, Indian Agent Frank Devlin indicated that three Musqueam families lived at Garry Point continually, and each had a little cottage. They had done so undisturbed "for all time to the present".

[1475] The plaintiffs submit the ethnographic evidence relied on by Musqueam does not indicate when Musqueam occupied Garry Point. They say the first indication of Musqueam presence at Garry Point in the written historical record is in 1896.

[1476] In the 2004 *Musqueam Reference Grammar*, Suttles recorded from James Point and Arnold Guerin that Garry Point was “a summer campsite for some of the Musqueam people”. James Point’s father who was born in 1879 or 1881 stayed there. In Ed Sparrow’s recorded interview in 1991 at Steveston he referred to ḏʷeyaʔχʷ as a campground. Dominic Point’s testimony in the *Mathias* litigation (*Squamish Indian Band and Mathias v. Canada*, 2001 FCT 480 [*Mathias*]) is that there were no bighouses at Garry Point before the dykes were built because it was very marshy and wet. After the dykes were built people could build houses and farm land started to appear in the area. Joseph Trutch surveyed Lulu Island in 1859 and recorded no Indigenous village at Garry Point. Based on this evidence, I find there is more support for the plaintiffs’ position that people who were part Sumas, part Cowichan, and part Musqueam used Garry Point as a campground for fishing, and did not create any permanent housing until the late 1800s. It appears that the Point family is connected to the Cowichan, Sumas, and Musqueam, and ended up living at Musqueam. This places some Musqueam camping at the Steveston area in the summer.

Canoe Pass

[1477] Musqueam submits Canoe Pass was traditionally used by the Musqueam. There is evidence about Canoe Pass as a campsite in Dr. Kew’s field notes, and from Ed Sparrow Sr. They make a claim to it in the Musqueam Declaration as well.

[1478] The plaintiffs argue there is no evidence of the use of this area as a campsite, and that Musqueam oral history must date to the cannery period, when there were several canneries in Canoe Pass.

[1479] While I agree that the absence of historical evidence does not limit the Musqueam oral history to the post-cannery period, Musqueam oral history does not

place a timeframe for Musqueam habitation of this campsite. I accept that there were several canneries in Canoe Pass.

[1480] Based on the evidence, I find it likely that Musqueam fished at Canoe Pass during the cannery period, and may have had a seasonal fishing camp there perhaps prior to 1846. Canoe Pass is near the Claim Area, but not part of that area. I do not consider Musqueam fishing or camping at Canoe Pass to undermine the plaintiffs' claim that they exclusively used and occupied the Claim Area.

səwi̓q̓ʷeqsən (Annacis Island) and qʷəqʷəʔápəɬp (St. Mungo)

[1481] Musqueam submits the southwest portion of Annacis Island and the place where the St. Mungo cannery used to be (where the south footing of the Alex Fraser Bridge now sits) were places used by Musqueam people pre-contact.

[1482] The ethnographic and oral history evidence is that səwi̓q̓ʷeqsən (Suwqw'eqsun) is the place name for the southwestern side of Annacis Island down the river from the St. Mungo cannery, where the Musqueam people had a village. Suttles records a different place name for the site of St. Mungo, qʷəqʷəʔápəɬp. Ed Sparrow Sr. gave oral history about this place, but did not use the name qʷəqʷəʔápəɬp. He said that his people used to live there, and that some people used it as a campground, while others stayed there permanently.

[1483] I note that the plaintiffs refer to two documents, which appear to record parts of the June 20, 1995 meeting at Musqueam to discuss Musqueam history and family trees. The plaintiffs argue one of the documents, a set of typed meeting minutes, records oral history from Vincent Stogan that the people from Vancouver Island camped at St. Mungo's cannery site for fishing, and Musqueam did not camp at St. Mungo, but with the Katzie and Langley camped at Kikeyt.

[1484] Musqueam argues the second document, notes of the meeting prepared by Pat Berringer, are inconsistent with the minutes and therefore the two documents are unreliable.

[1485] The minutes say Island people had a campsite at the St. Mungo cannery site, while the notes say the Island people camped across from Glenrose cannery. The plaintiffs submit St. Mungo and Glenrose canneries were adjacent to one another. They emphasize that Vincent Stogan's statement that the Musqueam shared a campground with other groups at Kikeyt is inconsistent with Ed Sparrow's and James Point's statements that səw̓q̓ʷeqsən was a Musqueam campsite.

[1486] I find that there may have been a small village on the south shore across from Annacis Island, but there is no evidence it was occupied after the smallpox epidemic in the late 1700s. There is no evidence of Musqueam presence there or on Annacis Island in the written historical record of the 1800s. Mr. Guerin's evidence suggests that the Musqueam occupied Suwqw'eqsun in ancient times before the river mouth extended further west.

[1487] I find very little can be concluded from the conflicting evidence. Musqueam may have camped at the west end of Annacis Island at some point in historical times. It is not established that they did so at 1846.

[1488] The evidence before me is that Musqueam had a permanent winter village on the north arm of the Fraser River, and a small village on Tree Island at the mouth of the Pitt River. The extent of Musqueam's full territory has not been established, nor is it an issue I am asked to resolve in this trial.

iv. The Musqueam Perspective — Sharing and Resource Access

[1489] Musqueam submits they were on the south arm of the Fraser River at all relevant times. Their families camped, hunted, and fished up and down the south arm. They were responsible for the stewardship of the river. The Hul'qumi'num-speaking families from the Island are intimately tied through extended family connections to Musqueam. They submit Musqueam are a warrior people, and maintained control of access to their territory, and they included the south arm as part of their territory by virtue of the fact they harvested in the south arm. They regulated people coming over to Musqueam to access resources. They had

protocols in place to deal with those who wished to come and harvest in their territory.

[1490] Musqueam submits that marriage and kinship connection between Musqueam and Cowichan families stretch back generations. Before contact, kinship arrangements would have existed between families on both sides of the Salish Sea.

[1491] Musqueam relies on an origin story and the travelling of masks in outlining a pre-contact connection between Musqueam and the plaintiffs, as well as several witnesses who testified as to their family connections going back generations.

[1492] Musqueam people had a traditional governance system based on their connection and responsibility to the land, resources, and to one another. Stewardship is a core principle in Musqueam governance; stewardship of the river is grounded in their teachings. Warriors cared for the water and lands and controlled territory access. Sharing is a core governance principle and is grounded in stewardship of their territory. Musqueam and members of the plaintiffs' communities have traditionally followed the teaching by sharing with each other.

[1493] Musqueam submits that family and kinship connections are of foundational importance to Coast Salish culture. Kinship ties in arranged marriages carried a combination of privileges and obligations. These connections created bonds and alliances, forming the basis for the flow of resources. sʔəyəɬəq testified that "accessibilities" were opened up through intermarriage. He was taught that intercommunity relationships were developed to facilitate the sharing of resources. Mr. Guerin said kinship-based protocol arrangements fostered resource sharing, ongoing connection, and respect and caring between families. The Musqueam and the Cowichan follow the principle of nə́c̓aʔmat in hən̓q̓əmin̓əm̓ (spelled nuts'a'maat in Hul'qumi'num), which means to be one piece or to work together in the same mind frame. Mr. Guerin testified that, when two families are connected through marriage, they become nə́c̓aʔmat. Mr. Guerin also testified that kinship arrangements would last as long as they are kept alive in practice.

[1494] sʔəyəɬəq explained that one's name could descend from a Musqueam person or from someone in a non-Musqueam parental lineage to keep the family connection alive. Chief Sparrow gave evidence that the Sparrow family at Musqueam shares traditional names from Penelakut and Cowichan.

[1495] Musqueam submits kinship ties allowed some members of the 11 local groups to access resource sites on the south arm of the Fraser River.

[1496] Musqueam and the plaintiffs generally agree on the operation of Coast Salish laws of access pursuant to kinship-based permission. They disagree on whether this law applies to the lower Fraser River, including the Claim Area.

[1497] The evidence from Mr. Guerin, sʔəyəɬəq, Chief Sparrow, and Chief Joe Norris is that Cowichan families and relatives from the Island would come to harvest with their Musqueam family. Accessing resources through kinship was an arrangement between families, rather than entire villages or nations.

[1498] The evidence of Chief Sparrow, sʔəyəɬəq, and Mr. Guerin is that Musqueam families were associated with certain resource gathering areas, and would have rights to use the site for resource gathering and the responsibility to look after it. Chief Sparrow gave oral history evidence that Cowichan people, who were extended family, would access fish at these sites when they came over.

[1499] The evidence from Ed Sparrow Sr. and Councillor Thomas, and from the Fort Langley Journals, suggest that, although the Musqueam and Cowichan had a long-standing kinship relationship and history of cooperation, including banding together for various raids, there is also oral history and written historical evidence that contradicts the notion that they were always friendly.

[1500] The plaintiffs submit Mr. Guerin's generalized evidence regarding kinship-based permission does not apply to the collective Cowichan occupation of the Lands of Tl'uqtinus or the practice of fishing on the south arm. Mr. Guerin's evidence is that kinship-based protocol between families would not apply to the

same place year after year, and it depended on the abundance on a year-to-year basis.

[1501] Musqueam disagrees with the plaintiffs' characterization of Mr. Guerin's evidence that kinship-based protocol would not apply to the same place year after year. Mr. Guerin testified resource access to kinship protocol would not necessarily be connected to a specific geographic location.

[1502] Musqueam is referring to specific sites that they had ownership of, and Cowichan is referring to the south arm of the Fraser River, where no one had ownership of the whole. Where Musqueam submits the plaintiffs' characterization of traditional Coast Salish site-based permission arrangements is unduly narrow, I find Musqueam's characterization is unduly broad and extends far beyond any area over which they had control. I find that the Cowichan's intention and capacity to control land in the Claim Area applied to Musqueam. There is a lack of evidence that Musqueam used or occupied the Claim Area at the relevant time period, or ever.

[1503] Mr. Guerin testified that people from outside the area had to have a basis for being present in Musqueam territory. They were expected to ask permission before going to someone else's territory.

[1504] Mr. Point gave evidence in the *Mathias* case that Cowichan people came to the river as a matter of "reporting", as opposed to "permission". This was consistent with the oral history Chief Sparrow learned from Mr. Point. However, Mr. Guerin testified that the way the Court in *Mathias* talked about reporting being optional is not part of his oral history. Mr. Guerin confirmed checking in on arrival is not just "reporting", but if you have arranged permission previously through kinship, it would be reporting rather than granting permission because the permission had already been arranged. Mr. Guerin was clear that he was not comfortable with the oral history post-colonization, leading into the 1800s.

[1505] Mr. Guerin gave oral history evidence about fierce Musqueam warriors who maintained control over access to the territory.

[1506] The plaintiffs say there is no evidence of Musqueam lookouts on the south arm, which Musqueam does not deny. Musqueam says they controlled the river through social structure and kinship connections.

v. Expert Evidence on Protocol

[1507] Dr. Lovisek concluded that, based on the ethnographic data, the Island Halkomelem used and occupied the Lands of Tl'uqtinus subject to protocol arrangements that required kinship relationships, such as intermarriage and permission. She also concluded that harvesting of fish by the Cowichan was subject to protocol arrangements with other Indigenous people.

[1508] The plaintiffs and Musqueam submit Dr. Lovisek was not qualified as an expert in genealogy or kinship, and so her opinions in this area have exceeded her expertise. They also contend that her opinions were refuted in cross-examination.

[1509] Dr. Lovisek agreed in cross-examination that Rozen’s statement upon which she relied that Tl'uqtinus was probably originally a summer campsite of the Musqueam was opinion. I also find that this statement is not supported by the ethnographic evidence.

[1510] In her reports, Dr. Lovisek opined that Musqueam occupied the Lands of Tl'uqtinus at times. There is no written historical evidence supporting this opinion. As I noted above, Dr. Lovisek was cross-examined on her conclusion that the Musqueam were present at the Cowichan village on May 8, 1828, when the Musqueam chief was killed. She agreed that she was in error. There is no evidence that the Musqueam were occupying the Cowichan village at that time.

[1511] Dr. Lovisek opined that the Cowichan only used and occupied the Lands of Tl'uqtinus as a collective for about three weeks in the summer, but agreed in cross-examination that their occupation of the village was more extensive in 1825, 1827, and 1829.

vi. Ethnographic Evidence

[1512] Some of the ethnographic evidence refers specifically to fishing and I address it in Part 10.

[1513] Suttles' 1952 recording of the information given by Simon Pierre does not say anything about the occupation of Lulu Island by "Vancouver Island tribes" being subject to permission or kinship ties.

[1514] In 1952, Duff recorded information from Simon Pierre about Tl'uqtinus, where he said the Cowichan came in summer, and some stayed the year round, but he did not include any information about the Cowichan requiring permission dependent on kinship ties.

[1515] In 1957, when Elder Andrew Charles Sr. spoke to Suttles, he did not say that the Cowichan required permission to use or occupy Tl'uqtinus or to fish the south arm. He did not refer to Musqueam or Tsawwassen owning fishing sites on the south arm, although he did mention that the 10 or 12 men who built the traps together owned the traps, and "[i]f there wasn't much they rotated in taking fish".

[1516] In 1968, Dr. Kew recorded from James Point the place name Tl'uqtinus and its meaning. He did not mention a Cowichan presence at Tl'uqtinus, nor anything about permission or kinship ties.

[1517] In 2004, Suttles recorded the place name Tl'uqtinus or ƛəqətínəs from Musqueam informants Andrew Charles, James Point, and Arnold Guerin. Suttles wrote: "This was the great summer village of the Cowichan-speaking people of Vancouver Island". Musqueam says Suttles attributes the place name to these informants through the use of their initials in round brackets after the place name, but does not attribute the statement that "Tl'uqtinus was the great summer village of the Cowichan-speaking people", indicating that it was Suttles' own editorial comment. Nonetheless, Suttles had information from Musqueam informants and concluded that Tl'uqtinus was the Cowichan's summer village. He did not say anything about the Cowichan needing permission to use or occupy Tl'uqtinus.

vii. Analysis

[1518] Musqueam's oral history evidence does not support a conclusion that Musqueam controlled the Fraser River or the south arm. Although some Musqueam witnesses testified about Musqueam controlling access to the river, Musqueam need not demonstrate that to undermine the plaintiffs' claim of exclusive occupation.

[1519] Mr. Guerin's evidence suggests that Musqueam warriors would meet anyone entering the Fraser River, and check whether they came in peace and why they were there.

[1520] Mr. Guerin recognized that his oral history for the 1800s was limited and lacked detail.

[1521] The assertion that prior to, at, and after 1846, Musqueam warriors intercepted people entering the south arm of the Fraser River is inconsistent with the evidence. Rather, the evidence indicates that, to the extent Musqueam had lookouts at Point Grey, it was to warn Musqueam people about attacks from hostile tribes like the Lekwiltok. The evidence does not support a finding that Musqueam had lookouts or warrior villages on the south arm.

[1522] The Musqueam had a village where the north arm empties into the gulf and winter villages on Burrard Inlet. They fished in areas of the south arm and camped when they did. The census evidence shows at 1839, 1845 and 1849 they were far outnumbered by the Cowichan.

[1523] Dr. Kennedy could not find evidence in the ethnographic and historical literature of the Cowichan seeking permission to establish or maintain their village, or for harvesting of resources at Tl'uqtinus. Dr. Brealey concluded it was the Cowichan who had the potential to be territorial if they chose to do so.

[1524] The ethnographic record does not support Musqueam's theory that the plaintiffs' ancestors occupied their village with Musqueam's permission. No ethnographer other than Rozen expressed this opinion, and I do not accept Rozen's

opinion for the reasons outlined above. Rozen's opinion is unique to him and is not attributed to any source. It is inconsistent with the other ethnographic evidence and with the historical record, and with most of the oral history.

[1525] On the whole of the evidence, I am satisfied that the Cowichan exclusively occupied land in the Claim Area. As previously set out, according to Dr. Kennedy and Suttles, it is possible but not known whether early family ties may have given rise to what became a Cowichan perpetual right. There is some oral history from Musqueam that the Cowichan required permission to come to the Cowichan village, but this is contrary to the substantial body of evidence that the Cowichan did not require permission. In any event, it relates to a time period outside of the relevant period with which these proceedings are concerned.

[1526] I review additional evidence related to Musqueam's claim that the Cowichan fished with permission in Part 10. For the reasons I already expressed, and based on my findings set out in Part 10, I conclude that the Cowichan did not fish with permission.

[1527] It is my view that Musqueam has overstated their power over the river, which was a shared resource. One reason for divergent views between the Cowichan and Musqueam is that there are divergent views about people coming to "Musqueam", and what "Musqueam" means and encompasses.

[1528] Musqueam did not have the capacity to control the entire south arm of the Fraser River, even if it had been its intent. There is little evidence that Indigenous groups fishing on the south arm of the Fraser River had to first check with them.

[1529] If the Cowichan wished to stay at a Musqueam village or use a Musqueam fish trap or weir, then they would have needed permission to do so.

[1530] There is no doubt that the Musqueam and Cowichan were closely connected through marriage and kinship ties. Musqueam may have had a practice of regulating people coming over to "Musqueam", but they did not control the south arm.

[1531] Musqueam has a close connection to the river, and is culturally and socially grounded in teachings of stewardship. That stewardship, however, is not necessarily accepted by other Indigenous people. The Cowichan did not view the south arm as Musqueam territory. Generally, Coast Salish people were governed by the principles of sharing of resources. In times of abundance, sharing was not an issue.

[1532] The concept of reporting as testified to by Mr. Point in *Mathias* is not inconsistent with my conclusion. Large groups of Indigenous people who were related to one another, or were camping and fishing on a long stretch of land on the south arm, might connect with one another when they arrived as a courtesy. I do not equate this with seeking permission because the Cowichan did not view the south arm as Musqueam territory.

[1533] Musqueam led some oral history evidence that the Musqueam controlled who came to the river, but I find the evidence falls short of establishing this. The evidence also falls short of establishing that the Musqueam controlled the Cowichan's access to fish the south arm of the Fraser River.

[1534] Lastly, there is no evidence that the Musqueam used or occupied the Claim Area. Their presence on the Fraser River does not undermine the evidence that the Cowichan had the intention and capacity to control their land on the south arm.

8. Conclusion on Exclusive Use and Occupation

[1535] The evidence demonstrates that a number of Coast Salish groups were present on the lower Fraser River, including the Musqueam, Tsawwassen, and Cowichan. The lower Fraser River was a place of abundant resources and fish runs. The evidence also shows that while many groups lived on the lower Fraser River, there were places that belonged to specific groups. The Cowichan established a large, permanent post and beam village along the waterfront of the south arm of the Fraser River. This was the Cowichan village. It belonged to the Cowichan, and other groups respected that it was on Cowichan land.

[1536] The Cowichan occupied their village *en masse* in the summer and maintained a periodic presence throughout the year. The evidence shows that the Cowichan had a perpetual right to their land at Tl’uqtinus, established through occupation, as a matter of Coast Salish and customary law.

[1537] The Cowichan exercised effective control over their land. There is no evidence of other Indigenous groups occupying this village. At the relevant time period, in the first half of the 18th century, the Cowichan were the dominant Indigenous group on the lower Fraser River, in terms of size and strength. They had many warriors and strength in numbers. They used intimidation and force to deter challenges from other groups. They established a reputation as a dangerous Nation with fierce warriors. These were strong messages to other Indigenous groups, who tended to avoid the Cowichan, and unless they were invited, they should not enter the Cowichan village and surrounding lands.

[1538] I conclude that the Cowichan had the capacity and intention to exclusively control their village land and some surrounding areas on the south arm of the Fraser River prior to and as at 1846.

[1539] Next, I discuss the extent of the lands that the Cowichan sufficiently and exclusively occupied.

E. EXTENT OF THE LANDS

[1540] The plaintiffs contend 2,250 Cowichan regularly used the Village Lands. They resided and launched their canoe-based fisheries there. They conducted shore-based fisheries, and landed, cleaned, and dried fish by the thousands. They fed themselves with fresh food resources. They had trails to access areas they regularly and intensively used for daily living, which were still evident in 1859. They cultivated and managed the Village Lands and Exploited Lands to maximize resource production.

[1541] The plaintiffs claim the Lands of Tl'uqtinus comprised about 1,846 acres of Cowichan settlement land, which was less than one acre per the more than

2,250 Cowichan who regularly used the lands at sovereignty. Their bighouses extended about a mile — 1.6 km — along the riverbank in rows with multiple neighbourhoods.

[1542] The plaintiffs rely on Dr. Brealey's Map 4, which delineates Cowichan territory on the lower Fraser River at first contact in about 1792, and as of the Oregon Treaty in 1846. Dr. Brealey's interpretation of the internal site characteristics of the village proper was partly based on the reports of Annance, Duff, and Trutch. He started with the archaeological reports for DgRs-17, confirming a total village infrastructure site extending east to west, from just west of an imagined southern extension of No. 8 Road, to about the intersection of Dyke and Triangle Roads — a distance of 2.2 km. This is just a little more than the three quarters of a mile claimed by Work in 1824.

[1543] When determining the southernmost boundary of the village, Dr. Brealey noted that several metres of what used to be beach has since been effectively inundated. The houses likely occupied or partially extended out over a stretch of beach frontage over the first half of the 19th century, which is now underwater at mean tide. His location of the houses was influenced by the summary archaeological report in a 2009 Site Inventory Form. In delineating the extended land management area, he relied on Trutch's description of the two trails and the village symbols that reference structures in his 1859 survey. He also relied on Work's statement that he counted 54 houses from the water. He accepted that most sources indicate two rows of houses running parallel along the water. He included the biogeoclimatic zones recorded by Trutch, which he found were likely subject to regular horticultural activities, including the blueberry patches specifically.

[1544] Dr. Brealey says portions of the area closest to the built infrastructure would have been used and managed on a regular and intensive basis, and would qualify as village space and justify the boundary of the village proper. Portions further away in the extended land management area would have been exploited regularly, but, depending on the season, and the resident population from one to another, likely not as intensively. In his opinion, the Cowichan extended land management area

defined by the green boundary in Map 4 confirms a total coverage of 1,687 acres. He also finds that the village proper extended beyond the boundary of DgRs-17 to embrace 451 acres on land, and perhaps an additional 142 acres of fluvial space reaching into the channel. I address the fluvial space in the section of these reasons about submerged lands.

[1545] Mr. Eldridge conducted his research within the boundaries of a previously-recorded archaeological site — DgRs-17, Tl'uqtinus — located on Lulu Island between the south end of No. 8 Road and Williams Road. To determine the size, shape, and location of the historic village site, he considered Work and Annance's journals, the 1827 Simpson chart, and Barnston's journal. He also considered the 1841 US Exploration Expedition chart, Alden's 1853 map, the US NWBS Kennerly journal, and Gibbs' drawing and journal. Mr. Eldridge said the most accurate and precise information about the mid-19th century location of the river bank and, with some qualifications, the location of the village, was obtained from Trutch's survey notes.

[1546] Using Trutch's survey, he was able to plot the location of the river bank in 1859, the village, fishing station, and trails.

[1547] He determined that the village of 108 houses sufficient to house 1,500 people (Barnston) or 3,000 to 4,000 people (based on Annance's estimate of at least 1,000 men) would cover roughly 1,300 by 200 m. If the houses were at least 60 by 60 ft (roughly 20 m^2), then he would expect cultural materials from under and around the houses to be at least 65 m inland of the riverbank. The 1,300 m length is equivalent to 0.8 of a mile, consistent with the "nearly a mile" and "at least three quarters of a mile" in the 1824 journals.

[1548] Dr. Brealey noted that the trails described by Trutch extended into an area mapped by Trutch as deadened by fire and cranberry bogs. That area extended into another archaeological site (DgRs-15), a site that contained basket fragments.

[1549] Dr. Brealey defined the southern village boundary, as he believed it existed at contact and as at the Oregon Treaty of 1846, to include the stretch of beach between the low and high tide lines that would accommodate canoe launches, fisheries, and related waterfront activity.

[1550] Dr. Brealey's definition of the outer boundary of the extended land management area was informed by the biogeoclimatic landscape. The village of not less than 1,000 men would have needed a substantial backyard in which residents could gather grass or mosses, cattails, rushes, berries, roots, and small mammals for domestic and commercial purposes.

[1551] Dr. Brealey's opinion is that a typical Coast Salish village was never built on infrastructure of houses and fish weirs alone, but included a much larger acreage that provided many of the necessities of life within a few minutes' walk.

[1552] Dr. Kennedy also concluded that a large Cowichan village with permanent structures stood on the south shore of Lulu Island prior to, at, and after 1846. It consisted of at least two rows of numerous houses constructed over a mile of river frontage. The plank houses could house many people. The trails led from the area of the village northwest into the higher areas where bog cranberries could be harvested, along with other resources.

[1553] I accept the fact that large numbers of Cowichan continued to use the Claim Area past 1846. As Douglas noted in his 1856 dispatch, of the 1,400 warriors (men) that the Cowichan could bring into the field, 1,000 were then away on an expedition to the Fraser River. Again, in August 1862, Douglas found the population of the Cowichan Valley mostly absent.

[1554] In 1867, Reverend W. H. Lomas, writing from his mission station at Quamichan, noted that the "Indian" villages on Vancouver Island were almost entirely deserted, as all had left to go to their different stations around the mouth of the Fraser River where they caught their main supply of salmon.

[1555] In the mid-1870s, the early settlers in the lower Fraser near the mouth of the south arm complained of difficulties with the Cowichan, who threatened them and admonished them for taking their land. Commissioner Sproat reported that, in the 1877 fishing season, about 1,000 Cowichan people stayed at their ancient fishery despite the land being alienated. In my view, the village must still have remained a substantial size at 1877 in order to accommodate 1,000 Cowichan people.

[1556] Canada submits if the plaintiffs have established title, it is to an area significantly smaller than the asserted 1,846 acres.

[1557] Canada submits that, with respect to the extent of the Village Lands, the Trutch survey shows that those lands were confined entirely within Section 23 at all material times, including in 1846, and even then encompassing only a portion of Section 23, and not its entirety. Canada also submits the plaintiffs have not established an extended land management area regularly used to harvest and gather plant resources.

[1558] As Canada submits, and I agree, in the written record, the only first-hand observations containing a description of the scope of the Village Lands come from Work and Annance in 1824, Barnston in 1827, and the Trutch survey in 1859. The ships' logs that I referenced above do note anchoring at or near the Cowichan village, but they do not provide any description of the village itself in the time period between 1842 and 1858.

[1559] In 1857, Kennerly referenced several large but deserted villages where the Cowichan and other tribes resorted during the fishing season. In 1858, Gibbs also referenced a large camp on the north side of the river below the Squamish. The NWBS indicated the location of the Cowichan village across from Tilbury Island, but did not provide evidence of the size of the village.

[1560] I accept the Trutch survey establishes that the permanent Cowichan village decreased substantially in size and was contained in Section 23. This was in 1859, but I need to determine how large the village was in 1846.

[1561] The evidence supports the Cowichan were coming in large numbers to the Fraser to fish in 1846. I find an estimate of 2,250 Cowichan occupying the village is reasonable because the 1,000 warriors would have brought family to assist them with resource harvesting and processing. This number accords with the historical record. I accept Dr. Brealey's opinion that an extended land management area was required to support the village proper, and the trails noted by Trutch support my conclusion that there was at least a harvesting area in adjacent Sections 21, 22, 26, 27, as well as portions of Sections 20, 28 and 29, discussed below. What concerns me is whether sufficient housing for anywhere between 1,000 to 2,250 Cowichan could be confined to Section 23, and whether a village confined to Section 23 would be considered "large" by Gibbs and Kennerly.

[1562] The oral history evidence does not assist in describing the size of the Cowichan village and surrounding lands occupied by the Cowichan as at 1846, but it does support a finding that large numbers of Cowichan came annually to Tl'uqtinus to fish and harvest in the summer.

[1563] There is simply no direct evidence of the actual size of the village in 1846. The evidence suggests there was a significant decrease in the size of the village by 1859. There is evidence that the Cowichan were frequenting Fort Victoria after it was established in 1843 for religious services and for trade, but they continued to go to the Fraser River to harvest their winter food.

[1564] The start of the gold rush in 1858 is one explanation for the decline in use of the Fraser River, where 20,000 to 30,000 gold seekers arrived at the lower Fraser Canyon. Dr. Lovisek references work edited by anthropologist Keith Carlson entitled *A Stó:lõ Coast Salish Historical Atlas* and *The Power of Place, the Problem of Time: Aboriginal Identity and Historical Consciousness in the Cauldron of Colonialism*. There, Carlson reported that the same stretch of the Fraser offering the most lucrative mining prospects also constituted the most productive Indigenous salmon fishery on the entire northwest coast. The gold miners diverted creeks into canals in which flumes would carry water to separate gravel from gold. This hindered salmon

spawning. This may account in part for the reduced amount of housing at the Cowichan village in 1859 when Trutch conducted his survey.

[1565] I accept Dr. Brealey's opinion that the village proper had at some point extended from the eastern half of Section 27 upstream to include most of Section 24 to accommodate the approximately 108 bighouses. I also accept that, by 1859, the "Indian Village" Trutch observed was confined to Section 23. I suspect it took some time for it to diminish in size, and that it may have been influenced by the gold rush.

[1566] I accept Trutch's survey as a reliable depiction of the "Indian" trails traversing Sections 21, 22, 23, and 26, and the northern half of Sections 27 and 28. I also accept Dr. Brealey's evidence in his Map 4 that the longer trail continued into the southeast corner of Section 20. Similarly, this trail is mapped as ending in the southeast corner of Section 20 on Mr. Eldridge's map, labeled Figure 14. This is consistent with Trutch's notes, which record a trail crossing the border between Sections 21 and 28, and again indicates a trail between Sections 20 and 21. Trutch also recorded that the soil in Sections 20 and 29 was excellent for cultivation. This supports my conclusion that at least parts of adjacent Sections 20 and 29 included a harvesting area. I find this area extends across Sections 20 and 29 to the border of the extended land management area found in Dr. Brealey's Map 4. Following Dr. Brealey's line, I find that a thin strip of land in Section 29 and Section 20 from their eastern boundary to the western boundary of Dr. Brealey's extended land use management area are included in the Cowichan's Aboriginal title lands, outlined below.

[1567] Confining the village to Section 23 is inconsistent with other evidence about the population of Cowichan who were occupying the village annually to harvest well into the 1870s. It is also inconsistent with Gibbs and Kennerly's observations of the large deserted village. Even if the post and beam structures were limited to Section 23, I find the village had to extend into Sections 26 and 27 to house the large numbers of Cowichan coming each year to the village to fish. They may have

also been using more temporary mat housing by the 1850s, and likely by the 1860s and continuing on into the 1870s.

[1568] My task as trial judge is to determine the extent of the lands over which the plaintiffs have established sufficient exclusive occupation at sovereignty in 1846. In doing so, I aim to provide certainty as to which lands are impacted, given any frailties in the evidence and the changes in the lands that have occurred since 1846.

[1569] I undertake this task recognizing that any boundary defining Aboriginal title land as at 1846 will be artificial, both because it is simply not possible to say with certainty where a boundary may be found, given the shifting geography, but also because, while the Cowichan recognized boundaries, they did not delineate their land by metes and bounds. There is little in the way of natural boundaries in the Claim Area, and even the natural boundary, the south arm of the Fraser River, is artificial, because the land has changed, the shore has eroded, and, as I explain below, some of the land the plaintiffs have established Aboriginal title to is submerged.

[1570] In *Tsilhqot'in* BCSC, Justice Vickers acknowledged that the boundaries of the claimed territories were "entirely artificial" and that the boundaries of the Trapline Territories were the result of a legislative scheme that did not exist until well into the 20th century: at paras. 641-642. Nonetheless, establishing boundaries was a necessary part of the exercise he was engaged in: at para. 649.

[1571] Below, I define some of the boundaries of the Cowichan's Aboriginal title by or with reference to survey lines that Trutch marked out in 1859. I appreciate that there is some artificiality in doing so; however, any boundary, including the boundaries the plaintiffs asserted in defining the Claim Area, are necessarily artificial.

[1572] For clarity, I use both the Trutch survey lines and some of the features outlined in Dr. Brealey's Map 4 to define the extent of the land over which the plaintiffs have established Aboriginal title. I recognize that this is unlikely how the

plaintiffs' ancestors would have delineated the boundaries of their lands. However, it is not possible to define the boundaries of the lands entirely from the Indigenous perspective — as Dr. Turner opined, immense changes have occurred since the arrival of Europeans to the features of the lands and waters at Tl'uqtinus and the areas adjacent with which the Cowichan people would have been familiar.

[1573] Leaving aside the submerged lands for the moment, I conclude that, at 1846, the Cowichan sufficiently and exclusively occupied the following lands, as described below:

a) The eastern boundary starts just east of the "Fishing Station" noted by Trutch, at the eastern boundary of Section 23 and travels directly north to the northeast corner of Section 23.

b) The southern shoreline runs from just east of the "Fishing Station", following the shoreline west across Sections 23 and 26 to the southwest corner of Section 27. This would give sufficient shoreline to house 1,000 men and their families, in bighouses, and to land hundreds of canoes along the beach. The southern boundary is defined in the section of these reasons dealing with submerged lands.

c) The western boundary starts at the southwest corner of Section 27, travels north half way up Section 27, then due west across Section 28 and a portion of Section 29 until it hits the western edge of Dr. Brealey's extended land management line. The western border travels up that line to Blundell Road and the northwestern corner of Section 21.

d) The northern boundary runs along the northern borders of Sections 21–23.

[1574] Overall, this area includes the two "Indian" trails, the "Indian Village", and the "Fishing Station" noted by Trutch, as well as the blueberry patches divided between

Sections 21, 22, 27, and 28. The plaintiffs have established Aboriginal title to this land.

[1575] For ease of reference throughout these reasons, I refer generally to Section 21 as part of the Cowichan's Aboriginal title lands. However, a small plot of land in the northwest corner is excluded, as shown on Schedule "A".

[1576] In summary, as at 1846, the Cowichan's Aboriginal title lands were confined in full to the land in Sections 21, 22, 23, 26, and 27, and in part to Sections 20, 28, and 29, except as described below with respect to the submerged lands.

F. DURATION OF OCCUPATION

[1577] Although I previously found the plaintiffs are not required to prove continuity to establish Aboriginal title, there is a significant body of evidence that establishes that they maintained a substantial connection to the Lands of Tl'uqtinus into the 1870s and longer. It continues to be a place of central significance to the culture of the Cowichan.

[1578] The plaintiffs submit that their ancestors continued to occupy the village at Tl'uqtinus well past Confederation in 1871. The evidence supports continued Cowichan occupation after Confederation, through the 1870s and beyond.

[1579] While the village itself decreased in size and was probably transitioning from plank houses to mat houses sometime in the 1860s, it nevertheless remained a stl'ulnup of great importance to them. Mrs. James spoke about travelling to Tl'uqtinus as a child to fish and harvest berries. She was born in 1947, and so this would have been in the 1950s and 60s. Luschiim testified it is very important to the Quw'utsun to be able to live at Tl'uqtinus again, like they used to.

[1580] Dr. Lovisek noted in 1842, Governor George Simpson said the trade returns from Fort Langley were falling off. In 1843, Father Bolduc noted "1,200 Kawtichins [Cowichan], Klalams [Clallam] and Tsamishes [Songhees]" came to Fort Victoria for religious services. This indicated there was a trend of Indigenous peoples moving

from Fort Langley to Fort Victoria. By 1846, Finlayson reported year-round visits of Indigenous people (including the Cowichan) to Fort Victoria.

[1581] While I accept that trade in Fort Langley may have dropped off after 1843 when Fort Victoria was established, the Cowichan continued to go to Tl'uqtinus in the summer to fish and harvest.

[1582] In Dr. Brealey's opinion, the Cowichan occupied the village up to and beyond the creation of the Colony in 1858. As noted earlier, the gold rush partly explains the decline in the use of the Fraser River in 1858. Nonetheless, there is evidence of 1,000 Cowichan continuing to fish there in the 1870s. They were likely using mostly mat housing by then.

[1583] As I discussed earlier, while on a trip to the Cowichan Valley in 1856, Douglas observed that of the 1,400 warriors that the Cowichan could bring into the field, 1,000 were away on an expedition to the Fraser River. When he visited again in August 1862, most of the population were absent, away fishing. In 1867, Reverend Lomas noted the village was almost entirely deserted, all having left to their various stations around the mouth of the Fraser River.

[1584] The plaintiffs and their experts rely on Sproat's correspondence and submit the Cowichan continued to occupy the Lands of Tl'uqtinus post-1871.

[1585] On January 12, 1878 Sproat wrote to the Lieutenant Governor, inquiring what to do about the sale of the ancient Cowichan fishing ground to a settler, "where 700 to 1000 Indians" assembled to catch fish for the winter supply.

[1586] Sproat listed complaints of the Cowichan in a memo dated January 20, 1878:

> (No. 5) They complained that they had heard that white men had bought the fishing station on the Lower Fraser River, where they had always been accustomed to get their winter food.
>
> As regards complaint No. 5, it is stated to be true that the old fishery station on the Fraser known as the "Cowichan Fishery" and annually used by them from time immemorial in getting fish for winter food, has been sold many years ago. The owner being an absentee, there has been no trouble about the land as yet. <u>About one thousand Indians encamped there last season</u>.

> This question will come up when the Indian reserves generally for the New Westminster District are considered. At present I have no personal knowledge of the facts.
>
> [Emphasis added].

[1587] Later that year on April 22, 1878 Sproat wrote to Israel W. Powell, Canada's Indian Superintendent:

> … these numerous Cowichan Indians, from a recent examination of their history which I have made, have past grievances to which it is undesirable to make any additions, and particularly as I have been told that an old fishing place on Frazer River frequented by the Cowichan as a winter fishing place has been sold some time ago over their heads.

[1588] BC submits little weight should be placed on this evidence, because Sproat did not have personal knowledge of the fishing village. He learned about it from the Cowichan who made the complaint.

[1589] I find this evidence reliable because Sproat was recording these statements in the course of his JIRC duties. The fact that the Cowichan were complaining about the loss of their village is itself probative.

[1590] In Dr. Kennedy's opinion, Sproat may also have had personal knowledge because, as I set out later, his business partner Matthew Trotter Johnson was involved in the ownership of Sections 21, 22, and 23.

[1591] BC notes that in 1876 when the JIRC travelled the Fraser River, they did not record seeing a village at all.

[1592] By 1877, I find the village of post and beam structures likely no longer stood; however, the evidence demonstrates that the Cowichan were still going in great numbers to their village seasonally to fish for salmon.

[1593] It is also apparent from the oral history that the ancient stl'ulnup of Tl'uqtinus was, and remains today, of significant importance to the Cowichan culture.

[1594] Dr. Kennedy opined that the Cowichan's pattern of seasonal movement continued through the 1870s. Neither the HBC's presence nor the introduction of new technologies amongst the Indigenous peoples significantly changed this.

[1595] Even after the alienation of the village site in the 1870s, the Cowichan continued to use these lands while at their fishery on the Fraser River. Dr. Kennedy relied on the same passages from Sproat as I listed above. There were changes to the seasonal round, with the Cowichan undertaking more farming. However, by 1881, Indian Agent Lomas lamented at not being entirely successful in inducing Indigenous people to become full-time farmers. Most of them were away at the Fraser River fishing for canneries until the fall of that year.

[1596] Even by 1901, Reverend Tate, who resided amongst the Cowichan, found villages on Vancouver Island were nearly deserted during the Fraser sockeye runs.

[1597] I find the Cowichan continued to occupy their village through the 1870s, and probably continued to use the site for fishing into the early 20th century. While not required to establish Aboriginal title, because the plaintiffs do not rely on present occupation as proof of pre-sovereignty occupation, the evidence shows that the Cowichan maintained a substantial connection to their land, which they have not abandoned today.

G. SUBMERGED LANDS

1. Overview

[1598] The plaintiffs submit that the Cowichan title to the Lands of Tl'uqtinus includes submerged lands contiguous with the dry land portion, extending partway into the south arm of the Fraser River for 142 acres of fluvial space. They submit there should be no legal distinction between title to dry land and submerged land.

[1599] The SCC has yet to determine whether Aboriginal title can exist in water or land submerged by water.

[1600] In *Chippewas of Nawash* ONCA, the plaintiffs at trial had sought a declaration of Aboriginal title to submerged lands in a large section of Lake Huron and Georgian Bay. This claim was dismissed at trial. On appeal, the Court was clear that "[t]he *Tsilhqot'in* test is sufficiently flexible to be adapted to a claim for submerged lands": at para. 26.

[1601] Both Canada and BC agree that the *Tsilhqot'in* test can be used for the determination of Aboriginal title to submerged lands. Canada submits the plaintiffs have not met the evidentiary burden of proving that the Cowichan sufficiently and exclusively occupied the submerged lands. BC argues Aboriginal title to submerged land conflicts with the public rights of navigation and fishing in tidal waters.

[1602] I address the legal issue first, before analyzing the evidence.

[1603] Chief Justice Strong described the public interest in fishing in navigable waters as being in the nature of a public trust: *In re Provincial Fisheries*, [1896] 26 S.C.R. 444 at 527–528, 1896 CanLII 76.

[1604] In *Chippewas of Nawash* ONCA, because of the trial judge's finding that the plaintiffs had not established sufficient and exclusive occupancy of the submerged lands at issue, the Court found it unnecessary to assess whether the public right of navigation is incompatible with Aboriginal title. The Court did note at para. 93 that not every use of submerged lands will interfere with navigation, citing G.V. La Forest and Associates, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Regional Economic Expansion, 1973) at 186:

> It is now doubtful, to say the least, that every structure built in the bed of navigable water that may interfere in some slight degree with navigation is a public nuisance. Whether an obstruction constitutes a public nuisance is a question of fact to be determined having regard to all the facts of the particular case. This gives the courts some scope to make reasonable adjustments when the public right of navigation comes in conflict with other rights. In any event it is clear that not every work placed in navigable waters interferes with navigation.

[1605] The Court recognized that some instances of Aboriginal title to submerged lands may have no practicable effect on the public right of navigation, and may be entirely compatible with it: at para. 93.

[1606] The Court remitted the matter to the trial judge to determine whether Aboriginal title can be established to a more limited and defined area of submerged land, in accordance with *Tsilhqot'in* SCC. The Court declined to rule on the public right of navigation issue until such time as the extent of any Aboriginal title to submerged lands was determined: at para. 100.

[1607] The plaintiffs submit the starting point in the analysis is set out in *Delgamuukw* SCC and *Tsilhqot'in* SCC. Aboriginal title in British Columbia crystallized at Crown sovereignty in 1846: *Delgamuukw* SCC at para. 145. Therefore, the Crown acquisition of radical or underlying title was burdened by the pre-existing legal rights of Indigenous people: *Tsilhqot'in* SCC at para. 69.

[1608] The plaintiffs say public or third-party rights are not relevant at the title analysis phase. English law and principles relating to Crown title following the assertion of sovereignty did not displace or moderate Aboriginal title. The Court's task is to determine whether Aboriginal title existed prior to and at 1846. To consider any incompatibility between Aboriginal title and public rights would modify the *Tsilhqot'in* test. The Court must determine whether the plaintiffs have established Aboriginal title to submerged lands independently of any public rights. If Aboriginal title to submerged lands is established, then the Court must determine whether an incompatibility between Aboriginal title and the common law right of navigation arises. If one does, then it may be necessary to reconcile Aboriginal title with public rights if recognition of public rights infringes title. The plaintiffs say this is to be done through the framework established in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CanLII 104.

[1609] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 54, 1992 CanLII 110 [*Oldman River*], Justice La Forest held that in Canada, if waters are navigable in fact, the public right of navigation exists

whether or not the water is tidal or non-tidal. Canada submits the right is held in common by all Canadians, and acknowledges there may also be relevant Indigenous laws in respect of public use of waterways that could be considered.

[1610] In *Oldman River* at 53–54, La Forest J. explained that the law of navigation in Canada has two fundamental dimensions — the ancient common law public right of navigation, and the constitutional authority over the subject matter of navigation. Both are interrelated by virtue of s. 91(10) of the *Constitution Act, 1867*, which assigns exclusive legislative authority over navigation to Parliament. The right of navigation is a public right-of-way, not a property right. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. The right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown.

[1611] Canada submits that, although the SCC has not heard or considered the requirements of sufficient occupation, exclusivity, and continuity in the context of submerged lands, it has made clear that the character of the lands subject to an Aboriginal title claim, and the uses to which they can be reasonably put, is highly relevant. Canada surmises this would imply the indicia of sufficient occupation, exclusivity, and continuity may be somewhat different in the case of Aboriginal title to submerged lands, given the particular contextual considerations.

[1612] Canada notes that the plaintiffs assert use of the submerged lands largely as a means of access to the broader Claim Area, on the grounds that the Cowichan accessed the Claim Area by landing canoes on the foreshore.

[1613] BC says the compatibility of submerged lands with the public right of navigation must be considered at the title determination stage. BC says a finding of Aboriginal title over the submerged lands would be inconsistent with the *Oldman River* principle — that the right of navigation is paramount. However, BC acknowledges that its recognition of the Haida Nation's Aboriginal title to Haida Gwaii includes recognition of Aboriginal title to land under water: see *Haida Nation Recognition Amendment Act*, 2024, S.B.C. 2024, c. 23 which amended the *Haida*

Nation Recognition Act, S.B.C. 2024 c. 24 [*Recognition Act*] and confirms the Gaayhllxid • Gíihlagalgang "Rising Tide" Haida Title Lands Agreement ("Rising Tide Agreement").

[1614] BC submits the plaintiffs' approach urges the Court to ignore any conflict in rights at the title phase, and that the plaintiffs say it is only after a determination of whether Aboriginal title exists that the consideration of public rights occurs through the framework, which allows justified interference. BC submits this is wrong because the *Sparrow* framework only applies to government action, and the public rights of navigation and fishing do not arise from government action.

[1615] The plaintiffs say this argument is misleading. Government can, and has, modified common law public rights, including the public right to fish through the *Fisheries Act*, R.S.C. 1985, c. F-14, and the public right to navigate through the *Canadian Navigable Waters Act*, R.S.C. 1985, c. N-22. Thus, if Aboriginal title exists over submerged lands, and the Crown wishes to regulate or legislate to allow fishing or navigation in the area, this regulation would be subject to justification.

[1616] BC relies on *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 [*Haida Nation* BCCA], where Justice Hunter discussed the difference between pre-sovereignty underlying rights, and presently exercisable rights. The term "Aboriginal rights" is commonly used in two distinct ways, depending on the context. The presently-exercisable right is one in which issues of infringement and justification have been considered: at para. 28.

[1617] Justice Hunter said that what the Haida Nation referred to as the "underlying right" is the modern-day manifestation of a practice, custom, or tradition that was integral to the distinctive culture of the Indigenous group at the time of contact. This is the concept of Aboriginal rights embedded in s. 35 of the *Constitution Act, 1982*: at para. 29, referencing *Van der Peet* at para. 63. In theory, this can be described independently of issues of infringement and justification. However, it does not follow that a court should grant a declaration of rights on this basis: at para. 29.

[1618] Justice Hunter referred to *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 [*Cheslatta*], leave to appeal to SCC ref'd, 28309 (31 May 2001), where Justice Newbury noted that rights may be subject to restriction by government. He did not take her as saying that Aboriginal rights are incapable of description in broad terms, such as a fishing right, but rather that a court will not issue a *declaration* in such broad terms. Any limitation on the right must normally be included as part of the court's declaration: *Haida Nation* BCCA at para. 32.

[1619] The plaintiffs submit Canada and BC have taken the references in *Tsilhqot'in* SCC to 'translation' out of context. They say McLachlin C.J.C's comments about translating Aboriginal title into a modern legal right do not mean that courts should use common law rights to delineate the content of Aboriginal title:

> [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.

2. Discussion

[1620] I agree with the plaintiffs that BC is attempting to force Indigenous ancestral practices into the square box of common law concepts, which McLachlin C.J.C. cautioned against in *Tsilhqot'in* SCC in the above passage. One cannot disregard a pre-existing Aboriginal right because it does not accord with the common law. The correct approach is to define Aboriginal title as it existed at the date of sovereignty, and then reconcile any incompatibility. It is not consistent with the approach set out in *Tsilhqot'in* SCC to define and limit the existence of Aboriginal title by other common law rights which may exist in respect of the same land. It is not appropriate to discount a claim for Aboriginal title by waving a generic spectre of incompatibility with the public right of navigation.

[1621] The plaintiffs may be able to establish sufficiency of occupation if they can establish sufficient use of the submerged lands. They must prove intention and

capacity to retain exclusive control over the claimed lands, even if they are submerged lands.

[1622] The Court in *Chippewas of Nawash* ONCA at para. 94 noted that the common law has permitted private ownership of discrete areas of property on the seabed or lakebed of tidal waters or waters like the Great Lakes, and cited *Attorney General v. Emerson*, [1891] A.C. 649 (H.L.), where the House of Lords recognized that a private domain could include the foreshore and title to the bed of tidal waters. The Court referenced *Water Law in Canada* at 241, elaborating that the Crown can convey title to the beds of navigable waters. In *Commonwealth of Australia v. Yarmirr*, [2001] HCA 56, 184 A.L.R. 113 [*Yarmirr*], the Australian High Court recognized that the public right of navigation does not require access to every part of the territorial sea: *Chippewas of Nawash* ONCA at para. 95.

[1623] I agree with the following comments by Paula Quig in “Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands — An Overview” (2004) 45:4 C. de D. 659 at 674:

> This underlying purpose of reconciliation may well require that the scope and content of any Aboriginal title rights recognized and affirmed pursuant to s. 35(1) be defined in light of the purpose of reconciliation. In turn, courts faced with Aboriginal title claims to water spaces and submerged lands would seem to be required to take into account both the prior occupation of Aboriginal peoples and the sovereignty of the Crown when considering these claims, and to reconcile these two realities within the context of the current Canadian constitutional and legal structure ...

[1624] As Lamer C.J.C. said in *Delgamuukw* SCC at para. 156, the Indigenous and common law perspectives need to be given equal weight.

[1625] As noted by Quig, the physical indicators of exclusive occupation of submerged lands may not readily be available: “Testing the Waters” at 680. The plaintiffs submit the Indigenous perspective is particularly important because Indigenous people tend not to see territory as compartmentalized into land and sea, as the common law does: “Testing the Waters” at 680–681. They say the Cowichan

did not distinguish between dry land and sea in terms of their territory. The Lands of Tl'uqtinus and its adjacent waters were all stl'ulnup, an ancient Cowichan homeland.

[1626] The plaintiffs submit that the Crown was honour-bound to protect Cowichan title to the submerged lands when it asserted sovereignty in 1846. Allowing public rights to extinguish that title would be inconsistent with the honour of the Crown.

[1627] I agree with the approach to determining Aboriginal title to submerged lands endorsed in *Chippewas of Nawash* ONCA. The first question the Court is concerned with is whether the plaintiffs have established Aboriginal title to submerged lands based on the usual test for Aboriginal title set out in *Tsilhqot'in* SCC. The requirements of sufficiency, continuity and exclusivity are lenses through which to view the question of Aboriginal title: at para. 32. In my view, these lenses are equally instructive on the question of submerged lands. If Aboriginal title to submerged lands is established, the court will next determine whether it is compatible with common law public rights of navigation: *Chippewas of Nawash* ONCA at para. 97. The Court of Appeal declined to express an opinion about the consequences of such an incompatibility, including whether the public right of navigation must pass the test for infringement of title or otherwise be reconciled: at para. 98.

3. Analysis

[1628] The plaintiffs submit the Cowichan regularly used the submerged lands to harvest resources and gain access to their village and surrounding lands. In the past, they landed trees there, which constituted the posts and beams for the infrastructure of the housing that was prominent along the waterfront.

[1629] The plaintiffs say the Cowichan used the submerged lands as a harbour for their canoes by the hundreds, and it was the point from which they departed and returned to and from their winter villages. They launched canoes in pursuit of their traditional fishery there, and landed there upon returning from their traditional fishing activities.

[1630] Luschiim testified that the Cowichan fished for salmon and sturgeon near the village. They also caught sturgeon across from the village in the main channel.

[1631] There is oral history and ethnographic evidence that the Cowichan cleaned and dried their fish at the waterfront of their village lands.

[1632] The Cowichan practised traditional cold-water bathing rituals along the shoreline and cooked food along the beach using pit cooking methods, as described by Mrs. James. I infer that these traditional practices would have been followed along the shoreline of Tl'uqtinus.

[1633] Canada submits there is no direct evidence that the Cowichan were landing and beaching trees for house construction in 1846. I agree that this was an ancient practice, and by 1846 the Cowichan were likely no longer building the framework for bighouses at Tl'uqtinus, but were likely still attaching planks on to existing frames.

[1634] Canada submits there is no evidence that the Cowichan conducted a land-based fishery near the Claim Area. Canada says there is some evidence that the Cowichan fished the south arm of the Fraser River near or across from the Claim Area, but nothing tying the fishery to the submerged lands claimed by the plaintiffs.

[1635] Luschiim said one of the places where the Cowichan set nets was across from the village, where the water was slower. He also said there were back eddies on the same bank as Tl'uqtinus, and that when he was there, he saw these tiny back eddies and recognized some as being a very good place to set a short net. Luschiim concluded that there are spots on the Tl'uqtinus village side that would be very good for short nets. He was told that there were places across from the village where the water was slower, but he was not told that they were actually used by his ancestors.

[1636] Luschiim gave evidence about dip netting salmon with his great-grandfather, Qwul-thiimuluq, on the Cowichan River, but not at Tl'uqtinus.

[1637] Although it is likely that the Cowichan did set nets across from the village, there is no clear oral history of them doing so or where.

[1638] Canada also submits there is no direct evidence of the Cowichan launching military excursions from the submerged lands. They reference four specific raiding excursions in the Fort Langley Journals.

[1639] There is a September 24, 1827 entry from Barnston, where he wrote that a number of Cowichan and Nanaimo landed at the Fort, stating they were going to avenge the Chilliwack's murder of some Musqueam.

[1640] On October 11, 1827, a group of 86 Cowichan and Musqueam passed the Fort on their way to make war. Barnston did not record how many Cowichan were in that group or where they had come from. Again, they had to assemble somewhere. It was likely at the village, but there is no direct evidence of this.

[1641] On October 18, 1827, another group of Musqueam and Cowichan went past the Fort intent on attacking the Chilliwack. There is no record of where they assembled.

[1642] On March 13, 1828, the Fort Langley Journals record a Cowichan war party of 150 men passing the Fort, with no mention of where they were coming from.

[1643] Although there is no direct evidence of where these war groups were coming from, I find it more likely than not that if the war party was coming from Vancouver Island, they would rest at their village and assemble there. Sulipt'un estimated that it would take about five hours on a favourable tide to get a big journey canoe across the Salish Sea. He came to that estimate because he raced from False Creek to halfway to Valdes Island, which took a little better than an hour both ways in a race canoe. He said it takes much longer to paddle when towing anything behind due to the weight. Based on this evidence, I do not think it is reasonable to conclude that the Cowichan came all the way over from Vancouver Island directly to the Fort.

[1644] I am satisfied based on the oral history evidence and the record of the number of canoes fishing the Fraser River in the Fort Langley Journals that the shoreline in front of the Cowichan village was used for landing and launching hundreds of canoes for various reasons, including fishing and raiding. Dr. Brealey

also opined the boundary of the lands included the stretch of beach between the low and high tide lines that would accommodate canoe launches, fisheries, and related waterfront activity. Further, the oral history and ethnographic evidence demonstrates that the Cowichan cleaned and processed their catch on the shore in front of the village. Based on Mrs. James' oral history evidence, I am also satisfied that the Cowichan practised their early morning cold-water bathing along the shore in front of the village, and that they likely used the sandy soil along the shoreline for pit cooking.

[1645] Given their large numbers and fierce reputation, as explored above, I agree that the Cowichan's acts of occupation demonstrate that the shoreline belonged to them, was controlled by them and was under their exclusive stewardship. I agree that this area was a base from which the numerically superior Cowichan launched attacks. The submerged lands were a strategic area from which they protected their perpetual right to their village.

[1646] It is significant that there have been extensive changes in the landscape of Section 23, where the Cowichan village existed in 1846. Mr. Eldridge's evidence was that, as at 2013, there had been extensive erosion along the shoreline of the riverbank since the Trutch survey. He measured the erosion between the digitized line of the shoreline from the Trutch survey. He said that erosion is variable, but is from 20–45 m for much of the area, as measured between the digitized line of the shoreline from Trutch's survey and the modern vegetation edge. In some places, Trutch marked trees at locations that are now within the intertidal zone.

[1647] Mr. Eldridge provided a table showing the approximate amount of riverbank erosion between 1859 and the present in or near DgRs-17. At the boundary of Lots 8 and E, there has been 7 m of erosion in the shoreline. By the middle of Lot E, there is 24 m of erosion on the shoreline. Two thirds of the way down Lot E (embayment), there is 35 m of erosion. At Lot E/Lot K (embayment), there is 50 m of erosion. At the middle of Lot K, there is 25 m of erosion. At the western end of Lot K,

there is 50 m of erosion. It is Mr. Eldridge's opinion that some of the area that must have been occupied by the village has now been eroded.

[1648] Dr. Brealey displays this in Map 4. The eastern part of Section 23 is underwater, as is the fishing station marked by Trutch in 1859, and where he plotted some of the houses and archeological stakes to be previously located. Dr. Brealey said that he allowed for the fact that the banks of the river are not where they were in 1859 or 1827. He is of the opinion that the map, being guided by the archaeological evidence, is a reasonable approximation. I accept that opinion.

[1649] Therefore, the beach that the Cowichan actively used in front of their village, even as at 1846, is underwater. For the reasons I found they had sufficient and exclusive use of the village, I also find they had sufficient and exclusive use of the shoreline. This shoreline is immediately in front of the village, or is part of the village, now submerged. For two to four months in the summer, Cowichan occupied this area for harvesting purposes, and smaller groups sporadically occupied it throughout the year. I found this is sufficient occupation. The village was known by other Indigenous groups, who feared the Cowichan. By numbers and reputation, the Cowichan effectively controlled the village and shoreline in front of it.

[1650] Accordingly, the plaintiffs meet the *Tsilhqot'in* test for Aboriginal title to submerged lands resulting from the shore erosion, which were once their village lands or beach in front of their village. Aboriginal title is established to submerged lands contiguous with the dry land portion of the Cowichan's Aboriginal title lands. These submerged lands extend to the southern boundary of the archaeological site DgRs17 as drawn by Dr. Brealey on Map 4, as shown in Schedule "A".

[1651] These submerged lands together with the land described at paras. 1573–1576 are Cowichan Aboriginal title lands (the "Cowichan Title Lands").

[1652] The plaintiffs claimed a much wider expanse of submerged lands extending 142 acres of fluvial space into the south arm of the Fraser River, which has been

described by Dr. Brealey as a fluvial highway. I do not find sufficient evidence of activities extending well into the Fraser River to base a finding of title there.

[1653] As noted above, “the public right of navigation does not require access to every part of the territorial sea”: *Chippewas of Nawash* ONCA at para. 95. The Court in *Chippewas of Nawash* ONCA quoted *Yarmirr*, which illustrated this point with the example of the construction of a pier. That pier would prevent ships from using that specific part of the sea, but this would not infringe the public right to navigate nor the right of innocent passage. Given that the submerged title land hugs the shoreline in front of the Cowichan Title Lands, I find that it will not interfere with public rights of navigation to any unreasonable extent, if at all. As no incompatibility between the Cowichan’s Aboriginal title and the public rights of navigation arise on the facts before me, I consider the question of compatibility no further.

H. CONCLUSION

[1654] As above, I find that the current members of Cowichan Tribes, Stz’uminus First Nation, Penelakut Tribe, Halalt First Nation and Lyackson First Nation are the descendants of the historic Cowichan nation or people existing at 1846. The Cowichan Tribes, Stz’uminus, Penelakut, Halalt and Lyackson as “bands” within the meaning of the *Indian Act* are collectively the continuation of the 11 local groups that comprised the Cowichan prior to, at, and after 1846. They are the modern-day successor groups within the Canadian legal order to the Cowichan as an Aboriginal people and are the proper holders of the Cowichan Aboriginal title to the Cowichan Title Lands.

[1655] The Cowichan Title Lands encompass:

a) Sections 21, 22, 23, 26, and 27, and parts of Sections 20, 28, and 29, as set out in detail above; and

b) the submerged lands contiguous with the dry land portion, which extend to the southern boundary of the archaeological site DgRs17 as drawn by Dr. Brealey on Map 4.

[1656] I have depicted the boundaries of the Cowichan Title Lands on Dr. Brealey's Map 4 in Schedule "A", which is intended as a visual aid.

PART 6 CROWN APPROPRIATION AND DISPOSITION OF THE COWICHAN TITLE LANDS

A. CROWN PROMISE AND APPROPRIATION OF LANDS OF TL'UQTINUS

1. Introduction

[1657] A central issue in this case is whether the Crown grants of fee simple interest in the Claim Area were made without statutory and/or constitutional authority. The plaintiffs say that Governor Douglas appropriated Indian settlement lands, including the Lands of Tl'uqtinus, from the Crown's land disposition processes. They say those lands remained appropriated at all material times and as such the Crown grants were made without statutory and/or constitutional authority.

[1658] The plaintiffs seek declarations that the fee simple titles and interests in the Federal Tl'uqtinus Lands (except for the YVR Fuel Project lands) and the Richmond Tl'uqtinus Lands are defective and invalid. They do not seek a declaration of invalidity regarding the fee simple titles held by private owners. The plaintiffs say a finding that there was no statutory and/or constitutional authority for the issuance of the Crown grants should inform the Court's exercise of discretion in considering whether to grant this relief.

[1659] An analysis of whether the Crown grants were made without statutory and/or constitutional authority requires consideration of colonial and post-Confederation law and policy regarding reserve creation and the treatment of "Indian settlement lands".

2. Issues

[1660] I first address the following issues, as raised in the plaintiffs' pleadings and final argument:

a) Did Douglas, on behalf of Queen Victoria, promise the Cowichan that the Crown would treat them with justice and humanity so long as they remained at peace with settlers?

b) Did Douglas protect Aboriginal title to the lands of Indian settlements, such as the Lands of Tl'uqtinus, by appropriating Indian settlement lands from the Colony of British Columbia's land disposition processes in 1859/60?

3. Overview

[1661] By way of overview, I begin by briefly summarizing the parties' positions.

[1662] Second, I review the early colonial correspondence respecting Indian settlement lands — prior to 1853.

[1663] Third, I review evidence related to the 1853 assurance, the law respecting the honour of the Crown, and analyze whether the 1853 assurance engaged the Crown's honour.

[1664] Fourth, I review colonial policy with respect to land, including Indian settlement lands, and Douglas' reserve system. I then set out the law respecting reserve creation and analyze whether Douglas appropriated Indian settlement lands.

[1665] Fifth, I review and analyze the purchase of land in Sections 27 and 34 by Richard Moody, the first Chief Commissioner of Lands and Works ("CCLW") in the Colony of British Columbia.

4. Positions of the parties

a) Plaintiffs

[1666] The plaintiffs say, in the absence of treaty-making, the Crown made commitments to the Cowichan in order to secure their peaceful relations with settlers. In particular, the plaintiffs say Governor Douglas made a promise to the Cowichan in 1853, which engages and informs the honour of the Crown as it relates

to the Cowichan's dealings with the Crown, and is also a material fact for the Court to consider in determining whether the Crown grants were made without statutory or constitutional authority.

[1667] The plaintiffs say Douglas, through executive and legislative actions in 1859 and 1860, appropriated Indian settlement lands, including the Lands of Tl'uqtinus, from the Crown's land disposition processes. The Lands of Tl'uqtinus remained appropriated at all material times, including when the Crown issued grants of fee simple interest in same.

[1668] The plaintiffs say Douglas appropriated Indian settlement lands to implement a reserve system, designed to keep the peace in the absence of treaty-making, by protecting Indian settlement lands from encroachment by settlers.

[1669] In furtherance of that objective, the plaintiffs say Douglas appropriated Indian settlement lands from pre-emption and sale, instructed his subordinates that Indian settlement lands were set aside as Crown reserves, and provided directions with respect to finalizing Indian reserves. However, rather than carrying out Douglas' instructions, Crown officials tasked with protecting Indian settlements purchased the Claim Area for themselves. In particular, Moody, who was responsible for the sale of land and for carrying out Douglas' instructions to stake out Indian settlement lands as reserves, covertly acquired two sections of the Claim Area. The plaintiffs say this explains why Moody's office did not complete the steps to set aside an Indian reserve at the Lands of Tl'uqtinus.

[1670] The plaintiffs say the Claim Area remained appropriated from the Crown's land disposition processes after Douglas retired in 1864. Although his reserve creation policy was not completed in respect of the Claim Area, and the lands were sold or otherwise granted, that does not void the effect of the appropriation and subsequent statutory protections that were attached to appropriated land, occupied land, and/or Indian settlement lands.

b) Canada

[1671] Canada says the Crown grants were lawfully issued and the plaintiffs' conception of appropriation is novel and unsupported by the case law. Douglas did not appropriate the Claim Area, and it was not exempted from the Crown's land sales and pre-emption processes. The Claim Area was surveyed and sold, and never considered "Indian settlement lands" for the purposes of colonial policy.

[1672] Canada submits the case law shows Douglas, and subsequent governments, set apart reserves when demand for colonization in a particular area grew. This is not consistent with the plaintiffs' theory that Douglas intended to reserve all Indian settlements in the colony (known and unknown) at one time, rather than as the need arose.

[1673] Canada also says the surveying and auctioning of the Claim Area pre-dates the proclamations that protected Indian settlements. Therefore, the proclamations did not apply to the Claim Area and it was not exempted from sale and pre-emption. The grants were made in compliance with the Crown's prerogative power and applicable statutes.

c) VFPA

[1674] The VFPA relies on Canada's submissions with respect to the validity of the fee simple titles.

d) BC

[1675] BC submits there is no evidence to rebut the presumption that the Crown grants were issued lawfully. Speculation about Moody's motivations as purchaser is insufficient to challenge the lawfulness of the grants.

[1676] BC says the sale of surveyed land and pre-emption of unsurveyed lands were two distinct processes, governed by different statutory provisions. The land in the Claim Area was surveyed and sold, and therefore the law and evidence related to protections for Indian settlements from pre-emption are irrelevant.

[1677] BC says the Claim Area was not appropriated. Neither the relevant statutes nor Douglas' instructions resulted in an appropriation of the Claim Area. Further, neither Queen Victoria's instructions, nor Article 13 of the *British Columbia Terms of Union*, reprinted in R.S.C. 1985, App. II, No. 10 [*BC Terms of Union*] constitutionally limited the applicable legislation.

[1678] BC submits the plaintiffs' appropriation argument runs contrary to the jurisprudence on reserve creation.

e) Richmond

[1679] Richmond submits that Douglas did not appropriate the Claim Area. It was never reserved, or designated to be reserved. Instead, it was surveyed to be sold at public auction.

[1680] Richmond submits that in terms of the impugned conduct of public officials, the plaintiffs have not overcome the presumption of regularity and fall short of presenting the quality of evidence required to find corrupt conduct.

[1681] Richmond says the grants related to the Claim Area were valid. In any event, the former *Municipal Acts* and ss. 23 and 25 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] are complete defences to a declaration that the fee simple titles and interests in the Richmond Tl'uqtinus Lands are defective and invalid. These defences are dealt with in subsequent parts of these reasons.

[1682] Lastly, Richmond says the plaintiffs impliedly argue that any land that was granted in fee simple becomes once again susceptible to a declaration of Aboriginal title if the Crown comes back into possession, and that this has no support in the case law. I do not engage with this argument, because the plaintiffs say they are not advancing it, and I agree that they are not. The plaintiffs seek a declaration of Aboriginal title over the entirety of the Claim Area but the declaration sought with respect to the invalidity of the fee simple titles relates only to certain Federal Tl'uqtinus Lands and Richmond Tl'uqtinus Lands. It was open to the plaintiffs to tailor the remedies they seek to minimize their effect on third parties.

f) TFN

[1683] TFN says that the plaintiffs' argument about appropriation has two aspects: 1) the legal effect of the colonial instruments and whether they protected all Indian settlement lands from non-Indigenous occupation in 1859; and 2) whether the Cowichan in fact occupied the Lands of Tl'uqtinus at and after 1859.

[1684] TFN takes no position on the first issue. With respect to the second issue, TFN submits that there was no Cowichan-occupied village in the Claim Area. It is not the case that the plaintiffs were the victims of land speculation and failures of diligence by colonial and post-colonial officials. Rather, the evidence the plaintiffs rely upon is consistent with an alternative explanation, namely, that there was no identifiable Cowichan village at Tl'uqtinus in or after 1859, and therefore nothing to reserve or set aside for their benefit. Given my finding in Part 5 of these reasons that the Cowichan have established Aboriginal title to their village at Tl'uqtinus, this submission falls away.

g) Musqueam

[1685] Musqueam's argument also centres around the assertion that the evidence does not support that the 11 local groups used and occupied the Claim Area as a settlement, or at all, after 1846. As above, given my findings in Part 5, this argument also falls away.

[1686] Further, Musqueam says Dr. Brealey's conclusion that there ought to have been a reserve made at the Claim Area pursuant to Crown policy is a legal conclusion and should be given no weight.

5. Review of Evidence

[1687] The relevant evidence includes a substantial amount of correspondence between public officials, including letters to and from Douglas, in his capacity as Chief Factor of the HBC and later in his capacity as Governor of the Colony of Vancouver Island and Governor of the Colony of British Columbia. It includes correspondence from the Secretary of State in the Colonial Office in England,

correspondence from Moody in his capacity as CCLW, as well as other documents authored by public officials in their official capacity. Most of these documents were admitted for hearsay purposes as public and government documents. These documents were authored by high-ranking officials responsible for stewardship of the colony, as well as by other senior public officials, and may generally be afforded significant weight: *Canada (Minister of Citizenship & Immigration) v. Seifert*, 2006 FC 270 at para. 25.

a) Early Colonial Policy with Respect to "Indian Settlement" Lands

[1688] June 15, 1846 marked the assertion of Crown sovereignty over British Columbia. Three years later, the Crown established the Colony of Vancouver Island by letters patent issued to the HBC.

[1689] In his capacity as Chief Factor of the HBC on Vancouver Island, Douglas was responsible for developing colonial policy regarding Indigenous communities under instructions from Archibald Barclay, the HBC Secretary in London. He continued this work in his capacity as Governor of the Colony of Vancouver Island following his appointment in August 1851.

[1690] In September 1849, Douglas wrote to Barclay recommending that an arrangement be made with the "native Tribes" as soon as possible for the purchase of their lands, and that their villages, fisheries and fields should be reserved for their benefit as a matter of justice and for the future peace of the Colony:

> Some arrangement should be made as soon as possible with the native Tribes for the purchase of their lands and I would recommend payment being made in the Shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent [benefit] from the sale of their lands and the Colony will have a degree of security from their future good behaviour. I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians [Fisheries], Village [Sites] and Fields, should be reserved for their benefit and fully secured to them by law.

[1691] On December 17, 1849, Barclay instructed Douglas to confirm "the natives" in the possession of their occupied lands:

> With respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your [negotiations] with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivation, or had houses built on at the time when the Island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purposes of colonization.
>
> ...
>
> ... The natives will be confirmed in the possession of their lands as long as they occupy and cultivate them themselves, but will not be allowed to sell or dispose of them to any private person, the right to the entire soil having been granted to the Company by the Crown.

[1692] Further to these instructions, Douglas implemented a policy of entering into treaties with the Indigenous peoples on Vancouver Island.

[1693] On May 16, 1850, Douglas replied to Barclay:

> I have the honor to acknowledge your communication of the 17th December 1849, stating in a more detailed form the views of the Governor and Committee respecting the colonization of this Island, the rights of the Natives, and their instructions as to the extent to which these rights are to be respected.

[1694] Douglas advised that agreements had been reached with the Songhees, Clallam and Sooke tribes, and that "[t]he Cowetchin and other Tribes have since expressed a wish to dispose of their lands on the same terms; but I declined their proposals in consequence of our not being prepared to enter into possession".

[1695] In May 1850, Douglas also wrote to James Yale, HBC Clerk, Fort Langley, advising:

> I have been lately engaged in buying out the Indian right to the lands in this neighbourhood and to the westward. It is rather a troublesome business, but we are getting on very well.
>
> ... I mention this circumstance as your Indians will no doubt be claiming payment for their lands also; but that can be settled by and bye.

[1696] Between 1850–1854, Douglas concluded 14 treaties with some Indigenous groups on Vancouver Island. These came to be known as the Fort Victoria Treaties. After 1854, Douglas discontinued the policy of entering into treaties.

b) 1853 Assurance

[1697] As mentioned previously in Part 5, in January 1853 Douglas travelled to the mouth of the Cowichan River to arrest a Cowichan person wanted for murder.

[1698] Dr. Kennedy described the meeting in her report. She noted that upon his arrival on January 6, Douglas requested a meeting with the chiefs. Shashia met him the next day, and several Cowichan arrived with the accused, arguing for his innocence. Douglas assured them he would receive a fair hearing, and appealed to them to respect British law.

[1699] Douglas recorded the events in his journal entry of January 7, the same day that they occurred. The plaintiffs rely heavily on Douglas' journal entry, and in particular, the passage below, which follows a description of the expedition, the arrival of the Cowichan, and the surrender of the accused:

> ... I afterwards addressed the Indians who were there assembled, on the subject of their relations with the Colony, and the Crown. I informed them that the whole country was a possession of the British crown, and that Her Majesty the Queen had given me a special charge, to treat them with justice and humanity and to protect them against the violence of all foreign nations which might attempt to molest them, so long as they remained at peace with the settlements. I told them to apply to me for redress, if they met with any injury or injustice at the hands of the Colonists and not to retaliate, and above all things, I undertook to impress upon the minds of the chiefs, that they must respect Her Majesty's warrant, and surrender any criminal belonging to the respective tribes, on demand of the Court Magistrate and that resistance to the Civil power, would expose them to be considered as enemies. I also told them that being satisfied with their conduct in the present conference, peace was restored and they might resume trade with Fort Victoria. The distribution of a little tobacco and some speechifying on the part of the Indians, expressions of their regret and friendship for the whites closed the proceedings and the conference broke up.
>
> [Emphasis added.]

[1700] By letter dated January 21, 1853, Douglas advised Sir Pakington, Queen Victoria's Principal Secretary of State for the Colonial Department, about the encounter. He wrote that he had assembled the people there and spoken to them about their relationship with the Colony and the rules which must govern their conduct:

> ... On landing they made a furious rush towards the spot where I stood, a little in advance of the force, and their deportment was altogether so hostile, that the marines were with difficulty restrained, by their officers, from opening a fire upon them. When the first excitement had a little abated, the felon, fully armed, was brought into my presence, and I succeeded after a great deal of trouble, in taking him quietly into custody; and sent him a close prisoner on board the Steam vessel. His capture having removed all cause of dispute I assembled the Indians and spoke to them long, and seriously on the Subject of their relations with the Colony, and the rules which must govern their conduct, in future. They expressed the utmost regret for the death of Brown, and a sincere desire to live in peace with the Colony, a feeling which was much strengthened by the appearance of the imposing force before them. They left us in the course of the afternoon, in the best possible temper ...
>
> ... The surrender of a criminal, in the case of the Cowegin murderer, without bloodshed, by the most numerous and warlike of the Native Tribes on Vancouvers Island, at the demand of the Civil powers may be considered, as an epoch, in the history of our Indian relations, which augurs well for the future peace and prosperity of the Colony. That object however could not have been effected without the exhibition of a powerful force.
>
> [Emphasis added.]

[1701] Douglas also reported the encounter in similar terms in a letter to Barclay.

[1702] BC says there is insufficient evidence of the promise. While the letters to Pakington and Barclay refer to the encounter at the Cowichan River and Douglas' remarks after the surrender of the accused, only Douglas' journal entry refers to his statement that Queen Victoria had charged him to treat the Cowichan with justice and humanity. Dr. Kennedy referenced the encounter, but did not refer to the promise. Dr. Brealey referenced the promise in a footnote in his main report but did not connect the promise to any subsequent appropriation of the Claim Area. No witness testified about the journal entry or the promise. Therefore, the basis of any findings with respect to the promise will be based largely on the face of the journal entry.

[1703] In my view, Douglas' first-hand, contemporaneous recording of his statements to the Cowichan in his official capacity as Governor are reliable and ought to be given considerable weight. The account in his journal of this visit is generally consistent with subsequent reports he made to Barclay and Pakington, which are also reliable and to which I accord significant weight. His statement references that

he had received “a special charge” from the Queen herself. The evidence establishes that Douglas promised the Cowichan on behalf of the Queen that the Crown would treat them with justice and humanity so long as they remained at peace with the settlers.

[1704] Douglas visited the Cowichan again in September 1856, to arrest a Cowichan person for the attempted murder of a settler. The plaintiffs rely on a February 1857 dispatch to Henry Labouchere (then Queen Victoria’s Principal Secretary of State, Colonial Department, London) as evidence that Douglas repeated the substance of the 1853 promise on that occasion. Douglas wrote:

> I had recourse essentially to the same principles of action, as in the case of the successful expeditions against the Cowegin and Nanaimo Tribes, reported in my Despatch of the 21st of January 1853 to Secretary Sir John Pakington. That is, by striving to impress on the minds of the Natives, that the terrors of the law would be let loose on the guilty only, and not on the Tribe at large, provided they took no part in resisting the Queen’s authority, nor in protecting the criminal from justice.

[1705] I do not find Douglas’ statement that he “had recourse essentially to the same principles of action” is sufficiently specific to support an inference that he reiterated to the Cowichan that the Queen had given him a special charge to treat them with justice and humanity so long as they remain at peace with the settlers. Rather, it appears that the “principles of action” he refers to are elaborated upon in the latter half of the passage which falls short of establishing that Douglas repeated the promise that he made in 1853.

[1706] The Cowichan had a reputation for fierceness and aggression. At the time, they outnumbered the settlers and HBC officials.

[1707] I do not understand the defendants to seriously dispute that the Cowichan remained at peace with the settlers. As above, there is a recorded incident of an individual Cowichan person accused of attempting to murder a settler after 1853. In my view, the individual actions of one person do not undermine the majority of the evidence which shows that the Cowichan remained peaceful and prevailed upon the Crown authorities for redress in relation to their land claims.

[1708] For example, when the Cowichan became aggrieved about settlers occupying their fishing station in 1877, they took their complaints up with the JIRC. Another example is the Cowichan's complaint to W. H. Lomas, recorded in a March 28, 1890 letter from Lomas to Peter McTiernan, Indian Agent, where he notes Cowichan fishers claimed a "reserve on the Fraser ... known as Kluck-tins" which arose in relation to a refusal of a federal fisheries inspector to license Cowichan fishermen. I conclude that the Cowichan remained at peace with the settlers generally.

6. Law Regarding the Honour of the Crown

[1709] The "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign: *Manitoba Metis* at para. 65. Its origin is the "Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida* SCC at para. 32.

[1710] The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty: *Manitoba Metis* at para. 66. Because of its connection with s. 35, it has been called a constitutional principle: *Manitoba Metis* at para. 69, citing *Beckman* at para. 42.

[1711] In *Haida* SCC at para. 16, the Court explained that the honour of the Crown is not a mere incantation, but a core precept that finds application in concrete practices. The Court continued at para. 17:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

[1712] Determining what specific obligations are imposed by the honour of the Crown, and what constitutes honourable dealing, depends heavily on the

circumstances: *Mikisew* at para. 24. Not every interaction between the Crown and Indigenous people engages the honour of the Crown: *Manitoba Metis* at para. 68.

[1713] The following duties have been found to arise from the honour of the Crown:

a) A fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest: *Wewaykum* at paras. 79, 81; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 71 [*Williams Lake* SCC];

b) A duty to consult when the Crown contemplates an action that will affect a claimed but unproven Aboriginal interest: *Haida* SCC at para. 25;

c) A duty of honourable negotiation and the avoidance of the appearance of sharp dealing in treaty negotiation and implementation: *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41, 1996 CanLII 236 [*Badger*];

d) A duty to act in a way that accomplishes the intended purposes of treaties and Crown grants to Indigenous peoples: *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 43, 1999 CanLII 665 [*Marshall*]; *Mikisew* at para. 28; *Badger* at para. 47; and

e) A duty to take a broad and purposive approach to the interpretation of the promise, and to act diligently to fulfill it, when implementing a constitutional obligation: *Manitoba Metis* at para. 75.

[1714] Recently, in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [*C-92 Reference*], the Court found that Parliament's legislative affirmation that s. 35 includes the inherent right to self-government, in a statute which expressly binds the Crown, may also require the Crown to act as though the honour of the Crown is engaged: at paras. 63–66.

[1715] In *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, the majority found that the honour of the Crown can apply to a contract between

an Indigenous group and the Crown when the purpose of the contract is based on the group's Indigenous difference and the contract involves an Indigenous right of self-government: at paras. 161–163. The duties that follow include negotiating, interpreting and performing the contracts with honour and integrity: at paras. 186–192.

[1716] I return to a consideration of the law respecting the honour of the Crown in Part 11 of these reasons.

7. Analysis Re: 1853 Assurance

[1717] The plaintiffs say Douglas' 1853 promise was a solemn commitment, constitutional in nature, that engaged the honour of the Crown. The plaintiffs say the promise:

a) on its own (and together with executive and legislative acts like Article 13 of the *BC Terms of Union*, and s. 35 of the *Constitution Act, 1982*) informs the honour of the Crown as it relates to all of its dealings with the Cowichan, from at least the Crown assertion of sovereignty to present; and

b) is one of the many undertakings that ground the plaintiffs' prayer for declarations that the provincial and federal Crowns owe a fiduciary duty to the plaintiffs in respect of the Lands of Tl'uqtinus. It also grounds their assertion of promissory and proprietary estoppel.

[1718] The plaintiffs also say the promise is a material fact which supports a finding that the colonial government policy of peaceful settlement included securing the cooperation of Indigenous persons, and that Douglas intended to respect Indigenous interests in their property. As I set out below, the evidence supports both findings, even without the promise.

[1719] As to whether the honour of the Crown was engaged in 1853, the plaintiffs say that the promise was made early on in the Crown's relationship with the

Cowichan, when the Crown recognized “the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help”: *Manitoba Metis* at para. 66, quoting Slattery, “Understanding Aboriginal Rights” at 753.

[1720] Canada and BC say the context in which the statement was made is critical. The Crown’s assertion of authority was in relation to a criminal matter, to dissuade the Cowichan from taking extra-judicious measures when seeking justice, and to instead respect British law. The only reference Douglas made to land was that “the whole country was a possession of the British Crown”. Douglas was only Governor of the Colony of Vancouver Island in 1853; the mainland Colony of British Columbia did not yet exist.

[1721] Richmond says Douglas’ statement does not contain an obligation at all; it is rather in the nature of a general commitment, difficult to measure (or, except in egregious cases, to breach). It is not enshrined in the Constitution.

[1722] In my view, there is little doubt the honour of the Crown was engaged when Douglas made this assurance to the Cowichan. *Haida* SCC tells us that the honour of the Crown has its foundation in the Crown’s assertion of sovereignty, and that it is always at stake in its dealings with Indigenous people. The honour of the Crown must be understood generously, to reflect the underlying realities from which it stems: *Haida* SCC at para. 17. Here, in this early encounter, Douglas explained to the Cowichan that he had a “special charge” from the Queen, to treat them with justice and humanity. He spoke to the Cowichan “long, and seriously on the Subject of their relations with the Colony, and the rules which must govern their conduct, in future” and considered the encounter as an “epoch” in Colony’s history of “Indian relations”, auguring well “for the future peace and prosperity of the colony”.

[1723] As above, when implementing a constitutional obligation, the honour of the Crown requires the Crown to take a broad and purposive approach to the interpretation of the promise and to act diligently to fulfill it: *Manitoba Metis* at para. 128. In my view, the 1853 promise falls short of the kind of clear constitutional

obligation that was at stake in *Manitoba Metis* and the duties that resulted. The majority of the Court held that s. 31 of the *Manitoba Act* (a constitutional document establishing Manitoba as a province), which set aside 1.4 million acres of land for Métis children, was a solemn constitutional obligation that engaged the honour of the Crown. This in turn gave rise to a duty to act with diligence to fulfill its promise, and it had failed to do so: at para. 128.

[1724] BC says it is clear that Douglas' promise does not form part of the Constitution. However, the Queen gave him a special charge with respect to the treatment of "Indians". Douglas exercised near complete authority at the time, and the promise was communicated in circumstances that related to Crown conduct in furtherance of its sovereignty assertion and superimposition of laws on the Cowichan.

[1725] The majority of the Court in *Manitoba Metis* noted that both a constitutional obligation and a treaty promise include: 1) an intention to create obligations; 2) a measure of solemnity; and 3) are made for the purpose of reconciling Aboriginal interests with Crown interests: at para. 71. Additionally, the constitutional obligation must be explicitly owed to an Indigenous group: at para. 72. In my view, it is open to me to conclude, as I do, that these elements were present with respect to the 1853 assurance, and although the promise falls short of a constitutional commitment, it nonetheless invokes the special relationship between the Crown and the Cowichan. The circumstances in which the promise was made are sufficient to engage the honour of the Crown.

[1726] I find that the promise was made to induce the Cowichan, who were a strong military force at the time, to remain peaceful. The Cowichan were accordingly obligated to take up concerns formally through the Crown and not use violence, in exchange for protection against settlers. Douglas told the Cowichan if they met with injustice at the hands of colonists, to apply to him for redress. Further, given Douglas' near complete authority at the time, and the rights to which the promise attaches (protection by the Crown, treated with justice and humanity), a measure of

solemnity clearly arises. Finally, the historical record evinces tensions between early settlers in the Colony and the Cowichan; within this context, Douglas' promise was a way of reconciling the Cowichan's rights with Crown sovereignty. While the promise falls short of a constitutional commitment, it bears the hallmarks of one, and as such, in my view it is sufficient to engage the honour of the Crown.

[1727] I therefore accept that the promise should be afforded a broad and purposive interpretation. Accordingly, I must resist construing it as only in relation to a criminal matter. It stands to reason that the promise related to the Cowichan's interests generally, including their land. Douglas, at the time, had instructions from Barclay to consider Indigenous peoples as the rightful possessors of lands they occupied by cultivation or had built houses on. Exercising nearly autonomous authority, Douglas was engaged in concluding the Fort Victoria treaties on behalf of the Crown around this time. The Cowichan had already, in 1850, expressed to Douglas a wish to dispose of their lands to the Crown on the same terms as the agreements the Crown had reached with the Songhees, Clallam and Sooke tribes.

[1728] That the mainland colony was not yet established is not an impediment to this interpretation. Per Douglas, he informed them the "whole country" was a possession of the British Crown. Consideration of the Indigenous perspective suggests that there would be no shared understanding about geographical limitations, and the Cowichan's interests included their interest in their village on the Fraser River. An honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose: *Manitoba Metis* at para. 77.

[1729] There is an absence of evidence about what the Cowichan understood the assurance to relate to. Construed objectively, I find the assurance is a general promise of fair dealing on the part of the Crown with respect to the Cowichan and their interests, and a commitment to the Cowichan to address injury or injustice that the Cowichan incurred at the hands of settlers, provided the Cowichan remain at peace with the settlers. I do not agree with Richmond that the fact that the promise

was general in nature renders it too vague to give rise to specific duties with respect to the Crown's dealings with the Cowichan.

[1730] In summary, the honour of the Crown was engaged when Douglas promised to treat the Cowichan with justice and humanity in exchange for peace. In my view, such an interpretation could include obligations with respect to the Cowichan's interest in land. I return to this point when considering the sale of the Cowichan Title Lands and later in Part 9.

8. Establishment of the Colony of British Columbia and Early Policy with Respect to Land

[1731] I return to a review of the establishment of the Colony of British Columbia, colonial policy with respect to settlement, disposition of Crown land, and the treatment of Indian settlement lands.

[1732] In 1856, the discovery of gold at Nicoamen resulted in an influx of gold seekers travelling up the Fraser River. Dr. Brealey opined that this led to an "alien occupation of gravel bars, fisheries or patches of arable terrace already occupied by Coast Salish (read Halkomelem) and Nlaka'pamux peoples, and intermittent engagements of an often hostile nature". Approximately 30,000 miners entered the Fraser River in 1858, making a significant impact along it and the Fraser canyon.

[1733] In response, the British government instructed Douglas to prioritize settlement of the colony, in an effort to bring order to the escalating turmoil caused by the gold rush. On July 1, 1858, British Secretary of State Edward Lytton instructed Douglas as follows: "All claims and interests must be subordinated to that policy which is to be found in the peopling and opening up of the new country, with the intention of consolidating it as an integral and important part of the British Empire". Dr. Brealey opined that Lytton seems to suggest that the prime directive of the government had become the colonization and settlement of the mainland.

[1734] By letter dated July 31, 1858 (Dispatch No. 6), in anticipation of legislation creating a new mainland colony, Lytton sent directions to Douglas regarding the

survey and disposal of public lands, and how to approach Indigenous interests in the prospective colony. Lytton noted that the disposal of public lands, especially town lots, would afford a rapid means of obtaining funds for the general purposes of the colony. Further, a party of Royal Engineers was to be sent to the colony to survey suitable settlement sites. With respect to the interests of Indigenous peoples, Lytton directed as follows:

> I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. This question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest ... it should be an invariable condition, in all bargains or treaties with the Natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape ...
>
> [Emphasis added.]

[1735] Dr. Brealey opined that this was "the first substantive directive from the home government since the communications with Barclay that the 'peopling and opening up of the new country' will be subject to Douglas dealing with the prior 'interests of the Natives'," as well as "an indication that those interests included 'lands in possession by them'".

[1736] On August 2, 1858, British Parliament passed *An Act to Provide for the Government of British Columbia, 1858* (U.K.), 21 & 22 Vict., c. 99 (reprinted in R.S.B.C. 1871, App. No. 30), formally constituting the mainland Colony of British Columbia.

[1737] Shortly thereafter, on August 14, 1858, Lytton sent Douglas a letter (Dispatch No. 9) setting out provisional rules for disposal of land in the Colony:

a) Douglas was authorized to sell land for agricultural purposes, whenever a demand for it arose, at an upset price that he considered appropriate. Lytton was of the view that a high upset price had

advantages, but observed the need to keep prices comparable to those in neighbouring American territories;

b) Lytton considered town land ripe for speculation, and cautioned Douglas against setting the upset price too low;

c) Douglas was instructed to open land for settlement gradually, not to sell land beyond what is surveyed or ready for immediate survey, and to prevent squatting as far as possible. Mineral lands would require special care and forethought;

d) Douglas was to keep a separate account of monies raised by the sale of land, and apply them to the cost of surveying;

e) Foreigners were not entitled to grants of waste land of the Crown in British Colonies. However, given the objective of attracting peaceful settlers, naturalization was to be granted to those who sought it, and with naturalization, the right to acquire Crown land was to follow; and

f) Douglas was to take care to ensure that there was no suggestion of favouritism to HBC servants in the sale of Crown land. Lytton observed that such sales, either to benefit favoured individuals, or to cheat the Land Revenue, were frequent occurrences at the outset of colonization and the duty of the Crown to repress.

[1738] On September 2, 1858, Douglas was appointed the Governor and Commander-in-Chief of the Colony of British Columbia by letters patent. An Order in Council empowered Douglas to establish laws for the peace, order and good government of Her Majesty's subjects and others in the Colony. It required him to send all laws to Her Majesty for approval or disallowance. Instructions on matters of policy were attached to Douglas' commission.

[1739] In *British Columbia (Attorney General) v. Canada (Attorney General)*, [1906] A.C. 552 (J.C.P.C.), quoted in *Delgamuukw v. British Columbia*, 79 D.L.R . (4th) 185

at 453; 1991 CanLII 2372 (B.C.S.C.) *[Delgamuukw* BCSC], Douglas' powers and authority during this period were described as being:

> ... absolutely autocratic; he represented the Crown in every particular, and was, in fact, the law. At the same time careful despatches were sent to him by the Colonial Minister of the day laying down in explicit terms the methods of administration which it was desired he should follow.

[1740] On the day of Douglas' appointment, Lytton sent him Dispatch No. 12, enclosing a letter from the Aborigines Protection Society and reiterating his direction to Douglas:

> Sir, – In my Despatch of the 31st July, No 6, I directed your attention to the treatment of the Native Indians in the country which it has so recently been decided to establish as a British Colony. I regard that subject as one which demands your prompt and careful consideration. I now transmit to you the copy of a letter from the Aborigines Protection Society, invoking the protection of Her Majesty's Government on behalf of these people. I readily repeat my earnest injunctions to you to endeavour to secure this object. At the same time I beg you to observe that I must not be understood as adopting the views of the Society as to the means by which this may be best accomplished.

[1741] On October 11, 1858, Douglas replied to Lytton's Dispatch No. 6, confirming that he would "not fail to give the fullest scope to your humane consideration for the improvement of the native Indian tribes, and shall take care that all their civil and agrarian rights be protected".

[1742] On November 5, 1858, Douglas responded to Lytton's Dispatch No. 12 assuring him that "I shall not fail to give the fullest effect to your instructions on that head, as soon as the present pressure of business has somewhat abated". He went on to remark that "the native Indian tribes are protected in all their interests to the utmost extent of our present means".

[1743] On November 19, 1858, Douglas was formally installed as Governor of the new Colony of British Columbia, and English law was received in British Columbia. This is reflected in s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which provides:

> **Application of English law in British Columbia**
>
> **2** ... the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

[1744] On December 30, 1858, Lytton wrote again to Douglas querying whether Douglas thought it feasible to settle Indian tribes permanently in villages.

9. Surveying the Colony of British Columbia and Early Proclamations

[1745] Colonel Richard Moody, and a detachment of Royal Engineers under his command, arrived in the Colony of British Columbia in 1858. The Royal Engineers were responsible for a wide range of duties, including military security, the survey of town lots, government reserves, the construction of transportation and communications links, and public works.

[1746] In 1859, Lytton appointed Moody as CCLW for the Colony. As CCLW, Moody was responsible for the sale of surveyed lands in the Colony, amongst other things.

[1747] On December 2, 1858, as one of his first legislative acts, Douglas issued a proclamation enabling the Governor to make Crown grants of land in the Colony:

> ... on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being of the said Colony ... to grant to any person or persons any land belonging to the Crown in the said Colony; and every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument in the lands therein described.

[1748] Shortly thereafter, on February 14, 1859, Douglas issued Proclamation No. 13 (*Land Act, 1859*, reprinted in R.S.B.C. 1871, App. No. 13), declaring that all the lands in British Columbia, and the mines and minerals therein, belong to the Crown in fee. It expressed Douglas' early policy on the sale of Crown land, including:

a) setting the price of country lands at 10 shillings per acre (s. 2);

b) preserving the authority of the Executive to reserve portions of unoccupied Crown Lands for such purposes as the Executive deemed advisable (s. 3);

c) except as otherwise provided, requiring all land in British Columbia to be exposed in lots for sale, by public competition (s. 4);

d) authorizing the private sale of lands which were unsold at public auction. Private contracts were made on application to the CCLW (s. 5); and

e) providing for the intent to lay out and settle the site of a city to be the Capital of British Columbia on the right or north bank of the Fraser River (s. 10).

[1749] Douglas wrote to Lytton on February 19, 1859, enclosing Proclamation No. 13, noting:

> It is also our intention to make large reserves for roads, the erection of places of worship, schools, and public purposes, and also for towns and villages, in such a manner, however, as not seriously to interfere with or retard the progressive improvement and settlement of the country.

[1750] Several weeks later, on March 14, 1859, Douglas responded to Lytton's December 30, 1858 dispatch, which had included Lytton’s proposal about settling Indian tribes permanently in villages. Douglas expressed agreement with Lytton’s proposal, and advised that reserves for Indigenous tribes should include their village sites and cultivated fields:

> As friends and allies the native races are capable of rendering the most valuable assistance to the Colony, while their enmity would entail on the settlers a greater amount of wretchedness and physical suffering, and more seriously retard the growth and material development of the Colony, than any other calamity to which, in the ordinary course of events, it would be exposed.
>
> ...
>
> I feel much confidence in the operation of this simple and practical scheme, and provided we succeed in devising means of rendering the Indian as comfortable and independent in regard to physical wants in his improved

> condition, as he was when a wandering denizen of the forest, there can be little doubt of the ultimate success of the experiment.
>
> The support of the Indians will thus, wherever land is valuable, be a matter of easy accomplishment, and in Districts where the white population is small, and the land unproductive, the Indians may be left almost wholly to their own resources, and, as a joint means of earning their livelihood, to pursue unmolested their favourite calling of fishermen and hunters.
>
> Anticipatory reserves of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.
>
> In forming settlements of natives, I should propose, both from a principle of justice to the state and out of regard to the well-being of the Indians themselves, to make such settlements entirely self-supporting, trusting for the means of doing so, to the voluntary contributions in labour or money of the natives themselves; and secondly, to the proceeds of the sale or lease of a part of the land reserved, which might be so disposed of, and applied towards the liquidation of the preliminary expenses of the settlement.
>
> [Emphasis added.]

[1751] Dr. Brealey opined that regardless of what Douglas may have thought about the merits of treaties, it appears from this dispatch that for purposes of "[t]he support of the Indians" on the mainland Colony of British Columbia, the focus had shifted to the creation of "[a]nticipatory reserves". Dr. Brealey said it is important that the letter set out Douglas' policy to create anticipatory reserves at the sites of already existing villages and cultivated fields that, from habit and association, a strong attachment was conceived.

[1752] The plaintiffs say Douglas' March 14, 1859 letter marks the first intentional step in his efforts to exercise executive authority to reserve lands, including village sites and cultivated fields, for the benefit of the Indigenous people who occupied them.

[1753] Douglas intended to survey land in the Colony before opening it up to settlement. As above, Lytton had instructed him not to sell land beyond what was surveyed or ready for immediate survey.

[1754] In the summer 1859, Douglas had Lulu Island surveyed. CCLW Moody concluded a Memorandum of Agreement with Joseph Trutch to conduct the survey. The surveyed lands included the Claim Area. As described later, in 1863, Moody purchased waterfront lands, Sections 27 and 34, in the Claim Area. In 1874, Trutch, now Lieutenant Governor, issued the Crown grant to Moody in respect of those lands.

[1755] Trutch carried out the survey between June 20 and September 1859. There is a dispute amongst the parties as to whether Trutch concluded his work on September 20 or September 30. The timing matters because some defendants say that the Claim Area lands were included in a public auction held on October 5–6, 1859.

[1756] Canada relies on Dr. Kennedy's testimony as evidence that the survey was completed on September 20. In cross-examination by BC, Dr. Kennedy was taken to a compilation of documents not in evidence, where Moody certified that Trutch had furnished him with certain notes, being the concluding portion of his contract, on September 20, 1859. Dr. Kennedy agreed that Trutch had finished his survey in its entirety by September 20. Dr. Kennedy was then asked about a passage where Moody certified on October 6, 1859 that Trutch had completed the survey. She agreed that it appears by October 6, 1859, Trutch had finalized and completed his survey of Lulu Island. BC says the survey was completed by September 20. Trutch's field notes include a certification on the last page as to their accuracy, signed by Trutch and dated September 30.

[1757] On October 1, 1859, Douglas sent a circular to the Gold Commissioners and Magistrates of British Columbia observing that British subjects who wished to settle in the country could not do so. Land was not available for purchase or by pre-emption because the public land had not been surveyed; surveys could not be completed for some time. He advised that delays would greatly impede settlement, and he had decided to introduce a pre-emption law to allow persons to settle on unoccupied Crown land. He also directed the Gold Commissioners and Magistrates

to cause to be reserved the sites of all Indian villages. The circular is reproduced in part below:

> 1. In wandering on the Mining Districts from Yale to Spuzzem, my attention has been forcibly attracted to many objects of a public nature, to which I wish to draw your earnest and immediate attention.
>
> 2. In the first place I find that not a few British subjects, who are desirous of settling in the country cannot accomplish their object in consequence of not being able to get land either by purchase or pre-emption as the Public Land is not yet surveyed, and the surveys cannot be completed for some time to come.
>
> 3. As delays of that nature will have the effect of compelling useful settlers, who we are desirous of encouraging, to leave the country and will be in many other ways injurious, and greatly retard its settlement, I have decided on introducing a Pre-emption Law, for the purpose of enabling such persons to settle at once on any unoccupied Crown Land, which may suit their purpose, on condition of and immediate improvement.
>
> ...
>
> 5. I beg you however to bear in mind that the proposed law will not apply to Town or Suburban Land or to Rural Land immediately beyond the Suburban Lots contiguous to Towns, all of which will be reserved for government purposes and for the purpose of raising an immediate revenue to meet the wants of the country.
>
> 6. You will also cause to be reserved the sites of all Indian villages, and the Land they have been accustomed to cultivate, to the extent of several hundred acres around each village for their special use and benefit.

[1758] On October 7, 1859, Douglas wrote to Moody, enclosing the circular:

> I enclose herewith for your information a copy of Circular which I addressed to the Gold Commissioners and Magistrates of British Columbia, on the subject of pre-empting unsurveyed Crown Lands in certain conditions by persons who are British subjects, or who have recorded their intention of becoming such.
>
> Such persons will thus be enabled to form settlements and to occupy and improve farms, in any part of the country where they may think it desirable to settle, as soon as they arrive in British Columbia and they will not be called upon to make any payment, till their land is surveyed, and the government prepared to issue title to the same.
>
> ...
>
> You will also observe from the Circular in question that Town sites, with the adjacent Suburban and Rural Land, and also the sites of all Indian Villages and the Land which they have been accustomed to cultivate, to the extent of

> several hundred acres around each villages, have been reserved and are not to be subjected to the operation of the proposed pre-emption law.
>
> [Emphasis added.]

[1759] The plaintiffs say that Douglas' advice to Moody — who as CCLW was responsible for the sale of surveyed lands — that "certain Indigenous lands have been reserved" is Douglas communicating that he had created provisional Crown reserves at the sites of Indian settlements. Douglas' instructions to the Gold Commissioners and Magistrates were made in furtherance of causing appropriated Indian settlement lands (now Crown reserves) to be set aside as Indian reserves.

[1760] The plaintiffs say Douglas reserved Indian settlements in a sweeping fashion, in the same way the Crown reserves rights to minerals and gold without knowing their precise location or quantity. Much of British Columbia was unknown, and the objective of Douglas' policy was to ensure that he had the tools to establish Indian reserves at the sites of Indian villages, to prevent affrays with settlers.

[1761] BC says Douglas' instruction to the Magistrates, Gold Commissioners, and Moody, concerned measures to exclude Indian settlements from the operation of the anticipated pre-emption law, the *Proclamation Relating to Acquisition of Land, 1860*, reprinted in R.S.B.C. 1871, App. No. 15 [Proclamation No. 15]. They were not an appropriation of Indian settlements generally, and did not relate to the sale of Crown land nor exclude land from the Crown land sales process.

[1762] A few weeks later, on October 18, 1859, Douglas reported to the Duke of Newcastle:

> The colony has not proved attractive to agricultural settlers. The surveyed country land was all put up to public sale at New Westminster on the 5th and 6th of the present month (October), when four lots only were sold, none of which realized more than the upset price of 10s. an acre, as there was no competition and few purchasers.

[1763] Canada and BC submit this report shows that the land in the Claim Area, which Trutch surveyed, was put up for sale at public auction. Section 4 of Proclamation No. 13 required land in British Columbia to be exposed in lots for sale

by public competition “as soon as the same shall have been surveyed and made ready for sale”.

[1764] The plaintiffs say Douglas’ report does not refer to the Claim Area and cannot support that inference. Canada and BC did not put their theory to any experts, and the plaintiffs say they seek to legitimize Moody’s subsequent purchase of a portion of the Claim Area, because the law required lands to be put up for public sale before they could be sold privately. As above, the plaintiffs argue that there is evidence that Moody certified the Trutch survey on October 6, 1859, which was the second day of the auction, which bodes against finding that the lands were included in the auction on October 5–6.

[1765] In my view, the evidence does not support a conclusion that the lots in the Claim Area were included in the public sale on October 5–6. Douglas’ report about the auction is not sufficiently specific to draw that inference. To the contrary, such an inference would go against the weight of the other evidence before me. I find Trutch completed his survey on September 30 when he certified his field notes, and Moody certified the results of Trutch’s survey on October 6, the second day of the auction. Given that the survey was not certified until October 6, it is unlikely the surveyed lots in the Claim Area were exposed at the auction on October 5–6.

[1766] I now turn back to Douglas’ policies respecting land. On January 4, 1860, he enacted a system of land pre-emption through issuance of Proclamation No. 15. The preamble states, in part:

> Whereas, it is expedient, pending the operation of the survey of agricultural lands in British Columbia, to provide means whereby unsurveyed agricultural lands may be lawfully acquired by pre-emption in British Columbia by British subjects, and in certain cases to provide for the sale of unsurveyed agricultural land by private contract ...

[1767] Section 1 of Proclamation No. 15 provided:

> ... British subjects and aliens who shall take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved and unsurveyed Crown Lands in British Columbia (not being the site of an existent or proposed town, or auriferous land available for mining purposes,

> or an Indian Reserve or settlement, in fee simple) under the following conditions ...

[1768] The pre-emption system expanded the amount of land available to settlers, allowing individuals to physically stake a claim to land that had not yet been surveyed. Land that was the site of an Indian reserve or settlement was not available for pre-emption.

[1769] In a letter to the Duke of Newcastle dated January 12, 1860, Douglas advised as follows:

> The object of the measure is solely to encourage and induce the settlement of the country; occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition.
>
> The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements, and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land, as well as the advantage, which is perhaps of more real importance to him, of being allowed to choose for himself and enter at once into possession of land without expense or delay; while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.

[1770] Several weeks later, on January 20, 1860, Douglas issued Proclamation No. 16 respecting the sale of land (*Land Act, 1860*, reprinted in R.S.B.C. 1871, App. No. 16). Proclamation No. 16 authorized the CCLW, all Magistrates, Gold Commissioners and Assistant Gold Commissioners to sell surveyed land through private contract, whereas previously Proclamation No. 13 authorized private sales only on application to the CCLW. Unlike Proclamation No. 15 which governed pre-emption, Proclamations No. 13 and 16 respecting sale of land did not include express statutory language excluding “Indian settlements” from sale. Such an express provision was not included in statutes governing sale of land until the *Land Act, 1874*, S.B.C. 1874, No. 2 came into force.

[1771] BC notes the staking of pre-emption claims by settlers took place outside the direct control of the Crown. Unlike sales, pre-emptions were not controlled by centralized decision-making. Public officials remained closely involved in the Crown

land sales process right up to the point the Crown grant was issued. Crown grants were made with reference to the official plan or survey held in the land office, entered in a register, and compared to the official map.

[1772] BC says that excluding “Indian settlements” from pre-emption served to protect Indigenous rights.

10. Indian Reserve Creation Under Douglas

[1773] In the ensuing period from 1860–1864, Douglas established administrative procedures for creating Indian reserves, requiring (1) consultation with Indigenous villagers as to the extent of their settlement, followed by (2) demarcating posts or stakes placed in the ground.

[1774] As above, the Gold Commissioners and Magistrates had instructions to mark out Indian reserves. At least by early 1861, Douglas had directed Moody to mark out Indian reserves, following which Moody relayed those instructions to his subordinates. A review of the relevant evidence follows.

[1775] In a report to the Duke of Newcastle dated October 9, 1860, Douglas affirmed that he had personally communicated with numerous assembled tribes at Cayoosh. He referenced his earlier instructions to the magistrates and his policy with respect to reserving occupied Indian settlements lands:

> I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support ...

[1776] On March 5, 1861, Douglas, through Charles Good (for the Colonial Secretary, William Young) instructed Moody as follows:

> ... I am directed by His Excellency the Governor to request that you will take measures, so soon as may be practicable, for marking out distinctly the sites of the proposed Towns and the Indian Reserves throughout the Colony.
>
> The extent of the Indian Reserves to be defined as they may be severally pointed out by the Natives themselves.

[1777] The same day, Douglas had Good directly advise William Cox, Magistrate at Rock Creek, that Cox would:

> ... receive instructions from the Chief Commissioner of Lands and Works to mark out the limits of Indian Reserves according to the boundaries the inhabitants of each village and settlement may point out, which is to be the rule adopted in defining those reserves, and all persons should be cautioned not to intrude thereon.

[1778] The following day, Moody wrote to Cox, advising of Douglas' instruction to mark out Indian reserves and define their extent as they may be pointed out by the Indigenous peoples themselves. Moody added:

> ... I would, at the same time, beg of you to be particular in scrutinizing the claims of the Indians, as I have every reason to believe that others (white persons) have, in some instances, influenced the natives in asserting claims which they would not otherwise have made, the object of such persons being prospective personal advantages previously covertly arranged with the Indians. To instance this, I heard of men keeping Indian women inducing them or their relations to put forward claims in order that they (the white men) may so gain possession of the land.

[1779] Dr. Brealey opined that Moody appears to have modified the directive on his own initiative and without any apparent authorization from Young or Douglas.

[1780] On April 5, 1861, Young wrote to Moody conveying Douglas' concern that officials connected with the Lands and Works Department had been recording claims to land under the pre-emption law, including nearly 2,000 acres of land in 11 different places that were recorded in Moody's name. Douglas was also concerned about the Lands and Works Department preventing settlement on sections held as reserves, and then later withdrawing the prohibition on pre-emption without due notice, following which claims were recorded by persons connected with that Department. Douglas directed, through Young, that lands set apart as government or Indian reserves were to be published and a map of the reserves provided to him:

> His Excellency further directs me to convey to you his instructions that the position and extent of all spots of land now set apart as Government or Indian Reserves, are to be forthwith published in three different places in each district where there may be such Reserves, and also in the local newspapers ... His Excellency requests you will furnish him at your earliest convenience,

> with a rough general map of the country, exhibiting the different Reserves in the different districts, and also as near as may be the land already alienated by the Government.

[1781] The same day, Young wrote to the Magistrates on the topic of government servants in the Lands and Works Department abusing the pre-emption law:

> His Excellency therefore directs me to explain to you, for your information and guidance, both as an officer connected with the Lands Department, and as the District Officer with whom claims under the Pre-emption Law are recorded that the object and intent of the Government in enacting that law was not to give facilities to servants of the Government to speculate in land, but on the contrary to promote the settlement and development of the Country, by rendering the acquisition of land easy to the actual settler, and to the actual settler only.

[1782] On April 13, 1861, Moody instructed Captain William Parsons to "[m]ark out successively and as early as practicable by Posts and in any other clear and permanent ways, Boundaries of Lands claimed by Indians in this neighbourhood — extending from Harrison River, inclusive, to the Sea — Burrards' Inlet District also included". Dr. Brealey opined that there is no doubt that 'inclusive to the Sea' included the entire lower Fraser River and delta north of the 49th parallel, which would include the village and settlement of Tl'uqtinus on the south arm of the river. I agree with his view of the scope of Moody's instructions.

[1783] On April 15, 1861, Parsons wrote back to Moody, seeking clarification about Moody's directions, including how to deal with summer and winter villages. A summary of Parson's questions and Moody's responses are set out below:

> Q: What extent of Land is allowed for each Village? Or which proportion is it to bear to the number of male occupants?
>
> A: What the Tyee of the Village points out – (within reason – if anything extreme is asked for postpone decision until further communication with me.)
>
> Q: Many Indian families having Summer + Winter residences widely separated, in what way should the Lands be appropriated?
>
> A: As they claim.
>
> Q: Indian Burial places are frequently isolated, how much ground will be allowed for each?
>
> A: The immediate precincts.

Q: Indian potato patches are likewise scattered over most portions of tolerably open ground, when these are in groups and manifestly are in occupation by a neighbouring Village, what allowance is to be made for them?

A: As claimed.

Q: When the Posts or Marks are inserted in the ground, is it to be explained to the occupants of the House or Village that the Land as staked out is bona fides allotted to that settlement?

A: Yes.

[1784] Several weeks later, on April 30, 1861, Parsons issued instructions to Corporal Charles Sinett to mark lands claimed by Indians from the mouth of the Harrison River to Fort Langley, instead of "inclusive to the Sea" as Moody had directed. This modification excluded Indigenous villages and settlements below Fort Langley, including the Claim Area. His instructions provided:

> You will proceed to the Harrison River and attend to the following instructions —
>
> 1. Mark on the ground with strong stakes and blazed trees all the Land claimed on the Harrison River by the Indians, likewise all that claimed on the Fraser River from the mouth of the Harrison to Fort Langley, and make surveys with proper field notes of all these claims.
> 2. The lands claimed will generally be around Villages, Potatoe patches + Burial grounds, and you will mark out on the ground the amount of land that the Tyhee of the Village or the owners of the Potatoe patches points out to you, provided the quantity claimed is within reason considering the size of the Village or the number of persons cultivating the patches.
>
> If anything extreme be asked for, postpone your decisions and report the circumstances to me before marking the Land.
>
> If White men dispute the Claims made by the Indians, refer the matter to Head Quarters before staking the ground, sending a sketch with dimensions, stating all the circumstances especially whether White men are [actual] settlers and what improvements either they or the Indians have made on the disputed ground.
>
> I enclose you a copy of replies to some questions I addressed to the Colonel Com [*sic*] as they may assist you; — by them you will see that you may inform the Indians that within the stakes you put down, the Land (whether potato ground or burial grounds) is allotted to the <u>Village</u> claiming it, but you are not to state that it is the property of any particular Indian or Indians.
>
> [Emphasis in original.]

[1785] On August 2, 1861, Douglas, via Good, followed up with Moody about his April 5, 1861 instructions to publish notice of Government and Indian reserves, noting he had not received a reply, requesting a briefing of measures taken to date, and reiterating his request for a map of reserves.

[1786] On March 4, 1862, about one year after Douglas issued his March 1861 instructions to Moody to mark out reserves, Young wrote to Moody about avoiding the unnecessary outlay of monies to employ surveyors, and reiterating his directions to demarcate the sites of proposed towns and Indian reserves:

> ... His Excellency considers it so desirable to avoid unnecessary outlay in marking anticipatory surveys ... he trusts that due effect will be given to his instructions of the 6th March last directing that measures be taken as soon as practicable for marking out distinctly the sites of the proposed Towns and the Indian Reserves throughout the Colony — it being obviously of the utmost importance that the exact position of every Reserve should be known to the public at large ...
>
> These intentions His Excellency conceives may be fully carried into effect through the Agency of the District Magistrates acting under your instructions ...
>
> The boundaries of such Reserves should be marked out by corner and intermediate posts, and public notice thereof given, that settlers may neither encroach upon, nor be deterred from settling in the neighbourhood in consequence of those limits being undefined.

[1787] On June 2, 1862, Moody wrote to Douglas, regarding the expense of "marking out and surveying the spots occupied by Indians with their villages and isolated 'provision grounds'". A week later, Young replied on behalf of Douglas:

> ... His Excellency would be glad of some further information on this subject, as he was under the impression that the work of marking out (*not surveying*) the Indian Reserves had been long ago carried out, where requisite, under the instructions conveyed to you by His Excellency on the 5th April, 1861.
>
> ... unless the reasons are very weighty, His Excellency would not, under the existing heavy pressure on the resources of the Colony, feel justified in authorizing an outlay to the extent you mention ... for all present purposes, the marking of such Reserves by conspicuous posts driven into the ground would be sufficient ...
>
> [Emphasis in original.]

[1788] On April 27, 1863, Douglas wrote directly to Moody regarding concerns that the Coquitlam Indian reserve was too small, and said:

> I beg that you will, therefore, immediately cause the existing reserve to be extended in conformity with the wishes of the Natives, and to include therein an area so large as to remove from their minds all causes of dissatisfaction.
>
> Notwithstanding my particular instructions to you, that in laying out Indian Reserves the wishes of the Natives themselves, with respect to boundaries, should in all cases be complied with, I hear very general complaints of the smallness of the areas set apart for their use.

[1789] Moody replied the following day, advising that the Coquitlam Indian reserve was laid out according to the wishes of the Indigenous peoples, and generally that their interests were "scrupulously" regarded by him and those under his command:

> I beg leave earnestly to move Your Excellency that some practical measures be adopted in respect to the land as well as to other interests of the Indians, measures that shall effectually guard against any misunderstanding. I do not think this can well be done by my department. It requires also a thorough knowledge of the Indian languages.
>
> ...
>
> Several full reserves have already been made, but I hear incidentally that there are other Indian villages and potato grounds with the sites of which the Lands and Works Department is not acquainted.

[1790] On May 11, 1863, Young replied to Moody's letter on Douglas' behalf:

> ... His Excellency considers that the instructions contained in his letters to you of 5th March and 5th April, 1861 and 27th April 1863, cover the whole question, and he requests that those instructions may be carried out to the letter, and in all cases where the land pointed out by the Indians appears to the officer employed on the service to be inadequate for their support, a larger area is at once to be set apart.

[1791] In November 1863, Moody and the Royal Engineers departed the mainland Colony and returned to England. Shortly before his departure, Moody acquired two sections of waterfront land in the Claim Area through a land agent, amounting to 125 acres.

[1792] Chartres Brew replaced Moody as CCLW. On April 6, 1864, Brew issued reserve creation instructions to William McColl. He directed McColl to mark out Indian reserves around the different Indian villages on the Fraser River between

New Westminster and Harrison River, wherever reserves had not been declared and defined. McColl was to mark as reserves any ground which had been cleared and tilled for years by the Indigenous people. Where land claimed was not equal to 10 acres for each family, the reserve was to be enlarged to that extent.

[1793] On May 16, 1864, McColl reported that he had received additional verbal orders from Douglas, "to the effect that all lands claimed by the Indians were to be included in the reserve; the Indians were to have as much land as they wished, and in no case to lay off a reserve under 100 acres".

[1794] Governor Douglas' tenure ended in 1864. Before his retirement, he commented on the Indian reserve creation process in his address to the first sitting of the Legislative Council of the Colony on January 21, 1864, explaining his policy of establishing reserves at existing village sites to prevent encroachment by settlers:

> The Native Indian Tribes are quiet and well disposed; the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favorite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and for ever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the Natives. The areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned, and are to be held as the joint and common property of the several tribes, being intended for their exclusive use and benefit, and especially as a provision for the aged, the helpless, and the infirm.

[1795] About a decade later, in 1874, Israel W. Powell, Canada's Indian Superintendent, asked Douglas whether there had been a particular basis for the acreage used in setting apart Indian reserves. Douglas responded:

> To this enquiry, I may briefly rejoin, that in laying out Indian reserves no specific number of acres was insisted on. The principle followed in all cases, was to leave the extent and selection of the land entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular and to include in each Reserve the permanent village sites, the fishing stations and burial grounds, cultivated land and all the favourite resorts of the Tribes, and in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights, of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience

> or support and to provide against the occurrence of agrarian disputes with the white settlers.
>
> [Emphasis added.]

[1796] Dr. Brealey opined that this is an important passage; it confirms what Douglas had always intended, and came a decade after his retirement, by which time the spirit and substance of his policy had been compromised in subsequent administrations.

[1797] Dr. Brealey opined that while Douglas' directives, pronouncements and other instructions after October 1859 varied in their points of emphasis, they were consistent with his original instructions. In my view, the correspondence reviewed above supports this conclusion. Douglas intended to create permanent Indian reserves which would include the village sites, fishing stations, burial grounds, cultivated lands and favourite resorts of all Indigenous communities in the Colony. This work was never completed, and in some instances, was frustrated by the conduct and delay of public officials.

a) Law Re: Reserve Creation

[1798] The plaintiffs acknowledge that Douglas' Indian reserve creation policy was not completed for the Lands of Tl'uqtinus. However, they say the first two steps in the reserve creation process were fulfilled, such that the lands were appropriated from the Crown's disposition processes as provisional Crown reserves and administrative protections attached.

[1799] Reserves were established in many different ways in Canada: Jack Woodward, K.C. & Ethan Krindle, *Aboriginal Law in Canada* (Toronto: Thomson Reuters, 1989) (loose-leaf updated December 2024, release 6), s. 8.10 at para. 8.960. In British Columbia, reserve creation did not result from a treaty process, but instead from a unilateral undertaking of the Crown, notably set out in Article 13 of the *BC Terms of Union* and in various Crown instructions issued to implement that Article: *Canada v. Kitselas First Nation*, 2014 FCA 150 at para. 51 [*Kitselas*].

[1800] The reserves that were made during the colonial period were formally listed by B. W. Pearse, then CCLW, when British Columbia joined Confederation. After Confederation, the JIRC Commissioners took over the work of visiting each Indigenous nation and determining the extent and location of reserves. BC and Canada approved the allocated reserves, which became legally established reserves on July 29, 1938 by virtue of Order in Council No. 1036, when British Columbia transferred the administration and control of the lands to Canada: see *Wewaykum* at para. 51.

[1801] In *Ross River Dena Council Band v. Canada*, 2002 SCC 54 at para. 44 [*Ross River*], Justice LeBel, writing for the majority, observed that the methods for creating reserves in Canada have been varied and inconsistent:

> In the Maritime provinces, or in Quebec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, reserves were created by various methods. The legal and political methods used to give form and existence to a reserve evolved over time. It is beyond the scope of these reasons to attempt to summarize the history of the process of reserve creation throughout Canada. Nevertheless, its diversity and complexity become evident in some of the general overviews of the process which have become available from contemporary historical research.

[1802] At para. 67, LeBel J. set out the common law test for determining whether a reserve had been created, and concluded that there are four requirements:

a) The Crown must have had an intention to create a reserve;

b) This intention must be possessed by Crown agents holding sufficient authority to bind the Crown;

c) Steps must be taken in order to set apart land. The setting apart must occur for the benefit of an Indigenous group; and

d) The Indigenous group accepts the setting apart and starts to make use of the lands so set apart.

[1803] Although these elements are prerequisites for reserve creation, the evaluation of their legal effect turns on a contextual and fact-driven analysis performed on the basis of the record: at para. 67.

[1804] The key issue in *Ross River* arose in respect of steps one and two — whether there was an intention to create a reserve on the part of persons having authority to bind the Crown: at para. 69. Justice LeBel concluded that no person with authority to bind the Crown ever agreed to setting up a reserve at Ross River. To the contrary, Crown officials represented that no reserves existed in Yukon territory and that it was contrary to government policy to establish reserves there. Crown officials who did advocate for creation of a reserve never had the authority to do so: at para. 71. Accordingly, no reserve was legally created: at para. 77.

[1805] The Court observed that the lands were nonetheless set aside for the use of the Band, and Crown actions with respect to the lands would be governed by a fiduciary relationship: at para. 77. Further, set-aside lands were dealt with under a framework agreement with the Crown, with the expectation that they would become settlement lands in negotiations: at para. 78. Justice Bastarache, concurring, noted that setting lands aside or apart (in that case, under the 1952 *Territorial Lands Act*), though short of an Indian reserve, was a means of protecting set-apart Crown lands from disposition: at paras. 8–9.

[1806] In *Wewaykum*, the SCC affirmed the legal requirements for reserve creation established in *Ross River*. There, two First Nations claimed each other's reserve lands: at para. 1. The reserve creation process had "dragged on" from 1878 to 1928: at para. 89. The SCC held that Commissioner Sproat's early survey of a proposed reserve, if approved by the provincial government, while not enough to create a reserve, would be sufficient to withdraw the lands from other inconsistent uses, such as pre-emption by settlers. A measure of administrative protection would attach to the lands, short of the protections for reserves under the *Indian Act*: at para. 22.

[1807] In *Shot Both* Sides FC at para. 299 (rev'd on other grounds, 2022 FCA 20, rev'd in part, 2024 SCC 12), the Court found the intention to create a reserve need

not be an intention to create a specific reserve with defined boundaries. It can be more general in nature with an understanding that specifics will subsequently be determined. The Court held that the first step of the *Ross River* test — Crown intention — was satisfied by Canada's intention to create a reserve near Fort Kipp that met the formula for geographic size under Treaty 7.

[1808] As Canada points out, the fact-sensitive and contextual nature of the test means the jurisprudence offers little guidance respecting the first, third, and fourth steps.

b) Analysis Re: Appropriation of the Cowichan Title Lands and Reserve Creation

[1809] The plaintiffs do not contend that the third and fourth elements of the *Ross River* test (steps to set apart the lands, and acceptance of the setting apart and use of the lands by the Indigenous group) were completed at the Lands of Tl'uqtinus. Further, Canada acknowledges Douglas held sufficient authority to bind the Crown, and so the second element in the *Ross River* test has been established. The other defendants do not appear to seriously contest Douglas' authority in this regard. Accordingly, the dispute focuses on the first step of reserve creation, which is whether the Crown had an intention to create a reserve at Tl'uqtinus.

[1810] The Crown defendants and Richmond urge the Court to reject a conclusion that Douglas appropriated all Indian settlement lands from Crown sales and pre-emptions, establishing provisional Crown reserves, with the intent of establishing permanent Indian reserves on a site-by-site basis. They say the plaintiffs' claim is novel and without jurisprudential foundation. As set out below, in my view, the evidence suggests that this is in fact what Douglas did and intended to do.

i. Douglas' Authority

[1811] The authority of the Crown to appropriate land to create Indian reserves lies in the executive governmental powers found in the royal prerogative: *Ross River* at paras. 47, 54, 58–59.

[1812] There can be no serious dispute as to whether Douglas had the power and authority in his capacity as Governor of the Colony to reserve Crown lands or create Indian reserves. He was nominated to his office by the sovereign in council and appointed by letters patent. His jurisdiction and powers were set out in the terms of his commission and by the royal instructions which accompanied it. As above, Governor Douglas' powers and authority during this period were "absolutely autocratic" and "he represented the Crown in every particular, and was, in fact, the law": *Delgamuukw* BCSC at 453 citing *British Columbia (Attorney General) v. Canada (Attorney General)*, [1906] A.C. 552 (J.C.P.C.).

[1813] The letters patent issued to Douglas upon his appointment, the colonial correspondence (particularly Lytton's dispatches enjoining him in her Majesty's protection of Indian tribes) and the fact that many Indian settlement lands were eventually converted to Indian reserves along the Fraser River all support my finding that Governor Douglas had the authority to both appropriate lands for Crown purposes and to create Indian reserves.

[1814] Additionally, Proclamation No. 13 (issued on February 14, 1859 and one of Douglas' earliest legislative acts) expressly preserved the authority of the Executive to reserve portions of unoccupied Crown Lands for such purposes as the Executive deemed advisable (s. 3).

[1815] The dispute between the parties and my analysis therefore focuses on whether Douglas did appropriate Indian settlement lands, including the Cowichan Title Lands, from the Crown's disposition processes, not whether he could.

ii. Douglas' Steps to Appropriate Indian Settlement Lands

[1816] Under colonial policy, Indian settlement lands included the "sites of all Indian villages and the Land which they have been accustomed to cultivate, to the extent of several hundred acres around each village". Both summer and winter residences were considered Indian settlement lands. Parson's previously-mentioned April 1861 letter inquired how these types of residences should be appropriated, to which Moody responded: "As they claim". Douglas directed that Indian reserves should be

marked in accordance with the wishes of the Indigenous peoples, and in all cases, their villages and the surrounding lands should be included. In *Williams Lake Indian Band v. Canada*, 2014 SCTC 3 [*Williams Lake* SCTC], aff'd in *Williams Lake* SCC, Slade J. observed in considering indicia of a settlement (at para. 48): "Douglas' policy recognized that the Indian collectives occupied various places throughout their seasonal round. All were to be set apart for their continued use".

[1817] The evidence reviewed in Part 5 demonstrates that the Cowichan had a village at Tl'uqtinus on the south arm of the Fraser River that they sufficiently and exclusively occupied, such that a finding of Aboriginal title follows. Accordingly, I have no difficulty concluding that the Cowichan Title Lands were plainly Indian settlement lands. As previously set out, the village and surrounding lands were used and occupied by the Cowichan on a seasonal basis in the period leading up to Confederation in 1871 and beyond.

[1818] In my view, the evidence is sufficient to support a finding that Douglas appropriated Indian settlement lands, including the Cowichan Title Lands, from the Crown's land disposition processes, as Crown reserves (or provisional reserves), with the intention that they would eventually be converted into Indian reserves for the benefit of the occupants. This conclusion is supported by the following points of evidence.

[1819] In anticipation of the creation of the mainland colony, the British government through Lytton directed Douglas to "consider the best and most humane means of dealing with the Native Indians". The British government wanted to prevent affrays between settlers and Indigenous communities and directed Douglas to use his knowledge and experience to address that concern. Lytton directed that it should be a condition in all bargains and treaties with Indigenous peoples for the cession of their lands that subsistence be supplied to them in some other shape.

[1820] In December 1858, the British government through Lytton expressed an interest in seeing Indian tribes permanently settled in villages.

[1821] On March 14, 1859, Douglas outlined to Lytton his policy with respect to Indian settlements, advising that “anticipatory reserves” of land for the benefit and support of Indigenous peoples would be made in all districts of British Columbia inhabited by them. He advised that in all cases, those reserves should include their cultivated fields and village sites. When Douglas set out this policy for Lytton, it was before he had set his pre-emption policy into motion. It is notable that Douglas’ policy with respect to anticipatory reserves was communicated to Lytton at a time when sale was the primary means by which the Colony disposed of Crown lands. This undermines BC’s submission that Douglas only intended to carve out Indian settlement lands from the pre-emption system. Rather, it reinforces that Douglas’ policy generally was to preserve Indian settlement lands for the Indigenous peoples who resided there and to allow for the eventual establishment of Indian reserves.

[1822] Moody was both the Commander of the Royal Engineers and the CCLW. As CCLW, Moody was responsible for the sale of surveyed lands in the Colony, and took direction from Douglas with respect to the implementation of colonial policy. The Royal Engineers’ responsibilities included surveying land.

[1823] In October 1859, Douglas informed Moody that Indigenous peoples’ land was reserved and “not to be subjected to the operation of the proposed pre-emption law”. In my view, the evidence does not support the contention that Douglas was merely advising Moody that the anticipated law would prohibit pre-emption of Indian settlement lands. Douglas had advised the Government six months earlier that he would create anticipatory reserves in respect of Indian settlements. In my view, Douglas’ direction to Moody was intended to implement this policy — particularly as Moody was responsible for sale of Crown land — in addition to informing him about the anticipated pre-emption law and how it would reflect this policy by exempting Indian settlements from pre-emption.

[1824] The October 1859 circular that Douglas sent to the Gold Commissioners and Magistrates set out his direction to the Gold Commissioners and Magistrates to convert Indian settlement lands into reserves.

[1825] Douglas intended to preserve sites of Indian villages and cultivated fields for Indigenous communities, to permit communities to be self-supporting.

[1826] There were separate processes and statutory schemes for sales and pre-emption. From the outset, beginning with Proclamation No. 15, the pre-emption laws expressly prohibited pre-emption of Indian settlement lands. Express protection specifically for “Indian settlements” was not included in the statutes respecting sale until the *Land Act, 1874* was introduced. However, the plaintiffs do not say that Proclamation No. 15 appropriated the Lands of Tl’uqtinus. Rather, Douglas took executive actions, which I take to include the advice to Lytton in March 1859 and the directions to Moody and the Gold Commissioners and Magistrates in October 1859, to appropriate Indian settlement lands from Crown disposition processes generally. This was followed by statutes that reflected that appropriation and policy, expressly exempting Indian settlement lands from pre-emption in 1860 (Proclamation No. 15) and then (after Douglas’ tenure) from sale in 1874. The prohibition on pre-emption of Indian settlement lands was an early legislative expression of Douglas’ policy, which, although it did not apply to the Cowichan Title Lands because those lands were surveyed and sold, reflects his policy of removing Indian settlement lands from the Crown’s disposition processes.

[1827] The defendants urge the Court to conclude that the lack of an equivalent provision in the early proclamations respecting sale expressly exempting “Indian settlements” from land that was eligible for sale is evidence that Indian settlement lands were not appropriated from sale. BC says the differences between the systems of sale versus pre-emption explain why the pre-emption statute contained express protection for Indian settlements. Pre-emption allowed settlers to take up unoccupied and unsurveyed country lands. BC explains that it was in the context of pre-emption that “Indian settlements” most needed protection. Settlers were responsible for staking their claims, and then providing a rough plan to the local magistrate to register their claims. Accordingly, practical measures on the ground, supported by legislation, were required to ensure Indigenous interests were

protected from pre-emptors in order to avert disputes and promote the colonial government's goal of peaceful settlement.

[1828] In contrast, lands that were sold were subject to careful survey and a centralized means of sale.

[1829] In my view, for the purpose of protecting Indian settlement lands, the differences in the two systems explain why it was important to expressly exempt Indian settlement lands from pre-emption laws, but less pressing in laws governing sales, which had their own provisions regarding which lands were eligible for sale. There was centralized government oversight with respect to sale of Crown lands and Douglas had directed Moody that Indian settlement lands had been reserved. Moody, as CCLW, was positioned to see that Douglas' policy with respect to Indian settlement lands was carried out.

[1830] The suggestion that Douglas' policy was to permit lands of Indian settlements to be sold finds little support in the historical record. Douglas' remarks to Powell in 1874 illustrate his view that Indigenous groups had interests in lands — "equitable title" — anchored in collective use and occupation.

[1831] Protecting Indian settlements from disposition was consistent with and critical for attaining the overall goal of peaceful settlement. Canada acknowledges the Crown's main goals were the settlement of Europeans and the protection of Indigenous interests. BC notes that Douglas took steps to protect Indigenous interests while still facilitating settlement.

[1832] In *Williams Lake* SCTC, Justice Slade described the purpose of the Crown policy in reserving tracts of land as follows (in the context of Indian settlement lands that were pre-empted):

> The policy of reserving tracts of land for Indian occupation within lands over which the colony had asserted sovereignty was intended to advance the orderly and peaceful settlement of immigrants to the Colony, and as a matter of justice. To that extent the policy and the law had the same purpose as treaty-making, namely to reconcile an acknowledged Indian interest with crown sovereignty. In circumstances of an influx of settlers who would rely on

> their ability to pre-empt land, diligence would require the prompt staking out of Indian settlements and, where Indian settlement land was found to have been pre-empted, to exercise the power to resume.
>
> [Emphasis added.]

[1833] BC says even if a blanket appropriation of Indian settlement lands was supported by the evidence, it would not have been a valid executive act authorized by Proclamation No. 13. To do so would have been contrary to the purpose of the Act, which was the survey and sale of all land subject to reservations the Executive deemed advisable. Similarly, Canada says creating large-scale reservations of Indian settlements would have seriously impeded settlement and was contrary to the Crown's goal of facilitating settlement. To the contrary, the evidence shows that Douglas was of the view that removing sites of Indian villages from the disposition processes for both pre-emption and sale would not hamper settlement, but rather would promote it, by preventing affrays between Indigenous communities and settlers and maintaining peace in the Colony.

[1834] BC also says it is not clear what acts the plaintiffs rely on as executive or legislative acts appropriating Indian settlements lands from sale. Overall, in my view, a finding that Indian settlement lands, including the Cowichan Title Lands, were appropriated from Crown disposition processes rests primarily on the following exercises of Douglas' executive authority:

a) his advice to Lytton on March 14, 1859 about creating "[a]nticipatory reserves";

b) his direction to the Gold Commissioners and Magistrates on October 1, 1859 to "cause to be reserved the sites of all Indian villages" and cultivated lands; and

c) his direction to Moody on October 7, 1859 that sites of all Indian villages have been reserved and are not to be subject to the proposed pre-emption law.

[1835] I find that Douglas' executive acts above appropriated Indian settlement lands from the Crown's land disposition processes. His directions in this regard were reflected in subsequent statutes (discussed later) which provided that only "unappropriated" land was available for sale, and later statutes which expressly precluded the sale of "Indian settlements".

[1836] Additionally, the exemption of Indian settlement lands from pre-emption in Proclamation No. 15 and subsequent proclamations which carried forward the exemption, protected Indian settlement lands and are material facts which support a conclusion that Governor Douglas appropriated Indian settlement lands. While the pre-emption laws did not apply to the surveyed Claim Area, they are material in that they reflect the Crown's policy with respect to appropriating Indian settlement lands.

[1837] Finally, the plaintiffs say that Douglas' appropriation of Indian settlement lands, and therefore the Claim Area, fulfills steps one and two in the *Ross River* test, and that these provisional Crown reserves were afforded administration protections even though the reserve creation process was not completed at the Claim Area. I agree that Moody's failure to demarcate a reserve at the Lands of Tl'uqtinus did not undo the appropriation and render the Cowichan Title Lands available for sale. This conclusion diverges somewhat from the case law the plaintiffs rely on (in *Ross River*, the lands were set aside and occupied by the Band, and in *Wewaykum*, a survey of the lands had been carried out, and had the Province approved the survey, the lands would have had protection from inconsistent uses). However, this is highly fact-specific inquiry. Given Moody's administrative failures, the failure of other public officials to carry out Douglas' directions, and Moody's subsequent acquisition of some of the Cowichan Title Lands for himself, I do not find that the sale of the lands and the failure to establish an Indian reserve at the Cowichan Title Lands undid the administrative protections that were attached to the land.

[1838] I find that Douglas intended to, and did appropriate, the Cowichan Title Lands from the Crown's land disposition processes, including sales, and that the lands were provisional Crown reserves, pending completion of Douglas' Indian reserve

policy. This conclusion impacts my determination with respect to whether the Crown grants of fee simple interest in the Cowichan Title Lands were made without statutory and/or constitutional authority, addressed later in these reasons.

11. Moody's Purchase

[1839] The plaintiffs say the Crown grants were only made because of Moody's fraud and administrative oversights and deficiencies.

[1840] In September 1863, in the midst of parting from his posts as CCLW and Commander of the Royal Engineers, Moody purchased land in the Claim Area. In particular, on September 3, 1863, Moody purchased Sections 27 and 34 of B4N, R5W on the waterfront of the Fraser River through a private sale of those lands to his land agent, John James Cochrane. The Crown grant (No. 1424) which was later issued on July 30, 1874 attaches a receipt indicating the purchase was made by private sale, with the first installment paid by Cochrane on September 3, 1863. The receipt is signed by Parsons, Moody's subordinate, on behalf of the CCLW.

[1841] The certificate of purchase indicates that Moody paid the final installment on May 29, 1874. Mr. Cochrane passed away before the Crown grant was issued, and on March 28, 1874, his widow declared that Cochrane was Moody's agent and that neither she nor her husband had an interest in the land.

[1842] By 1874, Joseph Trutch was Lieutenant Governor of British Columbia. Trutch issued the Crown grant to Moody. As above, Moody had contracted with Trutch to carry out the original survey of Lulu Island in 1859.

[1843] Moody did not return to British Columbia after his departure in November 1863. He did not use or occupy the lands that he purchased in the Claim Area. Drs. Binnema and Kennedy gave evidence that Moody was a land speculator who continued to acquire land after his departure, amounting to 3,049 acres by 1873.

[1844] The plaintiffs say Moody's purchase was covert, and is tied to the failure of colonial officials to create an Indian reserve at Tl'uqtinus. Moody knew about the

village at Tl'uqtinus when he received Douglas' directions in 1861 to mark out Indian reserves, and when he acquired Sections 27 and 34 in 1863. The plaintiffs ask the Court to draw a connection between Moody's purchase and the lack of an Indian reserve for the Cowichan at Tl'uqtinus. Dr. Brealey opined as to the disconnect between Douglas' intention regarding Indian reserve creation and what Moody and his subordinates had actually done, and by 1863, that disconnect had widened.

[1845] Dr. Kennedy gave evidence about improprieties at the Lands and Works Department under Moody's watch (the subject of correspondence from Young to Moody on April 5, 1861, reviewed above) and the differences between Douglas' and Moody's priorities:

> ... Moody's career in British Columbia had not been successful. In 1861, the citizens of New Westminster accused Moody and his friends of squandering money and awarding contracts for roads without public advertisement, of faulty administration of public lands, and of the setting aside of government reserves for the benefit of government officers.
>
> A brief investigation showed that Moody had acquired land from the government at a public auction or had registered pre-emptions, thus providing evidence of the public's charge of land speculating. Governor James Douglas sent a letter to all the Magistrates requesting greater vigilance to the application of the pre-emption law, informing them that since "the object and intent of the Government in enacting the law was not to give facilities to servants of the Government to speculate in land," and thus, each Magistrate was instructed to "use your best influence to discourage any use of its privileges ..."
>
> Moody was not disciplined for his improprieties, nor was his authority reduced. In an effort to uncover the location of both Government and Indian Reserves, the former of which may have been fraudulently created by the Department of Lands solely to alienate good land with an eye to inside speculation, Douglas requested Moody to provide a map of their locations. Moody's delivery of such a map was slow and incomplete, so in August 1861 the Colonial Secretary again asked Moody to state what measures he had undertaken to comply with the Governor's instructions.
>
> Relations were chilly between Moody and Douglas, and the Governor became increasingly dissatisfied with some aspects of Moody's handling of the Lands and Works administration. While Moody's emphasis was on the construction of roads and other communication infrastructure, the Governor wanted Town Sites laid out as quickly as possible so that lands might be sold to raise government revenues. He also wanted Indian Reserves set aside to protect the Indian villages and related land from encroachment.

[1846] With respect to Moody's purchase, the Crown defendants point out that government officials were not prohibited from purchasing land and Moody paid full price. Using a land agent to do business does not render a purchase "covert". With respect to what knowledge Moody had of the village, if any, TFN asserts that it is speculation to conclude that Moody would have studied the Trutch survey in detail, but that if he had, the only notation of an Indian village and fishing station are found in Section 23, and not on the sections that Moody purchased. I have found that the plaintiffs have established Aboriginal title to some of the land — Section 27 — that was included in the Crown grant to Moody.

a) Discussion

[1847] The evidence supports a finding that Moody knew about the Cowichan village when he acquired Sections 27 and 34. Moody commissioned the survey of Lulu Island, which included the Claim Area, in 1859. Trutch provided the results of his survey to Moody, which included notations regarding the Indian village and fishing station and depicted Indian trails. I infer that Moody would have reviewed the survey when it was provided to him and when he certified that it was complete. It is also likely that he reviewed it because he was interested in acquiring some of the surveyed lands. The Trutch survey was the basis for the survey description of the lands Moody acquired. The map affixed to Crown Grant No. 1424 which was ultimately issued to Moody in 1874 shows an "Indian trail" running through Section 27. Dr. Brealey also opined that as of 1863, given his position in the colonial administration, Moody would have been aware of the continued existence of the Cowichan village at Tl'uqtinus.

[1848] In light of the foregoing, I find that Moody knew about the village when he purchased Sections 27 and 34.

[1849] It follows that, in purchasing these sections, Moody knowingly acted contrary to Douglas' direction to him in October 1859 that the sites of Indian settlements were to be reserved from the Crown's land disposition processes, as well as his

subsequent instructions in March 1861 to mark out reserves around existing Indian settlements.

[1850] Colonial policy was to preserve Indian settlement lands. Instead, Moody caused the Lands and Works Department to sell some of the Cowichan's settlement to himself. Moody was responsible for carrying out Douglas' direction to mark out Indian settlements as permanent Indian reserves, including on the lower Fraser River, and he benefitted from his subordinates' failure to set aside an Indian reserve in the Claim Area. Neither Moody nor his subordinates consulted with the Cowichan about their land on the Fraser River.

[1851] The plaintiffs ask the Court to infer that Moody used a land agent to conceal his identity, and to draw a connection between Moody's covert acquisition of Cowichan Title Lands and the Crown's failure to establish an Indian reserve at Tl'uqtinus. I accept that Moody's use of a land agent had the effect of concealing his identity. Given my finding that he acted contrary to Douglas' directions and his responsibilities with respect to setting apart Indian reserves in making this purchase, I find it is likely that he used a land agent to conceal his acquisition.

[1852] The defendants say there was no prohibition on government officials purchasing land. However, this is not an answer with respect to Moody's purchase. Indian settlement lands had been appropriated from sale, for the purpose of eventual Indian reserve creation, which Moody was tasked with advancing.

[1853] There is a lack of evidence as to why an Indian reserve was not established at Tl'uqtinus. Moody knew about the Cowichan village and Tl'uqtinus. Douglas directed Moody to cause permanent Indian reserves to be established at the sites of Indian settlements. This would have included the Cowichan village. Moody did not fulfill his responsibilities. Instead, he purchased some of the Cowichan's land for himself shortly before leaving the Province. The honour of the Crown requires servants of the Crown to act with honour when acting on behalf of the Sovereign: *Manitoba Metis* at para. 65. This conduct was dishonourable.

[1854] No Indian reserve would be established at Tl’uqtinus in subsequent years, and, as I review later, the remainder of the Cowichan Title Lands would be sold — mostly to high-placed officials — in the following years.

[1855] However, I do not find that the evidence supports an inference that a permanent Indian reserve was not created at Tl'uqtinus because Moody wished to acquire some of the lands himself. The colonial correspondence suggests a number of possible reasons why this step was not taken. For example, there is evidence related to the expense associated with Indian reserve creation as a cause for delay. There is also evidence that in 1861, reserve creation instructions from Parsons to Sinett, which initially included establishing reserves at Indian settlements below Fort Langley, were inexplicably modified to exclude Indian settlements below Fort Langley. On the whole, there is insufficient evidence to determine why an Indian reserve was not created.

[1856] In summary, Moody acted in his own self-interest and contrary to Douglas’ express directions and colonial policy, taking appropriated Indian settlement lands for himself. He did so covertly, through a land agent. His failure to take steps to stake out an Indian reserve at the Cowichan’s village resulted in a personal benefit to him — the acquisition of part of the Cowichan’s waterfront land at Tl'uqtinus. As the plaintiffs put it, the very Crown official clothed with the task and responsibility of protecting the settlements of the Indigenous inhabitants, surreptitiously took part the of Lands of Tl'uqtinus for himself.

B. CONTINUED APPROPRIATION OF INDIAN SETTLEMENT LANDS AND AUTHORITY TO ISSUE CROWN GRANTS

1. Issues

[1857] I now address the following issues:

a) Did the Cowichan Title Lands remain appropriated from the Crown’s land disposition process at all material times?

b) Did the Crown lack the statutory authority to grant fee simple interests in the Cowichan Title Lands between 1871–1914?

c) Did the Crown lack the constitutional authority to grant fee simple interests in the Cowichan Title Lands between 1871–1914?

2. Background

[1858] Below, I consider whether the Cowichan Title Lands remained appropriated through the tenures of Governors Seymour and Musgrave and up to Confederation in 1871. This entails a review of Indian reserve creation policy between 1864 and 1871 and how it was implemented under CCLW Trutch. I review how Indian settlement lands were treated in colonial laws respecting land during this period and the royal instructions that were issued to Governors Seymour and Musgrave. I conclude that the appropriation of Indian settlements, including the Cowichan Title Lands, continued during this time.

[1859] Next, I set out the facts with respect to the two Crown grants that were made in the Claim Area prior to Confederation (in relation to lands in Sections 24, 19 and 13). Because I found that these lands were not Indian settlement lands, the plaintiffs' submission that these Crown grants were made without authority falls away, and I do not consider it.

[1860] I then describe the division of powers at Confederation, consider the jurisprudence respecting Article 13 of the *BC Terms of Union*, and the treatment of Indian settlements in the *Land Acts* that were enacted after Confederation. I review the implementation of Article 13 and conclude that the appropriation of Indian settlement lands was continued by Article 13.

[1861] I briefly set out the facts regarding the issuance of the remaining Crown grants in the Claim Area, and in greater detail, the issuance of Crown grants in the area over which I have found Aboriginal title (Sections 21, 22, 23, 26, and 27, and in part Sections 20, 28, and 29). Except in respect of Crown Grant No. 1424 to Moody, I conclude that most of those Crown grants were made without statutory authority

because they were not “unappropriated” lands as required by the eligibility for sale provision in the *Land Ordinance, 1870*, reprinted in R.S.B.C. 1871, No. 144 [*Land Ordinance, 1870*], as amended by the *Land Ordinance Amendment Act, 1873*, S.B.C. 1873, No. 1, s. 16 [*Amendment Act, 1873*]. There was no such statutory requirement in respect of the Moody grant. Additionally, the Crown grant of land in Section 20 was made without statutory authority because under s. 36 of the *Land Act, 1908*, S.B.C. 1908, c. 30 appropriated lands, and Indian settlements, were ineligible for sale.

[1862] Lastly, I find that Article 13 is capable of constraining British Columbia’s power with respect to disposition of land as it pertains to the reserve creation process. I find that the Crown grants that were issued in respect of the Cowichan Title Lands were made without constitutional authority by virtue of being issued under legislation that was constitutionally limited by Article 13.

3. Reserve System (1864–1871)

[1863] In 1864, Frederick Seymour succeeded Douglas as the Governor of the Colony of British Columbia. The same year, Trutch was appointed as the Colony’s CCLW. Dr. Brealey opined that Governor Arthur Kennedy, on the Colony of Vancouver Island, and Governor Seymour, on the mainland, were weak administrators, and that for all intents and purposes, Indian land policy devolved in 1864 to Trutch.

[1864] In 1866, the *Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia*, reprinted in R.S.B.C. 1871, App. No. 43, merged the two colonies into the united Colony of British Columbia. Anthony Musgrave replaced Seymour as Governor of the Colony in 1869.

[1865] Indian reserves continued to be established during Seymour and Musgrave’s tenures. Many of these would eventually be included on the 1871 Schedule of Reserves, produced shortly after Confederation. However, between 1864 and 1871, there were no allocations of reserves on the lower Fraser River below New

Westminster. Dr. Brealey noted that the focus under Musgrave shifted to establishing reserves above the Harrison River.

[1866] Under Trutch's instruction, colonial officials adopted a more meagre approach to determining the extent of Indian reserves. As set out below, Trutch endorsed a formula of 10 acres of tillable land per family (instead of deferring to the Indigenous communities, as under Douglas' direction).

[1867] An exchange between the Colonial Secretary and Trutch about reducing the reserves in the Okanagan and lower Fraser Valley that had been staked under Douglas illustrates this revised approach. In a report dated August 28, 1867 to the Acting Colonial Secretary about the Lower Fraser Indian Reserves, Trutch indicated that:

a) It was desirable that the extent of Indian reserves along the lower Fraser River be definitely determined;

b) There was no established system for reserving lands for Indians under Douglas' administration, and no written directions on the subject in the CCLW's office;

c) Reserves were informally made on verbal instructions from Douglas, or set apart by Douglas personally;

d) The Indian reserves marked out around different Indian villages on the Fraser between New Westminster and Harrison River laid out by McColl were not based on written instructions received from Brew, but rather were based on verbal instructions from Douglas that all lands claimed by Indians were to be included in the reserves and McColl was in no case to lay out a reserve under one hundred acres;

e) This resulted in McColl marking out reserves of an unreasonable extent, based on walking the lands and staking the lands claimed by Indians; and

f) These reserves should be materially reduced.

[1868] Dr. Brealey opined that Trutch was being disingenuous in his report, as Douglas had a system for establishing reserves, if inadequately enforced, and there were written records with respect to same. As previously set out, based on the review of colonial correspondence and Douglas' policy, Trutch's statement that there was not an established system under Douglas for reserve creation, nor any written records, was incorrect.

[1869] Colonial Secretary Young responded to Trutch on November 6, 1867 indicating that:

a) The Governor did not want the extent and boundaries of Indian Reserves on the Lower Fraser to remain in an indefinite state, and the reserves should be defined;

b) There was reason to believe McColl misunderstood the instructions conveyed to him and created reserves far beyond the wants or expectations of the Indians;

c) McColl entirely misinterpreted Douglas' wishes, although it was probable that he was right in not laying out any Indian reserve of less than 100 acres; and

d) All reserves laid out to an excessive extent should be reduced as soon as practicable.

[1870] On November 19, 1867, Trutch wrote to Young that he had visited all but four Indian reserves laid out by McColl on the lower Fraser River and conferred with the Chiefs at their respective villages. Trutch reported:

> I am satisfied ... that those reserves are in almost every instance too extensive, and in some cases extravagantly so, but that there will be no practical difficulty in reducing them, with the full concurrence of the Indians themselves, within much narrower limits.
>
> ...

> I had not time to make such a careful and detailed inspection of these Reserves as would warrant me in recommending what specific tracts of land should be set apart for each tribe. This can be best decided on the ground, the boundaries of each reserve being so arranged as to leave out as far as may be found practicable such lands as have been settled upon, and improved by white persons, retaining always however, for the use of the Indians, the sites of their villages and as much land around them or (as will in some cases be found expedient) both around their villages and at the spots where they have been in the habit of cultivating potatoes, as will amount in the aggregate to ten acres of tillable land to each adult male in the tribe, together with a modest amount of grazing land for those tribes which possess cattle or horses.

[1871] The plaintiffs say this letter shows that while Trutch modified the approach for determining the extent of reserves, Douglas' policy of reserving Indian villages, settlements, cultivated fields, fisheries, and burial sites, and of exempting them from purchase, remained intact. The plaintiffs also point to a May 26, 1867 letter where Trutch refused a settler's application to pre-empt lands which were part of the Katzie reserve and contained potato gardens. They say this shows that Trutch defended Indian settlement lands from encroachment by settlers. Dr. Brealey opined that after 1864, Trutch succeeded in reducing the size of a number of previously-established reserves. However, the basic allotment policy of reserving Indian villages, settlements, cultivated fields, fisheries and burial sites, and of exempting them from purchase, pre-emption or encroachment by settlers remained intact.

[1872] On June 19, 1868, Magistrate Peter O'Reilly wrote to Trutch about pre-emption claims around Nicola Lake. He advised that as "Indians have been in the habit of cultivating detached portions of land immediately about the lake" a survey should be made without delay, and Indian reserves clearly defined "to avoid trouble".

[1873] On August 5, 1868, Trutch replied that Governor Seymour approved of O'Reilly's recommendation, and:

> ... that certain lands immediately about the lake, which have for many years been occupied and partly cultivated by Indians, should at once be surveyed off and established as permanent reserves for the use of the Indians resident thereon, so as to prevent collision between them and the white settlers.

[1874] In the same letter, Trutch noted the extent of land should be determined on the spot with due regard to the quality of the land and the numbers and industrial habits of the occupants, but generally, 10 acres should be allotted per family. Later that month, O'Reilly reported to Trutch that he had marked off Indian reserves on the Bonaparte and at Nicola Lake in accordance with Trutch's instructions.

[1875] While this evidence does not relate specifically to the Lands of Tl'uqtinus, the plaintiffs say it confirms the colonial government's policy of Indian reserve creation continued to include cultivated land in 1868. I agree.

[1876] In sum, the historical evidence shows, and there is no real dispute amongst the parties, that Indian reserve creation continued under Governors Seymour and Musgrave. As under Douglas, Indian reserves were allocated at the location of Indian settlement lands, albeit at a reduced scale.

[1877] Indian settlement lands that were not yet marked as reserves continued to be protected from encroachment by settlers. In one instance in 1864, a settler, George Tranfield, petitioned the Legislative Council of British Columbia on the grounds that he occupied, by pre-emption, land on the north branch of the Fraser River at its mouth but had not received title or deed to the land. When he tried to record his pre-emption he was shown a letter from Douglas "relating to Indian habitations receiving advice at this time to leave 1000 acres round any Indian dwelling that might be in the vicinity of the land I wished to pre-empt or purchase". He complained to Moody, who sent Royal Engineers to survey the land and stake out his pre-emption.

[1878] On May 9, 1864, the Executive Council of British Columbia, including Seymour, determined that "the Indians had never deserted the land, but only resided there during the fishing season" and refused the petition. On May 12, 1864 the Colonial Secretary wrote to Tranfield:

> I am directed by His Ex[cellency] to inform you in reply that it appears from the reports received that the Indians had not abandoned the land at the time when you occupied the same and that as it was the desire of the late

> Governor Sir J. Douglas that the Indians should not be disturbed in the possession of their lands.

[1879] On July 28, 1864 the Colonial Secretary further informed Tranfield that “your case ... is a peculiar one conflicting as it does with the Claims of the Indians whom, as the original proprietors of the Soil, it is the first duty of the Govt to protect”. While this relates to pre-emptions rather than sale, the plaintiffs say Seymour’s ejectment of Tranfield is significant because it confirms that the government intended for Indian settlement lands, including fishing villages used seasonally that had not formally been made Indian reserves, to remain appropriated from disposition in May 1864.

[1880] On another occasion, in 1869, Trutch instructed Surveyor F. W. Green with respect to surveying lands for timber cutting, and exempted Indian settlement lands:

> ... you are to survey and mark off the same provided that no Indian Village or settlement or any lands now under reservation or otherwise appropriated be embraced within the limits of such additional tract of land.

[1881] In 1870, Trutch reiterated his instructions to Green, and referenced his earlier instructions as warning Green against including within the survey “any lands now occupied by the Indians or otherwise appropriated or reserved”.

[1882] In my view, the evidence shows that Douglas’ approach of creating eventual Indian reserves at the sites of Indian settlements continued under Trutch. I agree with the plaintiffs that the fact that there were frailties in the implementation of the Indian reserve policy does not mean there was no policy. Although Trutch took a more restrictive approach to the size of eventual reserves, the animating principle — protection of Indian settlement lands for the purpose of Indian reserve creation — remained intact. This evinces the government’s continued understanding in 1869–1870 that Indian settlement lands were appropriated from disposition, whether or not they were staked out as reserves.

[1883] Accordingly, I agree with the plaintiffs that Indian settlement lands remained appropriated in the Colony up to 1871 in one of two ways. Some were staked or demarcated in the ground and published as Indian reserves for specific Indigenous

groups. Others, like the Indian settlement land in the Claim Area, remained removed from the Crown's disposition processes by way of Douglas' appropriation, as Crown reserves for the Crown's benefit but not yet formally designated as Indian reserves. This conclusion is supported by the evidence reviewed above, as well as the royal instructions issued to Seymour and Musgrave and the laws which were enacted during this period. A review of the relevant laws and royal instructions follows.

a) Notable Land Laws (1864–1871)

[1884] Below is a brief review of laws of note with respect to Indian reserves and settlements that were enacted from 1864 until Confederation in 1871.

[1885] On April 11, 1865, Seymour, by and with the advice and consent of the Legislative Council of British Columbia, adopted a new *Land Ordinance, 1865*, reprinted in R.S.B.C. 1871, App. No. 23, which:

a) repealed most of the provisions of Proclamation No. 13 of February 14, 1859 (s.1);

b) repeated the declaration previously set out in Proclamation No. 13 that the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated, belong to the Crown in fee (s. 3); and

c) provided for pre-emption of unoccupied, unsurveyed and unreserved Crown lands, not being the site of an Indian reserve or settlement (s. 12).

[1886] The *Land Ordinance, 1865* accordingly includes a commitment by the newly-formed Legislature to protect Indian reserves and Indian settlement lands from pre-emption.

[1887] On March 15, 1869, Governor Seymour assented to the *Indian Reserves Ordinance, 1869*, reprinted in R.S.B.C. 1871, No. 125, which provided that the magistrates would settle disputes between Indians or between Indians and any other

person as to the right to enter or occupy any Crown lands that are Indian reserves or settlements: s. 1. Magistrates were authorized to award costs and damages “in case of wilful injury or trespass upon such Crown Lands, being Indian Reserves or Settlements” and to remove any person off the land, with potential for imprisonment (ss. 1–2). This Ordinance expressly recognized Indian reserves and settlements, both of which the Crown undertook to protect from unlawful encroachment.

[1888] In 1870, Governor Musgrave, with the advice and consent of the Legislative Council, enacted the *Land Ordinance, 1870*. Like Douglas’ Proclamation No. 15 and Seymour’s *Land Ordinance, 1865*, the *Land Ordinance, 1870* continued the prohibition on pre-empting Indian settlement lands. Its provisions are considered in more detail in the discussion of the Crown grants of land in the Claim Area.

[1889] These laws enacted by Seymour or Musgrave further affirm that Indian settlement lands were protected at law and remained appropriated from disposition, whether or not they were formal Indian reserves. Douglas’ policy of protecting Indian settlement lands from disposition, with a view to formally establishing Indian reserves, remained intact through to Confederation. This conclusion is consistent with the royal instructions that were given to Seymour and Musgrave, as explained below.

b) Queen Victoria’s Royal Instructions

[1890] The plaintiffs say that Queen Victoria’s royal instructions constrained Musgrave’s statutory and constitutional authority to issue the two partially free military grants that were issued 10 weeks prior to Confederation, and that those colonial Crown grants were made without authority. I do not consider this submission as the pre-Confederation Crown grants relate to land outside of the Cowichan Title Lands which the plaintiffs have not established were Indian settlement lands.

[1891] The plaintiffs further say that Queen Victoria’s royal instructions limited the executive authority of Seymour and Musgrave to remove Crown protection of Indian settlements. Put another way, the instructions directed the government to continue to protect Indian settlements and Aboriginal title. The plaintiffs impugn the exercise

of executive authority to issue Crown grants when doing so would dispose of Indigenous-held possessions to third parties. I consider these submissions to the extent that they are relevant to the continued appropriation of the Cowichan Title Lands.

[1892] On January 11, 1864, Queen Victoria issued the royal commission of and instructions to Seymour. The instructions required him:

> ... to do and execute all things in due manner that shall belong to your said Command, and the Trust we have reposed in you, according to the several Powers and Directions granted to or appointed for you by Our said Commission, and by the Instructions under Our Sign Manual and Signet accompanying Our said Commission, and according to such further Powers, Instructions, and Authorities as therein are mentioned ...
>
> ...
>
> And it is Our further Will and Pleasure that you do to the utmost of your Power promote Religion and Education among the Native Inhabitants of Our said Colony or of the Lands thereto adjoining, and that you do especially take care to protect them in their Persons and in the Free Enjoyment of their Possessions, and that you do by all Lawful means prevent and restrain all Violence and Injustice which may in any manner be practised or attempted against them, and that you take such Measures as may appear to you to be necessary for their conversion to the Christian Faith, and for their Advancement in Civilization.
>
> [Emphasis added.]

[1893] On October 16, 1869, Queen Victoria issued the royal commission of and instructions to newly appointed Musgrave. Section XXIV contained the same command, in largely the same terms, as was given to Seymour five years earlier:

> And we further Direct and Enjoin that you do to the utmost of your power promote Religion and Education among the Native Inhabitants of Our said Colony and its Dependencies and that you do especially take care to protect them in their Persons and in the Free Enjoyment of their Possessions and that you do by all lawful means prevent and restrain all Violence and Injustice which may in any manner be practised or attempted against them and that you take such measures as may appear to you necessary for their conversion to the Christian Faith, and for their advancement in Civilization.
>
> [Emphasis added.]

[1894] One distinction, which gives rise to a dispute amongst the parties, is that the s. XXIV of the instructions to Musgrave include a marginal note: “Promotion of Religion Amongst the Natives”.

[1895] The plaintiffs submit that a broad and purposive interpretation of the royal instructions is not required in order to conclude that (1) “care to protect” included protection from disposition to third parties; (2) “Native Inhabitants” included the Cowichan; and (3) “possessions” included Aboriginal title to Indian settlement lands, whether or not the lands were physically occupied year round. This is the only interpretation that aligns with the purpose of the royal instructions and gives meaning and substance to the obligations contained therein.

[1896] The plaintiffs say that, to the extent there is ambiguity in the scope of the royal instructions, the principle in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, 1983 CanLII 18 [*Nowegijick*] should prevail, not a marginal comment, which is not considered part of the instrument. In *Nowegijick* at 36, the SCC established that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”.

[1897] Canada says the SCC has consistently limited the *Nowegijick* principle to statutes that deal with, relate to, or protect the interests of Indigenous peoples. The principle should not be applied in a way that results in an unreasonable interpretation unsupported by the language in the instruction, as set out in *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 at para. 68:

> ... if two approaches to the interpretation and application of an enactment are reasonably sustainable as a matter of law, then the interpretation or application that impairs the Indian interests as little as possible should be preferred, so long as the ambiguity is a genuine one, and the construction that is favourable to the Indian interests is one that the enactment will reasonably bear, having regard to the legislative purposes of the enactment.

[1898] Canada says consistent with the marginal note, a plain reading of s. XXIV makes clear that the instruction was intended to promote religion and education. Canada agrees with the plaintiffs that the Crown’s obligations, such as royal instructions, attract a broad and purposive interpretation consistent with the Crown’s

honour. However, the plaintiffs' interpretation should be rejected because it would create an entirely new meaning to the words in the royal instructions. Canada submits that the reference to "protecting possessions" was presumably in relation to various possessions that related to the practice of religion.

[1899] BC says the construction of the royal instructions that the plaintiffs advance goes far beyond what is "possible on the language" or "realistic": *Marshall* at para. 78 (McLachlin J., as she then was, dissenting).

[1900] In my view, Canada and BC offer an impoverished view of the meaning of the royal instructions. A plain reading of s. XXIV does not support a conclusion that the instructions are confined to the promotion of religion and education. It is framed in more expansive terms than that. It includes a charge to protect "the Native inhabitants" in their persons and the free enjoyment of their possessions, and also to take measures to prevent and restrain violence against them.

[1901] I do not agree with Canada's suggestion that s. XX alone was meant to deal with lands; s. XX references the commission to Musgrave which authorizes him to grant and dispose of lands in the colony, and instructs him to refrain from granting land to himself without special permission. In my view, s. XXIV deals generally with both the promotion of education and religion in respect of "Native inhabitants", as well as the treatment of "Native inhabitants" in the colony, and the reference to protecting them in the free enjoyment of their possessions and restraining injustice against them includes protecting their lands and villages.

[1902] In *Guerin v. the Queen*, [1984] 2 S.C.R. 335 at 376, 1984 CanLII 25 [*Guerin*], the SCC described the origin of Aboriginal title "as a legal right derived from the Indians' historic occupation and possession of their tribal lands". In *Tsilhqot'in* SCC, the SCC explained the common law concept of possession "extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised": at para. 36.

[1903] In my view, the instruction from Queen Victoria to Musgrave to "take care to protect [the Native inhabitants] in their Persons and in the Free Enjoyment of their Possessions" is consistent with the common law understanding of possession. Interpreting protection of the free enjoyment of possessions in a manner that excluded homes and villages would be inconsistent with the language of the royal instructions and the honour of the Crown. The instruction reflects the approach that was adopted under Douglas of protecting Indian settlement lands from disposition. "Native inhabitants" included the Cowichan. Accordingly, in my view, the royal instructions support a finding that Indian settlement lands remained appropriated during the tenures of Governor Seymour and Governor Musgrave.

4. The Colonial Crown Grants

[1904] All of the lands in the Claim Area were purchased between 1863 (when Moody made a partial payment on Sections 27 and 34) and 1908. The Crown grants in respect of the purchased lands were issued between 1871 and 1914. As above, two Crown grants in the Claim Area were issued shortly before Confederation. The circumstances of those Crown grants are reviewed below.

[1905] On May 6, 1871, about 10 weeks before Confederation, the Colony, in the name of Musgrave, issued the following Crown grants in the Claim Area:

a) Crown Grant No. 1154 to Thomas Argyle, granting an estate of fee simple interest to all the lands in Section 24 of B4N, R5W and Section 19 in B4N, R4W, New Westminster District. The total surveyed area was 155 acres.

b) Crown Grant No. 1155 to William Dingle, granting an estate of fee simple interest to all the lands in Section 13, B4N, R5W, New Westminster District. The total surveyed area included was 160 acres.

(together, the "Colonial Crown Grants").

[1906] Argyle was a sapper with the Royal Engineers, and Dingle was a sapper with the British North American Boundary Commission. In these roles, they were entitled to a free military grant of 150 acres of land. Argyle paid for the excess five acres, and Dingle paid for the excess 10 acres. There is no evidence that Argyle or Dingle ever used or occupied the lands that were granted to them.

[1907] The plaintiffs, Canada and BC agree that s. 49 of the *Land Ordinance, 1870* applied to the Colonial Crown Grants. Section 49 provided:

> It shall be lawful for the Governor in Council to make such special free or partially free grants of the unoccupied and unappropriated Crown Lands of the Colony, for the encouragement of immigration or other purposes of public advantage, with and under such provisions, restrictions, and privileges, as to the Governor in Council may seem most advisable for the encouragement and permanent settlement of immigrants, or for such other public purposes as aforesaid.

[1908] The plaintiffs say the Colonial Crown Grants were made without authority. This position rests on s. 49 of the *Land Ordinance, 1870*, which authorized grants of unoccupied and unappropriated land, and on the royal instructions requiring Musgrave to protect Indian settlement lands. The plaintiffs allege that because these grants were made in respect of Indian settlement lands, the lands were both occupied and appropriated, and therefore not eligible for sale. Moreover, the plaintiffs contend that Musgrave lacked authority to issue the Colonial Crown Grants because Queen Victoria's royal instructions of 1869 required Musgrave to protect Indigenous peoples' "Free Enjoyment of their Possessions".

[1909] As the plaintiffs have not established Aboriginal title over the lands that were the subject of the Colonial Crown Grants, nor that these lands were Indian settlement lands, the plaintiffs' argument that the Colonial Crown Grants were made without statutory authority and constitutional authority cannot succeed. I consider them no further.

5. Confederation

[1910] In 1867, the British Parliament passed the *British North America Act, 1867* (now the *Constitution Act, 1867*) establishing the Confederation of Canada in eastern British North America.

[1911] On July 20, 1871, British Columbia was admitted to Canada by Imperial Order in Council. In concert with the *Constitution Act, 1867*, the *BC Terms of Union* set out the means by which British Columbia would join the Confederation.

[1912] The legal landscape changed after British Columbia joined Confederation. Virtually all land in the Colony vested in the new Province and the federal Crown assumed responsibility for "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. Article 13 of the *BC Terms of Union* provided a framework for the continued creation of Indian reserves. Those changes are reviewed below, and are foundational to the plaintiffs' challenge to the validity of the Crown grants issued after Confederation.

[1913] By virtue of ss. 109, 117, and 146 of the *Constitution Act, 1867*, and Article 10 of the *BC Terms of Union*, virtually all land and public property in the Colony vested in British Columbia in 1871.

[1914] Article 10 of the *BC Terms of Union* made the provisions of the *Constitution Act, 1867* applicable to British Columbia "as if the colony of British Columbia had been one of the provinces originally united by this Act". As such, Article 10 applied s. 92(13) of the *Constitution Act, 1867* to British Columbia, establishing its legislative power over property and civil rights in the Province. Article 10 also applied s. 91(24) of the *Constitution Act, 1867* to British Columbia, establishing federal jurisdiction over "Indians, and Lands reserved for the Indians" in the Province.

[1915] Under Article 13, Canada assumed responsibility for Indian reserve creation according to a policy "as liberal" as the Colony's, and the Colony agreed to convey land to Canada for that purpose. Article 13 provides:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

[1916] Article 13 confirms the pre-existing practice of the colonial government of appropriating tracts of land for the purpose of reserving lands for the use and benefit of Indians. The plaintiffs submit that the effect of Article 13 was to extend the appropriation of Indian settlement lands post-Confederation. They say the Crown grants that were issued after Confederation were made without authority by virtue of being made under legislation that was constitutionally limited by Article 13.

[1917] While the plaintiffs say the Cowichan continued to occupy the Lands of Tl'uqtinus at and after Confederation, they also submit that strictly speaking, there is no need to establish that the Cowichan continued to occupy the Lands of Tl'uqtinus because those lands were already appropriated as Indian settlement lands and therefore were a tract of land “of such extent as it has hitherto been the practice of the British Columbia Government to appropriate”. In other words, Article 13 did not require ongoing occupation of the Lands of Tl'uqtinus at or after Confederation for those protections to remain attached.

a) Law Regarding Article 13

[1918] Below, I review the jurisprudence about the constitutional nature of Article 13 and what it requires of the provincial and federal governments.

[1919] In *Jack v. the Queen* (1979), [1980] 1 S.C.R. 294, 1979 CanLII 175 [*Jack*], the SCC considered whether Article 13 of the *BC Terms of Union* affords protection for “Indian fishing”. Chief Justice Laskin affirmed the constitutional status of the *BC*

Terms of Union, as it was approved by an Imperial Order in Council in conformity with s. 146 of the *Constitution Act, 1867* and, in accordance with that provision, had effect as if enacted by the Imperial Parliament: at 298. Consequently, non-parties to the agreement are entitled to invoke the *BC Terms of Union* to establish constitutional limitations on legislation: at 299–300.

[1920] In concurring reasons, Dickson J. (as he then was) observed that the *BC Terms of Union* may establish constitutional limitations upon the exercise of federal or provincial legislative power: at 301. At 302, Dickson J. summarized the effect of Article 13:

> The first paragraph imposes two obligations: (i) to assume the charge of the Indians and the trusteeship and management of the lands reserved for the use and benefit of the Indians, and, (ii) to continue, after the Union, a policy as liberal as that pursued by the British Columbia government prior to the Union. The second paragraph imposes an obligation upon the local government to convey to the Dominion government, for the carrying out of the policy referred to in the first paragraph, tracts of land of such extent as had been the practice of the British Columbia government to appropriate for the purpose prior to the Union. The word "policy" in the first paragraph refers, in my view, to a broad general policy as affecting Indians and lands reserved for their use. The word "policy" in the second paragraph refers to that same policy, and the implementation thereof, in so far as it affects lands ... I am further of the view that if the article can be said to be ambiguous, it should be so interpreted as to assure the Indians, rather than to deny to them, any liberality which the policy of the British Columbia government may have evinced prior to Union.

[1921] In the result, Laskin C.J.C. for the majority found that Article 13 did not inhibit federal legislative power in relation to fisheries. The majority found that whatever policy may have existed in pre-Confederation British Columbia of toleration of Indians fishing for food, there appeared to have been no basis in law to ordain the policy: at 299.

[1922] In *R. v. Adolph*, 47 B.C.L.R. 330, 1983 CanLII 299 (C.A.) [*Adolph*], leave to appeal to SCC ref'd, [1983] S.C.C.A. No. 43, the question of whether Article 13 could constitutionally limit subsequent federal legislation arose again before the Court of Appeal. Again at issue was whether Article 13 was a constitutional limit on federal legislative power in relation to fisheries. The appellants argued certain

constitutional facts were present which distinguished the circumstances from *Jack*. In dismissing the appeal, Justice Taggart cited *Jack* and held "it would take very clear evidence of the pre-confederation ordination of the policy by law ... to enable me to say that a constitutional limitation on the federal legislative power in relation to fisheries exists": at para. 34.

[1923] In *Mathias*, the Federal Court found that federal legislative power under s. 91(24) could apply in respect of "lands reserved for Indians" before a conveyance was completed as contemplated under Article 13: at para. 439. Conveyance was anticipated to occur in stages and take some time. The Court concluded that under the *BC Terms of Union*, British Columbia had a constitutional obligation to convey tracts of land to Canada for the use and benefit of the Indians: at para. 442. The Court also confirmed the Crown's constitutional obligations were ongoing notwithstanding delay between identifying the reserves and conveying the land to the federal Crown:

> [442] The *Terms of Union* imposed on British Columbia a constitutional obligation to convey tracts of land to the Federal Crown for the use and benefit of the Indians. This was agreed to be done from time to time when the Federal Crown applied for a conveyance. If there was disagreement about the size of a tract to be conveyed, then the *Terms of Union* provided that the Secretary of State for the Colonies in Great Britain was to decide the matter. However, I have already concluded that, by accepting the JIRC's Mandate, the Province agreed to accept its allocations as final. Accordingly, the provision for dispute resolution in the *Terms of Union* did not apply to JIRC reserve allocations and nothing further was needed to be agreed or settled prior to conveyance. It is nevertheless clear that the process of conveyance was seen as one which would occur in stages and therefore as one which could take some time.

[1924] In *Wewaykum*, the trial judge had purported to rectify the so-called "ditto mark error" on the Schedule to OIC No. 1036 by characterizing it as a clerical error: at para. 68. Issued in 1938, this OIC transferred administration and control of the subject lands to Canada: at para. 51. The SCC held the trial judge's rectification was ill-conceived. Judicial corrections of legislation should only occur where the correction reflects the intent of the enacting body: at paras. 69–70. The SCC was unable to attribute to British Columbia in 1938 a "corrected" intent to allocate a

certain reserve to the Cape Mudge Band. Allocation of reserves was not British Columbia's responsibility. The SCC observed:

> [70] ...The permissible constitutional scope of the provincial "intent" in relation to "lands reserved for Indians" was limited to the size, number and location of reserves to be transferred by it to the administration and control of the Crown in right of Canada.

[1925] In *Williams Lake* SCTC, the Specific Claims Tribunal considered what actions are called for on the part of Canada and British Columbia to implement Article 13:

> [293] Article 13 of the Terms of Union speaks prospectively, and places obligations on Canada and the Province. The Province is to convey to Canada, from time to time, "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose." The reference to "that purpose" relates to the assumption by the Dominion Government of the trusteeship and management of the lands reserved for the use and benefit of the Indians.
>
> [294] The reference to "a policy as liberal as that hitherto pursued by the British Columbia Government" incorporates the policies established by the Colony under Douglas.
>
> [295] As Crown title remained with the Province, Canada could not act on the "policy as liberal" unless there was a concomitant obligation on the Province to appropriate tracts of land as had hitherto been its practice. It had been the practice of the colony to reserve Indian settlements out of the land available for pre-emption for the continued occupation of the Indians.
>
> [Emphasis added.]

[1926] The Tribunal further observed:

> [337] Article 13 of the *Terms of Union* bound the Province to convey title to lands allotted as reserve to Canada. The land was to be identified in accordance with the policies of the former colony. It would be no less a failure to uphold the honour of the Crown for the Province to act contrary to the intent of Article 13 of the *Terms of Union* and the 1876 Agreement [establishing the JIRC] than it would be for Canada.

[1927] In *Kitselas*, a judicial review of a decision of the Specific Claims Tribunal, the Federal Court of Appeal found that the Kitselas had a cognizable interest in 10.5 acres of land which was excluded from Kitselas I.R. No. 1. The Kitselas' interest was its historic and contemporary use and occupation of the land as a settlement: at para. 54. The Court agreed that this land interest was specifically contemplated by Article 13 of the *BC Terms of Union* and the Crown instructions issued to implement

it: at para. 54. In reaching this conclusion, the Court observed that reserve creation in British Columbia resulted from Article 13 of the *BC Terms of Union* and the Crown instructions to implement that Article. With regard to the instructions, the Court found that Crown officials responsible for reserve creation were required to take into account the "actual land uses" of the Indigenous nations the reserves were created for (at para. 52):

> ... the instructions that governed the implementation of the unilateral Crown policy of reserve allocation in British Columbia clearly required the Crown officials responsible for the implementation of the policy to take into account and to have regard to the actual land uses of the various aboriginal nations for which the reserves were being created. This is notably reflected in the instructions given by the Department of Indian Affairs to Commissioner O'Reilly in 1880: "In allotting Reserve Lands […] [y]ou should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to claims of the White settlers (if any)": Reasons at para 15. In essence, as noted in Commissioner Sproat's report of 1878, "[t]he first requirement is to leave the Indians in the old places to which they are attached": Reasons at para. 16.

b) Post-Confederation Legislation

[1928] The plaintiffs say that the fact that appropriation of Indian settlement lands was continued after Confederation is also evidenced by express protections in certain British Columbia land laws and other legislation. These are reviewed below.

[1929] When British Columbia entered Confederation in 1871, the *Land Ordinance, 1870* was in force. As above, the *Land Ordinance, 1870* exempted Indian settlement lands from pre-emption (s. 12). It was amended by the *Amendment Act, 1873*. Section 16 of the *Amendment Act, 1873* provided for the sale of unappropriated, unoccupied lands by way of public sale:

> 16. Unappropriated lands (not being reserved for the sites of, Towns or the suburbs thereof,) shall be open for purchase at the rate of not less than One dollar per acre: Provided that whenever so ordered by the Lieutenant-Governor in Council, such unoccupied, lands as may be deemed by him expedient, from time to time, shall be put up at public sale (of which sale due and sufficient notice shall be given) at the upset price of not less than One dollar per acre to the highest bidder.

[1930] Land which remained unsold after auction could be sold by private contract at the upset price: s. 49.

[1931] On March 2, 1874, Trutch assented to British Columbia's first *Land Act, 1874*. It came into force on October 24, 1874 and expressly provided that Indian settlements were not available for pre-emption and sale. This is the first Act which expressly exempted Indian settlements from sale, in addition to pre-emption.

[1932] With respect to pre-emption, s. 3 of the *Land Act, 1874* provided:

> Any person being the head of a family, a widow, or single man over the age of eighteen years ... may record any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent, in that portion of the Province situate to the northward and eastward of the Cascade or Coast Range of Mountains, and one hundred and sixty acres in extent in the rest of the Province.
>
> [Emphasis added.]

[1933] With respect to sale, s. 61 of the *Land Act, 1874* provided:

> Unappropriated, unoccupied, and unreserved lands, the surveys of which have been duly made and confirmed by notice in the British Columbia Gazette, and which are not the sites of towns or the suburbs thereof, and not Indian settlements, shall be open for purchase at the rate of one dollar per acre ...
>
> [Emphasis added.]

[1934] As discussed later, Canada disallowed the *Land Act, 1874* on March 16, 1875. On April 22, 1875, the *Land Act, 1875*, S.B.C. 1875, No. 5 [*Land Act, 1875*] was assented to. Section 60 stated:

> The Lieutenant Governor in Council shall, at any time ... reserve any lands not lawfully held by record, pre-emption, purchase, lease, or Crown Grant, for the purpose of conveying the same to the Dominion Government, in trust, for the use and benefit of the Indians ...

[1935] When the *Land Act, 1874* was disallowed, the law reverted to the *Land Ordinance, 1870*, as amended by the *Amendment Act, 1873*, until the coming into force of the *Land Act, 1875* on April 22, 1875: see *Constitution Act, 1867*, ss. 56, 90.

[1936] The *Land Act, 1875* provided identical protection for Indian settlements (see ss. 3 and 61, dealing with pre-emption and sale, respectively) as the *Land Act, 1874*.

[1937] On April 18, 1884, British Columbia enacted the *Land Act, 1884*, S.B.C. 1884, c. 16. The *Land Act, 1884* continued to protect Indian settlements from pre-emption and sale (ss. 3, 31).

[1938] The *Land Act, 1888*, S.B.C. 1888, c. 66 continued the same protections (ss. 5, 30).

[1939] On April 20, 1891, British Columbia amended s. 30 of the *Land Act, 1888*: see *Land Act Amendment Act, 1891*, S.B.C. 1891, c. 15, s. 5 [*Land Act, 1891*]. Indian settlements remained expressly ineligible for sale:

> So much of the unappropriated and unoccupied lands of the Province, the surveys of which have been duly made and confirmed in the British Columbia Gazette, which are not the sites of towns or the suburbs thereof, nor Indian settlements, and as are not reserved from sale by the Lieutenant-Governor in Council, may be classified in the same manner as unsurveyed lands, and purchased ... at the same price.

[1940] No amendment was made to the prohibition on pre-emption of Indian settlement lands.

[1941] On April 17, 1896, British Columbia amended the *Land Act* though the *Land Act Amendment Act, 1896*, S.B.C. 1896, c. 28, s. 14. No change was made to the protection of Indian settlements.

[1942] No changes were made to the protection of Indian settlements in the *Land Act, 1897*, R.S.B.C. 1897, c. 113, ss. 5, 31.

[1943] The *Land Act, 1897* was amended by the *Land Act Amendment Act, 1899*, S.B.C. 1899, c. 38. It preserved protection for Indian settlements from pre-emption and its protection of Indian settlements from sale continued at s. 4:

> The public lands of the Province, of which surveys have been made, including town or city lots, not Indian settlements, and not reserved from sale by the Lieutenant-Governor in Council, may be directed to be sold by the Lieutenant-Governor in Council, either by public auction or by tender.

[1944] The 1899 amendment was repealed in the *Land Act Amendment Act, 1901*, S.B.C. 1901, c. 30, s. 5, and replaced with substantially the same wording from the *Land Act, 1891*. Indian settlements also remained protected from pre-emption.

[1945] The *Land Act, 1908*, ss. 5 and 36, and the *Land Act, 1911*, R.S.B.C. 1911, c. 129, ss. 7 and 45, maintained protection for Indian settlements from sale and pre-emption.

[1946] In summary, following the coming into force of the *Land Act, 1874* (except for the brief period between its disallowance on March 16, 1875 and the coming into force of the *Land Act, 1875* on April 22, 1875), every subsequent version of the *Land Act* continued to expressly protect Indian settlements from sale and pre-emption. This continued for some time: see also *Land Act*, R.S.B.C. 1924, c. 131., ss. 12(1), 39(1), 51; *Land Act*, R.S.B.C. 1936, c. 144, ss. 12(1), 40(1), 52; *Land Act*, R.S.B.C. 1948, c. 175, ss. 12(1), 40(1), 52; and *Land Act*, R.S.B.C. 1960, c. 206 ss. 12(1), 40(1), 52.

[1947] Other legislation also protected Indian settlement lands from disposition. For example, the *Mineral Act 1877*, S.B.C. 1877, No. 14, s. 14 provided that the Act "shall only apply to unoccupied and unreserved Crown Land, and shall not apply to any Indian reserve or settlement". Similarly, the *Timber Act, 1884*, S.B.C. 1884, c. 32, s. 7 provided: "No timber licence shall be granted in respect of lands forming the site of any Indian settlement or reserve".

[1948] The plaintiffs say that the express protection of Indian settlement lands from disposition in legislation is evidence that Indian settlement lands remained appropriated from disposition after Confederation. The plaintiffs also rely on various provisions of the *Land Acts* described above in support of their argument that the Crown grants were made without statutory authority, which I address later.

c) Implementation of Article 13

[1949] After Confederation, Indigenous communities in British Columbia continued to express concerns about Indian reserve creation. For example, on May 26, 1873,

4,000 Indigenous people assembled at New Westminster for celebrations of the Queen's birthday. In a petition presented to Powell, seventy signatories stated on behalf of the "Lillooet, Lower Fraser and Bute Inlet Indians" that:

> The white men have taken our land and no compensation has been given us, though we have been told many times that the great Queen was so good she would help her distant children the Indians.
>
> White men have surrounded our Villages so much as in many instances especially on the Fraser River but few acres of Land have been left [to] us.

[1950] Powell was responsible for administering Canada's commitments under Article 13. On June 21, 1873 Powell wrote to now Lieutenant Governor Trutch:

> I have to address Your Honour in respect of the urgent necessity of adjusting existing Indian Reserves — extending them where required, and of setting apart Indian land for tribes not now provided for — and should the arrangements proposed by the Dominion Government be satisfactory to the Government of the Province, that I am now ready to proceed with the necessary surveys.
>
> I am informed at different places, just visited by me, that in some instances great injustice has been done [to] the Indians in not reserving sufficient land for their use, and some cases, such as Comox, Chemainus &c., land actually occupied by Indians, as potatoe patches, &c., has been pre-empted by white settlers and certificates granted.
>
> From these causes abundant discontent prevails among Indians, both on the Island and Mainland, and I regard it as a matter of urgent and paramount importance, not only to the future peaceful settlement of the Province by whites, but as a matter of justice to the Indians themselves, that their complaints should be adjusted and reserves made for them in those parts of the Province where they do not at present exist.

[1951] Powell received other petitions from Indigenous communities, including one from Chiefs along the Fraser River on July 14, 1874 (no Cowichan representative appears to have signed it) which stated in part:

> Our hearts have been wounded by the arbitrary way the Local Government of British Columbia have dealt with us in locating and dividing our Reserves.
>
> ...
>
> For many years we have been complaining of the land left us as being too small. We have laid our complaints before Government officials nearest to us; they sent us to some others; so we had no redress up to the present ...
>
> Discouragement and depression have come upon our people. Many of them have given up cultivation of land, because our gardens have not been protected against the encroachment of the whites. Some of our best men

> have been deprived of the land they had broken and cultivated with long and hard labour, a white man enclosing it in his claim, and no compensation given. Some of our most enterprising men have lost part of their cattle, because white men had taken the place where those cattle were grazing ...
>
> We are now obliged to clear heavy timbered land, all prairies having been taken from us by white men. We see our white neighbours cultivate wheat, peas, &c., and raise large stocks of cattle on our pasture lands ...

[1952] Powell became aware of Indian reserves having been omitted from British Columbia's 1871 Schedule of surveyed Indian reserves. On August 7, 1874 Powell raised the matter to the CCLW:

> ... I am informed there are several tribes of Indians for whom lands have been reserved by former Governments, but which were omitted in the schedule furnished the Dominion Government at the time of union.
>
> ...
>
> Future and perhaps grave mistakes would be avoided if all reserves of land intended for Indians were placed upon the Schedule. Great dissatisfaction prevails now among the Indians, especially those on the mainland, in, regard to their lands and the non-recognition of their pre-existing rights ...

[1953] On October 9, 1874 Powell wrote to Douglas in an effort to seek clarity about whether there was any particular basis of acreage used in setting apart Indian reserves during his tenure as Governor. As previously cited above, Douglas responded on October 14 that there was no strict policy for the number of acres, and that the principle was to leave the extent and selection of the land with the Indigenous people immediately interested in the reserve. I reproduce it here in part:

> ... the surveying officers having instructions to meet their wishes in every particular and to include in each Reserve the permanent village sites, the fishing stations and burial grounds, cultivated land and all the favourite resorts of the Tribes, and in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage or other investment of their labour.

[1954] Douglas wrote that it was "never intended that they should be limited or restricted to the possession of 10 acres of land". This is somewhat at odds with his address to the Legislative Council in 1864, recounted earlier, where he said that the areas set apart "in no case exceed the proportion of 10 acres for each family concerned". On balance, the evidence, particularly the colonial correspondence

reviewed at length earlier in these reasons, indicates that Douglas' policy respecting Indian reserve creation was not based on a fixed acreage, but rather on including the village sites, fishing stations, burial grounds, cultivated lands and favourite resorts, as pointed out by the Indigenous inhabitants themselves.

[1955] As the governments exchanged positions on Indian reserve policy, it became apparent that there was not a shared understanding between Canada and British Columbia about what colonial policy had been with respect to Indian reserve creation. They were at odds about the policy going forward, with Canada seeking a more liberal approach.

[1956] On October 15, 1874, the federal Indian Commissioner, James Lenihan, wrote to the Provincial Secretary about the fulfillment of Article 13:

> A careful reading of this section, taken and considered in connection with all the other sections of the Terms of Union Act, and taking into account the very liberal provisions and stipulations of the same in favour of British Columbia, leads me to the conviction that the most liberal and enlightened interpretation should be given to the spirit and meaning of this particular section.
>
> ... has this been done by the Government of British Columbia? And to what extent has it been "faithfully observed?"

[1957] Lenihan's query at the end of the quoted passage was made in response to a letter from the Provincial Secretary to Lenihan advising "that all that is 'reasonable and just' to demand of Provincial Government is that the 13th Section of the Terms of Union should be faithfully observed".

[1958] Lenihan went on to remark that "it is quite evident the 'policy and practice which has hitherto been observed' has been neither well defined, uniform, or regular". In final submissions, BC says this is evidence that no reserve policy was clearly defined, let alone ordained in law, at the time of union, and as such, Canada's commitment under Article 13 was not sufficiently clear to ground a limit on federal legislation. I return to this point in my analysis as to whether Article 13 limited British Columbia's authority to issue the Crown grants in Cowichan Title Lands to third parties.

[1959] On November 2, 1874, David Liard, Federal Minister of the Interior wrote a lengthy memorandum to the Governor in Council in reference to “the present unsatisfactory state of the Indian Land question in the Province of British Columbia”. The memo was based on voluminous correspondence between Powell and representatives of British Columbia, amongst other reports and documents. Liard reported that in British Columbia, 10 acres of land was the maximum allowance for a family of five persons, in contrast to the eighty acres allowed in Canada. He wrote: “Read by this light, the insertion of a clause guaranteeing the aborigines of British Columbia the continuance by the Dominion Government of the liberal policy heretofore pursued by the Local Government, seems little short of a mockery of their claims”. He noted that the policy pursued and views expressed by British Columbia “fall far short of the estimate entertained by the Dominion Government of the reasonable claims of the Indians”. He observed that the “principal land grievances of which the Indians complain” included “that, in many instances, the lands which they had settled upon and cultivated have been taken from them without compensation”.

[1960] After years of back and forth between British Columbia and Canada about how to implement Article 13, and give effect to Indian reserve creation, the governments established the JIRC in November 1875: Order-in-Council P.C. 1088, November 10, 1875. Its mandate was to “visit, with all convenient speed, in such order as may be found desirable, each Indian nation ... in British Columbia, and ... to fix and determine for each nation separately, the number, extent and locality of the Reserve or Reserves to be allowed to it”.

[1961] The Commissioners were instructed to have regard “to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers”: *Williams Lake* SCC at para. 15, quoting the memorandum attached to the Governor in Council’s Order approving the JIRC, dated November 5, 1875.

[1962] As discussed in Part 5, the Cowichan had complained to Commissioner Sproat about a settler’s purchase of the Cowichan fishery. Sproat noted that the

owner was absent. In January 1878, Sproat wrote to the Lieutenant Governor of British Columbia about "[t]he ancient fishing ground on the Lower Fraser of the Cowichan nation, where 700 to 1000 Indians have been accustomed to assemble and catch fish for their winter food, has been sold and now belongs to a white non-resident. What can be done in such a matter?"

[1963] There is no evidence that Sproat investigated the Cowichan complaint at the Lands of Tl'uqtinus, and it was Dr. Brealey's opinion that he did not.

d) Appropriation of Indian Settlement Lands was Continued Through Confederation

[1964] Above, I found that the Colony of British Columba under Governors Seymour and Musgrave continued the policy of protecting Indian settlement lands from sale and pre-emption for the purpose of eventual Indian reserve creation, and continued the appropriation of Indian settlement lands for that purpose.

[1965] As I explain below, it follows that Article 13 extended appropriation of those lands after Confederation.

[1966] Article 13 speaks prospectively and places obligations on both Canada and British Columbia: *Williams Lake* SCTC at para. 293. Through it, Canada assumed a responsibility to create Indian reserves according to a policy as liberal as the Colony. British Columbia assumed a responsibility to convey tracts of land for that purpose to such extent as had been the practice of the Colony prior to Confederation. The evidence shows that the Colony's policy was to protect Indian settlement lands from disposition for the purpose of establishing Indian reserves at the sites of existing settlements.

[1967] Canada could not act on a "policy as liberal" without a concomitant obligation on British Columbia to appropriate tracts of land as had hitherto been its practice: *Williams Lake* SCTC at para. 295. The Colony had protected Indian settlement lands from pre-emption and sale for the purpose of Indian reserve creation. The Cowichan's interest in their village at Tl'uqtinus was grounded in their historic

occupation; its use as a fishing village for the Cowichan Nation was central to their way of life. In *Kitselas*, the Federal Court of Appeal found that the Kitselas' village, which had been excluded from their reserve, was "a land interest specifically contemplated by Article 13 of the *British Columbia Terms of Union* and by the Crown instructions issued to implement that Article": at para. 54. Similarly, I find that the Cowichan village at Tl'uqtinus was the kind of interest contemplated by Article 13 and the work of the JIRC.

[1968] Additionally, the *Land Acts* enacted after Confederation, from the *Land Act, 1874* through to the *Land Act, 1911*, contained express protection for Indian settlements from both sale and pre-emption. These statutes reflected the continued appropriation of Indian settlements from the Crown's land disposition processes through legislated exemptions, which also facilitated the ability of British Columbia to fulfill its commitment to convey tracts of land to Canada. Notably, the provisions protecting Indian settlements from sale and pre-emption appeared in every iteration of the various *Land Acts* from 1874 to 1970, except for the brief period between the disallowance of the *Land Act, 1874* on March 16, 1875 and the coming into force of the *Land Act, 1875* on April 22, 1875.

[1969] The work to implement Article 13 through establishment of the JIRC also supports this conclusion, as does the direction to the Commissioners to take into account the territory of Indigenous communities, as well as their "habits, wants and pursuits" in considering allotments.

6. Post-Confederation Crown Grants

[1970] I now review the material facts regarding the issuance of the Crown grants in the Claim Area after Confederation. With respect to the Crown grants that were made in respect of Cowichan Title Lands, I consider the laws that applied to those grants and whether the grants were made with statutory and constitutional authority. The question I am concerned with is whether the Crown grants in the Cowichan Title Lands were made without authority because the Cowichan Title Lands were appropriated Indian settlement lands.

[1971] The evidence reviewed in Part 5 establishes that the Cowichan Title Lands were Indian settlement lands at the time of Confederation and after. I found in Part 5 that the Cowichan continued to use and occupy their village in great numbers through the 1870s, and probably continued to use the site for fishing into the early 20th century. By the late 1870s, it is likely that the post and beam structures no longer stood and the Cowichan were using mat houses.

[1972] Even after the alienation of the village site in the 1870s through issuance of the Crown grants, the Cowichan continued to use and occupy these lands annually while at their fishery on the Fraser River. Sproat documented the Cowichan's complaint about the sale of their village and their continued occupation of it in a letter to the Lieutenant Governor on January 12, 1878: "... the old fishery station on the Fraser known as the "Cowichan Fishery" and annually used by them from time immemorial in getting fish for winter food, has been sold many years ago. The owner being an absentee, there has been no trouble about the land as yet. About one thousand Indians encamped there last season."

[1973] Indian reserve creation was to take into consideration the actual territory of the Indigenous group and their "habits, wants and pursuits". From this perspective, the seasonally occupied Cowichan village and fishery on the Fraser River was an Indian settlement. From the perspective of the Cowichan, Tl'uqtinus was a stl'ulnup, and part of their homeland, which they had not abandoned, in spite of its sale.

[1974] As the Cowichan Title Lands were an Indian settlement at the time of Confederation, this issue turns on whether the applicable laws and Article 13 constrained the Province's ability to dispose of them.

a) Positions of the Parties

[1975] The plaintiffs say the post-Confederation Crown grants were made without statutory authority because the *Land Act*, as amended, did not authorize the sale of lands that were occupied, appropriated, or Indian settlements, which the Lands of Tl'uqtinus were.

[1976] Alternatively, they say BC lacked constitutional authority to grant fee simple interests in the Lands of Tl'uqtinus. Under Article 13, British Columbia had a constitutional obligation to convey those lands to Canada. Concomitant to that obligation was the expectation that British Columbia would not dispose of those lands, pending conveyance.

[1977] Canada's submissions focus on the lawfulness of the Crown grants from which Canada and the VFPA's modern day fee simple title is derived. Canada says both the land sales process and the issuance of the Crown grants were compliant with the operative authorities, whether statutory instruments or the Crown prerogative. While the statutory framework regulating the disposal of Crown lands expanded and evolved over time, the plaintiffs have not shown that any of the Crown land sales or its subsequent grants were inconsistent with the Crown's prerogative power or the operative statutory authorities. With the exception of the 1910 to 1914 grants of Section 14 of BN4, R5W, the statutory exclusion of Indian settlements from the Crown's disposition process had no application to any of the grants in the Claim Area because those lands were purchased *before* the exclusion was extended to the sale of surveyed Crown lands. While Canada accepts that the *Land Act, 1908* prohibited the sale of Crown lands with an Indian settlement thereon, there is no evidence suggesting that any part of Section 14, located in the interior of Lulu Island, constituted such lands.

[1978] BC says the Crown grants were made lawfully. The requirement in the various *Land Acts* that lands must be "unoccupied" and "unappropriated" in order to be eligible for sale did not preclude the at-issue sales. Those terms have a particular meaning and the Claim Area was neither occupied nor appropriated. Further, there is a presumption of regularity, impartiality, and good faith in relation to the actions of public officials. The public officials who put land up for sale in the Claim Area, and those who issued the Crown grants, are presumed to have done so lawfully, rightly, impartially, and in good faith. BC relies on *North Pacific Lumber Co. v. Sayward*, [1918] 2 W.W.R. 771 (B.C.C.A.) [*Sayward*] and *Wilson v. E & N Railway*, [1922] 1 AC 202 (J.C.P.C) for the proposition that any inquiry into the statutory authority for

the Crown grants must start from the presumption that they were validly issued. The burden is on the plaintiffs to show otherwise with persuasive evidence, not speculations and suspicions.

[1979] Like Canada, BC acknowledges that sales made when the *Land Act, 1908* was in effect excluded Indian settlements from land available for sale. However, BC says there is no evidence that the plaintiffs' ancestors occupied the areas put up for auction in 1908.

[1980] With respect to whether the Crown grants were made with constitutional authority, BC says Article 13 of the *BC Terms of Union* relates to a federal head of power and cannot limit provincial legislation, including the various *Land Acts*.

[1981] Richmond adopts BC's submissions both on the facts and law related to the disposition of the Claim Area and the authorization therefor. Richmond holds fee simple interests in land in Section 27, the subject of the Moody grant, as well as in Sections 23 and 26.

b) Disposition of the Claim Area

[1982] Disposition of Crown lands was governed both by statutory authorities and the Crown's prerogative power to administer and dispose of its lands. The Crown's prerogative power to administer and dispose of its lands continued at Confederation, when the Colony's Crown lands became vested in the Province: *Canada (Attorney General) v. Higbie*, [1945] S.C.R. 385 at 407, 1945 CanLII 237; see also *Ross River* at para. 54. As described below, the statutory framework regulating the disposal of Crown lands in British Columbia during the relevant period changed over time.

[1983] The fact that the land in the Claim Area was sold and Crown grants issued is not contested. As the plaintiffs have established Aboriginal title to a portion of the Claim Area, the Cowichan Title Lands, the issue before me is whether the Crown grants of fee simple interest in those lands were made without authority. In some instances, the parties disagree about which statute applied. The plaintiffs say the applicable law is the law in effect at the time the Crown grant was issued. BC says

the applicable law is that in effect at the time of sale. In respect of some of the Crown grants, there is no dispute because the operative law was the same at the time of sale and time of grant. In respect of others, a considerable period of time elapsed between the purchase and sale and the subsequent issuance of the Crown grant, and the law had changed.

[1984] The Crown grants in the Claim Area were issued between 1871 and 1914. For the most part, the facts of whom the Crown grants were issued to, when they were issued, and the general description of the lands, are undisputed. Two of those Crown grants, the Colonial Crown Grants, were already addressed above.

[1985] The post-Confederation Crown grants in the Claim Area were issued as follows:

a) Crown Grant No. 1424 (Sections 27 and 34, B4N, R5W) was issued to Moody on July 30, 1874.

b) Crown Grant No. 1454 (Section 26, B4N, R5W) was issued to James Morrison on October 17, 1874.

c) The following were issued to Michael John Goode on December 8, 1874:

    i) Crown Grant No. 1474 (Section 28, B4N, R5W, New Westminster District);

    ii) Crown Grant No. 1476 (Section 29, B4N, R5W, New Westminster District);

    iii) Crown Grant No. 1479 (Section 32, B4N, R5W, New Westminster District);

    iv) Crown Grant No. 1480 (Section 33, B4N, R5W, New Westminster District).

d) Crown Grant No. 1489 (Section 4, B3N, R5W, New Westminster District) was issued to Thomas Wilton on December 17, 1874. The first payment on the land was made on September 30, 1873, with the balance paid on November 9, 1874.

e) The following were issued to Thomas Lett Wood and Robert Burnaby as trustees under the marriage settlement of Matthew Trotter Johnston on April 16, 1875:

   i) Crown Grant No. 1520 (Section 21, B4N, R5W, New Westminster District);

   ii) Crown Grant No. 1521 (Section 22 B4N, R5W, New Westminster District);

   iii) Crown Grant No. 1522 (Section 23, B4N, R5W, New Westminster District).

f) Crown Grant No. 4251/55 was issued to William and Joseph Wilson (Section 18, B4N, R4W, New Westminster District), along with other lands not in the Claim Area, on March 27, 1893. The land was purchased on September 30, 1873.

g) Crown Grant No. 414/264 was issued to George T. Cline (eastern half of Section 14, B4N, R4W, New Westminster District), along with other lands not in the Claim Area, on August 23, 1910. The land was purchased on September 29, 1908.

h) Crown Grant No. 1394/277 was issued to Cora E. Runner (southeast quarter of Section 15, B4N, R5W, New Westminster District) on April 18, 1911. The land was purchased September 29, 1908.

i) Crown Grant No. 2703/296 was issued to Fred Allen (southwest quarter of Section 14, B4N, R5W, New Westminster District) on January 17, 1912. The land was purchased on September 29, 1908.

j) Crown Grant No. 7188/364 was issued to Charles C. Westenhaver (western half of Section 15, B4N, R5W, New Westminster District and Section 16, B4N, R5W, New Westminster District) on December 23, 1914. The land was purchased on September 29, 1908.

k) Crown Grant No. 7189/364 was issued to John D. Westenhaver on December 23, 1914 granting:

i) Northwest quarter of Section 14, B4N, R5W, New Westminster District;

ii) Northeast quarter of Section 15, B4N, R5W, New Westminster District; and

iii) Section 20, B4N, R5W, New Westminster District.

c) Statutory Authority to issue the Crown Grants in Cowichan Title Lands

[1986] Eight of the Crown grants (those in respect of Sections 20, 21, 22, 23, 26, 27, 28 and 29) were made in respect of Indian settlement lands, the Cowichan Title Lands. Below, I consider the authority for those Crown grants. With the exception of the Crown grant for Section 20, which was issued in 1914, the Crown grants of fee simple interest in the Cowichan Title Lands were issued between 1874 and 1875. Dr. Kennedy observed that these early purchases were made by “well-placed men”, including high-ranking government officials, at one dollar per acre. They received their Crown grants from the original surveyor of Lulu Island, Joseph Trutch, in his role as Lieutenant Governor.

[1987] The burden is on the plaintiffs to demonstrate that the Crown grants were made without statutory authority. I accept that the acts of Crown officials in issuing the Crown grants are presumed to be regular: *Sayward* at paras. 12 and 14. The onus is on the plaintiffs to rebut that presumption on a balance of probabilities: Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 6th Ed. at §4.59.

i. Crown Grant No. 1424

[1988] On July 30, 1874, Trutch issued Crown Grant No. 1424 to Moody. As previously set out, the first payment in respect of these lands was made on September 3, 1863 by his land agent. Another payment was made on May 29, 1874.

[1989] Sections 27 and 34 are on the waterfront adjacent to the Fraser River within what we now know as DgRs-17. The surveyed area totalled 125 acres.

[1990] The plaintiffs have established Aboriginal title to the land in Section 27, which includes Federal Tl'uqtinus Lands and Richmond Tl'uqtinus Lands:

a) Richmond holds the fee simple interest in Lot K, Section 27, B4N, R5W, New Westminster District Plan 19680, Except Plan BCP42299 (PID 010-535-519);

b) Canada holds the fee simple interest in Lot 1, Sections 27 and 22, B4N, R5W, New Westminster District Plan 74529 (PID 007-793-464).

Applicable law

[1991] The parties do not agree on which statute applies.

[1992] The plaintiffs say that the relevant date for determining which law applies is the date the Crown grant was issued. The Crown conduct that the plaintiffs impugn is the issuance of the Crown grant. The plaintiffs rely on the *Land Ordinance, 1870*, as amended by the *Amendment Act, 1873*, which was in force when the Crown grant was issued to Moody and which provided that "unappropriated" and "unoccupied" land was eligible for sale (s. 16).

[1993] For clarity, I reproduce s. 16 of the *Amendment Act, 1873*:

> Unappropriated lands (not being reserved for the sites of Towns or the suburbs thereof,) shall be open for purchase at the rate of not less than One dollar per acre: Provided that whenever so ordered by the Lieutenant Governor in Council, such unoccupied lands as may be deemed by him expedient, from time to time, shall be put up at public sale (of which sale due

> and sufficient notice shall be given) at the upset price of not less than One dollar per acre to the highest bidder.

[1994] BC says the legislative provisions in force at the time of sale apply. The legislation that governed the sale of surveyed land in the Colony when the land was sold in 1863 was Proclamation No. 13, as amended by Proclamation No. 16 and the *Country Land Act, 1861*, reprinted in R.S.B.C. 1871, App. No. 18. There was no requirement in Proclamation No. 13 (as amended) for land to be "unoccupied", "unappropriated" or not an "Indian settlement" in order for it to be eligible for sale. As a result, BC says the plaintiffs' allegations in this regard are irrelevant to the Moody grant.

[1995] In support of its position as to which statute applies, BC relies on s. 2 of the *Land Ordinance, 1870* (as amended) which was in force when the Crown grant was issued to Moody and which preserved rights acquired and payments due pursuant to earlier land sales legislation. Section 2 repealed the above laws (among others) and provided "but such repeal shall not prejudice or affect any rights acquired or payments due, or forfeitures or penalties incurred prior to the passing of this Ordinance in respect of any land in this Colony".

[1996] Canada says two distinct sets of laws need to be considered: those in place at the time of the sale, and those in place at the time the Crown grant was issued. Canada relies on Proclamation No. 16, the *Country Land Act, 1861*, and the *Land Ordinance, 1870* (as amended).

[1997] Both Canada and BC submit that the requirement that in s. 16 of the *Amendment Act, 1873* that lands be unoccupied and unappropriated did not apply because it was not in force at the time of sale. However, if it did, they say the lands were both unoccupied and unappropriated, and were eligible for sale.

[1998] BC argues that the terms "unappropriated" and "unoccupied" did not refer to the reservation of Indian settlements; distinct language was used for that purpose. In considering the use of "unoccupied" and "unappropriated" two principles of statutory interpretation are relevant. The first is the presumption against tautology: every word

in a statute is supposed to have a meaning and function: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Markham: LexisNexis Canada, 2022) at s. 8.03. The second is the presumption of consistent expression: within a statute, the same words have the same meaning and different words have different meanings: *The Construction of Statutes* at s. 8.04.

[1999] The plaintiffs say statutory interpretation principles only apply where there is ambiguity. Words contained in a statute are otherwise to be given their ordinary meaning: *The Construction of Statutes* at s. 3.01. The terms “unoccupied” and “unappropriated” are unambiguous and should be given their ordinary meaning.

[2000] I turn now to consider whether the Cowichan Title Lands, which were an Indian settlement, were “unoccupied” and “unappropriated” lands within the meaning of s. 16 of the *Amendment Act, 1873*.

Meaning of “Unoccupied”

[2001] “Unoccupied” is not defined in the *Land Ordinance, 1870*, as amended. However, “occupation” is defined in s. 16 of the *Land Ordinance, 1870*, as originally enacted, in the part dealing with pre-emption (ss. 3–25). Section 16 provided:

> The occupation herein required shall mean a continuous *bona fide* personal residence of the pre-emptor on his pre-emption claim. Provided, however, that the requirement of such personal occupation shall cease and determine after a period of four years of such continuous occupation shall have been fulfilled.

[2002] This section refers to the occupation necessary to acquire land through pre-emption. The “occupation” requirement was amended by s. 2 of the *Amendment Act, 1873* to permit the pre-emption occupation requirement to be fulfilled by an agent. BC relies on the definition of “occupation” in support of its argument that “unoccupied” therefore refers to a requirement that the land be free from a pre-emptor in occupation (i.e., the land must not be subject to a pre-emption claim).

[2003] “Occupation” in s. 16 of the *Land Ordinance, 1870*, as amended, sets out what was required in order to establish a claim for pre-emption. The sections which

follow provide that the holder of a pre-emption claim may be absent from his claim for any one period not exceeding two months each year (s. 17), set out a process for seeking leave for longer absences (s. 18) and a process for obtaining a license to have a substitute in occupation (s. 19).

[2004] I agree with BC that the term “unoccupied” is used specifically in relation to land that was not pre-empted. I find that the definition of occupation in s. 16 in the *Land Ordinance, 1870*, as amended, is imported into s. 16 of the *Amendment Act, 1873*. The requirement that land be unoccupied has a prescribed meaning: it must be unoccupied in the sense that the land has not been pre-empted. This conclusion is in keeping with the overall scheme of the legislation, which sets requirements for both pre-emptions and sales. Lands that have been pre-empted, but are unoccupied as permitted under the law (for example, where the pre-emptor has obtained leave for a long absence) are nonetheless “occupied” within the meaning of the legislation and therefore ineligible for sale.

[2005] It follows that, for land to be “unoccupied” and eligible for sale under s. 16 of the *Amendment Act, 1873*, the land must not be subject to occupation by a pre-emptor. In other words, to be eligible for sale, the land must not be subject to an existing pre-emption claim. “Unoccupied” therefore has a particular meaning under the *Amendment Act, 1873* and it does not bar occupied Indian settlements from sale.

Meaning of “Unappropriated”

[2006] Section 16 of the *Amendment Act, 1873* also required that land be “unappropriated” in order to be eligible for sale. “Unappropriated” is not defined.

[2007] Apart from its use in s. 16, “unappropriated” is also used in s. 20:

> 20. It shall be lawful for the Lieutenant-Governor in Council to set apart in such places in the Province as he shall think fit, as an endowment for the purposes of Education, such portions of the unappropriated land in the Province as he shall think fit.

[2008] The terms “appropriate” and “appropriations” are also found in ss. 21 and 22:

> 21. The Lieutenant-Governor in Council may appropriate any public lands considered suitable for settlement and cultivation, and not being mineral lands, as free grants to actual settlers, under such regulations as shall from time to time be made by Order in Council, not inconsistent with the provisions of this Act.
>
> 22. Such grants or appropriations shall include lands surveyed or hereafter to be surveyed.

[2009] Additionally, as described above, s. 49 of the *Land Ordinance, 1870*, as originally enacted, provided the Governor in Council could make special free or partially free grants of unoccupied and unappropriated Crown land.

[2010] BC submits the term “appropriate” is used in the sense of land that has been allocated to someone, as an alternative to the term “granted”. As such “unappropriated”, as used in describing land that is eligible for sale, simply refers to land that has not already been allocated to someone else for some other purpose. BC argues that when the word “unappropriated” is used in the eligibility for sale provisions, all it means is that the land must not have previously been granted in order to be eligible for sale. BC says the term “reserve” is generally used in the legislative scheme in relation to lands the Crown had specifically marked out and held back for public purposes.

[2011] Taken together, BC says the requirements that land must be both unoccupied and unappropriated to be eligible for sale, are simply requirements that the land be neither pre-empted nor granted, respectively.

[2012] Later statutes, like the *Land Act, 1874* and the *Land Act, 1908*, S.B.C. 1908, c. 30 use “unappropriated” in a similar manner to the *Land Ordinance, 1870*, as amended. BC notes that in later Acts, the Legislature felt the need to expressly preclude sale of “Indian settlements” in the eligibility for sale provisions, which suggests that Indian settlements were not included in the definition of “unappropriated” or “unoccupied”.

[2013] I agree with BC that in interpreting the meaning of “unappropriated” the Court should adopt an approach consistent with the principle described by the SCC in

Rizzo v. Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837 [*Rizzo Shoes*] that:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[2014] In my view, "unappropriated" as it was used in s. 16 of the *Amendment Act, 1873* had a broader meaning than "ungranted". I observe that under s. 49 of the *Land Ordinance, 1870* (as originally enacted), the Governor in Council could make free grants of "unappropriated Crown Lands" (Crown Lands, meaning lands of the Colony held by the Crown in fee simple) which makes it plain that "unappropriated" lands did not refer only to lands that had already been granted, but also to Crown lands that had been appropriated for another purpose. I find that use of the word "unappropriated" in the eligibility for sale provision refers to land that has not been appropriated or set aside for another purpose or person. That is the plain and ordinary meaning. Here, the land was set aside from the Crown's land disposition processes for the purpose of eventual Indian reserve creation, to promote peaceful settlement and as a matter of justice for the Indigenous occupants. This afforded Indian settlement lands a measure of administrative protection as provisional Crown reserves. I find that the Cowichan Title Lands, as an appropriated Indian settlement, were "appropriated" within the meaning of s. 16.

[2015] As previously discussed, the lack of an express reference to Indian settlements in provisions respecting sale can be understood with reference to the different processes governing pre-emption and sale. There was direct government control over sales, which was not true of lands taken up and occupied for the purpose of pre-emption. Providing that unappropriated lands were ineligible for sale was sufficient to achieve the Legislature's purpose in exempting Indian settlement lands and other appropriated lands from eligibility for sale. In the next substantial re-enactment, the *Land Act, 1874*, the Legislature expressly stated that Indian settlements were ineligible for sale. That the Legislature decided to make this

exemption express does not undermine the protection afforded to appropriated Indian settlements in the *Land Ordinance, 1870*, as amended.

[2016] Further, I agree with the plaintiffs that because some Indian settlement lands were in various stages of Indian reserve creation (as appropriated Indian settlement lands or finalized Indian reserves) there was utility in ensuring their protection, irrespective of their status.

Analysis

[2017] I turn now to consider which provisions applied to the Crown grant to Moody.

[2018] I agree with Canada that in considering whether the Crown grant was issued with statutory authority, regard must be had to the law that was in place at the time of sale, as well as at the time the Crown grant was issued. Sometimes, as in the case of the Moody grant, the Crown grant was issued years after the sale and the law changed in that time.

[2019] With respect to the Moody grant, at the time of sale in 1863, Proclamation No. 13, as amended by Proclamation No. 16 and the *Country Land Act, 1861*, were in force. These laws did not include an eligibility for sale provision requiring that land be “unoccupied” or “unappropriated” in order to be eligible for sale.

[2020] I find that s. 16 of the *Amendment Act, 1873* did not apply to the Crown grant of fee simple interest issued to Moody, meaning there was no requirement that the land be “unappropriated” to be eligible for sale. Section 2 of the *Land Ordinance, 1870* expressly provided that the repeal of those earlier laws would not affect land rights acquired prior to its passing. I agree with Canada and BC that the *Land Ordinance, 1870* (as amended) preserves rights acquired under the legislation that it repealed, and does not retroactively impose new eligibility requirements respecting sale. To find otherwise would import considerable uncertainty into land sales, and would not accord with the express language of the transitional provision.

[2021] A similar provision preserving rights is found in the *Land Act, 1874*, discussed later. Accordingly, as a general principle, I accept BC and Canada's arguments that the eligibility for sale provisions that were in place at the time of the sales of land in the Claim Area govern, and not the eligibility for sale provisions in place at the time the Crown grants were issued. The requirements in the law respecting the form of Crown grant in place at the time the Crown grant was issued apply to the grant itself. There were requirements in the *Land Ordinance, 1870* (as amended) regarding the form of grant, but there is no real suggestion that the Moody grant was not adherent. Apart from the required form, there were no other statutory limitations or requirements before the grant could issue.

[2022] Proclamation No. 13 (as amended) is the applicable law for the purpose of determining whether the land was eligible for sale. Proclamation No. 16 required land to be exposed at public auction before it could be sold privately. If Sections 27 and 34 were not put up for auction, Moody's acquisition contravened the law at the time. While I have found that the lands were not put up for auction on October 5–6, this falls short of a conclusion that they were not put up for auction at all. Nor do the plaintiffs appear to seriously challenge the statutory authority to issue the grant on the basis that the land may not have been exposed for sale at public auction. The plaintiffs have not established a lack of statutory authority for the Crown grant to Moody.

ii. Crown Grant No. 1454

[2023] On October 17, 1874, Trutch issued Crown Grant No. 1454 to Morrison, granting a fee simple interest to all the lands in Section 26, B4N, R5W, New Westminster District.

[2024] This land was purchased at a public auction on September 30, 1873.

[2025] Richmond holds the fee simple interest in Lot E, Sections 23 and 26, B4N, R5W, New Westminster District Plan 19680 (PID 010-535-471).

[2026] Canada holds the fee simple interest in Lot 9, Sections 23 and 26, B4N, R5W, New Westminster District Plan 74529 (PID 007-793-723).

[2027] Section 26 is on the waterfront adjacent to the Fraser River. It is the small triangle of land immediately south of Trutch's demarcation of an "Indian Village"; it also falls within Dr. Brealey's demarcation of the "Village Boundary" and forms part of DgRs-17. The total surveyed area was 10 acres.

[2028] It appears that Morrison was a land agent. There is no evidence he ever used or occupied Section 26.

Applicable Law

[2029] The plaintiffs and BC agree that the *Land Ordinance, 1870*, as amended by the *Amendment Act, 1873*, is the applicable law. Canada agrees that the *Land Ordinance, 1870*, as amended, applies to the sale. However, Canada says the *Land Act, 1874* applies in respect of the Crown grant, arguing it was proclaimed in force on October 17, 1874 by notice in the BC Gazette on October 24.

[2030] BC and the plaintiffs agree the *Land Act, 1874* came into force on October 24, 1874. I can find no basis for Canada's position, and agree that the *Land Act, 1874* came into force when the Lieutenant-Governor's assent was proclaimed by notice in the BC Gazette on October 24, 1874. Accordingly, it had no application to the Crown grant to Morrison.

[2031] The *Land Ordinance, 1870* (as amended) was in force at both the time of sale and when the Crown grant was issued to Morrison and plainly governs.

Analysis

[2032] As discussed above, s. 16 of the *Amendment Act, 1873* set eligibility requirements respecting the sale of land: the land had to be "unoccupied" and "unappropriated". "Unoccupied" referred to land that was not subject to a pre-emption claim. "Unappropriated" referred to land not allocated for another purpose or person. As explained above, the Cowichan Title Lands were an

appropriated Indian settlement, and therefore were appropriated within the meaning of s. 16.

[2033] As the land in Section 26 was appropriated Indian settlement land, it was not "unappropriated", and therefore it was not eligible for sale under s. 16 of the *Amendment Act, 1873*. As the land was ineligible for sale, the Crown grant of fee simple interest issued to Morrison was made without statutory authority.

iii. Crown Grants Nos. 1474, 1476, 1479 and 1480

[2034] On December 8, 1874, Trutch issued four Crown grants to Goode:

a) Crown Grant No. 1474 granting a fee simple interest to Section 28, B4N, R5W, New Westminster District;

b) Crown Grant No. 1476 granting a fee simple interest to Section 29, B4N, R5W, New Westminster District;

c) Crown Grant No. 1479 granting a fee simple interest to Section 32, B4N, R5W, New Westminster District; and

d) Crown Grant No. 1480 granting a fee simple interest to Section 33, B4N, R5W, New Westminster District.

[2035] Sections 28, 29, 32 and 33 were put up for auction on September 30, 1873. Goode purchased the land through private sale on November 3, 1873. Goode was on the voter's list in Esquimalt, where he was identified as "the keeper of the insane asylum" at Esquimalt. There is no evidence he ever used or occupied the lands.

[2036] The total surveyed area included in the Crown grants for Sections 28, 29, and 32 was 160 acres each. The Crown grant for Section 33 encompassed 145 acres. These sections are located in the southwest area of the Claim Area.

[2037] The plaintiffs have established Aboriginal title over of the northern half of Section 28 and an area in the northeast corner of Section 29. Below, I consider the

statutory authority in respect of Crown Grants No. 1474 and No. 1476. These lands do not include Federal Tl'uqtinus Lands or Richmond Tl'uqtinus Lands.

Applicable Law

[2038] The plaintiffs and BC do not agree which law applies. Canada did not make specific submissions because Sections 28 and 29 do not include Federal Tl'uqtinus Lands. The *Land Ordinance, 1870* (as amended) was in force at the time of sale. The *Land Act, 1874* was in force when the Crown grant was issued.

[2039] BC says the applicable law is the *Land Ordinance, 1870*, as amended. I previously reviewed the relevant sections of that law. BC also relies on s. 67 of the *Land Act, 1874* which honours agreements made under earlier legislation:

> 67. All agreements, contracts, and leases, heretofore entered into between any person and any officer acting on behalf of the Government shall, notwithstanding any defects therein, be valid and effectual to all intents and purposes, and the covenants, provisoes, and agreements therein contained may be enforced by action, suit, or other proceeding at law or in equity instituted in the name of Her Majesty's Attorney-General for the Province.

[2040] The plaintiffs submit the eligibility for sale provisions in the *Land Act, 1874* apply. As previously set out, the eligibility for sale provision in s. 61 of the *Land Act, 1874* precluded the sale of unappropriated, unoccupied, and unreserved lands, and expressly precluded the sale of Indian settlements.

[2041] Like the *Land Ordinance, 1870*, the *Land Act, 1874* also had a transitional provision (s. 1), which stated:

> The "Land Ordinance, 1870," and all Proclamations, Statutes, Ordinances, and Acts thereby repealed, and the "Land Ordinance Amendment Act, 1872," and the "Land Ordinance Amendment Act, 1873," shall be and are hereby repealed; but such repeal shall not prejudice or affect any rights acquired or payments due or penalties incurred prior to the passing of this Act, in respect of any land in this Province.

Analysis

[2042] As above, I find the eligibility for sale provision which applies is the provision that was in force at the time of sale.

[2043] When Goode purchased the land on November 3, 1873, the operative law was the *Land Ordinance, 1870* (as amended). In my view, it is the eligibility for sale provision in that statute (*Amendment Act, 1873*, s. 16) which applied when the land was sold, not the eligibility for sale provision in the statute in place when the Crown grant was issued (*Land Act, 1874*, s. 61).

[2044] Section 1 of the *Land Act, 1874* repealed the *Land Ordinance, 1870* (as amended) and preserved rights acquired and payments due under the law. That transitional provision applied when Crown Grants No. 1474 and No. 1476 were issued to Goode. This reinforces my determination that the eligibility for sale provisions which apply are those that were in force at the time of sale.

[2045] Section 16 of the *Amendment Act, 1873* required that land be "unappropriated" in order to be eligible for sale. As the land in the northern half of Section 28 and the north east corner of Section 29 was appropriated Indian settlement land, it was not unappropriated, and therefore it was not eligible for sale. As a result, Crown Grants No. 1474 and No. 1476 of fee simple interest were made without statutory authority.

iv. Crown Grants Nos. 1520, 1521, 1522

[2046] On April 16, 1875 Trutch issued three Crown grants to Wood and Burnaby as trustees under the marriage settlement of Johnston, as follows:

a) Crown Grant No. 1520 granted a fee simple interest to all 160 acres in Section 21, B4N, R5W, New Westminster District;

b) Crown Grant No. 1521 granted a fee simple interest to all 160 acres in Section 22, B4N, R5W, New Westminster District; and

c) Crown Grant No. 1522 granted a fee simple interest to all the lands in Section 23, B4N, R5W, New Westminster District approximately 145 acres.

[2047] Sections 21, 22 and 23 were included in the public auction on September 30, 1873. The land was purchased privately on October 13, 1873.

[2048] The plaintiffs have established Aboriginal title in respect of these sections.

[2049] Section 22 includes Federal Tl'uqtinus Lands:

a) Canada holds the fee simple interest in Lot 1, Sections 27 and 22, B4N, R5W, New Westminster District Plan 74529 (PID 007-793-464).

[2050] Section 23 includes Federal Tl'uqtinus Lands and Richmond Tl'uqtinus Lands:

a) Canada holds the fee simple interest in Lot 2, Section 23, B4N, R5W, New Westminster District Plan 74529 (PID 007-793-499) and Lot 9, Sections 23 and 26, B4N, R5W, New Westminster District Plan 74529 (PID 007-793-723);

b) Richmond holds the fee simple interest in Lot E, Sections 23 and 26, B4N, R5W, New Westminster District Plan 19680 (PID 010-535-471).

[2051] Johnston was a Justice of the Peace on Vancouver Island. He was in a business partnership with Sproat for about 10 years.

[2052] Wood was a lawyer who served as Attorney General for the Colony of Vancouver Island from 1864 to 1866. He then became the Solicitor General for the unified Colony, and later continued in other high-ranking positions in British Columbia, Bermuda, and the Straits Settlements.

[2053] Burnaby arrived in British Columbia in 1858 with a personal letter of introduction from Sir Bulwer-Lytton to Douglas. He was private secretary to Moody and was affiliated with the Lands and Works Department. He was elected to the Legislative Assembly in 1860 and was a real estate and land agent in the 1870s.

[2054] Neither Johnston, Wood, nor Burnaby ever occupied or used these lands.

Applicable Law

[2055] The parties agree that the applicable statute is the *Land Ordinance, 1870*, as amended by the *Amendment Act, 1873*. That Act was in effect when the sale occurred on October 13, 1873, and as a result of the disallowance of the *Land Act, 1874*, it was also in effect when the Crown grants were issued on April 16, 1875.

Analysis

[2056] As above, the *Land Ordinance, 1870*, as amended by the *Amendment Act, 1873*, permitted the sale of "unappropriated" land (s. 16). The land in Sections 21, 22, and 23 was appropriated Indian settlement land and not eligible for sale. It follows that the Crown grants of fee simple interest were made without statutory authority.

v. Crown Grant No. 7189/364

[2057] On December 23, 1914, Lieutenant Governor Barnard issued Crown Grant No. 7189/364 granting John D. Westenhaver a fee simple interest to all the lands in:

a) the northwest quarter of Section 14, B4N, R5W, New Westminster District;

b) the northeast quarter of Section 15, B4N, R5W, New Westminster District; and

c) Section 20, B4N, R5W, New Westminster District.

[2058] The total surveyed area was 251.4 acres. Section 20 was approximately 160 acres while the quarter portions of Sections 14 and 15 were approximately 45 acres each.

[2059] The land was purchased on September 29, 1908 at auction.

[2060] The plaintiffs have established Aboriginal title in respect of part of Section 20, which does not include Federal Tl'uqtinus Lands or Richmond Tl'uqtinus Lands.

Applicable Law

[2061] The plaintiffs and BC do not agree which law applies.

[2062] BC says s. 36 of the *Land Act, 1908* is the applicable provision; it was in effect at the time of sale.

[2063] The plaintiffs say s. 45 of the *Land Act, 1911* is the applicable provision; it was in force at the time the Crown grant was issued.

[2064] As previously set out, the *Land Act, 1908* and the *Land Act, 1911*, in addition to precluding the sale of appropriated and occupied land, included express protections for the sale of Indian settlements.

[2065] Section 36 of the *Land Act, 1908* provided:

> So much of the unappropriated and unoccupied lands of the Province, the surveys of which have been duly made and confirmed in the British Columbia Gazette, which are not the sites of towns or the suburbs thereof, nor Indian settlements, and as are not reserved from sale by the Lieutenant-Governor in Council, may be classified in the same manner as unsurveyed lands, and purchased at the same price ...

[2066] Section 45 of the *Land Act, 1911* contained essentially the same language.

Analysis

[2067] When Westenhaver purchased the land in Section 20 on September 29, 1908, the operative law regarding eligibility of land for sale was s. 36 of the *Land Act, 1908*. It is the eligibility for sale provision in force at the time of sale that applies, not the eligibility for sale provision in place when the Crown grant was issued (s. 45 of the *Land Act, 1911*). Little turns on this, however, given that the eligibility for sale provision in both Acts precluded the sale of appropriated lands and expressly precluded the sale of Indian settlements.

[2068] BC acknowledges that the *Land Act, 1908* did not permit the sale of Indian settlements, but argues that Section 20 was not the site of an Indian settlement. The

plaintiffs have established Aboriginal title over part of Section 20, and BC's argument falls away with respect to that land.

[2069] Some of the land in Section 20 was appropriated Indian settlement land. As a result, it was not eligible for sale. It follows that the Crown grant of fee simple interest in Section 20 was made without statutory authority.

Summary re Statutory Authority for the Crown Grants

[2070] With the exception of the Crown grant to Moody, I find that all the Crown grants in respect of the Cowichan Title Lands were made without statutory authority because they were appropriated Indian settlement lands. Lieutenant Governor Trutch, and later, Lieutenant Governor Barnard, issued Crown grants of fee simple interest in land which was not eligible for sale under the operative authorities. This is sufficient to rebut the presumption of regularity which BC and Richmond rely on in relation to the conduct of public officials.

d) Constitutional Authority to Issue the Crown Grants in the Cowichan Title Lands

[2071] The plaintiffs say that the Province did not have the constitutional authority to sell or otherwise dispose of Indian settlement lands, and that the Province acted without constitutional authority when it issued the Crown grants. Under Article 13 of the *BC Terms of Union*, the Province was required to convey those lands to the Dominion. As a corollary to that obligation, the Province could not dispose of those lands nor otherwise unilaterally extinguish Crown protection of Indian settlement lands, pending conveyance. The various legislation governing sale of land which exempted Indian settlement lands from sale reflected the constitutional limit embodied in Article 13 which constrained the Province's power with respect to land.

[2072] For ease of reference, I reproduce Article 13 again:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

[2073] There is no dispute that the *BC Terms of Union* have constitutional effect and can limit legislative authority. However, BC argues that Article 13 speaks to Canada's jurisdiction over "Indians, and Lands reserved for the Indians" (s. 91(24)) and does not speak to provincial legislative power over property and civil rights (s. 92(13)). BC submits it is theoretically possible that Article 13 could constitutionally limit federal legislation, as per *Jack* and *Adolph*, but it has never been found to do so. BC argues there can be no suggestion that Article 13 placed constitutional limits on provincial law because Article 13 does not speak to the exercise of provincial legislative power. BC says its commitment under Article 13 was only triggered "on application by" Canada to transfer specific parcels of land, as identified and requested by Canada and this never occurred in relation to the Claim Area.

[2074] I find that BC mischaracterizes its obligations. It is only the *obligation to convey* that is triggered once Canada applies for the land. But BC's commitment presupposes the application and conveyance. BC cannot convey land that it has not set aside.

[2075] Both *Jack* and *Adolph* involved the question of whether Article 13 could limit federal legislation with respect to fishing. The question of whether Article 13 could limit provincial legislation was not in issue and was not considered, although in *Jack* at 301, Dickson J. (concurring) noted that the *BC Terms of Union* generally may establish constitutional limitations upon the exercise of federal or provincial legislative power.

[2076] Per *Jack* and *Adolph*, if a challenge is brought in respect of federal legislation, the law requires clear evidence of a colonial policy related to Indian reserve land that

was ordained in law in British Columbia pre-Confederation, which the challenged federal policy would then need to be compared to and found not "as liberal". BC submits there was no clear policy prior to Confederation, let alone one "ordained in law" at the time of the union. In my view, that is not so. The evidence shows that there was an Indian reserve policy established under Douglas, who, through executive and legislative acts, appropriated and protected Indian settlement lands from disposition. As above, this policy continued through the tenures of Seymour and Musgrave, although implemented parsimoniously under Trutch. I found that Article 13 continued the appropriation of Indian settlement lands.

[2077] Article 13 required cooperation between the provincial and federal governments. Article 13 required British Columbia to convey certain tracts of land in order to fulfill its constitutional responsibility under Article 13 and enable Canada to continue "a policy as liberal as hitherto pursued by the British Columbia Government". In my view, this obligation imported a requirement on the Province not to dispose of those lands prior to conveyance or until the Cowichan's interest in the Cowichan Title Lands had otherwise been addressed through the reserve creation process. I agree with the plaintiffs that any other interpretation renders the Crown's obligations under Article 13 hollow. It follows that Article 13 is capable of imposing a constitutional constraint on British Columbia's power to dispose of property, and relatedly, on its legislative power over property and civil rights, as it pertains to the reserve creation process, limiting British Columbia's authority to dispose of Indian settlement lands.

[2078] Under Article 13, British Columbia was obliged to be in a position to convey lands to Canada that had previously been its practice to appropriate for Indian reserve creation. The Colony's policy was to establish reserves at the sites of Indian settlement lands. Reserve creation was a process that took time, and a policy as liberal as that of the Colony could not be achieved if the villages of Indigenous communities were granted away. Per Dickson J, concurring in *Jack*, Article 13 does not require adoption of the same policy the Colony followed, but only a policy "as liberal". Article 13 does not guarantee an outcome. However, because the Cowichan

Title Lands were Indian settlement lands, British Columbia was obliged not to dispose of those lands to third parties pending conveyance to Canada for the purpose of eventual Indian reserve creation or until the Cowichan's interest in the Cowichan Title Lands was otherwise addressed.

[2079] BC says its commitment under Article 13 extended only to the transfer of specific parcels of land, as identified and requested by Canada. In this case, there was no application from Canada to trigger BC's commitment. In my view, this narrow interpretation of BC's obligation should be rejected. Article 13 is forward-looking (it "speaks prospectively": *Williams Lake* SCTC at para. 293) and requires cooperation between the federal and provincial governments. Implementation can only occur with regard to the past practices of the Colony. And, as per *Wewaykum*, British Columbia had a role to fulfill with respect to identifying the location, size, and number of reserves.

[2080] Article 13 constrained British Columbia's power to dispose of the Cowichan Title Lands. I find that the Crown grants that were issued in respect of Cowichan Title Lands were therefore made without constitutional authority by virtue of being issued under legislation that was constitutionally limited by Article 13. British Columbia had a constitutional commitment to deal with the Cowichan's interest in their lands for the purpose of implementing its obligations under Article 13, and as a result, did not have the authority to unilaterally extinguish Crown protection for those lands pending conveyance. The constitutional constraints on British Columbia in disposing of Indian settlement lands in Article 13 were reflected in legislation through provisions which rendered appropriated lands, including Indian settlement lands, ineligible for sale. These were not just statutory limits, but constitutional limits.

[2081] Accordingly, I conclude that the post-Confederation Crown grants in Cowichan Title Lands were made without constitutional authority, because the Ordinances and statutes that those Crown grants were issued under were constitutionally limited by Article 13 of the *BC Terms of Union*. British Columbia

exceeded its constitutional authority each time it issued a Crown grant of fee simple interest in the Cowichan Title Lands.

PART 6.1 COWICHAN ABORIGINAL TITLE AND THE FEE SIMPLE INTERESTS IN COWICHAN TITLE LANDS

[2082] The plaintiffs have established Aboriginal title to the Cowichan Title Lands based on use and occupation as at 1846. In the decades that followed, all of the Cowichan Title Lands were sold to settlers with no regard for the Cowichan's interest. The Crown grants of fee simple interest that were issued in the Cowichan Title Lands were made without constitutional authority by virtue of being issued under legislation that was constitutionally limited by Article 13 of the *BC Terms of Union*. Most of the Crown grants were made without statutory authority because the lands were appropriated and as such were ineligible for sale under the various applicable ordinances and acts.

[2083] The result of those historic Crown grants of fee simple interest is that today, third parties and parties to this litigation now hold fee simple interests in the entirety of the Cowichan Title Lands. The Cowichan's land has been encumbered with fee simple interests for well over a century.

[2084] British Columbia and Richmond say that the issuance of the Crown grants and the presence of fee simple titles have significant consequences for the existence, scope and content of the Cowichan's Aboriginal title.

[2085] Richmond says that the Cowichan's Aboriginal title was extinguished when the Province issued the Crown grants. Richmond argues that Chief Justice Lamer's conclusion in *Delgamuukw* SCC that the provinces cannot extinguish Aboriginal title has been overtaken by subsequent jurisprudence and is no longer good law. Alternatively, Richmond says if the Province lacked the authority to extinguish Aboriginal title, the Province nonetheless created fundamentally irreconcilable interests in land when it issued the Crown grants, which permanently displaced Aboriginal title. As a result, a declaration of Aboriginal title is no longer available to the Cowichan as their Aboriginal title has been terminated.

[2086] BC does not argue extinguishment. Rather, BC says the content of any Aboriginal title rights that the Cowichan may have today is necessarily limited by the fee simple interests. BC submits that the Court should decline to grant a declaration of Aboriginal title over fee simple lands. In the alternative, BC says that any declaration of title must be limited to the lands owned by the parties to this proceeding, and any right that is declared must be made subject to existing fee simple interests. BC submits the Crown grants and the fee simple interests are inherently valid and the fee simple interests displace (meaning suspend) Aboriginal title for as long as the incompatible interest persists. Any declaration of Aboriginal title must account for the nature and scope of any presently exercisable right the plaintiffs may have.

[2087] Richmond agrees that Aboriginal rights cannot be properly defined separately from the limitation of those rights, but encourages the Court not to adopt BC's suspension argument because it places a cloud on title holders' interests, and implicitly changes their interest in land from 'normal' fee simple to some form of contingent fee simple. Richmond says the Cowichan's Aboriginal title has been permanently displaced.

[2088] Additionally, Richmond argues that its fee simple titles are indefeasible under the *Land Title Act, 1996* [*LTA*] and that the guarantees of indefeasibility in ss. 23 and 25 are a complete statutory defence to a declaration that its fee simple titles in the Cowichan Title Lands are defective and invalid. BC says the validity of fee simple interests is further guaranteed by the land title registration system. BC does not argue that the *LTA* displaced Aboriginal title but says it precludes a challenge to the validity of the fee simple interests.

[2089] Accordingly, I must now consider the consequences of the historical Crown grants and the present-day fee simple titles and interests on the Cowichan's Aboriginal title. I also return to this issue in considering the relief sought.

[2090] I address the following issues: A) whether the Cowichan's Aboriginal title has been extinguished; B) whether the Cowichan's Aboriginal title has been displaced by

the Crown grants of fee simple interest and/or by the present-day fee simple interests; and C) whether ss. 23 and 25 of the *LTA* bar a declaration that Richmond's fee simple interests are defective and invalid.

A. WAS THE COWICHAN'S ABORIGINAL TITLE EXTINGUISHED?

[2091] I turn first to Richmond's submission that the Province had the authority to, and did, extinguish the Cowichan's Aboriginal title. As above, BC does not advance this argument.

1. Richmond's position

[2092] Richmond argues that the Crown grants of fee simple interest extinguished any Aboriginal title that may formerly have existed in the Claim Area. Richmond submits that the Court's rejection in *Tsilhqot'in* SCC of the application of the doctrine of interjurisdictional immunity as a constraint on the Province's authority to regulate Aboriginal rights is a repudiation of its determination in *Delgamuukw* SCC that the provinces lacked the authority to extinguish Aboriginal title. Accordingly, Lamer C.J.C.'s determination in *Delgamuukw* SCC that the provinces cannot extinguish Aboriginal title has been overruled or is at least an open question vulnerable to reconsideration.

[2093] Richmond submits that the decision in *Tsilhqot'in* SCC reflects a broader systemic judicial reconsideration of the doctrine of interjurisdictional immunity which began in *Canadian Western Bank v. Alberta*, 2007 SCC 22 where the majority cautioned against its broad use. Richmond says this trend continued in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, decided shortly after *Tsilhqot'in* SCC, where the Court observed that the doctrine does not preclude Ontario from justifiably infringing treaty rights: at para. 53.

[2094] Richmond submits the test for extinguishment — clear and plain intention — is met because fee simple interests and Aboriginal title are irreconcilable interests. Richmond says upon a Crown grant of fee simple interest, the intention to extinguish Aboriginal title is clear and plain. Richmond says this is supported by an

overwhelming body of jurisprudence. Courts have repeatedly recognized that a grant of fee simple interest in land is fundamentally inconsistent with Aboriginal title. Further, alienation of the Claim Area was completed long before the constitutional entrenchment of Aboriginal rights in 1982. Richmond also relies on case law from Australia in support of its position that grants in fee simple are inherently inconsistent with Aboriginal title and evince a clear and plain intention to extinguish same.

[2095] Richmond did not specifically plead extinguishment, but did plead reliance on the test for establishing Aboriginal title, which it says necessarily includes an analysis of extinguishment. Richmond says no unfairness arises from a lack of an express plea of extinguishment because it is a purely legal argument which the plaintiffs have responded to. The nature of the argument is such that it would not have changed the evidence that was led in this case. The current state of the lands has been fully canvassed, and the fact that the Crown grants were issued and the existence of fee simple interests in the Claim Area are non-contentious. Richmond also says that because it pled and particularized permanent displacement of Aboriginal title arising from the Crown grants, the plaintiffs' complaint in essence is that Richmond failed to use the term "extinguishment".

2. Plaintiffs' position

[2096] The plaintiffs say that Richmond did not plead extinguishment and is foreclosed from advancing it now. Canada initially pled extinguishment but abandoned its reliance on this defence in its amended response to civil claim filed November 22, 2018. BC never pled extinguishment. Richmond and BC both pled displacement. The plaintiffs sought particulars. Richmond provided an informal response which did not reference extinguishment and upon which Richmond now relies on as particulars of extinguishment. The plaintiffs say following receipt of Richmond and BC's responses, satisfied that no party was pleading extinguishment, they amended their pleadings to remove their reply to extinguishment.

[2097] Second, and more substantively, Richmond's argument must be dismissed because it would have the Court abandon established Canadian jurisprudence and

instead apply case law from Australia, a jurisdiction that Richmond acknowledges does not have a system of constitutionally enshrined Aboriginal rights as does Canada.

[2098] The plaintiffs submit that *Tsilhqot'in* SCC does not say that the *Sparrow* framework replaces interjurisdictional immunity when extinguishment of a right is at issue. The SCC's comments are clearly made in the context of an alleged infringement. There is nothing in *Tsilhqot'in* SCC that suggests an intention to retroactively expand the provinces' constitutional powers to include authority to extinguish Aboriginal title. The plaintiffs say Richmond's argument effectively asks the Court to eliminate any constitutional protection for Aboriginal rights prior to 1982.

[2099] Further, and in the alternative, even if the Province had jurisdiction to extinguish Aboriginal rights, a clear and plain intention is required, and that is missing here. Inconsistency between a statute and an Aboriginal right is not sufficient to evince a clear and plain intention to extinguish the right: *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641, 2000 CanLII 16991 (C.A.) [*Chippewas of Sarnia*], leave to appeal to SCC ref'd, 28365 (8 November 2001), motion for reconsideration of the application for leave to appeal to SCC ref'd, 28365 (13 June 2002) at para. 240. Nor does ignoring Aboriginal title through issuing Crown grants suffice to meet that standard.

3. Discussion

[2100] I turn first to the adequacy of Richmond's pleadings on extinguishment.

[2101] I am prepared to consider Richmond's submission on extinguishment. I agree with Richmond that the facts underlying Richmond's arguments — the issuance of the Crown grants — are uncontested. Richmond's position, that the law has changed since *Delgamuukw* SCC, is a legal one.

[2102] The plaintiffs say they would be prejudiced by a determination of the issue now, absent an opportunity to lead evidence on extinguishment, but offer no specifics. I see no prejudice. The substantive issue is grounded in legal argument

and it has been fully argued by Richmond and the plaintiffs. Further, the plaintiffs had notice of Richmond's position that the Crown grants of fee simple interest permanently displaced Aboriginal title, such that it did not persist or exist as at 1982. Accordingly, I consider Richmond's argument on its merits.

4. Law re extinguishment

[2103] Prior to the enactment of s. 35 of the *Constitution Act, 1982*, Aboriginal rights were vulnerable to extinguishment. The test for extinguishment of an Aboriginal right was set out in *Sparrow*. A unanimous SCC held that the "test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right": at 1099. This follows Hall J.'s reasons in *Calder*, in which he stated that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'": at 404.

[2104] Chief Justice Lamer later clarified in *R. v. Gladstone*, [1996] 2 S.C.R. 723, 1996 CanLII 160 [*Gladstone*] that while the Crown's intention to extinguish an Aboriginal right must be clear and plain, language which refers to the extinguishment of Aboriginal rights may not be required: at para. 34. The Crown must do more than demonstrate that an Aboriginal right has been subject to a regulatory scheme: at para. 34.

[2105] Left undecided in *Sparrow* was the level of government that had jurisdiction to extinguish Aboriginal rights. Chief Justice Lamer addressed this in *Delgamuukw* SCC, confirming that the provinces do not have the authority to extinguish Aboriginal rights: at paras. 172–181.

[2106] Chief Justice Lamer held that s. 91(24) of the *Constitution Act, 1867*, which vests in the federal government the exclusive jurisdiction to legislate in relation to "Indians, and Lands reserved for the Indians", also encompasses the exclusive jurisdiction to extinguish Aboriginal rights and title: at para. 173. Chief Justice Lamer noted that in *St. Catherine's Milling and Lumber Co. v. The Queen (*1888), 14 App. Cas. 46, the Privy Council found that the provinces' ownership of land is qualified by

Aboriginal title as a result of the operation of s. 109 of the *Constitution Act, 1867*: at para. 175. Accordingly, underlying title to Aboriginal title land is vested with the provincial Crown while jurisdiction over those lands rests with the federal government. The jurisdiction to accept surrenders of Aboriginal title and to extinguish Aboriginal title lies with the federal government; the absolute title would go to the province upon surrender or extinguishment but only the federal government has jurisdiction to accept surrender: at para. 175. Chief Justice Lamer emphasized that separating federal jurisdiction over “Indians” from jurisdiction over their lands would result in the government vested with primary constitutional responsibility for securing the welfare of Aboriginal people being unable to safeguard their interests in their lands: at para. 176.

[2107] Chief Justice Lamer was clear that provincial governments are prevented from legislating in relation to Aboriginal rights. Laws that purport to extinguish Aboriginal rights, including the rights that are recognized and affirmed by s. 35(1), are beyond the legislative competence of the provinces. This is because Aboriginal rights, including rights in relation to land, touch the core of “Indianness”, which lies at the heart of s. 91(24): at para. 178.

[2108] Chief Justice Lamer then considered whether — notwithstanding that exclusive jurisdiction over Indians and land reserved for Indians is vested with the federal government — a provincial law of general application could extinguish Aboriginal rights. He held that provincial laws of general application could not have the effect of extinguishment, both because they could not meet the “clear and plain” intent standard without taking the law outside of provincial jurisdiction, and because of the operation of the interjurisdictional immunity doctrine, which protects the core of federal jurisdiction even from provincial law of general application: at paras. 180–181. It is this latter conclusion which Richmond says the SCC has called into question in *Tsilhqot’in* SCC.

[2109] In *Tsilhqot’in* SCC, the Court held that for the purposes of determining the validity of provincial legislative incursions on Aboriginal title lands, the *Sparrow*

framework replaces the doctrine of interjurisdictional immunity: at para. 2. Chief Justice McLachlin determined that interjurisdictional immunity had no role to play in the circumstances of that case: "[t]he 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.": at para. 141. Following an analysis of the Court's jurisprudence on the matter, McLachlin C.J.C. asked:

> [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.

[2110] Accordingly, the SCC directed that the analysis in cases where land is held under Aboriginal title should not focus on interjurisdictional immunity. Rather, the infringement and justification analysis should govern: at para. 151. The real test is how far provincial governments can go in regulating the exercise of s. 35 Aboriginal rights. Regulatory environments can no longer be divided into watertight jurisdictional compartments. Effective regulation requires cooperation between interlocking federal and provincial schemes, whereas interjurisdictional immunity may thwart productive cooperation: at para. 148.

[2111] The Court in *Tsilhqot'in* SCC concluded that, as per *Sparrow* and *Delgamuukw* SCC, the s. 35 framework applies to exercises of both provincial and federal power: at para. 150. This test seeks to sensitively reconcile general legislation with Aboriginal rights, as required by s. 35 of the *Constitution Act, 1982*, and is fairer and more practical than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity: at para. 150. Provincial laws of general application will apply to Aboriginal title lands unless they are unreasonable, impose a hardship, or deny the title holders their preferred means of exercising their rights: at para. 151.

a) Delgamuukw is binding on extinguishment

[2112] Respectfully, I do not agree with Richmond's submissions about the effect of the Court's ruling on interjurisdictional immunity in *Tsilhqot'in* SCC. As above, the SCC was clear that where an Aboriginal right is established, and the rights-holder challenges provincial regulation of that right, the appropriate framework through which to assess the constitutional validity of the provincial law or conduct is the s. 35 framework. The doctrine of interjurisdictional immunity no longer has a role to play in assessing whether a province's interference with an Aboriginal right or title is constitutional. However, *Tsilhqot'in* SCC plainly does not suggest that the s. 35 framework is the appropriate framework when dealing with extinguishment. The SCC was express about the extent to which the doctrine of interjurisdictional immunity is no longer applicable in Aboriginal title cases: "for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, [the s. 35] framework displaces the doctrine of interjurisdictional immunity": at para. 2 (emphasis added). There is no basis to extend its reasoning to extinguishment.

[2113] Nor could there be. Section 35 protects Aboriginal rights that were not extinguished prior to April 17, 1982: *Sparrow*. Therefore, the prospect of extinguishment only arises prior to the enactment of s. 35. The SCC's holding in *Tsilhqot'in* SCC only does away with the doctrine of interjurisdictional immunity to the extent it has been overtaken by the infringement/justification framework under s. 35, as it has been supplanted by the Crown's obligation to justify any infringements. The doctrine of interjurisdictional immunity is otherwise undisturbed, and to the extent that Lamer C.J.C. relied on it in *Delgamuukw* SCC to ground his conclusion that the Province lacked jurisdiction to extinguish Aboriginal rights prior to 1982, his reasoning is undisturbed. Presumably, in assessing provincial regulation of Aboriginal title lands prior to the enactment of s. 35, there is still a role for interjurisdictional immunity.

[2114] In any event, the infringement/justification analysis is not the test for extinguishment of a common law Aboriginal right — it is the test to determine the

permissible scope of intrusion or regulation on a constitutionally protected Aboriginal right. Extinguishment is an analytically distinct power, which only existed prior to the enactment of s. 35 and the obligation on the Crown to justify infringements. The test for determining whether a common law Aboriginal right has been extinguished was laid out in *Sparrow* (at 1099) approved in *Gladstone* (at para. 31) and *Delgamuukw* SCC (at para. 180): the standard is one of a clear and plain intent to extinguish.

[2115] Lastly, Richmond acknowledges that the pith and substance doctrine still applies and that on its theory, only a provincial law of general application under a head of power under s. 92 of the *Constitution Act, 1867* could extinguish an Aboriginal right. As above, Chief Justice Lamer held that provincial laws of general application could not extinguish an Aboriginal right for two reasons: 1) they could not meet the "clear and plain" intent standard and 2) by operation of the interjurisdictional immunity doctrine: at paras. 180–181. *Tsilhqot'in* SCC did not touch on nor impact the former finding that "a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province": *Delgamuukw* SCC at para. 180.

[2116] I agree with the plaintiffs that nothing in *Tsilhqot'in* SCC suggests that the Court has opened the door to revisiting its determination that the constitutional powers of the provinces did not include the authority to extinguish Aboriginal rights. The Court did not reconsider the provinces' jurisdiction to extinguish Aboriginal rights. Rather, it affirmed use of a more finely-tuned test to consider the constitutional limits of how both the federal and provincial governments may regulate Aboriginal rights protected under s. 35 of the *Constitution Act, 1982*.

[2117] In my respectful view, Lamer C.J.C.'s determination in *Delgamuukw* SCC that since Confederation the Province has lacked the jurisdiction to extinguish Aboriginal rights remains the law.

[2118] Given my conclusion that BC lacked the authority to extinguish Aboriginal title, it is not necessary to address Richmond's argument that it evinced a clear and

plain intention to do so. Nor does BC advance that position. However, I observe that there is no evidence of a clear and plain intention on the part of the Province to extinguish Aboriginal title by way of the Crown grants. I accept the plaintiffs' submission that the evidence before the Court suggests the opposite — that both the colonial and provincial Crown intended to respect Aboriginal interests in land. This is evident from the following facts:

a) In 1853, Douglas promised to treat the Cowichan with justice and humanity;

b) Douglas' appropriation of Indian settlement lands from the Crown's disposition processes, with a view to promoting peaceful settlement of the colony;

c) The executive directions respecting the setting aside of Indian settlement lands and Indian reserves; and

d) The later land ordinances and acts and many subsequent statutes that reflect legislative removal of Indian settlements from the Province's various land disposition processes until 1970.

B. WAS THE COWICHAN'S ABORIGINAL TITLE DISPLACED?

[2119] I turn now to consider whether the Cowichan's Aboriginal title has been permanently displaced by the Crown grants of fee simple interest or is temporarily displaced so long as the fee simple interests persist. This necessarily entails a consideration of the relationship between fee simple interests and Aboriginal title and whether the two can coexist.

1. Richmond's position

[2120] Richmond says Aboriginal title and fee simple title cannot coexist, and as a result Aboriginal title is necessarily terminated by Crown grants of fee simple interest. Richmond says because the Claim Area lands were completely granted long before 1982, and because there are no Crown lands within the Claim Area, any

in rem rights that the plaintiffs' ancestors once had have fallen away forever. The descendants of Aboriginal people who had title in 1846 may pursue other remedies against the Crown, but a declaration of Aboriginal title is unavailable. Richmond distinguishes its position from extinguishment, arguing that if the Province was without jurisdiction to extinguish Aboriginal title then the Crown grants of fee simple interest nonetheless necessarily terminated the Cowichan's Aboriginal title.

[2121] Richmond submits that courts have repeatedly recognized the fact that a grant of fee simple interest in land is fundamentally inconsistent with the notion of Aboriginal title. The two are mutually exclusive; other than in situations of joint tenancy or tenancy in common at common law, there cannot be two or more persons each with an independent right to exclusive use and occupation of a single piece of land.

[2122] In support of the proposition that fee simple interests in land and Aboriginal title are incompatible, Richmond relies on *Hamlet of Baker Lake v. The Queen*, [1980] 1 F.C. 518, 1979 CanLII 4085 [*Baker Lake*]; *Delgamuukw* SCC; *Fejo v. Northern Territory*, [1988] H.C.A. 58 [*Fejo*]; *Skeetchestn Indian Band and Secwepemc Aboriginal Nation v. Registrar of Land Titles, Kamloops*, 2000 BCCA 525 [*Skeetchestn*]; *Yarmirr*; *Saugeen First Nation* ONSC; and *Saik'uz* BCSC.

[2123] Richmond refers to Australian cases that consider extinguishment, notably *Mabo v. Queensland (No 2)*, [1992] H.C.A. 23, (1992) 175 C.L.R. 1 and *Fejo*. Australia has legislation to protect Aboriginal rights in certain contexts, but it does not have a system of constitutionally enshrined Aboriginal rights as we do in Canada. Richmond says displacement of Aboriginal title occurred prior to the enactment of s. 35 of the *Constitution Act, 1982* so the law from Australia is helpful.

2. BC's position

[2124] BC's displacement argument rests on a somewhat different basis and speaks to the content of Aboriginal title rather than its existence. BC submits that the legal incompatibility between fee simple title and Aboriginal title is the operative requirement to suspend the right of exclusive use and occupation grounded in

Aboriginal title. According to BC, that is because the fee simple interests are valid and entitle their holders to exclusive use and occupation of those lands. The Crown grants suspended the Aboriginal interest. The fee simple interests limit the nature and scope of any "presently exercisable right" that the plaintiffs may have. In this way, Aboriginal title rights, including the right to exclusive use and occupation, are displaced so long as those incompatible interests exist. BC says it may be that certain incidents of Aboriginal title — such as a limited economic component — could be consistent with the existence of fee simple interests.

[2125] In support of its displacement theory, BC submits that prior to a declaration of title, an Indigenous group has only an interest in land that is not yet legally recognized. The Crown may continue to manage the resource consistent with the honour of the Crown which requires it to respect unproven claims: *Tsilhqot'in* SCC at paras. 95 and 113. BC says it follows from this that the Crown had, at all relevant times, full authority to issue the Crown grants from which the current fee simple interests derive. As previously set out, I found that it did not. In any event, BC says the fee simple titles are legally distinct from the Crown grants and are valid irrespective of any purported defect in the Crown grants.

[2126] BC says that while Aboriginal rights are pre-existing rights, their effect depends on whether they have been legally recognized, and that a declaration of an Aboriginal right concerns the "presently exercisable right" and must take into account limitations on that right that have arisen prior to its proof: *Haida Nation* BCCA at paras. 28–32. A declaration in full form would ignore the fact that for over a century third parties have held the right to exclusive use and occupation of the Claim Area. It would create significant uncertainty to declare two sets of mutually exclusive rights in the same land, and disrupt valid social, political and economic interests.

[2127] BC says it is open to the Court to decline to make a declaration of Aboriginal title and instead make a finding of the plaintiffs' ancestors' historic use and occupation of the land which could serve as a base for modern negotiations. Or, if the Court considers it appropriate to declare Aboriginal title, any presently

exercisable right it declares must be subject to the existing fee simple titles, and any declaration should be limited to land owned by parties to this proceeding.

3. Plaintiffs' position

[2128] The plaintiffs submit that, although Canadian courts have grappled with the complex question of how fee simple and Aboriginal title could coexist, none have decided it. According to the plaintiffs, the jurisprudence Richmond relies on does not support Richmond's position or is from non-Canadian jurisdictions with fundamentally different legal regimes.

[2129] The plaintiffs say that *Delgamuukw* SCC does not say anything about the incompatibility of Aboriginal title and fee simple, and neither *Baker Lake* nor *Skeetchestn* conclude that fee simple and Aboriginal title cannot coexist. *Saugeen First Nation* ONSC and *Saik'uz* BCSC speak to co-existence of Aboriginal title and a public right of navigation, not fee simple, and are of no assistance in considering the relationship between fee simple and Aboriginal title.

[2130] The plaintiffs say *Haida Nation* BCCA provides that Aboriginal title cannot be efficiently litigated without a plea of infringement; it does not say that Aboriginal title should be defined by unjustified third party interests.

[2131] In sum, the plaintiffs say there is no overwhelming body of jurisprudence supporting the premise that a grant of fee simple in land is fundamentally inconsistent with Aboriginal title such that Aboriginal title is permanently displaced by private ownership.

[2132] The plaintiffs submit that, while no court has yet issued a declaration of Aboriginal title over fee simple lands, the SCC has never suggested that the test in *Tsilhqot'in* SCC would not apply. They say the converse is true, and that *Tsilhqot'in* SCC says the justification framework applies to third party property rights. The SCC did not define the Tsilhqot'in's Aboriginal title with reference to existing private interests and licenses on the land; it declared Aboriginal title first and then considered the infringement and justification framework.

[2133] In response to Richmond's position that fee simple interests are fundamentally inconsistent with Aboriginal title and that the Crown has permanently unburdened Aboriginal title from the land, the plaintiffs submit that interests in land — whether Crown, Indigenous, or private — are never absolute. Private fee simple rights can be affected by legislation, even to the extent of expropriation. There are also constraints on Aboriginal title.

[2134] The plaintiffs say there is no jurisprudence to support the assertion that Aboriginal title and fee simple interests cannot coexist. Further, academic writers have suggested examples where they could: see for example John Borrows, "Aboriginal Title and Private Property" (2015) 71:5 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 91 at 130–131.

[2135] The plaintiffs submit that, even if the Crown created valid third party interests to the Lands of Tl'uqtinus through the Crown grants of fee simple interest and Crown vesting of soil and freehold interest in Richmond, these historical Crown wrongs must be reconciled with Cowichan Aboriginal title. This work is not done by cancelling or circumscribing the content of a constitutional right. It is done via the SCC's justification framework; limits on Aboriginal rights are permitted only if justified.

[2136] Limiting Aboriginal title based on third party fee simple interests would give non-Aboriginal property rights superiority over Aboriginal title. Recognition of Aboriginal title would depend on what the Crown has done with the land since it dispossessed an Aboriginal people. This negates consideration of the Indigenous perspective.

[2137] The plaintiffs submit that the coexistence of Aboriginal title and private ownership should not be understood as a "zero-sum game", citing Borrows, "Aboriginal Title and Private Property" at 130. Aboriginal title can coexist at law and in fact with an estate in fee simple in the same tract of land. The two interests are reconcilable. This is done through the justification framework or through the Crown and Indigenous people negotiating reconciliation through modern treaties.

[2138] Lastly, the plaintiffs say under the *Recognition Act*, BC recognizes that the Haida Nation has Aboriginal title to land on Haida Gwaii. The *Recognition Act* confirms and continues fee simple estates, and interests in or rights in relation to land deriving from, burdening, or otherwise relating to such estates. BC has therefore recognized the coexistence of Aboriginal title and Crown granted fee simple estates and related interests. The *Recognition Act* confirms the Rising Tide Agreement, which includes the Haida Nation's agreement to honour the fee simple interests in Haida Gwaii, and provides that the Haida Nation may acquire and retire the fee simple interests.

4. Discussion

[2139] As I explain below, I do not find that the historical Crown grants of fee simple interest in the Cowichan Title Lands permanently displaced the plaintiffs' ancestors' Aboriginal title such that there is nothing left for the Cowichan. Richmond's displacement theory is without foundation in Canadian law and is, in essence, a form of extinguishment. It departs from the settled test for extinguishment the SCC articulated in *Sparrow*, *Gladstone*, and *Delgamuukw* SCC. Further, it rests on the notion that Aboriginal title and fee simple interests are fundamentally irreconcilable and cannot coexist, a proposition with which I do not agree.

[2140] I acknowledge that the *Recognition Act* and the Rising Tide Agreement illustrate how Aboriginal title and fee simple can coexist as legal interests through a negotiated agreement. I also accept BC's submission that a bilateral negotiated agreement does not alter the jurisprudence that I must apply in this case. The issue before me is whether and how a court declaration of Aboriginal title may be reconciled with fee simple interests. This question is unsettled in Canada. In considering this issue, I review what courts have said about the relationship between these interests.

[2141] The following principles on the relationship between Aboriginal title and fee simple emerge from the authorities and literature, which I discuss in further detail below:

a) The law regarding the effect of fee simple interests on Aboriginal title land is ambiguous and unsettled;

b) Neither Aboriginal title nor fee simple title is absolute;

c) Aboriginal title burdens land upon which fee simple estates have been granted; and

d) The exercise or application of Aboriginal title and fee simple title rights require reconciliation.

a) The law is ambiguous and unsettled

[2142] No court has conclusively ruled on the issue of compatibility between Aboriginal title and fee simple title. As set out below, courts have identified that the issue remains unsettled, and some have suggested it is impossible or improbable that Aboriginal title and fee simple estates can exist in the same area in their full form without conflicting. A review of the jurisprudence follows.

[2143] In an early Aboriginal title case, the 1979 decision in *Baker Lake*, Mahoney J. of the Federal Court stated in *obiter* at 565:

> The coexistence of an aboriginal title with the estate of the ordinary private landholder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land.

[2144] *Baker Lake* is an important case in the development of Aboriginal law. However, it was decided prior to the enactment of s. 35 of the *Constitution Act, 1982* and the development of the *Sparrow* framework, at a time when Aboriginal title was considered a type of usufructuary right. The Aboriginal title asserted in that case encompassed “only the right to hunt and fish as their ancestors did”: at 559. In light of the fundamental purpose of reconciliation embodied in s. 35 and the significant developments in the law with respect to how Aboriginal rights can be reconciled with the interests of broader society, these comments in *Baker Lake* are of little

assistance in considering the relationship between fee simple interests and Aboriginal title.

[2145] In the *Delgamuukw* litigation, the plaintiffs did not seek to recover any privately owned lands. Justice Macfarlane, writing for the majority of the Court of Appeal in 1993, offered a few general comments on the possible impacts of a fee simple grant. He observed "[a] fee simple grant of land does not necessarily exclude aboriginal use" and "[t]wo or more interests in land less than fee simple can co-exist": at paras. 230–231. The SCC overturned the Court of Appeal's decision in part and ordered a new trial.

[2146] In 2000, in *Skeetchestn*, the Court of Appeal heard an appeal related to the Registrar of Land Titles' refusal to register a certificate of pending litigation against certain lands, which the Crown had granted in fee simple, and to which the appellant claimed Aboriginal title. The court below had noted an "inherent conflict between fee simple title and aboriginal title": 2000 BCSC 118 at para. 5. On appeal, Justice Southin held that Aboriginal title is not a registrable interest and dismissed the appeal: at paras. 63–64, 68. She observed that "[s]ooner or later, the question of whether those who hold certificates of indefeasible title ... are subject to claims of aboriginal right must be decided": at para. 5.

[2147] In concurring reasons in *Skeetchestn*, Justice Mackenzie addressed the appellants' argument that the present use of the lands as a ranch was compatible with Aboriginal title but an intensive resort development would be incompatible. He noted this position has an inherent contradiction inasmuch as the claimed Aboriginal title and the fee simple title both involve rights to exclusive possession, which are mutually exclusive: at para. 72. However, Mackenzie J.A. also noted the appeal was not the place to decide larger questions of infringement, reconciliation and remedies surrounding Aboriginal rights in lands alienated by the Crown: at paras. 81–82.

[2148] That same year, the Ontario Court of Appeal in *Chippewas of Sarnia* protected the actions of innocent purchasers who traced their title to a faulty Crown deed, and sustained the non-Aboriginal land interest. This decision did not address

the coexistence of Aboriginal title and private landowner interests in the same lands, and is likely distinguishable from the situation in British Columbia. The Chippewas had transferred their lands directly to non-Crown purchasers, whereas private property owners in British Columbia cannot trace their title to any Aboriginal acquiescence: see Borrows, “Aboriginal Title and Private Property” at 123–124.

[2149] In 2005, before this Court in *Hupacasath First Nation v. British Columbia (Minister of Forests) et al*., 2005 BCSC 1712, the petitioners sought relief for an alleged breach of the provincial Crown’s duty to consult in relation to privately owned lands. The petitioners asserted Aboriginal title to their traditional territory but did not challenge the original Crown grant or the fee simple titles. Justice Smith reviewed the case law and noted it had not yet been decided what meaning, if any, Aboriginal title continues to have once the land over which it is asserted has been granted in fee simple to a third party: at para. 171. Justice Smith left this question open. She observed that because of the private ownership of the land, and the position taken by the Province in treaty negotiations, the prospect that the Hupacasath would obtain exclusive possession of privately owned lands or ownership of the resources on them “seems remote”: at para. 244. She found, on the existing state of the law, the petitioners’ Aboriginal rights to that land was highly attenuated: “their claimed aboriginal title, if it has not been extinguished, seems very unlikely to result in the Hupacasath obtaining exclusive possession” of the privately owned lands in future: at para. 249.

[2150] In 2007, in *Tsilhqot’in* BCSC, Justice Vickers considered the effect of fee simple interests on the Tsilhqot’in’s Aboriginal title claim. He found that the absence of any plea of infringement of Tsilhqot’in title and rights existing on private lands meant he was unable to make a declaration of such rights in relation to those lands: at para. 993. Citing *Delgamuukw* SCC, he noted that as the jurisdiction to extinguish Aboriginal title has only ever been held by the federal government, the Province had not extinguished Aboriginal title by a conveyance of fee simple: at para. 997. Accordingly, the Tsilhqot’in’s Aboriginal title was not extinguished by the private interests in the claim area that were derived from the Province:

> [998] Thus, regardless of the private interests in the Claim Area (whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province), those interests have not extinguished and cannot extinguish Tsilhqot'in rights, including Tsilhqot'in Aboriginal title.
>
> [999] What is not clear from the jurisprudence are the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area. While they have not extinguished the rights of the Tsilhqot'in people, their existence may have some impact on the application or exercise of those Aboriginal rights. This conclusion is consistent with the view of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CanLII 16991 (ON CA), [2001] 1 C.N.L.R. 56 (Ont. C.A.).
>
> [1000] Reconciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use. Such a task has not been assigned to this Court by the issues raised in the pleadings.

[2151] As above, Justice Vickers found that the consequences of Aboriginal title on the various private interests were unknown. While those interests had not extinguished the rights of the Tsilhqot'in people, their existence may have had some impact on the application or exercise of their Aboriginal rights. Justice Vickers identified that those competing interests would need to be reconciled.

[2152] On appeal, the Tsilhqot'in no longer sought a declaration of Aboriginal title over privately owned lands and the SCC did not consider the issue.

[2153] In *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, Justice Smith issued reasons related to her 2005 decision in *Hupacasath*. Regarding the private lands at issue in the proceedings, Justice Smith noted that her reference to the "existing state of the law" in *Hupacasath* was deliberate, as "the law has not yet yielded any definitive answer to the question of what remains of aboriginal rights, including aboriginal title, after lands have become privately owned through conveyance of fee simple.": at para. 218. She referenced Justice Vickers' statements at paras. 997–1000 in *Tsilhqot'in* BCSC that the Province has no jurisdiction to extinguish Aboriginal title and such title was not extinguished by a conveyance of fee simple title: at para. 219. She reiterated that "the law has not yet been clarified as to the inter-relationship, in the absence of treaties, between

aboriginal rights and title on the one hand and fee simple title on the other.": at para. 222.

[2154] In *Louis v. British Columbia (Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070, aff'd 2013 BCCA 412, leave to appeal to SCC ref'd 35630 (February 27, 2014), Justice Crawford considered the strength of a claim of Aboriginal title to the location of a new mill located on land held in fee simple. He found that the Crown's preliminary assessment — that the strength of the Stellat'en claim was tempered somewhat by overlapping Aboriginal claims and the existence of fee simple — was correct: at para. 174.

[2155] A number of interlocutory decisions of this Court have since noted that the nature of the relationship between fee simple interests and Aboriginal title remains unanswered. For example, in *The Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665, the Court considered two applications in proceedings in which the Haida Nation sought a declaration of Aboriginal title over all lands on Haida Gwaii, including private land held in fee simple. BC sought an order staying proceedings until the plaintiffs elected either not to disturb the tenures, permits and licenses of third parties or to join those parties as defendants. Canada sought an order that the plaintiffs provide notice of the proceeding to fee simple title holders. Justice Fisher dismissed both applications, noting that the law has not yet clarified the relationship between Aboriginal title and fee simple title: at para. 30. The Court noted "there is no authority that aboriginal title ousts fee simple title, or vice versa": at para. 32.

[2156] In *Giesbrecht v. British Columbia*, 2018 BCSC 822, Justice Affleck considered an application to strike portions of two responses to civil claim, including an allegation that fee simple title had displaced any Aboriginal title. The title to the lands at issue was held by public bodies, almost entirely in fee simple. The Court dismissed the application, noting a lack of binding authority addressing the relationship between existing Aboriginal title to land and Crown grants of title in fee simple to the same land: at para. 76. The Court noted the law around Aboriginal

rights and title has evolved considerably and "is far from reaching a state of stasis on the issue of the relationship between Aboriginal title and fee simple title": at para. 79.

[2157] Later, in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311, the Court heard appeals from other orders made in the same proceedings, which concerned joinder of parties, issuance of third-party proceedings, and pleadings amendments. Justice Abrioux, writing for the Court, noted that whether Aboriginal title and fee simple estates may coexist has broad implications for land ownership and use in British Columbia and beyond: at para. 3.

[2158] The Court in *Mi'kmaq of P.E.I. v. Province of P.E.I. et al.*, 2019 PECA 26, leave to appeal to SCC ref'd, 39023 (April 23, 2020), considered an appeal from a decision on judicial review. The PEI Mi'kmaq, who claim Aboriginal title to PEI, sought judicial review of the Province's approval of a conveyance of a golf course and resort to a private company, alleging a breach of the duty to consult. The judicial review and the appeal were both dismissed. In addressing the PEI Mi'kmaq's submission that conveyance of Crown land in fee simple is a potential adverse effect, the Court observed "Because the competing Aboriginal and fee simple title both have the essential quality of exclusive use and occupation of the land including the right to exclude all others they cannot coexist": citing *Delgamuukw* SCC at paras. 116–118; *Tsilhqot'in* SCC; Bruce Ziff: Principles of Property Law, 7th Ed. (Thompson Reuters, 2018), p. 229. BC relies on this observation of the PEI Court of Appeal, and I have included it for completeness. It is of little assistance as it appears to only summarize the appellants' submissions and in any event neither *Delgamuukw* SCC nor *Tsilhqot'in* SCC support the proposition that fee simple and Aboriginal title cannot coexist.

[2159] In *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the SCC addressed a motion to strike portions of the Innu's claim. The dissenting justices noted the interaction between Aboriginal title claims and third parties' property rights remains unsettled: at para. 293.

[2160] In *Ignace v. British Columbia (Chief Inspector of Mines)*, 2021 BCSC 1989, a judicial review of a decision to issue an amended permit to operate the McAbee Quarry, Justice Gomery considered the content of the duty to consult that was owed the Stk'emlupsemc Te Secwepemc Nation (SSN). He assessed the strength of the SSN's Aboriginal title claim to territory in which the quarry was located. It was common ground that the claim was strong, but he found it was not so strong insofar as it extended to the quarry itself, which was situated on land owned in fee simple by virtue of Crown grants dating back to the 19th century. The SSN accepted that its case was "weaker" in this regard. Justice Gomery determined that it was "substantially weaker": at para. 124.

[2161] In *Chippewas of Saugeen First Nation v. Town of South Bruce Peninsula et. al.*, 2023 ONSC 2056 [*Chippewas of Saugeen* ONSC], rev'd on other grounds, *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town)*, 2024 ONCA 884 [*Chippewas of Saugeen* ONCA], Justice Vella considered the impact of fee simple interests on 1.4 miles of beachfront on Lake Huron which had been improperly excluded from the boundaries of the Saugeen's reservation contrary to its reserve entitlement under Treaty 72. The defendant landowners resisted the Saugeen's claims on the grounds that they had legal title to those lands based on their deeds which derived their root of title from the original patents granted by Canada when the lands were originally sold, as well as various defences. Justice Vella determined that title reverted back to the Saugeen, and that its unceded reserve lands displaced the fee simple rights and interests of the private landowners. The Crown patents had not extinguished the Saugeen's interests in the lands. Justice Vella found most of the landowners had not established that they met the elements of *bona fide* purchasers without notice, with the exception of one landowner. She found it would be inequitable to apply the defence to deprive the Saugeen of their interest:

> [603] I have considered Saugeen's interest in its reserve territory, its connection to the land as part of its cultural identity, its long-standing efforts to have the reserve boundary re-established or re-surveyed and its long-standing assertions that the Disputed Beach is part of their reserve balanced against the claims of the defendant Landowners, including Dobson. Fairness

> dictates that a rigid application of the doctrine of *bona fide* purchaser without notice would render an injustice in the circumstances of this case.
>
> [604] Unlike the situation in *Chippewas of Sarnia*, the subject patents here were issued on the basis of a survey that was not conducted in accordance with the honour of the Crown. The Crown should not have approved Rankin's survey in which Rankin determined to resolve a latent ambiguity in a manner that prejudiced Saugeen and precluded any consultation with Saugeen regarding this alteration of the northern terminus of the east boundary from what was stipulated in Treaty 72. Unlike the situation in *Chippewas of Sarnia*, the private and Town land interests are far less in number and magnitude. Unlike the situation in *Chippewas of Sarnia*, I find that a denial of Saugeen's constitutionally protected Treaty right to its reserve territory would amount to an egregious and substantial denial.
>
> [605] I therefore conclude that it would be inequitable to apply the defence of *bona fide* purchaser without notice to deprive Saugeen of their reserve interest in the Disputed Beach under the overarching principle of reconciliation in the circumstances of this case.

[2162] The Ontario Court of Appeal dismissed all the appeals, except for Canada's cross-appeal on the issue of the Crown's pre-Confederation liability: 2024 ONCA 884. The Court of Appeal found that while the Court had erred in limiting the *bona fide* purchaser defence in respect of defendants who inherited their interests in land, it declined to interfere with Justice Vella's determination that this equitable defence is not absolute and should not operate to defeat the Saugeen's otherwise unceded and constitutionally protected interest in its reserve lands. The Court of Appeal agreed that the *bona fide* purchaser for value defence is not absolute, but rather an equitable tool to achieve fairness: at para. 241, citing *Canadian Imperial Bank of Commerce v. Pena*, 2022 ONSC 6941 at para. 13; *Urban Metal Contracting Ltd. v. Zurich*, 2022 ONCA 589, 163 O.R. (3d) 652 at para. 59. The Court found there was no reason that a treaty-protected reserve interest should, in every case, give way to the property interest of a private purchaser, even an innocent, good faith purchaser for valuable consideration. That approach would be inconsistent with the decision in *Chippewas of Sarnia*, fail to recognize the *sui generis* nature of Indigenous interests in land, and would not move us closer to reconciliation: at para. 241.

[2163] In *Wolastoqey Nations v. New Brunswick and Canada, et al*, 2024 NBKB 203, the Court heard an interlocutory application in proceedings in which the plaintiffs sought a declaration of Aboriginal title, including over fee simple lands. The plaintiffs

sought consequential relief against the Crown and private corporate entities (the Industrial Defendants) but not against strangers to the claim who held fee simple interests in the claim area. Justice Gregory granted the motion releasing the Industrial Defendants from the litigation and striking aspects of the plaintiffs' claim which sought recovery of land other than as against the Crown. She concluded that Aboriginal title could be declared over privately owned lands held in fee simple, and was of the view that resolution of conflicting interests in land would initially fall on the Crown as part of the Crown's legal duty upon declaration of an Aboriginal right: at para. 177. She observed: "It is through this *sui generis* relationship, in which the Crown stands as both a buffer, where necessary, and a conduit, where possible, between Aboriginal and non-Aboriginal individuals and settler societies.": at para. 181.

[2164] The defendants also rely on case law regarding the relationship between Aboriginal title and the public right of navigation as illustrative of the conflict between Aboriginal title and fee simple, as set out below.

[2165] In *Saugeen First Nation* ONSC, Justice Matheson noted that control is a core element of title to land: at para. 325. In closing argument, Saugeen Ojibway Nation proposed an alternative, that the Court define Aboriginal title to submerged land differently, removing the right to exclude the public for purposes of navigation. Justice Matheson found that this concession would give rise to a fundamental inconsistency between Aboriginal title and common law rights, and that it would not translate into Aboriginal title: at para. 326. Justice Matheson noted her conclusion did not rule out Aboriginal title to submerged land in other circumstances, noting that the impact on public navigation would be very significant for the particular area before her, but that may not be the case for all inland lakes, rivers and streams: at para. 330.

[2166] Saugeen Ojibway Nation appealed. The Ontario Court of Appeal found it was unnecessary to assess whether the public right of navigation is incompatible with Aboriginal title: *Chippewas of Nawash* ONCA at para. 96. Concerns about Aboriginal

title to submerged land and the public right of navigation cannot be addressed until the extent of Aboriginal title, if any, is determined: at para. 108. Aboriginal title to submerged land is to be determined through applying the test in *Tsilhqot'in* SCC: at para. 97. Aboriginal title must be established before a court can assess "whether such Aboriginal title to submerged land was not cognizable due to common law public rights, or whether such Aboriginal title would have such a substantial effect on public navigation as to create an incompatibility between Aboriginal title and the public right": at para. 97. This echoes *Tsilhqot'in* SCC, where the SCC noted that the establishment of Aboriginal title precedes the justification analysis (at para. 80), and in my view suggests that the infringement/justification analysis is the appropriate framework within which to evaluate limits on Aboriginal title.

[2167] In this case, as set out in Part 5 of my reasons, I find that the Cowichan established Aboriginal title to a narrow strip of submerged land, and I am satisfied that based on the extent and geographic location of the submerged land, there will be no substantial effect on the public right of navigation such that an incompatibility arises.

[2168] The relationship between Aboriginal title and the public right of navigation remains an open question and I expect much will turn on the circumstances of individual cases. I do not find the jurisprudence regarding the relationship between Aboriginal title and the public right of navigation to be of much assistance in considering the relationship between Aboriginal title and fee simple title.

[2169] Lastly, I turn to the cases Richmond relies on from Australia. While Canadian courts sometimes consider Australian Aboriginal law jurisprudence, there are significant differences between the two legal regimes. In particular, "native title" in Australia is not constitutionally enshrined and is created by statute; . In *Mabo*, the High Court of Australia applied a "clear and plain" test for extinguishment, and found that where the Crown "validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been

extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests": at para. 83. A similar conclusion was reached by the High Court of Australia in *Fejo*: "[T]he rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title.": at para. 42.

[2170] As previously explained, the SCC reached a different conclusion regarding the standard and jurisdiction for extinguishment of an Aboriginal right. Prior to the entrenchment of Aboriginal rights under s. 35 of the *Constitution Act, 1982*, the power to extinguish Aboriginal rights rested exclusively with the federal government. The Province had no authority to extinguish Aboriginal rights, through a Crown grant of fee simple or otherwise. Richmond's argument that the Cowichan's Aboriginal title was permanently displaced through the issuance of the Crown grants, as a result of an asserted fundamental incompatibility between Aboriginal title and fee simple interests, is tantamount to extinguishment and does not meet the standard for extinguishment. The issuance of the Crown grants did not extinguish or otherwise "permanently displace" or defeat the Cowichan's Aboriginal title. Whether a federal grant of land could meet the standard of clear and plain intention to extinguish is a question for another court.

[2171] I turn back to the Canadian jurisprudence. In summary, no Canadian court has conclusively ruled on the issue of compatibility between Aboriginal title and fee simple title. Some courts have suggested it is impossible or improbable that Aboriginal title and fee simple estates can exist in the same area in their full form without conflicting: see *Baker Lake* at 565; *Skeetchestn* at para. 72. This is because on the one hand, the content of Aboriginal title encompasses ownership rights, including the right to exclusive use and occupation of the land to the exclusion of others, and on the other hand, fee simple title permits the owner to exercise every conceivable act of ownership upon it or with respect to it: *Delgamuukw* SCC at paras. 166, 185; *Tsilhqot'in* SCC at paras. 73, 88; *Kwikwetlem* at para. 69; Anne Warner La Forest, Law of Real Property, 3rd ed, vol 1 (Toronto: Thomas Reuters, 2019) at Ch. 4, 4.10.

[2172] Other courts have suggested that Aboriginal title and fee simple interests may coexist on the same land, and that the existence of fee simple interests will have consequences for the exercise and application of Aboriginal title: see *Tsilhqot'in* BCSC at para. 999. On appeal, the SCC suggested that transfers of Aboriginal rights to third parties are infringements that must be justified: at para. 124.

[2173] *Chippewas of Sarnia* is an example of an Aboriginal interest in land yielding to the interests of fee simple owners. Most recently, in *Chippewas of Saugeen*, the Ontario courts have found that fee simple interests may yield to a treaty-protected reserve interest. The approach of the courts in weighing the equities in the context of competing rights in these cases is instructive.

[2174] It is plain from a review of the case authorities that the law in this area is unsettled, but I do not find that the law supports a conclusion that fee simple title and Aboriginal title cannot coexist. Rather, the trend in the jurisprudence suggests that they can coexist, and that where Aboriginal rights and third party rights coexist, the governing approach is reconciliation of those rights through engagement between the Aboriginal rights-holder and the Crown. Further, courts will adopt a case-by-case approach in considering the impact of fee simple interests on constitutionally protected Aboriginal interests in land.

[2175] In embarking on that exercise, I consider the words of Justice L'Heureux-Dubé in *Gladstone*. She said that when defining the nature and extent of constitutionally protected Aboriginal rights, it is important to keep in mind traditional and fundamental interpretive canons related to Aboriginal law and to s. 35. Section 35 must be given a generous, large, and liberal interpretation, and uncertainties, ambiguities, or doubts are to be resolved in favour of Aboriginal peoples. In my view, these general comments about s. 35 are applicable to assessing how Aboriginal title may be impacted by fee simple interests.

b) Neither Aboriginal title nor fee simple title is absolute

[2176] Aboriginal title and fee simple interests are not unqualified interests. Aboriginal title comes with restrictions, and rights that are recognized and affirmed

are not absolute: *Tsilhqot'in* SCC at paras. 74, 119. Aboriginal title has inherent constraints: (1) it is inalienable, except to the Crown; (2) it is held communally; and (3) it cannot be encumbered, developed or used in ways that would prevent future generations of the group from using and enjoying it: *Delgamuukw* SCC at paras.113, 115, 117; *Tsilhqot'in* SCC at paras. 67, 74, 94. Further, it can be infringed where doing so is justified.

[2177] In *Tsilhqot'in* BCSC, Vickers J. noted that the existence of various private interests in the claim area at issue may have some impact on the *application or exercise* of the underlying Aboriginal rights, including Aboriginal title: at para. 999.

[2178] Of note, historically, Aboriginal interests in land in British Columbia have not been well-protected. John Borrows describes this history in "Aboriginal Title and Private Property" (citations omitted):

> In much of British Columbia Aboriginal title was given to third parties without any transfer, sale or surrender. Indigenous land rights were unilaterally pre-empted by settlers throughout most of British Columbia history without any input from Aboriginal peoples. This process continues today. The same statute that granted the right of preemption to settlers denied the same to Aboriginal peoples. Now, with each judicial recognition of Aboriginal title, Aboriginal land-holdings might expand and be more adequately protected. As a result non-Aboriginal property interests may from time-to-time diminish in favour of Aboriginal peoples.

[2179] Fee simple title is the largest estate in land and the closest thing to absolute ownership in common law. In *Kwikwetlem*, the Court of Appeal confirmed that "a grant of fee simple title confers the broadest bundle of private rights to property, on a potentially infinite timescale": at para. 69 citing Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 168. A grant of fee simple title "amounts to a declaration by the Crown that the owners and their successors in title may do with the property as they wish, within the limits set by the law.": at para. 69.

[2180] Nonetheless, there are limits. Limits to fee simple title include public policy (such as the rule against perpetuities), restrictions (such as the law of nuisance), modern statutory restraints such as family disinheritance and matrimonial property legislation, environmental protection statutes, planning and zoning legislation,

expropriation by the state, aeronautics legislation, and the right of the Crown to minerals: La Forest, *Law of Real Property*, Ch. 4 at 4.10.

[2181] Rights exist in relation to and are limited by the rights of others. In *Chippewas of Sarnia*, the Court noted that the right asserted by the complaining party must be considered in relation to the rights of others: at para. 264. Likewise, private owners cannot automatically be granted entitlements in relation to Aboriginal title land without weighing the consequences of these actions for Aboriginal peoples: Borrows, “Aboriginal Title and Private Property” at 122. A recent example where that principle was applied to protect an Aboriginal interest in land is found in *Chippewas of Saugeen* ONCA, where the Ontario Court of Appeal held at para. 241: “There is no principled reason that a treaty-protected reserve interest of a First Nation should, in every case, give way to the property interest of a private purchaser, even an innocent, good faith purchaser for valuable consideration. Such an approach is inconsistent with this court’s decision in *Chippewas of Sarnia*, fails to recognize the *sui generis* nature of Indigenous land interests, and would not move us closer to reconciliation.”

c) Aboriginal title burdens land upon which fee simple estates have been granted

[2182] Aboriginal title is not inferior to other rights and interests in land. Uncertainty should not cause courts to prioritize fee simple interests over Aboriginal title.

[2183] Aboriginal title is *sui generis* — it arises from possession before the assertion of British sovereignty, whereas estates such as fee simple are derived from Crown title and arise afterward. Aboriginal title predates colonization by the British and survives British claims of sovereignty: *Tsilhqot’in* SCC at para. 14. This suggests a second source for Aboriginal title — the relationship between common law and pre-existing systems of Indigenous laws: *Delgamuukw* SCC at para. 114. The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal title-holders, and it is this relationship that makes Aboriginal title *sui generis*: *Tsilhqot’in* SCC at para. 72.

[2184] Aboriginal title is a unique proprietary interest, and it is wrong to equate it with interests such as fee simple title: *Delgamuukw* SCC at para. 190. Aboriginal title is *sui generis* in the sense that its characteristics cannot be completely explained by reference to common law rules of real property or to rules of property found in Indigenous legal systems. It must be understood by reference to both common law and Aboriginal perspectives: *Delgamuukw* SCC at para. 112.

[2185] Analogies to other forms of property ownership, such as fee simple title, may help us understand aspects of Aboriginal title, yet they cannot dictate precisely what Aboriginal title is or is not: *Tsilhqot'in* SCC at para. 72, referencing *Delgamuukw* SCC at para. 190.

[2186] British Columbia took its underlying title in land in the province subject to Aboriginal title. Under s. 109 of the *Constitution Act, 1867*, the provinces' ownership of land is subject to "any Interest other than that of the Province in the same". Aboriginal title is such an interest. In 1888, the Privy Council stated in *St. Catherine's Milling* that lands in the Province are "available to [the Province] as a source of revenue whenever the estate of Crown is disencumbered of the Indian Title": at 59. Provincial ownership of land is qualified by Aboriginal title and the provinces' associated duties: *Delgamuukw* SCC at para. 175; *Haida* SCC at para. 59.

[2187] In *Tsilhqot'in* SCC, the Court held "[t]he 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": at para. 69. The content of the provincial Crown's underlying title is what is left when Aboriginal title is subtracted from it: at para. 70. What remains of the Crown's underlying title to lands held under Aboriginal title is 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: at para. 71.

[2188] As above, I reject the submission that the Cowichan's Aboriginal title was permanently displaced when the provincial Crown grants of fee simple were issued. Rather, I find that the Cowichan's Aboriginal title burdened and burdens the land

over which the Crown grants of fee simple interest were issued. Cowichan Aboriginal title crystallized at sovereignty, although it was not recognized or established for another 179 years. While the fee simple titles in the Cowichan's land have changed hands many times and continue to overlie Aboriginal title today, that does not mean Aboriginal title is displaced. I further consider BC's submissions regarding suspension or temporary displacement when I consider what relief the Cowichan are entitled to.

[2189] I also find that, as Aboriginal title and Crown title coexist, it follows that Aboriginal title and fee simple can coexist, as the latter is a derivative of Crown title. In *Guerin*, Justice Dickson explained Crown title was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival: at 377–379. I find that the Cowichan's Aboriginal title, which is grounded in the prior occupation of the Cowichan's ancestors, and a constitutionally protected interest in land, is a senior interest in land vis-a-vis the fee simple titles which derive from the Crown grants.

[2190] In my view, Aboriginal title does not necessarily defeat fee simple title, just as it does not defeat the underlying title of the Crown. Rather, where Aboriginal title and fee simple interests exist in the same land, the respective interests must be addressed within the broader framework of reconciliation. This is an exercise which engages the Crown, and which must be done with regard to the particular circumstances and interests at play.

[2191] Justice Lambert's dissent in *Delgamuukw* BCCA included his view that Aboriginal title is a burden on fee simple title, just as it is a burden on the allodial Crown title. Although the resolution of those competing interests presents problems, their existence does not deny Aboriginal title: at para. 945. As the SCC overturned the Court of Appeal's decision and ordered a new trial, these comments should be treated carefully, but merit consideration.

[2192] The academic literature suggests that, as private property law recognizes shared uses of land, Aboriginal title could be considered yet another limit on private

ownership, with the additional weight of its constitutional status. This suggestion is rooted in the understanding that Aboriginal title in British Columbia is a prior and senior right to land: Borrows, “Aboriginal Title and Private Property” at 109 (referencing *Delgamuukw* SCC at para. 114), 130.

[2193] I agree that Aboriginal title is a prior and senior right to land. It is not an estate granted by the Crown, but rooted in prior occupation. It is constitutionally protected. The question of what remains of Aboriginal title after the granting of fee simple title to the same lands should be reversed. The proper question is: what remains of fee simple title after Aboriginal title is recognized in the same lands?

[2194] I agree with Professor Borrows that this should not be a zero-sum game. Both interests in land may be valid, and the exercise of the rights that come with those interests should be reconciled. The infringement/justification inquiry with regard to any fee simple-related infringements permits a principled reconciliation of Aboriginal rights with the interests of all Canadians. This inquiry speaks to the interests of the broader community. The outcome will affect if and how Crown conduct can limit the exercise of Aboriginal title and will likely impact aspects of other existing interests in land.

d) The exercise and application of Aboriginal title and fee simple title rights require reconciliation

[2195] Together, these principles indicate that the exercise of Aboriginal title and fee simple interests can coexist, but may not be exercised in their fullest form — the exercise of either will require modification or limitation. As I have found, the Cowichan’s Aboriginal title is a senior and prior interest and burdens the Cowichan Title Lands upon which fee simple estates have been granted. These principles will inform the reconciliation of the exclusive occupation of the lands at issue in this litigation, and perhaps possible future proceedings or negotiations. The “governing ethos” in the context of resolving land claims should be one of reconciliation, rather than competing interests: *Tsilhqot’in* SCC at para. 17.

[2196] Because reconciliation is the reason s. 35 was included in the *Constitution Act, 1982*, and because the rights it protects "must be defined in light of this purpose" (*Van der Peet* at para. 31), it is a central concept to consider when the Court is required to go beyond the guidance of established jurisprudence.

[2197] The principle of reconciliation has been the subject of much Canadian case law. An early meaning directs attention towards a 'task' of reconciliation: the 'reconciliation' of the pre-existence of Indigenous societies in Canada with Crown sovereignty and settler interests granted thereunder: see *Van der Peet* at para. 31.

[2198] Reconciliation is also aimed at establishing and maintaining a mutually respectful relationship between Indigenous and non-Indigenous peoples in this country and a just and lasting settlement of Aboriginal claims. This is traceable to McLachlin J.'s dissent in *Van der Peet*, before its later adoption by a majority of the SCC in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*], and subsequent adoption by the Truth and Reconciliation Commission of Canada and in other jurisprudence. At para. 230, she wrote:

> It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest, s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

[2199] In *C-92 Reference*, the SCC unanimously emphasized the goal of "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country": at para. 89, citing the Truth and Reconciliation Commission of Canada.

[2200] In my view, where possible, a court should favour outcomes that promote this type of relationship into the future.

[2201] Additionally, as a means of achieving reconciliation, priority is placed upon negotiation over litigation: see *Haida* SCC at para. 14; *Shot Both Sides v. Canada*, 2024 SCC 12 [*Shot Both Sides*] at paras. 61, 71; *C-92 Reference* at paras. 77, 90; *Desautel* SCC at para. 87; *Delgamuukw* SCC at para. 187; *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 at para. 297.

[2202] In my view, reconciliation of the Cowichan's Aboriginal title with the Crown grants of fee simple interest is appropriately considered through the established *Sparrow* framework. As set out in Part 7 of my reasons, I do not accept BC's position that the Cowichan's Aboriginal title should be defined with reference to third party interests in land, such that Aboriginal title is displaced by those interests. This would lead to an absurd result where Aboriginal rights would be defined by limitations arising from the Crown's improper conduct prior to a declaration, undermining the purpose of s. 35 which protects Aboriginal title and constrains the Crown's conduct with respect to same. I agree with the plaintiffs that the infringement/justification analysis is the appropriate framework through which to reconcile the third party interests in Aboriginal title land that are derived from Crown grants or other vesting of interests in land, where these interests persist at the time Aboriginal title is recognized.

[2203] In *Tsilhqot'in* SCC, McLachlin C.J.C. provided clear direction on the analytical framework for considering infringements of Aboriginal title and whether infringements are justified. The Court did not limit the Tsilhqot'in's Aboriginal title or define it based on existing forestry interests. The Court held that directly transferring Aboriginal property rights to third parties will plainly be a meaningful diminution of Aboriginal groups' ownership rights, and amount to an infringement that must be justified in cases where it is done without Aboriginal consent: at para. 124. On BC's displacement theory, the Tsilhqot'in's Aboriginal title would have been what was left over once third party rights to cut timber was subtracted from it. The Court also recognized that a declaration of Aboriginal title may require the Crown to re-evaluate historical conduct: at para. 92.

[2204] In Parts 7 and 8 of my reasons, I apply the *Sparrow* framework to the Crown grants of fee simple interest and find that they unjustifiably infringe Cowichan Aboriginal title.

e) Summary

[2205] In summary, I find that Aboriginal title and fee simple titles can coexist, and where they do, the exercise of one form of title must yield to the other so long as they are both present on the same parcel of land.

[2206] Once Aboriginal title is established by court declaration, 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: at para. 90. As an Aboriginal title holding group, the Cowichan may now seek these adapted remedies.

[2207] For Aboriginal title to be exercisable in fact, in the face of private third party interests, the title holding group must seek remedies to enforce that title. Otherwise, title simply exists as recognized title in law. This follows from the discussion in *Chippewas of Sarnia*, where the Court considered a patent that suffered from a defect that rendered it subject to attack. For practical purposes, a patent suffering from a defect that renders it subject to attack will continue to exist and to have legal effect, unless and until a court decides to set it aside: at para. 261.

[2208] In the same vein, fee simple interests and the exercise of associated rights will go unaffected in practice when Aboriginal title is recognized over that land, unless or until the Aboriginal title holder successfully takes remedial action in respect of the fee simple interests. Or, preferably, until the matter is resolved through negotiation between the Aboriginal title-holding group and the Crown. In this case, the Cowichan do not challenge the validity of the private landowners' fee simple interests. In my view, the Cowichan's Aboriginal title and the private fee simple titles will exist in the same land at the same time until future litigation or negotiation further modifies them and/or clarifies the practical aspect of the relationship. This goes beyond what I am asked to do in this case. With the findings that I make, and the

relief that I grant, the parties will be equipped to return to the bargaining table to work out a resolution. As Gregory J. set out in *Wolastoqey*, reconciliation of Aboriginal title with the private interests will initially fall to the Crown (together, with the Cowichan), to negotiate and reconcile: at para. 171. I return to this point in Part 11.

C. INDEFEASIBLE TITLE UNDER THE *LAND TITLE ACT*

[2209] The above discussion dealt with the basis for my determination that the Cowichan's Aboriginal title was not displaced by the Crown grants of fee simple interest, as well as my determination that Cowichan Aboriginal title and fee simple titles can coexist on the Cowichan Title Lands.

[2210] In this case, the Cowichan do challenge the validity of the fee simple interests in the Claim Area that are held by Richmond and Canada. Specifically, the plaintiffs seek a declaration that the fee simple titles and interests in the Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands (except in respect of the YVR Fuel Projects lands) are defective and invalid, in whole or in part.

[2211] Accordingly, I turn now to Richmond's defence that ss. 23 and 25 of the *LTA* bar a declaration that Richmond's fee simple titles in the Cowichan Title Lands are defective and invalid, in whole or in part (the "Richmond Fee Simple Declaration") irrespective of the merits of the plaintiffs' claim. Canada does not argue that the *LTA* bars the relief the plaintiffs seek.

1. Richmond's position

[2212] Richmond is the registered owner of fee simple interests and holds a Certificate of Indefeasible Title with respect to each of the lands Richmond owns in the Claim Area. With respect to Richmond's land, I found Aboriginal title over Lots E and K.

[2213] Richmond says ss. 23 and 25 of the *LTA* are a complete statutory defence to the Richmond Fee Simple Declaration. Regardless of the Cowichan's Aboriginal title,

Richmond is indefeasibly entitled to its land and there is an absolute bar and estoppel in this action to the extent it seeks the Richmond Fee Simple Declaration.

[2214] Richmond says subsection 23(2) is at the heart of the *LTA*, as it provides that a person registered in the Land Title Office as the owner of a fee simple interest in a property is indefeasibly entitled to that fee simple interest, subject only to certain narrow exceptions. Richmond relies on *Heller v. The Registrar, Vancouver Land Registration District and Heller* (1960), 26 D.L.R. (2d) 154 in which the Court of Appeal explained that "indefeasible" means "cannot be defeated, revoked or made void": at 160. Section 25 of the *LTA* compliments s. 23(2) by precluding an action for recovery of land against a registered owner.

[2215] Accordingly, by virtue ss. 23 and 25 of the *LTA*, Richmond is indefeasibly entitled to its registered fee simple interests in the Cowichan Title Lands. The Richmond Fee Simple Declaration cannot be made because it would dispossess Richmond of lands it currently owns.

[2216] Richmond says whether the Crown grants were made without authority is irrelevant, because s. 23(2) of the *LTA* cures any defect in the original Crown grants.

[2217] Richmond also says that the Legislature was competent to "legislate away" Aboriginal title through the *LTA* prior to 1982. As I previously set out in my discussion of extinguishment, the Province had no such jurisdiction. I consider this argument no further.

[2218] Richmond acquired Lots E and K through municipal tax sales. Richmond argues that the historical *Municipal Act*, as amended, is a complete defence to the Richmond Fee Simple Declaration. Even if the plaintiffs were correct that the municipal statutes vested land in Richmond, the Claim Area was purged and disencumbered of any Aboriginal title the plaintiffs' ancestors had through the municipal tax sales in the 1920s and 30s. The facts surrounding the tax sales are set out in Part 7 and I address the applicability of this defence in that section.

2. British Columbia's position

[2219] BC submits that the *LTA* applies to the Claim Area and the relief sought as a matter of statutory interpretation. BC says the *LTA* is consistent with the *BC Terms of Union*, the *Constitution Act, 1867*, and does not infringe Aboriginal title, or if it does, any infringement is justified.

[2220] BC says that the independent validity of the current fee simple titles is guaranteed by the *LTA* and those titles are therefore a limit on the content of any Aboriginal title. Additionally, the honour of the Crown should weigh in assuring the property rights of fee simple title owners flowing from a Crown grant: *Skeetchestn* at para. 5.

[2221] As a matter of statutory interpretation, the *LTA* applies. The point of the Torrens system is to ensure the security of titles registered under it; title is validated by public registration that is independent of the interests of the prior owners. BC says the *LTA* must capture the broadest range of challenges to title so as to accomplish this purpose.

[2222] The *LTA* is valid provincial legislation. The fee simple interests derived from the Crown grants are independently valid, and their validity is also guaranteed by the *LTA*, regardless of any defect in the Crown grants. BC says a declaration that the plaintiffs are entitled to the Lands of Tl'uqtinus as against BC would be contrary to the *LTA* because a declaration that the plaintiffs are entitled to lands registered in fee simple to a third party would undermine the guarantee of indefeasibility in s. 23 and contravene s. 25.

[2223] BC submits that "persons" under s. 23 are any parties that might bring a challenge against a registered title in court. BC further submits in regard to s. 25 that an indefeasible title is not only protected against actions for recovery of land brought by "persons"; it is protected against any entity that might bring a challenge.

[2224] The Court should not exercise its discretion to issue a remedy undercutting the title registration system. BC says that, as the *LTA* guarantees indefeasible title

through registration, ruling it inapplicable would deprive others of their interests to which the legislation applies, and undermine the foundations of the system impermissibly, creating uncertainty and dispute.

3. Plaintiffs' position

[2225] The plaintiffs submit that the *LTA* does not apply to Aboriginal title and/or does not apply to the relief sought in this case. There is nothing in the text, context, scheme or object of the *LTA*, nor the intention of the Legislature, that indicates the *LTA* was intended to or does apply to Aboriginal title. There is no reference in the *LTA* to "Aboriginal title" at all.

[2226] The Court in *Hwlitsum First Nation v. Canada (Attorney General)*, 2015 BCSC 1341 [*Hwlitsum*] found that Aboriginal title, held collectively *sui generis*, "lies beyond the British Columbia land title system and fee simple ownership": at para. 88(a). Further, Aboriginal title is not a registrable interest under the *LTA*: see *Delgamuukw (Uukw) v. British Columbia* (1987), 37 D.L.R. (4th) 408, 1987 CanLII 2630 [*Uukw*], leave to appeal to SCC ref'd, 20380 (1 June 1987); *Skeetchestn* at paras. 63–64.

[2227] The plaintiffs say if the *LTA* were to apply to Aboriginal title, it would be tantamount to extinguishment, which is beyond the jurisdiction of the Legislature. Additionally, there is no clear and plain intent in the *LTA* to extinguish Aboriginal title.

[2228] The plaintiffs rely s. 8.1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 61st Sess, UN Doc A/RES/61/295 (2007) GA Res 61/295 [*UNDRIP*] and the *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [*BC DRIPA*] in support of their position that the *LTA* does not apply to Aboriginal title.

[2229] The plaintiffs agree that the provincial land title system is intended to provide certainty and security as to title to land. They do not dispute that, generally, registered interests are indefeasible under the *LTA*. However, the plaintiffs say the *LTA* is not a bar to the relief sought and there is no indication that the *LTA* applies to Aboriginal title lands. In the alternative, if the *LTA* does apply, to the extent it

displaces Cowichan Aboriginal title, it is an unjustified infringement. In the further alternative, it is constitutionally inapplicable and of no force or effect as against the Lands of Tl'uqtinus.

[2230] With respect to Richmond's argument that any Aboriginal title was extinguished by virtue of being "purged and disencumbered" there is no indication that, when enacting any of the historical *Municipal Acts*, the Province considered Aboriginal title, considered it might conflict with its municipal regulatory scheme, or intended to resolve the conflict by abrogating Aboriginal title. I address this issue in Part 7.

D. ANALYSIS

[2231] I now consider whether ss. 23 and 25 of the *LTA* apply to preclude a challenge to the validity of the fee simple interests in the Cowichan Title Lands. As above, Richmond advances this as a defence to a declaration that its fee simple titles are defective and invalid, in whole or in part. The same relief is sought in respect of Canada's fee simple titles but Canada does not advance this defence. BC submits that the fee simple titles in the Cowichan Title Land are valid, including by virtue of the operation of these sections of the *LTA*. Although the plaintiffs do not seek this relief against any third party private landowners, I consider BC's submissions on this issue.

1. The Torrens System

[2232] I begin with some brief background about the Torrens system drawn largely from BC's submissions. BC and Richmond provided lengthy submissions on the historical development of the Torrens system. However, it is the current *LTA* and its effect on Aboriginal title and the relief sought in this case that are at issue here.

[2233] British Columbia's land title legislation is a form of Torrens system: an innovation upon earlier land conveyancing where a person's title to land is validated by public registration independent of prior owners' interests. The public register is to serve as the definitive statement of the state of title, and anything "behind the

register" is intended not to affect the state of title: Taylor (2008), *The Law of the Land: The Advent of the Torrens System in Canada*, at pp. 9–10.

[2234] A person's title under a Torrens system is independent of the title held by any prior owner. There is no more chain of title. If a purchaser makes a deal with the registered owner of a property and registers their newly acquired interest in the property, that purchaser may become indefeasibly entitled to the property regardless of how the seller or anyone prior came to be the owner: Taylor at pp. 9–10.

[2235] The foundations of the Torrens system in British Columbia are maintained under the current *LTA*. Part 3 of the *LTA* in particular sets out the effects of registration. This part provides that interests in land are only transferrable by registration, and that registration creates an indefeasible entitlement protected against actions for recovery of land. The current Torrens system is further reinforced by an insurance mechanism that limits the remedies available to a party deprived of an interest in land.

[2236] Di Castri calls indefeasibility of title a "cardinal principle" maintained through amendments under the *LTA*, which also simplified and modernized the system: Victor Di Castri, *Registration of Title to Land*, (Toronto: Thomson Reuters, 2023) at 1.14.

2. Do ss. 23 and 25 of the LTA bar a declaration that Richmond's fee simple interests in Cowichan Title Lands are defective and invalid?

[2237] I turn first to determine whether, as a matter of statutory interpretation, ss. 23 and 25 of the *LTA* apply to preclude a declaration that Richmond's fee simple interests are invalid. The *LTA* is a provincial statute of general application and whether it applies to Aboriginal title is first a matter of statutory interpretation.

[2238] The modern rule of statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of

Parliament.": see *Rizzo Shoes* quoting Elmer Driedger, *Construction of Statutes* (2nd ed. 1983) at 87.

[2239] Subsection 23(2), reproduced in part below, provides that indefeasible title is conclusive evidence as against the Crown and all other persons that the registered owner is indefeasibly entitled to a fee simple estate to the land described in the title, subject to certain exceptions:

> (2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following:
>
> …

[2240] Subsections 23(2)(a)–(g) enumerate certain exceptions, none of which are applicable.

[2241] Section 25 of the *LTA*, reproduced in part below, provides for the protection of registered owners against actions for recovery of land, subject to certain exceptions:

> 25(1) In this section, "courts" includes a person or statutory body having, by law or consent of parties, authority to hear, receive and examine evidence.
>
> (2) An action of ejectment or other action for the recovery of land for which an indefeasible title has been registered must not be commenced or maintained against the registered owner named in the indefeasible title, except in the case of
>
> …
>
> (3) In any case other than those enumerated by way of exception in subsection (2), the production of a subsisting state of title certificate must be held in all courts to be an absolute bar and estoppel to an action referred to in subsection (2) against the registered owner named in the certificate, despite a rule of law or equity to the contrary.

[2242] Subsections 25(2)(a)–(g) set out a list of exceptions, none of which are applicable.

[2243] Section 2(1) of the *Interpretation Act* provides that it applies to every enactment unless a contrary intention appears:

> 2(1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

[2244] Section 8.1 of the *Interpretation Act* provides that every enactment must be construed as upholding, and not derogating from, Aboriginal and treaty rights:

> **8.1**(1) In this section:
>
> "Declaration" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> "Indigenous peoples" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> "regulation" has the same meaning as in the *Regulations Act*.
>
> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> (3) Every Act and regulation must be construed as being consistent with the Declaration.

[2245] With respect to s. 23 of the *LTA*, the plaintiffs plead it does not and was not intended to apply to the plaintiffs and to Aboriginal title and rights holder generally, as *Indian Act* bands and Aboriginal title and rights holders are not 'persons' under the *LTA*.

[2246] The meaning of the word "person" in the *LTA* must be determined through applying the modern rule of statutory interpretation. In addition, s. 29 of the *Interpretation Act* defines "person" as including "a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law".

[2247] BC says under s. 23 of the *LTA*, a "person" is any entity with the capacity to challenge a fee simple title as a party in court and includes the plaintiffs. BC relies on *British Columbia v. New Westminster Indian Band No. 566*, 2022 BCCA 368 [*New Westminster*], in which the Court held that the Band was "a person" for purposes of the *Insurance Premium Tax Act*, R.S.B.C. 1996, c. 232 [*IPTA*]. In reaching this conclusion, the Court observed that "English and Canadian dictionary

authorities support the view that an entity that has the right to contract, to sue and to be sued is generally regarded as a "person" at law.": at para. 42, and see discussion at paras. 42-43. The Court acknowledged that the interpretation of words in a statute must be purposive and contextual, and undertook an instructive review of case law considering whether a First Nation is "a person" in various statutory contexts: see discussion at paras. 44-48.

[2248] In my view, the determination in *New Westminster* that the Band was "a person" for the purposes of the *IPTA* lacks application to the facts of this case. As Justice Newbury said at para. 62, the definition of "person" in another statutory context will not necessarily have the same meaning in the relevant statute. In *New Westminster*, the Indigenous group could contract with insurance companies in its own name, but argued that it could not be liable for tax on insurance premiums because it did not qualify as "a person" under the *IPTA*. One distinction between these cases is that the Indigenous group in *New Westminster* qualified for the benefit (insurance) but sought to avoid the cost (tax on premiums). In the present case, the plaintiffs cannot rely on the benefits of the *LTA* with respect to protecting Aboriginal title, but if it applies, could be precluded from exercising their rights to the land.

[2249] More importantly, in *New Westminster*, the Court was concerned with whether a band was "a person" for the purpose of the *IPTA*. Justice Newbury held "the unique nature of a band as a 'body of Indians' that must transact business with and have relationships with other Indians, other bands and other persons outside the First Nations community, would seem to militate in favour of legal personhood.": at para. 56.

[2250] Here, I am concerned with a much different context. Aboriginal title is held communally, grounded in historic occupation, and *sui generis* as arising out of the special relationship between the Aboriginal group and the Crown. This, in my view, differentiates Aboriginal title holders from other property holders — the proper title holders are the descendants of the Cowichan Nation, who hold the title communally

for the benefit of future generations. In my view, this differentiates Aboriginal title holders from persons advancing other property interests, and places the Aboriginal title holding collective outside of the meaning of "a person" in s. 23(2) of the *LTA*.

[2251] I accept that the purpose of s. 23, and the Torrens system generally, is to ensure the security of registered title as broadly as possible. However, given the nature of Aboriginal title, and the plain text of s. 23(2), I do not find that the Legislature intended s. 23(2) to provide that an indefeasible title under the *LTA* is conclusive evidence that the registered owner is indefeasibly entitled to an estate in fee simple as against Aboriginal title claimants and holders.

[2252] Section 23(2) must be read in accordance with the whole of the *LTA*. Generally speaking, the *LTA* and the Torrens system deal with estates and interests which derive from a Crown grant of fee simple. Aboriginal title is not derived from Crown title; it is grounded in an inherent right of Indigenous peoples to the ancestral lands they used and occupied prior to the Crown's assertion of sovereignty. Aboriginal title is not a registrable interest under the *LTA* and does not fit within the confines of the Registrar's powers under it. Aboriginal title is "upstream" certificates of indefeasible title: *Skeetchestn* at para. 50. No caveats, lis pendens, or certificates of pending litigation can be registered to alert purchasers to the existence of an unproven claim to the land by Aboriginal people. I acknowledge BC's submission that the fact that Aboriginal title is not a registrable interest under the *LTA* is a different issue than whether Aboriginal title holders are "a person" under s. 23(2). However, it is instructive in considering the scope and scheme of the *LTA*, which is largely aimed at a system of registration for Crown derived interests.

[2253] BC and Richmond advance arguments respecting the interpretation of ss. 23 and 25 of the *LTA* which would preclude relief for Aboriginal title holders through a statute that does not recognize it. In cases such as this, where the Crown has taken the land or assumed control of it and granted it to third parties, recognition of Aboriginal title would be hollow, as its exercise may never be possible. I question how an Act that does not permit the registration of Aboriginal title could effectively

extinguish the right of an Aboriginal people, where Aboriginal title is not a registrable interest.

[2254] I also find that if the *LTA* were to apply, the effect of indefeasibility of registered fee simple title on Aboriginal title land would be tantamount to extinguishing the interests of Aboriginal title holders.

[2255] If the indefeasibility sections of the *LTA* were to preclude Aboriginal title holders from challenging the validity of fee simple interests or seeking declarations in respect of Aboriginal title lands held in fee simple, they would, in effect, bar Indigenous people from seeking the return of their land. This would amount to extinguishment by denying Aboriginal title holders the ability to exercise their rights, and would be inconsistent with the well-established principle that, prior to the enactment of s. 35, only Parliament could extinguish Aboriginal title, and since s. 35 was enacted, Aboriginal rights cannot be extinguished; they can only be regulated or infringed, where doing so can be justified: *Van der Peet* at para. 28. Accordingly, my determination that the Cowichan in their capacity as Aboriginal title holders are not "a person" within the meaning of s. 23(2) of the *LTA* is consistent with the constraints on the Legislature's ability to extinguish Aboriginal rights.

[2256] I disagree with BC that an action for recovery of land is barred pursuant to the text of s. 25, regardless of who brings it or why. As with s. 23(2), if this reasoning is followed, it would mean that s. 25, in concert with s. 23, would serve to effectively extinguish the Cowichan's Aboriginal title.

[2257] BC submits that s. 8.1 of the *Interpretation Act* affirms the Province's commitment to non-derogation from constitutional rights and underscores the importance of *UNDRIP* in the interpretation of provincial laws. BC submits, and I agree, that the *Interpretation Act* is an interpretive tool applicable to provincial laws to ensure consistency with *UNDRIP*. Section 8.1 of the *Interpretation Act* applies unless a contrary intention appears and it cannot alter the plain meaning of unambiguous provincial legislation. As to the approach, the process in s. 8.1 of the *Interpretation Act* overlays the interpretative approach required under the *Rizzo*

Shoes analysis; it is an umbrella that covers the statutory interpretation process: *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at para. 417.

[2258] I find support for the view that the indefeasibility provisions in the *LTA* do not apply as against Aboriginal title in s. 8.1 of the *Interpretation Act*, which directs that legislation be interpreted in a manner that does not derogate from Aboriginal rights. To construe it otherwise would also be inconsistent with *UNDRIP*. A plain reading of the *LTA* indicates that it does not and was never intended to apply to Aboriginal title; indeed, it does not appear to contemplate Aboriginal title at all. Further, as it is beyond the jurisdiction of the Legislature to extinguish Aboriginal title, this interpretation of ss. 23 and 25 is consistent with the limits on the Legislature's powers.

[2259] In my view, Aboriginal title currently lies beyond the land title system in British Columbia and the *LTA* does not apply to it. It therefore cannot be said that a registered owner's title under the *LTA* is conclusive evidence that the registered owner is indefeasibly entitled to that land as against Aboriginal title holders and claimants.

[2260] The intention behind the land title system in this province is to provide certainty and security with regard to land titles. My conclusion on the inapplicability of the *LTA* to Aboriginal title does not otherwise detract from the notion that registered interests are, subject to prescribed exceptions, indefeasible under that legislation.

[2261] Alternatively, if the *LTA* does apply to Aboriginal title, I would nonetheless find that ss. 23 and 25 do not bar the relief sought in this case. As I later set out, I find the Crown grants of fee simple interest unjustifiably infringe the Cowichan's Aboriginal title. Further, the Crown grants were made without constitutional authority, and arise from the failure of colonial and provincial officials to set aside the Cowichan Title Lands as an Indian reserve. Some of Richmond's interest in the land, in Section 27, derives from the 1874 Crown grant to the Chief Commissioner of Land

and Works, Richard Moody, who dishonourably took some of the Cowichan's land for himself, rather than marking out an Indian reserve as Governor Douglas' policy had directed. The declaratory relief the plaintiffs seek is aimed at addressing these historic wrongs, and registration of competing interests in the Cowichan's land under the *LTA* cannot preclude the Cowichan from seeking relief, which, if granted, would enable the exercise of their constitutionally protected title.

[2262] Accordingly, I find ss. 23 and 25 of the *LTA* do not bar the Richmond Fee Simple Declaration. In other words, Richmond's registered fee simple interests are not conclusive evidence as against the Cowichan that Richmond is indefeasibly entitled to those lands, nor does registration of those fee simple interests preclude the declaration the Cowichan seek.

3. If ss. 23 and 25 of the LTA do apply to the relief sought in this case, they unjustifiably infringe the Cowichan's Aboriginal title

[2263] If ss. 23 and 25 do apply to the Cowichan Title Lands and the relief sought, then the question is whether those provisions are unjustifiably infringing. The test for infringement and justification is set out in *Sparrow* and refined with respect to Aboriginal title in *Tsilhqot'in* SCC. I set out the legal test for infringement and justification, which guides my analysis of this issue, in Parts 7 and 8 of these reasons, respectively.

[2264] In their third further amended reply, the plaintiffs plead that the provisions of the *LTA* that BC and Richmond rely on are an infringement. The plaintiffs submit that it is the Province's engagement with ss. 23 and 25 of the *LTA* that infringes Cowichan Aboriginal title; were the Court to accept BC's argument, and find that these provisions preclude a determination about the invalidity of fee simple titles, that would indefinitely suspend recognition or exercise of the Cowichan Aboriginal title, and as such, is an infringement.

[2265] The plaintiffs bear the burden of proof in establishing an infringement of their Aboriginal title. BC says the plaintiffs' argument that the manner in which BC relies on ss. 23 and 25 in this litigation is infringing, is improper and lacks merit. BC says

unfairness arises as this argument was not advanced in the plaintiffs' main submissions on infringement.

[2266] I am prepared to consider the plaintiffs' submissions as an alternative to my determination that ss. 23 and 25 do not apply to Aboriginal title. A measure of flexibility and a functional approach to pleadings is appropriate in Aboriginal rights litigation, with an aim of resolving the substance of the dispute on its merits: *Tsilhqot'in* SCC at para. 20. I give due consideration to BC's submissions about the effect of the *LTA* on the plaintiffs' claim although the private landowners are not parties to this litigation, and it is fair to consider the plaintiffs' reply on this issue. The plaintiffs' position is not a surprise, as it has formed part of the plaintiffs' case in reply since the plaintiffs filed their amended reply on January 2, 2018.

[2267] If the Court finds that ss. 23 and 25 infringe the Cowichan's Aboriginal title, BC says any infringement is justified. The *LTA* is a continuation of law in force since prior to Confederation and at no point did a duty to consult arise. Indefeasibility of fee simple interests in the Claim Area has existed since such interests were originally registered — there has been no Crown action which could trigger a duty to consult. BC says the *LTA* has a compelling and substantial purpose which can be broadly described as socio-economic development. I consider this in more detail in Part 8, and I accept that the endurance of fee simple titles, security of title and private property ownership is fundamental to British Columbia's and Canada's socio-economic development. However, there is a lack of evidence about how the application of ss. 23 and 25 is in furtherance of that purpose. There is also a lack of evidence about how the application of ss. 23 and 25 to the Cowichan Title Lands in particular serves that purpose.

[2268] BC says that the Cowichan's asserted but unproven Aboriginal title did not attract any fiduciary duties. If it did, the *LTA* is rationally connected to its purpose, is minimally impairing as universality and consistency of its application is required, and its benefits outweigh any costs of the rights infringement. Its benefits are felt by all British Columbians.

[2269] If ss. 23 and 25 of the *LTA* do apply to the fee simple interests in Cowichan Title Lands such that Aboriginal title is displaced or suspended, I find their effect is plainly an unreasonable limitation, imposing undue hardship through denying the Cowichan relief in respect of their constitutionally protected right, and denying their ability to exercise any of the incidents of title: *Tsilhqot'in* SCC at para. 104.

[2270] As I set out in Part 8, with respect to whether the Crown grants of fee simple interest are unjustifiably infringing, I am unable to conclude that ss. 23 and 25 are consistent with the Crown's obligation to only regulate Aboriginal title in a manner that respects that Aboriginal title is a group interest held communally for the benefit of present and future generations: *Tsilhqot'in* SCC at para. 86. Accordingly, if ss. 23 and 25 apply to the fee simple interests in the Cowichan Title Lands to preclude a challenge from the Cowichan as Aboriginal title holders, they unjustifiably infringe the Cowichan Aboriginal title.

E. SUMMARY

[2271] In light of my conclusion that the indefeasibility provisions in the *LTA* do not bar the relief that the plaintiffs seek, I need not consider the plaintiffs' alternative submissions that the provisions of the *LTA* that BC and Richmond rely on are inconsistent with Articles 10 and 13 of the *BC Terms of Union* and s. 91(24) of the *Constitution Act, 1867*.

[2272] Richmond and BC raise other defences which I address in Part 9.

PART 7 INFRINGEMENT OF ABORIGINAL TITLE

[2273] The plaintiffs submit there are four categories of Crown actions that have interfered and continue to interfere with the Cowichan's Aboriginal title.

[2274] The first alleged interference arises from the issuance of 18 Crown grants of fee simple interest in the Claim Area between 1871 and 1914. The plaintiffs say each grant represents a transfer of a fee simple property interest in Cowichan land to a third party and a meaningful diminution of the Cowichan's ownership right.

[2275] Second, the plaintiffs allege that pursuant to the *Municipal Act*, R.S.B.C. 1911, c. 170, s. 283 [*Municipal Act, 1911*], as amended, BC vested Richmond with fee simple estates to about half of the Lands of Tl'uqtinus following the respective owners' defaults on payment of their property taxes. In doing so, BC transferred ownership rights in the Lands of Tl'uqtinus to parties other than the Cowichan.

[2276] Third, pursuant to s. 35(1)(a) of the *Community Charter*, S.B.C. 2003, c. 26, the plaintiffs say BC vested Richmond with the soil and freehold of highways in the Lands of Tl'uqtinus.

[2277] The fourth interference relates to Canada and the VFPA's activities at the Lands of Tl'uqtinus, including assignment and leasing of lands, land-use planning and refusing to return the lands to the Cowichan. The plaintiffs also impugn the refusal of the VFPA, acting as Canada's agent, to grant the Cowichan's request for access to the waterfront Federal Tl'uqtinus Lands to carry out a fishery in the south arm of the Fraser River.

[2278] Before addressing the test for infringement, in light of the Crown defendants' submissions, it is necessary to consider whether the infringement analysis is available to the plaintiffs in respect of Crown conduct that occurred before 1982 and before a declaration of Aboriginal title.

A. APPLICABILITY OF THE *SPARROW* FRAMEWORK

1. Positions of the Parties

[2279] In final argument, the Crown defendants contend that the *Sparrow* framework is not available to the plaintiffs in respect of their Aboriginal title claim because the conduct complained of is largely historical. They say the infringement and justification analysis, first articulated in *Sparrow*, does not apply to pre-1982 interferences and does not apply prior to a declaration of Aboriginal title. The infringement and justification analysis is grounded in the Crown's obligations under s. 35(1) of the *Constitution Act, 1982* and applies to government action only after Aboriginal rights have been legally recognized.

[2280] The Crown defendants submit that although the *Sparrow* framework is not applicable to pre-1982 and pre-declaration interferences, Indigenous groups may seek judicial redress through other analytical frameworks, such as those based on fiduciary principles and the honour of the Crown. In this case, Canada accepts that for impugned Crown conduct post-1982, the duty to consult framework applies and is available to the plaintiffs. BC takes the contrary view, and says the Court should not ascertain whether BC had or met a duty to consult for conduct that occurred after 1982 because the plaintiffs did not plead it and cannot reframe their case at this late stage. I will return to this issue when I consider whether or how justification may apply to historical Crown actions.

[2281] Canada submits the *Sparrow* framework is forward-looking, and ill-suited to historical conduct where the legal framework and standards of the time differ greatly from those of today. Prior to 1982, Aboriginal rights lacked constitutional status and the Crown had sweeping powers to regulate, restrict, modify, and even extinguish Indigenous rights and interests: *Van der Peet* at para. 28.

[2282] BC similarly submits that the *Sparrow* framework was not created to address past actions alleged to infringe Aboriginal rights. BC says the at-issue government action occurred over 100 years ago and does not continue today. The *Charter* and s. 35(1) of the *Constitution Act, 1982* do not apply retrospectively.

[2283] BC further submits that the Crown must be in a position to know what the Aboriginal rights are before they are required to justify their actions.

[2284] BC says that a fundamental question before embarking on an analysis of infringement of Aboriginal title is, as the Court asked in *Tsilhqot'in* SCC at paras. 93–94: “What duties were owed by the Crown at the time of the government action?” The impugned action must be identified with particularity, along with the Aboriginal right in issue, in order to determine whether it has interfered with that right and to what extent.

[2285] In sum, BC says it is legally impermissible to apply the infringement/justification analysis to its impugned conduct. There can be no finding of infringement in this case.

[2286] In reply, the plaintiffs say that the duties the Crown owed at the time of the Crown conduct are relevant, but that they have no place in the infringement analysis — the Crown's duties are relevant to justification. To establish infringement, the plaintiffs do not need to prove exactly what Crown duty was owed at the time the interference occurred. This would improperly shift the burden to the plaintiffs. The burden on the plaintiffs is to establish on a balance of probabilities that Crown conduct interfered with their Aboriginal rights and that interference amounted to a *prima facie* infringement.

[2287] The plaintiffs note that in Aboriginal rights cases, a plaintiff cannot seek a declaration of a right without a plea of infringement: *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 at paras. 18–19, leave to appeal to SCC ref'd, [2000] S.C.C.A. No. 625; *Haida Nation* BCCA at para. 32. This flows in part from the proposition that the court will not make a bare declaration that does not address some dispute between the parties. The Crown defendants' position that the Court cannot determine infringement is inconsistent with this principle and approach to litigating Aboriginal rights.

[2288] In support of their position that their plea of infringement is correctly framed, the plaintiffs point to the proceedings in *Tsilhqot'in*. There, the Tsilhqot'in sought a declaration of Aboriginal title and a declaration that the issuance of forest licenses infringed their title. As in this case, the Tsilhqot'in did not plead breach of a duty to consult for the forestry activities that they alleged infringed their title; they pleaded infringement, and the Crown pleaded the defence of justification. Justice Vickers found that there was a failure to consult with the Tsilhqot'in people, which informed his conclusion that BC failed to justify its infringement of their Aboriginal title: at para. 1141. The SCC concluded that BC breached its duty to consult through its land-use planning and forestry authorizations: at para. 153.

[2289] BC says the law of duty to consult was in its infancy when the *Tsilhqot'in* proceedings began, and there was a lack of clear authority for the correct approach to examining the legality of historic Crown conduct. The plaintiffs' failure in that case, to frame their claim in the appropriate manner, was understandable, and the proper approach to pleadings was addressed by the SCC.

[2290] The plaintiffs say their infringement claims are not overly broad or premature.

[2291] The plaintiffs maintain that infringement and justification are two separate inquiries. Crown infringement of existing Aboriginal title can arise prior to a declaration of Aboriginal title and prior to 1982. The exercise of Crown power which may infringe an Aboriginal right is not sourced in s. 35 of the *Constitution Act, 1982* and as such, may well arise prior to 1982. Here, the exercise of Crown power which the plaintiffs say interfered with Cowichan Aboriginal title is grounded in the Crown's proprietary powers under s. 109 of the *Constitution Act, 1867*.

2. Analysis

[2292] To begin, I agree with the plaintiffs that infringement and justification are two separate inquiries. This Court can and should determine whether the Crown's historical conduct interfered and interferes with Cowichan Aboriginal title.

[2293] The plaintiffs claim that Crown power was used to issue the Crown grants of fee simple interest that adversely interfered, historically and currently, with the Cowichan's exercise of its Aboriginal title. They say this infringes their title. Justification is a separate analysis, a defence to infringement, concerned with whether the exercise of Crown power conformed with the Crown duties owed at the time. I agree.

[2294] This approach is consistent with the jurisprudence. The Court in *Tsilhqot'in* SCC said two inquiries are required where legislation affects an Aboriginal right protected by s. 35(1). Firstly, does the legislation interfere with or infringe the Aboriginal right? Secondly, if so, can the infringement be justified?: *Tsilhqot'in* SCC at para. 120.

[2295] Infringement claims and breach of duty to consult claims are both premised on the exercise or contemplated exercise of Crown power which adversely affects an established or claimed Aboriginal right. These inquiries examine whether the Crown has acted in a way or is contemplating acting in a way which adversely affects the Indigenous group's claimed or established rights, and, where the Crown defends its conduct, whether the Crown complied with the duties that it owed the Indigenous group at the relevant time.

[2296] In British Columbia, an exercise of Crown power that adversely affects Aboriginal title may occur from 1846 when the Crown asserted sovereignty and common law Aboriginal title crystallized. The duty on the Crown to justify an infringement within the meaning of s. 35(1) of the *Constitution Act, 1982* did not arise until 1982 when common law Aboriginal rights were constitutionally entrenched. The question of whether the Crown exercised its power in accordance with its duties must focus on the duties that were owed at the time of the impugned conduct. This will depend on whether Aboriginal title was established or asserted, such that "the practical result may be a spectrum of duties applicable over time in a particular case": *Tsilhqot'in* SCC at para. 91. Accordingly, the analysis that applies to reconcile the exercise of the Crown's power with the duties it owed to an Indigenous people will depend in part on when that conduct occurred, and whether it is continuing. The honour of the Crown is always at stake in its dealings with Aboriginal people: *Marshall* at para. 49. I return to the issue of the duties owed to the Cowichan in respect of Cowichan Title Lands, historically and going forward, in Part 8 of these reasons.

[2297] I turn back to whether the infringement analysis applies to the interferences alleged in this case. The Crown defendants' submissions that the Court must not determine whether the Crown conduct complained of interfered with the Cowichan's Aboriginal title, following a lengthy trial which included a massive volume of evidence about the historical and present-day actions of the Crown, are not persuasive. The Crown defendants have been entirely on notice of the complained of conduct. For example, the plaintiffs plead that the Crown grants of fee simple interest issued in

relation to the Lands of Tl'uqtinus adversely interfered and interfere with the exercise of Cowichan Aboriginal title to those lands and as such are an infringement of their title. The question of whether the Crown grants of fee simple interest interfere with the Cowichan's exercise of title was explored at length at trial. There is no lack of clarity about the nature of the impugned conduct.

[2298] The plaintiffs have proven Aboriginal title to some of the lands they claimed. The evidence establishes that BC sold the Cowichan Title Lands to settlers, depriving the Cowichan of the use of their village and of an important part of their way of life. It is true that the duties the Crown owed the Cowichan in respect of their title lands changed over time, and that the Court's recognition of the Cowichan's Aboriginal title changes the obligations of the Crown going forward: *Tsilhqot'in* SCC at para. 91. However, it is also true that the Cowichan's Aboriginal title crystallized in 1846 and it has persisted — unrecognized and unestablished — for nearly two centuries, burdening the land just the same. Section 35(1) recognizes and affirms these pre-existing legal rights. Now, that Aboriginal title is established, the Crown will be called upon to reassess prior conduct in order to faithfully discharge its fiduciary duty to the Cowichan in respect of the Cowichan Title Lands: *Tsilhqot'in* SCC at para. 92.

[2299] Some of the conduct that the plaintiffs say interfered with their title is not particularly contested. BC acknowledges that it issued the Crown grants in the Claim Area. The land has changed hands many times since. Much of the infringement analysis in this case reckons with steps BC has taken in the last 150 plus years which have alienated the Cowichan Title Lands and created third party interests in those lands with related impacts on the Cowichan. It may serve to underscore that there is a duty on the Crown to determine Aboriginal rights and title claims. The words of the SCC in *Haida* SCC at para. 25 bear repeating:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected.

[2300] BC has largely conducted itself, historically and in modern times, as though the Cowichan Title Lands were unencumbered and as if its interest in those land was not qualified by the Cowichan's title. That was never the case.

[2301] I conclude that it is appropriate to determine whether the Cowichan's Aboriginal title was interfered with historically. The parties generally agreed upon the test for infringement as set out below.

B. LAW OF INFRINGEMENT

[2302] The infringement inquiry in this case focuses on Crown conduct. The plaintiffs bear the onus of establishing that the purpose or effect of the Crown acts or omissions interfered with the exercise of Aboriginal title so as to constitute a *prima facie* infringement: *Sparrow* at 1111–1113. To evaluate whether a *prima facie* infringement has occurred, the court must examine the rights at stake including incidents of that right: *Sparrow* at 1111–1112; *Tsilhqot'in* SCC at para. 121. The incidents are determined having regard to the honour of the Crown which is always at stake in its dealings with the Indigenous people: *Marshall* at para. 49.

[2303] To determine whether the right is infringed, the Court must ask whether the Crown conduct results in a meaningful diminution of the right. A meaningful diminution is a detrimental or negative effect, an adverse restriction, or an interference with the exercise of the right that is not insignificant: *R. v. Morris*, 2006 SCC 59 at paras. 47–53 [*Morris*]; *Sparrow* at 1112; see also the discussion in *Yahey v. British Columbia*, 2021 BCSC 1287 at paras. 528–529 [*Yahey*].

[2304] In *Sparrow* at 1112, the SCC identified the following three factors which may assist in determining whether an infringement has occurred:

> First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?

[2305] All three factors must be considered, but there is no requirement that all three factors must be present: *Tsilhqot'in* SCC at para. 104. In applying the factors, a court will have regard to the factual context of the case: *Gladstone* at para. 39.

[2306] In considering these questions that shed light on whether an infringement has occurred, the court should take care not to import an element of justification: *Morris* at para. 52, quoting *Gladstone*. In *Gladstone* at para. 43, Lamer C.J.C. said:

> The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those 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.

[2307] The standard to establish *prima facie* infringement of Aboriginal title is not high: *Tsilhqot'in* BCSC at para. 1062. Aboriginal title is not absolute, and it may be infringed by both the federal and provincial governments, provided the infringements can be justified under s. 35(1) of the *Constitution Act, 1982*: *Delgamuukw* SCC at para. 160.

C. RIGHT AT STAKE

[2308] The right at stake is Aboriginal title, which encompasses the Cowichan's right to exclusive use and occupation of the Cowichan Title Lands, for a variety of purposes not confined to traditional uses: *Delgamuukw* SCC at para. 117; *Tsilhqot'in* SCC at para. 70. Aboriginal title confers a right to the land itself: *Tsilhqot'in* SCC at para. 112.

[2309] Aboriginal title confers ownership rights similar to those associated with fee simple. It includes the right to decide how the land will be used; the right to enjoy and occupy the land; the right to possess the land; the right to economic benefits of

the land; and the right to pro-actively use and manage the land: *Tsilhqot'in* SCC at para. 73.

[2310] Aboriginal title is held collectively, for the present and future generations: *Tsilhqot'in* SCC at para. 74. This restriction on Aboriginal title means that the land cannot be alienated, except to the Crown, and it cannot be encumbered in ways that would prevent succeeding generations from using and enjoying it. Nor can it be developed or misused in a way that would substantially deprive future generations of its benefit: at para. 74. As Vickers J. explained in *Tsilhqot'in* BCSC at para. 1066, to have any significance for Indigenous people, "Aboriginal title must bring with it the collective right to plan for the use and enjoyment of that land for generations to come".

[2311] The Cowichan's Aboriginal title includes a right to control the Cowichan Title Lands. If others seek to use the land, their consent must be obtained. Absent consent, government may only interfere with the Cowichan's Aboriginal title if doing so can be justified under s. 35(1) of the *Constitution Act, 1982*: *Tsilhqot'in* SCC at para. 76.

D. CROWN GRANTS

[2312] As set out in Part 6, between 1871 and 1914, the Colony of British Columbia and the Province of British Columbia issued 18 Crown grants of fee simple interest to settlers, encumbering the entirety of the Claim Area. The parties agree that as of December 2017, there were approximately 150 fee simple estates in the Claim Area, each derived through subdivision of the original Crown grants of fee simple interest. Some of the estates are now held by private parties who are not participants in this litigation. About half of the Claim Area is now held by a combination of Canada, the VFPA, and Richmond.

[2313] The plaintiffs have established Aboriginal title to a portion of the Claim Area. Eight of the Crown grants that BC issued after Confederation included Cowichan Title Lands.

[2314] The Crown grants of fee simple interest in the Cowichan Title Lands gave the grantees the right of possession, the right to exclude others from the land, the right to transfer the land to third parties, and the right to control, use, and profit from the land. As above, much has happened in respect of the Cowichan Title Lands in the intervening years since the Crown grants were issued. The lands have been subdivided and changed hands many times over.

[2315] Richmond holds fee simple interests in the following Cowichan Title Lands:

a) Lot E, Sections 23 and 26, B4N, R5W, New Westminster District, Plan 19680 (PID 010-535-471); and

b) Lot K, Section 27, B4N, R5W, New Westminster District Plan 19680, Except Plan BCP42299 (PID 010-535-519).

[2316] Canada holds fee simple interests in the following Cowichan Title Lands:

a) Lot 1, Sections 27 and 22 (PID 007-793-464);

b) Lot 2, Section 23 (PID 007-793-499); and

c) Lot 9, Sections 23 and 26 (PID 007-793-723).

[2317] Canada holds its land in the Claim Area as federal real property. Under the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50, s. 2, this property is effectively Crown land under the jurisdiction of Canada rather than BC. Tom Corsie, the VFPA's corporate representative, deposed that the Crown's interests are only registered in fee simple as a matter of convenience.

[2318] The remainder of the Cowichan Title Lands are encumbered by fee simple interests held by private landowners who are not parties to this litigation.

[2319] There is no evidence that BC ever attempted to notify the Cowichan that they were selling the Lands of Tl'uqtinus. When the Cowichan became aware of the sale, they complained in 1877 to Sproat. They also levied complaints to various Crown

officials that they had a reserve on the Fraser River in response to the refusal of a federal Fisheries inspector to license the Cowichan to fish there.

1. Positions of the Parties

[2320] The plaintiffs submit that the Crown grants of fee simple interest adversely interfered, and continue to interfere, with their exercise and enjoyment of all incidents of Aboriginal title. The current owners of these lands hold them to the exclusion of the Cowichan, and may exclusively manage and use the lands, and profit from them. The Cowichan are prevented from enjoying the possession and use of the land, and are denied the right to determine how the lands are used. There is no place on the Lands of Tl'uqtinus where the Cowichan may occupy the land.

[2321] From the Cowichan's perspective, the loss of access to these lands represents a severe interference with their Aboriginal title. They were made trespassers on their stl'ulnup. They could no longer access the land, cultivate berry fields, land their canoes, or use their fishing stations and fish drying racks.

[2322] The plaintiffs say, by depriving the Cowichan of legal access to Tl'uqtinus, the control they once exercised over the south arm of the Fraser River has been reduced to nothing. The Cowichan are considered an "extraterritorial nation" by Canada (DFO), which has systematically impeded their ability to exercise their right to fish for food.

[2323] The plaintiffs say that the Crown grants of fee simple interest were a direct transfer of Cowichan property rights to third parties, and this alone meets the threshold for infringement. While the Crown grants were issued over a century ago, the adverse interference with Cowichan Aboriginal title persists as long as non-Cowichan parties continue to hold and enjoy the benefits of the derivative fee simple estates and federal real property. This is an ongoing, meaningful diminution of their Aboriginal right to the Cowichan Title Lands.

[2324] In its pleadings, Canada denied that the Crown grants in the Claim Area infringe the plaintiffs' Aboriginal title. In final argument, Canada declined to make

submissions on the issue of whether the Crown grants are infringing, beyond articulating certain legal principles. Canada also argued that it is not responsible for any liabilities associated with the two Crown grants issued prior to Confederation. I need not decide that question as the plaintiffs have not established Aboriginal title to the lands that were the subject of the Colonial Crown Grants. I consider it no further.

[2325] BC submits that the fee simple interests in the Claim Area today are legally distinct from the Crown grants. The Crown grants were written instruments made under seal which merely served to effect the historical legal transfer of fee simple title. The modern-day fee simple titles follow many transfers and subdivisions of title over the years. As an example, the land in the original Crown Grant No. 1522, made in respect of Section 23 to Wood and Burnaby in trust for Trotter, is now held pursuant to five different titles.

[2326] BC submits that the plaintiffs do not adequately pinpoint the government decisions and/or legislative actions with respect to infringement, and when these decisions or actions occurred. I disagree. The plaintiffs have specifically alleged the Crown grants of fee simple interest were issued on lands over which they claimed Aboriginal title and the dates for the government decisions are precise.

[2327] BC says each disposition of Crown land effected by the Crown grants was a historic, discrete action. Upon issuance of the Crown grants, the fee simple estates in the lands were transferred to the grantees, subject to the exceptions, reservations, and provisos contained therein, and the function of the Crown grants was complete. There was and is no continuing Crown conduct; there is only the singular act of conveyance.

[2328] BC says the Court must distinguish between Crown grants as a written instrument of transfer, and the fee simple interest, which is the estate or interest in land that was conveyed. Fee simple title is a right or an interest in land, not a government action, and therefore fee simple interests cannot infringe Aboriginal title. The plaintiffs' framing of their claim, focusing on the Crown grants rather than exclusively focusing on Crown conduct, undermines reconciliation, shifting the

analysis away from a focus on government conduct toward the property rights of individuals. Even where fee simple title is held by the Crown, BC says mere ownership of property does not represent Crown conduct that could infringe Aboriginal rights. In any event, BC has no fee simple interests in the Claim Area.

2. Analysis

[2329] As set out below, I do not accept BC's characterization of the conduct that is impugned in this case. The issuance of the Crown grants may have been discrete acts, but their effects on the Cowichan's Aboriginal title endure. I find it impossible to separate the act from the effect, and, in considering whether BC's disposition of the Cowichan Title Lands has infringed the Cowichan's Aboriginal title, I do not find it would be analytically sound to do so. The infringement analysis includes consideration of the consequences of the exercise of Crown power on the rights of an Indigenous group. The consequences in this case which flow from the issuance of the Crown grants were severe and persist to present day — the alienation of the Cowichan Title Lands.

[2330] The Crown grants of fee simple interest deprived the Cowichan of their village lands and severely impeded their ability to fish the south arm of the Fraser River. The transfer of the Cowichan Title Lands to third parties left the Cowichan with no ability to exercise their right to occupy, use, control, and manage their land. The SCC held that a direct transfer of Aboriginal property rights to a third party will plainly be a meaningful diminution in the Indigenous group's ownership right: *Tsilhqot'in* SCC at para. 124. The Crown grants were a direct transfer of the Cowichan's property rights to third parties in the form of fee simple interests. This transfer is a denial of all the Cowichan's rights associated with their land. I can think of no more harmful conduct, no more significant intrusion, than selling Aboriginal title land to third parties without first consulting with the Indigenous people who live there, and without obtaining their consent.

[2331] I reject BC's position that issuing the Crown grants of fee simple interest was not Crown conduct. Crown officials commissioned the Trutch survey, dividing the

Cowichan Title Lands into sections. The Crown sold those sections of land to private parties, enriching itself. The Crown, through Lieutenant Governors Trutch and Barnard, issued the Crown grants when it knew, by virtue of the Trutch survey, that these lands were occupied Indian settlement lands.

[2332] BC considers its disposition of the land in the Claim Area a discrete historical act and says the Court is precluded from considering whether that act interferes with and infringes Aboriginal title. It happened long ago and the lands are now held by private parties, Richmond, Canada, or the VFPA, and therefore BC cannot be said to be engaging in conduct that infringes the Cowichan's Aboriginal title.

[2333] In my view, BC seeks to distance itself from its responsibility for its actions. The effects of the Crown grants are ongoing and continue to impede the Cowichan's exercise of their Aboriginal title. The alienation of the Cowichan Title Lands is a direct and continuing consequence of the Crown granting fee simple interests in those lands to third parties. The infringement analysis is concerned with Crown conduct and the effect of government action on Aboriginal rights, and is an appropriate lens through which to consider the impact of the issuance of the Crown grants on the Cowichan's exercise of its Aboriginal title.

[2334] The Crown grants in respect of the Cowichan Title Lands interfered with the Cowichan's right to possess, use, and enjoy their lands, to determine the uses to which the land is put, and to enjoy the economic fruits of the land. In other words, the Crown grants interfered with all of the Cowichan's rights with respect to their land. The Cowichan had a thriving village on that site where they annually came to harvest fish and plants. They landed hundreds of canoes on the waterfront in the summer months to fish the Fraser River. The Cowichan Title Lands were an important centre where the Cowichan resided together while processing their vital food sources.

[2335] The Court in *Tsilhqot'in* SCC affirmed that the factors identified in *Sparrow* are relevant in determining whether a law of general application results in a meaningful diminution of Aboriginal title: 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 to their preferred means of exercising the right: at para. 104. When I consider the evidence of the limitations on the exercise of Cowichan Aboriginal title that flows from the Crown grants of fee simple interest, I have no difficulty in concluding that all three factors are present. As above, the Crown grants of fee simple interest alienated the Cowichan's lands to third parties; this is an unreasonable limit on the Cowichan's Aboriginal title. The hardship which resulted to the title holders was undue and enduring. There was no recognition of the Cowichan's ownership of the land, and their ability to exercise any rights associated with their Aboriginal title — let alone their preferred means — was lost for well over one hundred years.

[2336] The Crown grants conveyed fee simple interests to the grantees. The fee simple interests have been transferred and subdivided throughout the last century or more. The fee simple estates include extensive and exclusive rights, such as the right to control, use, dispose of and profit from the land: Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed. (Aurora: Thomson Reuters, 2006) (loose-leaf updated 2024, release 2) at s. 1:3. While there are important distinctions between Aboriginal title and fee simple interests, there is also considerable overlap with respect to these rights.

[2337] I found that Aboriginal title and fee simple interests can coexist in respect of land but the ability to exercise the associated rights conflict. In my view, where Aboriginal title and fee simple title exist in respect of the same parcel of land, one set of rights must largely yield to the other. The current fee simple title holders may exclude the Cowichan from the Cowichan Title Lands. For years, the Cowichan have been unable to access it — they became trespassers on their own lands. The Crown grants of fee simple interest continue to disrupt the Cowichan's exercise of Aboriginal title in the most serious of ways.

[2338] The Crown was aware of the Cowichan village, fishing station, and trails when they issued the Crown grants. In fact, Trutch, who in 1859 surveyed the land himself

and noted the existence of an Indian village, would later, in 1874 and 1875, issue the Crown grants in respect of Sections 21, 22, 23, 26, 27, 28, and 29. The Crown was aware of the Cowichan practice of returning to that site to fish well into the 1870s. The south arm of the lower Fraser River was ignored by the JIRC when it travelled up and down the river consulting with Indigenous people about their claims for reserve lands. The Cowichan's complaints to Sproat and Lomas that their fishing village had been sold went unanswered. The Cowichan were not compensated for the alienation of their lands. There is no evidence that they were even notified that their lands were being sold. I address the question of the duties that the Crown owed the Cowichan at the time the Crown grants were issued when I consider justification.

[2339] I find that the Crown grants of fee simple interest issued in relation to the Cowichan Title Lands are a meaningful diminution of the Cowichan's Aboriginal title: *Tsilhqot'in* SCC at para. 124. The Crown grants of fee simple interest adversely interfered with and continue to interfere with the exercise of the Cowichan's Aboriginal title to the Cowichan Title Lands and are a *prima facie* infringement of Aboriginal title.

E. THE RICHMOND TAX SALES UNDER THE *MUNICIPAL ACT*

[2340] I turn now to the second category of alleged infringement — Richmond's acquisition of land in the Claim Area following a series of municipal tax sales that occurred in the first half of the 20th century.

[2341] Briefly, the fee simple interest holders of most of the Claim Area lands failed to pay their municipal taxes, resulting in the forfeiture and sale of their lands under the *Municipal Act* (as amended) between about 1920–1944. The tax sales resulted in Richmond being declared the purchaser of 18 fee simple interests in the Claim Area.

[2342] The plaintiffs submit that, through the tax sale process, BC vested Richmond with fee simple interests in the present-day Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands, which adversely interfered with and continue to interfere with Cowichan Aboriginal title to the Lands of Tl'uqtinus, and are an infringement.

The plaintiffs' allegations exclude the YVR Fuel Project lands in the Federal Tl'uqtinus Lands (approximately 12 acres in the west of Lot 1).

[2343] Further, the plaintiffs say BC's vesting of Richmond with the fee simple interest in the Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands), per s. 283 of the *Municipal Act, 1911*, as amended, was without constitutional authority by virtue of being constitutionally limited by Article 13 of the *BC Terms of Union*.

[2344] I first address the infringement claim, and then consider the effect of Article 13.

1. *Municipal Act*

[2345] In 1906, BC substantially overhauled the legislative framework applicable to municipalities. The new regime introduced a statutory scheme for auctioning off lands that had been forfeited for non-payment of taxes. With minor amendments, the substance of the regime remained largely unchanged between 1920 (when the first lands in the Claim Area were forfeited) and 1944 (when the last known municipal tax sale in the Claim Area occurred).

[2346] Generally speaking, under the *Municipal Act*, as amended, when municipal taxes for land were delinquent, a municipality could force a property sale as a means to recover the unpaid taxes. A municipality could appoint a collector to either seek recovery by action or by tax sale of the lands where the taxes were owed. A municipality was required to offer for sale at public auction all lands in respect of which property taxes had been delinquent for a prescribed period. At auction, if no bid met or exceeded the upset price (the sum of the overdue taxes, prescribed interest and fees, and taxes for the current year) the municipality was deemed the purchaser, subject to a right of redemption by the debtor within a year from the purchase.

[2347] Following expiration of the redemption period, the municipality could send a notice to the Registrar of Titles. The Registrar would then issue a certificate of

indefeasible title registering the municipality as owner. It was at this point that a municipality was vested with the property.

[2348] The *Municipal Act, 1911* provided:

> **283.** If the taxes, interest, costs, and expenses have not been previously paid, or if no person appears to pay the same at the place, day, and hour appointed for the sale, the collector may then and there, at public auction, sell the land of the assessed person, as described in the said notice, to the highest bidder. The collector shall offer each parcel of land as described in the said notice separately at an upset price, which upset price shall be the total amount due in respect of each parcel as set out in the third column of the said notice. In the event of there being no bids over the upset price, the person bidding the upset price shall be declared the purchaser; and in the event of there being no bids equal to the upset price, the municipality shall be declared to be the purchaser, and the collector shall issue to the municipality the certificate provided for in section 292 of this Act, and if the land is not redeemed as provided for by this Act, it shall, without any further proceedings, become and be the absolute property of the municipality. The Council may, by resolution passed by a two-thirds vote sale of lands of the Council, sell any land which has become the property of the municipality, under the provisions of this section, at such price as may be specified in such resolution.
>
> [Emphasis added.]

[2349] In 1920 (when the first tax sale lands in the Claim Area were acquired by Richmond) the relevant process was set out at ss. 266-267 and 279-283 of the *Municipal Act, 1911* as amended by the *Municipal Act*, S.B.C. 1914, c. 52, the *Municipal Act Amendment Act, 1916*, S.B.C., 1916, c. 44, and the *Municipal Amendment Act, 1919*, S.B.C. 1919, c. 63. The process was subsequently set out in the *Municipal Act*, R.S.B.C. 1924, c. 179 at ss. 252-270 [*Municipal Act, 1924*], the *Municipal Act*, R.S.B.C. 1936, c. 199 at ss. 270-290 [*Municipal Act, 1936*] and *Municipal Act Amendment Act*, S.B.C. 1939, c. 38 at s. 17. Each contained language similar to the underlined passage set out above and a legislated process for sale of forfeited lands and vesting of municipalities with fee simple interests in land in the event there was no bid equal to the upset price at auction.

2. Municipal Tax Sales

[2350] Many of the original grantees of land in the Claim Area were absentee settlers. Similarly, many subsequent owners did not use or occupy the land. The

land was mostly idle for decades. Many owners failed to pay their municipal taxes, which resulted in the forfeiture and sale of their lands under the *Municipal Act*, as amended.

[2351] Richmond was ultimately vested with 18 fee simple interests in lands in the Claim Area. The lands are described below. The details of each individual sale are set out in the Agreed Statement of Facts between the plaintiffs and Richmond. It is sufficient to find, as I do, that the following lands were all acquired from tax sales that Richmond held in which there were no bids equal to or greater than the upset price, so Richmond was declared to be the purchaser:

a) all of Section 13, B4N, R5W between 1920 and 1925;

b) all of Section 14, B4N, R5W between 1922 and 1944;

c) southeast quarter of Section 22, B4N, R5W in 1923;

d) all of Section 23, B4N, R5W (excluding 5.01 acres shown on NWD Plan 5022) between 1933 and 1938;

e) all of Section 24, B4N, R5W (excluding 5.42 acres shown on NWD Plan 4237) between 1930 and 1934;

f) all of Section 26, B4N, R5W (excluding the 1.04 acres on NWD Map No. 4933) acquired in 1937; and

g) all of Section 27, B4N, R5W (excluding the 7.46 acres shown on NWD Map No. 4933) acquired in 1933.

(the “Municipal Tax Sale Lands”).

[2352] The plaintiffs also rely on By-law No. 1131 that was passed on November 28, 1949 as some evidence that Richmond acquired all or portions of Section 15 and 28, and the remainder of Section 22 via tax sale. The By-law is in respect of an authorization for the sale of lands from Richmond to Acme Peat Products Limited.

The recitals provide that all or portions of these sections of land were acquired under tax sale proceedings. Third parties now hold the fee simple titles to these lands. The plaintiffs' infringement claim in respect of the tax sales only relates to the Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands) so it is not necessary to decide whether Richmond acquired these lands at a tax sale.

[2353] Some of the fee simple interests in the Municipal Tax Sale Lands are now held by private parties. However, some are Federal Tl'uqtinus Lands and some are Richmond Tl'uqtinus Lands, as follows:

a) the Municipal Tax Sale Lands that remained in Richmond's possession are Lot K, Section 27, and Lot E, Sections 23 and 26, both in B4N, R5W, and shown on New Westminster District Subdivision Plan 19680.

b) the Municipal Tax Sale Lands Richmond transferred directly to Canada or the VFPA's predecessor, the Fraser River Harbour Commission ("FRHC"), and which Canada now holds are:

   i. part of Lot 3, Sections 13 and 14, B4N, R5W ("Lot 3"). In 1968–69, Richmond transferred the relevant portions of Section 13 to Canada. Lot 3 is derived, in part, from that portion of Section 13;

   ii. part of Lot 5, Section 13, B4N, R5N, and Sections 18 and 19, B4N, R4W. In 1968–1969, Richmond transferred the relevant portions of Section 13 to Canada. Lot 5 is derived, in part, from that portion of Sections 13, 18, and 19; and

   iii. Lot 8, Section 24, B4N, R5W. In 1968, Richmond transferred Lot 8 to the FRHC. Lot 8 is derived, in part, from that portion of Section 24.

c) other Municipal Tax Sale Lands that Richmond transferred to a peat company who in turn transferred most of those lands to Canada or the FRHC by 1975 and which Canada and the VFPA continue to hold. Those Federal Tl'uqtinus Lands are:

i. most of Lot 1, Sections 22 and 27, B4N, R5W;

ii. most of Lot 2, Section 23, B4N, R5W;

iii. the remainder of Lot 3;

iv. most of Lot 6, Section 24, B4N, R5W; and

v. Lot 9, Sections 23 and 26, B4N, R5W.

[2354] I found that the plaintiffs have established Aboriginal title with respect to the land in Sections 21, 22, 23, 26, and 27 and in part to Sections 20, 28, and 29 and that these lands were appropriated Indian settlement lands.

[2355] Richmond's land in the Cowichan Title Lands are Lots E and K. Richmond came into possession of the land in these lots via tax sales in the 1930s and has held them ever since.

[2356] Canada's land in the Cowichan Title Lands are Lot 1 in Sections 27 and 22, Lot 2 in Section 23 and Lot 9 in Sections 23 and 26. These lots all include land which Richmond obtained through tax sales, and which were transferred to a peat company. Canada acquired this land from Fraser River Peat Moss Limited in 1975.

3. Positions of the parties

[2357] The plaintiffs submit that BC's vesting of Richmond with fee simple interests in the Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands) under the *Municipal Act*, s. 283, as amended, is an infringement. This vesting has had the effect of continuing the Cowichan's exclusion from all the rights and benefits associated with their Aboriginal title. Canada and Richmond's current holding of fee simple interests and federal real property that derive from the

Municipal Tax Sale Lands meaningfully diminish Cowichan Aboriginal title to those lands.

[2358] The plaintiffs say each transfer continued an encumbrance that excluded and continues to exclude them from the Lands of Tl'uqtinus. The Cowichan's ability to exercise their title rights by their preferred means, or at all, continues to be unreasonably limited. This amounts to undue hardship and satisfies the test for infringement.

[2359] BC submits the claim cannot succeed because the legislation itself did not vest anything in Richmond. Nor was there any Crown action involved in the tax sale process that could have infringed the plaintiffs' rights. BC did not own and could not transfer fee simple interest in the lands at the time of the tax sales. The tax sale process is a creditor's remedy available to municipalities, with the land passing from the owner who is in default to the municipality; BC does not effect a transfer of land in the way that it does when it issues a Crown grant. The legislation did not confer a right to an interest in land. Only if the conditions in the *Municipal Act*, as amended, were met could Richmond acquire an interest in land.

[2360] Richmond admits it acquired Lots E and K through the legislated tax sale process. Richmond points out that it acquired title to the Richmond Tl'uqtinus Lands from private individuals and/or corporations, and not immediately from the Crown. Richmond also says that the effect of the tax sales was to "purge and disencumber" the underlying lands of any Aboriginal title that may have been extant.

[2361] The plaintiffs do not take issue with BC's passing of the *Municipal Act*, as amended. They agree that the legislation did not in and of itself result in a transfer of its interest in land to Richmond. Certain conditions needed to occur before the interest vested in Richmond. However, the plaintiffs submit that once those conditions were met, the legislation operated to vest Richmond with an interest in Aboriginal title lands. Legislation can, by its operation, infringe Aboriginal rights.

4. Analysis

a) Richmond's defence under the Municipal Act, as amended

[2362] Before considering the plaintiffs' infringement claim, I first consider Richmond's defence that the Cowichan's Aboriginal title was "purged and disencumbered" by operation of the *Municipal Act*, as amended.

[2363] Although there were some slight differences amongst the different iterations of the *Municipal Act*, as amended (*Municipal Act, 1911*, s. 302 and *Municipal Act, 1936*, ss. 290 and 291) those differences are immaterial, and s. 270 of the *Municipal Act, 1924*, is representative of the provision that Richmond relies on:

> **270.** The registration of any person pursuant to section 266 as the owner of the land, and the issue to him of a certificate of indefeasible fee, shall: —
>
> (a.) Cancel and annul any certificate of title at any time theretofore issued:
>
> (b.) Purge and disencumber the lands of and from all the right, title, and interest of any previous owner of said lands, or of his heirs, executors, administrators, or assigns, and of and from all claims, demands, payments, charges, liens, judgments, mortgages, or encumbrances of any nature and kind whatsoever; excepting only such as such previous owner, or any person claiming by, through, or under him, was not competent to convey, and such as consist of easements held by the municipality.

[2364] As a matter of plain language and ordinary meaning, Richmond says "all the right, title, and interest of any previous owner" includes any Aboriginal title of previous Indigenous owners. Richmond says this demonstrates a clear and plain intention on the part of the Legislature to essentially hit a "reset button" and give clear title, whether or not the Legislature had subjectively considered Aboriginal title. This, Richmond submits, is a complete defence to the declaration that the plaintiffs' seek that Richmond's fee simple titles in the Cowichan's Aboriginal title lands are defective and invalid. BC does not advance this argument.

[2365] I deal with this submission briefly, as I considered Richmond's argument respecting extinguishment and displacement at length in Part 6.1 of these reasons, and the submission regarding the *Municipal Act*, as amended, rests on a similar

basis. As I set out in Part 6.1, the Province lacked jurisdiction to legislate away Aboriginal title. The Province took its lands subject to Aboriginal title under s. 109 of the *Constitution Act, 1867*. At the time of the municipal tax sales in the 1920s, 1930s and 1940s, the Province could not "purge and disencumber" Aboriginal title from the lands such that Aboriginal title was extinguished, by virtue of the operation of the *Municipal Act*, as amended, or at all.

[2366] Further, nothing in s. 270(b) of the *Municipal Act* suggests that Aboriginal title was contemplated by the Legislature in enacting that section or that it was intended to apply to Aboriginal title. Even if the Legislature had jurisdiction to extinguish Aboriginal title, which it did not, this provision and its counterparts in the various iterations of the historical *Municipal Act*, as amended, do not meet the standard of a "clear and plain" intent to extinguish Aboriginal title.

[2367] During the exchange of written closing arguments, the plaintiffs delivered a Supplemental Notice of Constitutional Question to BC, which questions the constitutional applicability of a number of provisions in three iterations of the *Municipal Act* from 1911, 1924, and 1936. The plaintiffs contend, in the alternative, if the *Municipal Act*, as amended, had the effect of extinguishing or displacing Aboriginal title, then those provisions of that legislation are constitutionally inapplicable to its Aboriginal title land. BC says that this is a change in the plaintiffs' position in their main argument. I agree with this submission — in their pleadings, the plaintiffs do not seek a declaration that the legislation was constitutionally inapplicable. However, given my conclusion that the *Municipal Act*, as amended, did not "purge and disencumber" the Cowichan's Aboriginal title, the plaintiffs' alternative submission about the constitutional inapplicability of the historical *Municipal Act*, as amended, does not arise.

b) Infringement

[2368] I turn now to consider whether BC infringed the Cowichan's Aboriginal title in vesting Richmond with fee simple interests currently held by Canada (other than the YVR Fuel Project lands) and Richmond in the Cowichan Title Lands.

[2369] Generally speaking, the infringement analysis is concerned with whether legislation or Crown conduct has adversely interfered with an Aboriginal right. I accept BC's submission that it does not effect a transfer of land under the municipal tax sales process in the way that it does when it issues a Crown grant. Ownership of the land in this case passed from private parties to Richmond. A number of conditions had to occur before the tax sale process was triggered — including the owner's default on the payment of municipal taxes, a prescribed period of delinquency, and no bid at public auction that met or exceeded the upset price — and before Richmond was declared the purchaser.

[2370] However, I find the operation of BC's legislated tax sale process and its application to the Cowichan Title Lands resulted in Richmond's acquisition of the fee simple interests in the Cowichan Title Lands. This was a further disposition and alienation of the Cowichan's Aboriginal title land, effected through the operation of the *Municipal Act, 1911*, s. 283, as amended, the *Municipal Act, 1924*, s. 255(2) and the *Municipal Act, 1936*, s. 273(2), as amended. BC's submission that there is no Crown action to impugn in the municipal tax sale process minimizes its role. BC acts through its legislation, and here, the effect of the legislated tax sale process was to significantly interfere with the ability of the Cowichan to exercise its title through permitting Richmond to acquire fee simple interests from largely absentee owners. BC acts through the provincial Registrar of Titles, who, after the expiration of the redemption period, issues a certificate of indefeasible title registering the municipality as owner. This is the last step in the municipal tax sale process, effecting the vesting of the municipality with the property.

[2371] I do not agree with BC's argument that the transfer of the property interest following a municipal tax sale has no effect on the Cowichan's Aboriginal title. Richmond's current ownership of Lots K and E — waterfront lands where the Cowichan's village once stood — is derived directly from BC's legislated tax sale process in the *Municipal Act*, as amended. This particular ancestral land is of great significance to the Cowichan.

[2372] I find that BC's vesting of Richmond with fee simple interests in the Richmond Tl'uqtinus Land and the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands) by operation of the legislated tax sale process in the historical *Municipal Acts*, as amended, continued the Cowichan's exclusion from the rights and benefits associated with their Aboriginal title to the Cowichan Title Lands. This was a meaningful diminution of the Cowichan's ownership rights in respect of the Cowichan Title Lands, and a *prima facie* infringement of their Aboriginal title.

5. Article 13

[2373] I turn now to the other ground on which the plaintiffs impugn the municipal tax sales. The plaintiffs claim that BC's vesting of Richmond with the fee simple interests in the Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands), per s. 283 of the *Municipal Act, 1911*, as amended, was without constitutional authority by virtue of being constitutionally limited by Article 13 of the *BC Terms of Union.*

a) Positions of the Parties

[2374] The plaintiffs say Article 13 limited BC's authority to dispose of appropriated Indian settlement lands pending conveyance to Canada for Indian reserve creation. The plaintiffs' argument rests on a similar basis as its submissions respecting a lack of constitutional authority for the Crown grants: that the Lands of Tl'uqtinus were appropriated, remained appropriated through Confederation, and by virtue of its obligations under Article 13, BC did not have the constitutional authority to vest Richmond with the Municipal Tax Sale Lands (that are presently owned by Richmond or Canada) under the *Municipal Act*, as amended.

[2375] The plaintiffs say when BC, through the tax sales process, effected the conveyance of the lands to Richmond, that placed the honour of the Crown at stake, and warrants invalidating the unconstitutional result. The plaintiffs do not seek a declaration respecting the constitutional inapplicability of the historical *Municipal Act*, as amended, because it is no longer in force, and because a declaration of

defectiveness and invalidity of the related fee simple titles would satisfy the plaintiffs' desire to advance reconciliation in respect of these lands.

[2376] BC says there was constitutional authority for Richmond's acquisition of interests in the Claim Area. The *Municipal Act*, as amended, was within provincial jurisdiction pursuant to s. 92(13) of the *Constitution Act, 1867*. Further, Article 13 did not limit its constitutional authority to enact these statutes. BC's arguments with respect to Article 13 and the constitutionality of the Crown grants apply to this aspect of the plaintiffs' claim. Article 13 does not speak to provincial jurisdiction. BC objects to the plaintiffs' characterization of the effect of municipal statutes as a means by which BC vested or transferred an interest in land, as though BC took action comparable to transferring a fee simple interest from it to Richmond. Richmond adopts BC's submissions.

b) Analysis

[2377] I found that Article 13 is a constitutional constraint on BC's authority to dispose of Indian settlement lands. Article 13 continued the appropriation of Indian settlement lands and required BC to refrain from disposing of certain tracts of land for the purpose of eventual conveyance to Canada pending Indian reserve creation. In my view, this imposed an obligation on BC not to dispose of those lands prior to fulfilling its commitment, whether through conveying those lands to Canada or reaching another arrangement in satisfaction of Article 13. Accordingly, I determined the Crown grants were made without constitutional authority because BC lacked constitutional authority to sell or dispose of appropriated Indian settlement lands which the Cowichan Title Lands were.

[2378] The first question I must consider is whether the protections that attached to the Cowichan Title Lands, as Indian settlement lands that were appropriated from the Crown's disposition processes, continued after BC issued the Crown grants of fee simple interest.

[2379] In my view, there is a lack of a principled basis to conclude that after it issued the Crown grants, BC's obligations under Article 13 in respect of those lands

ceased. Article 13 “speaks prospectively” and imposes a constitutional obligation on BC to convey lands to the federal government that had previously been its policy to reserve for the use and benefit of Indians: *Mathias* at para. 442; *Williams Lake* SCTC at para. 293. I find the constitutional effect of Article 13 of the *BC Terms of Union* is such that it continued to limit BC’s authority to dispose of the Cowichan Title Lands at the time the operation of legislated tax sale process vested Richmond with fee simple interests in the Cowichan Title Lands.

[2380] BC has the same concern about how the plaintiffs have framed this aspect of their claim as it raised in respect of the infringement claim: that BC did not transfer the Municipal Tax Sale Lands to Richmond and had no role in respect of the conveyance. I found that the plaintiffs’ claim is sufficiently framed to impugn the operation and effect of s. 283 of the *Municipal Act, 1911*, as amended, on the Cowichan Title Lands.

[2381] I conclude that Article 13 constrained BC’s authority to dispose of or forfeit the Cowichan Title Lands to Richmond via the operation of the *Municipal Act, 1911*, s. 283, as amended, for the same reason it lacked authority to issue the Crown grants in the first place. The lands were appropriated from disposition by Douglas, and that appropriation was continued through to and by Article 13. BC had an obligation under Article 13 to convey Indian settlement lands to Canada and BC’s obligations persisted in spite of the Crown grants. Accordingly, with respect to the Cowichan Title Lands, BC’s vesting of Richmond with the fee simple interests in the Richmond Tl’uqtinus Lands and Federal Tl’uqtinus Lands (other than the YVR Fuel Project lands) under the *Municipal Act, 1911*, s. 283, as amended, was made without constitutional authority because it was constitutionally limited by Article 13 of the *BC Terms of Union*.

F. THE VESTING OF ROADS TO RICHMOND UNDER THE *COMMUNITY CHARTER*

[2382] I turn now to the third category of alleged infringement. The plaintiffs submit that by vesting Richmond with property interests in certain roads in the Claim Area,

BC has interfered and continues to interfere with each incident of Cowichan Aboriginal title. Specifically, BC infringed their Aboriginal title by vesting Richmond with the soil and freehold interest to nine road parcels in Richmond pursuant to the *Community Charter*, s. 35(1)(a). The nine road parcels are described in Part 1 of these reasons. I refer to them as the Richmond Tl'uqtinus Lands (Highways).

[2383] It is not contentious that the effect of s. 35(1)(a) of the *Community Charter* is to vest in Richmond the soil and freehold of every highway within Richmond.

[2384] In addition to the claim of infringement, the plaintiffs say BC vested Richmond with the soil and freehold of every highway of the Richmond Tl'uqtinus Lands, per s. 35(1)(a) of the *Community Charter*, without constitutional authority by virtue of being constitutionally limited by Article 13 of the *BC Terms of Union*. They seek a declaration that BC's vesting of Richmond with the soil and freehold of every highway in Richmond under s. 35(1)(a) is constitutionally inapplicable to the Richmond Tl'uqtinus Lands.

[2385] I first consider the infringement claim, and then turn to whether the vesting was without constitutional authority by virtue of Article 13 of the *BC Terms of Union*.

1. Positions of the Parties

[2386] Since January 1, 2004, s. 35(1)(a) of the *Community Charter* has vested soil and freehold of highways to municipalities, meaning municipalities have ownership rights over most highways within their boundaries. According to the plaintiffs, prior to 2004, a municipality had a statutory right of possession of highways that was short of ownership. For example, a municipality could not grant charges or tenures to highway lands: *FortisBC Energy Inc. v. Surrey (City)*, 2013 BCSC 2382 at paras. 260–261. A municipality's right of possession to highways was limited to highway purposes: *Affleck v. Nelson (City)*, 23 W.W.R. 386 at 387, 1957 CanLII 577 (B.C.S.C.); *Barratt v. North Vancouver (District)*, 6 B.C.L.R. 319 at 328–329, 1978 CanLII 368 (C.A.), aff'd [1980] 2 S.C.R. 418, 1980 CanLII 219.

[2387] The plaintiffs say BC's vesting of soil and freehold of highways under the *Community Charter* transferred an ownership interest in those lands to Richmond that is akin to a Crown grant.

[2388] The plaintiffs submit the effect of s. 35(1) of the *Community Charter* is that municipalities are now vested with broad rights to use and manage highways which include converting municipalities' soil and freehold interest in highways to a common fee simple interest registerable under the *LTA*. But for s. 35(1)(a) of the *Community Charter*, the soil and freehold of every highway in the province would vest to BC. The plaintiffs rely on s. 107 of the *LTA* which provides that the deposit of a subdivision, reference, or explanatory plan showing a portion of the land as a highway will generally operate to extinguish the owner's common law property in those lands and vest title to those lands with BC.

[2389] The plaintiffs submit the transfer of a legal interest in the Richmond Tl'uqtinus Lands (Highways) has the immediate effect of interfering with every incident of Cowichan Aboriginal title to that land. These interferences are ongoing. It is Richmond and not the Cowichan who exercise and enjoy ownership and management rights over those lands. Richmond stands to profit from the Richmond Tl'uqtinus Lands (Highways) either by sale (via closure) or by issuing lesser tenures to third parties. The control Richmond exercises comes at the expense of the Cowichan.

[2390] BC says the enactment of the *Community Charter* did not change Richmond's interest in the roads. The land has been Richmond's property since the 20th century.

[2391] BC acknowledges that the state of title of the roads varied depending on how they had been dedicated. If the *Community Charter* vested "fuller title" to certain roads in Richmond, the only actual effect was an administrative change allowing Richmond to directly and consistently administer all the roads in the municipality, removing whatever small role BC had retained in certain roads. The plaintiffs frame their argument as if these were new Crown grants, which is incorrect.

[2392] BC submits when the Crown grants were made, they contemplated that parts of the land would be “resumed” by the Crown to construct infrastructure, such as roads. The option for parts of the Claim Area to be made into roads was inherent to the issuance of the Crown grants themselves. Further, the *Municipal Act, 1892*, S.B.C. 1892, c. 33 enabled Richmond to exercise the right of resumption by enacting by-laws under s. 104(107). As set out later, Richmond did exercise this authority, and BC says the majority of impugned decisions were taken by Richmond, and were not Crown actions.

[2393] BC submits the *Community Charter* did not impact any interest the plaintiffs may have had in the claimed lands. The *Community Charter* transferred administrative responsibilities from BC to Richmond with the result that Richmond gained the ability to authorize additional uses of roads. This transfer of administrative responsibility does not attract constitutional scrutiny. The enactment of the *Community Charter* did not alter the status of the designated lands as roads. The roads remain the property of Richmond.

[2394] Richmond agrees that, subject to specific exceptions, s. 35(1)(a) vests ownership and possession of the soil and freehold of every highway in a municipality. Richmond adopts the submissions of BC, and says to the extent there was an infringement, Richmond is not responsible for it.

[2395] In response, the plaintiffs say that by BC’s own admission, the *Community Charter* did in fact vest Richmond with fuller title to certain roads allowing Richmond to directly and consistently administer the roads. Indigenous litigants are not required to prove exactly what interests the Crown have in their lands and what interest was transferred. All that is required to meet the *prima facie* threshold of infringement is proof of a meaningful diminution of the right. The plaintiffs do not suggest the passage of the *Community Charter* in itself is an infringement. When BC vested Aboriginal title lands to a municipality by operation of statute, that transfer of interest is clearly an infringement.

2. Law

a) Community Charter

[2396] The *Community Charter* came into force on January 1, 2004. Section 35(1)(a) provides that subject to certain exceptions, the soil and freehold of every highway in a municipality is vested in that municipality. Section 35 in its entirety provides:

> **35**(1) Subject to this section,
>
> (a) the soil and freehold of every highway in a municipality is vested in the municipality, and
>
> (b) in the case of a highway in a municipality that is not vested under paragraph (a), the right of possession of the highway is vested in the municipality.
>
> (2) Subsection (1) (a) does not apply to the following:
>
> (a) Provincial arterial highways, including the intersection between a Provincial arterial highway and another highway and any interchange between a Provincial arterial highway and another highway;
>
> (b) highways referred to in section 23 (1) of the *South Coast British Columbia Transportation Authority Act*;
>
> (c) highways in a park, conservancy, recreation area or ecological reserve established under the *Park Act*, the *Ecological Reserve Act* or the *Protected Areas of British Columbia Act* or an area to which an order under section 7 (1) of the *Environment and Land Use Act* applies;
>
> (d) highways in a regional park;
>
> (e) a regional trail, other than a regional trail that is part of the road system regularly used by vehicle traffic;
>
> (f) land, including the improvements on it, on which Provincial works such as ferry terminals, gravel pits, weigh scales and maintenance yards are located;
>
> (g) roads referred to in section 24 of the *Forest and Range Practices Act* that have not been declared to be public highways;
>
> (h) highways vested in the federal government;
>
> (i) in relation to a reserve as defined in the *Indian Act* (Canada), highways in the reserve or that pass through the reserve;
>
> (j) public rights of way on private land.
>
> (3) Subsection (1) (b) does not apply to highways referred to in subsection (2) (a) to (h).

(4) The vesting under subsection (1) (a) and the right of possession under subsection (1)(b)

(a) are not adversely affected or derogated from by prescription in favour of any other occupier, and

(b) are subject to any rights reserved by the persons who laid out the highway.

(5) The vesting under subsection (1) (a) includes the vesting of all statutory rights of way and other easements owned by the Provincial government solely for purposes relating to the drainage of a highway that is vested under that subsection, and the interest of the Provincial government under those easements is transferred to the municipality and the municipality assumes the rights and obligations of the Provincial government in relation to those easements.

(6) The minister responsible for the *Transportation Act* may file with the land title office an application satisfactory to the registrar of land titles that identifies an easement referred to in subsection (5) and, on filing, the registrar must register ownership of the easement in the name of the municipality.

(7) The vesting under subsection (1) (a) is subject to the following:

(a) the right of resumption under subsection (8);

(b) the limits referred to in section 23 (2) of the *Land Title Act*;

(c) the exceptions described in section 50 (1) (a) (ii) to (iv) and (b) of the *Land Act*, as if the vesting were made by Crown grant under that Act;

(d) the exceptions described in section 107 (1) (d) of the *Land Title Act*, as if the vesting were under that section.

(8) The Provincial government may, by order of the Lieutenant Governor in Council, resume the property or interest vested in a municipality under subsection (1)(a), if the Lieutenant Governor in Council considers that this is required

(a) for the purpose of or in relation to a Provincial arterial highway,

(b) for any other transportation purpose, or

(c) for the purpose of or in relation to a park, conservancy, recreation area or ecological reserve established or proposed to be established under the *Park Act*, the *Ecological Reserve Act* or the *Protected Areas of British Columbia Act* or an area to which an order under section 7 (1) of the *Environment and Land Use Act* applies.

(9) An order under subsection (8) (a) or (b) may only be made on the recommendation of the minister responsible for the *Transportation Act*, and an order under subsection (8) (c) may only be made on the recommendation of the minister responsible for the applicable Act referred to in that subsection.

(10) The minister responsible for the *Transportation Act*, after consultation with the minister responsible for this Act, may

(a) by order, cancel the Provincial government's right of resumption under subsection (8) in relation to a specified highway or in relation to highways within a specified area, or

(b) by regulation, specify circumstances in which the Provincial government's right of resumption is cancelled without a specific order.

(11) For certainty, a council may grant a licence of occupation or an easement, or permit an encroachment, in respect of a highway that is vested in the municipality under subsection (1) (a).

(12) This section does not apply to a highway for which the municipality has purchased or taken the land and for which title is registered in the name of the municipality.

[2397] Subject to specific exceptions, s. 35(1)(a) vests ownership and possession of the soil and freehold of every highway in a municipality.

b) Land Title Act and other Laws Dealing with the State of Title to Roads

[2398] The plaintiffs rely on s. 107 of the *LTA* which provides that the deposit of a subdivision, reference or explanatory plan showing a portion of the land as a highway will generally operate to (1) extinguish the owner's common law property in those lands and (2) vest title to those lands with BC. Section 107 states:

107(1) The deposit of a subdivision, reference or explanatory plan showing a portion of the land

(a) as a highway, park or public square, that is not designated on the plan to be of a private nature, or

(b) as covered by water and as lying immediately adjacent to a lake, river, stream or other body of water not within the land covered by the plan, and designated on the plan to be returned to the government,

operates

(c) as an immediate and conclusive dedication by the owner to the public of that portion of land shown as a highway, park or public square, or to be returned to the government, for the purpose indicated on or to be inferred from the words or markings on the plan,

(d) to vest in the Crown in right of the Province, subject to any other enactment, title to the highway, park or public square, or to the portion to be returned to the government, except any of

> the following that are registered in the name of a person other than the owner:
>
> (i) minerals and placer minerals as defined in the Mineral Tenure Act;
>
> (ii) coal;
>
> (iii) petroleum as defined in the Petroleum and Natural Gas Act;
>
> (iv) gas or gases, and
>
> (e) to extinguish the owner's common law property, if any, in the portion of land referred to in subsection (1) (a) or (b).
>
> (2) If the Crown in right of Canada, in trust for a band, as defined in the Indian Act (Canada), is the owner of the subdivided land, the Lieutenant Governor in Council may limit, in whole or in part, and subject to the terms and conditions the Lieutenant Governor in Council considers necessary, the operation of subsection (1).
>
> (3) An indefeasible title must not be registered for a highway, park or public square dedicated and vested under this section.
>
> (4) A public street, road, square, lane, bridge or other highway that vests in the City of New Westminster under section 204 of the New Westminster Act, 1888 vests subject to the exceptions referred to in subsection (1) (d) of this section.

[2399] The *LTA* does not contain any provisions for vesting of highway lands to municipalities. The default is that lands dedicated as highways vest in BC.

[2400] BC notes that, while the plaintiffs rely on s. 107 of the *LTA* as a means through which a highway may be dedicated and which operates to vest BC with title, it is not the only legislation which governed the state of title in roads. BC points to s. 303(1) *Municipal Act, 1924* as an example, which sets out the following rule:

> **303**(1.) Except in any case where a municipality has purchased or taken land for a highway, as defined in the "Highway Act," and the title thereof is registered in the name of the municipality, the soil and freehold of every highway, as so defined, within a municipality, shall be deemed and are hereby declared to be vested in His Majesty, his heirs and successors.

[2401] Accordingly, s. 303(1) provided for an exception whereby in some cases title remained with municipalities. BC acknowledges that there is some ambiguity in the interaction between the *Municipal Act, 1924* and the *LTA*, s. 107 because Richmond held title to the land before parts of it were dedicated as highways.

[2402] Where title to highways in a municipality was vested in BC, municipalities were vested with the "possession" of these roads. For example, s. 370 the *Municipal Act, 1911* provided:

> **370.** The possession of every public road, street, bridge, lane, square, or other highway in a municipality, except such as have been taken and held possession of by any person in lieu of a public road, street, bridge, lane, square, or other highway laid out by him without compensation therefor, shall be vested in the municipality, subject to any rights in the soil which the persons who have laid out such road, street, bridge, lane, square, or other highway may have reserved.

[2403] A municipality's right of possession to highways (for example, under historical iterations of the *Municipal Act*) was limited to possession only for highway purposes.

[2404] Moreover, under s. 323(1) of the *Municipal Act, 1936*, a municipality had discretion in approving "construction or work on or over any public road".

[2405] Municipalities could also pass by-laws to establish, alter, or close highways by depositing the by-law with an explanatory note under what was s. 120 of the *Land Registry Act, 1948*, R.S. 1948, c. 171 [*Land Registry Act*].

[2406] The above illustrates how the law operated to vest municipalities with interests in highways and the powers of municipalities to manage highways. It is not an exhaustive review of the many legislative frameworks that applied over the last century.

c) Vesting of Highways Under the Community Charter

[2407] There are several road parcels in the Claim Area that meet the statutory criteria or definition of a highway (i.e., at s. 107(1) of the *LTA* and under the *Community Charter*). The plaintiffs did not include all of these in their prayer for relief. The plaintiffs say they selected the Richmond Tl'uqtinus Lands (Highways) because they are either 1) wholly situated within the Federal Tl'uqtinus Lands or Richmond Tl'uqtinus Lands, or 2) are not developed or used as a public highway.

[2408] The plaintiffs have established Aboriginal title to the following Richmond Tl'uqtinus Lands (Highways) to the extent they are in Cowichan Title Lands:

a) Dyke Road, Parcel A: Dyke Road, Section 27, B4N R5W, shown as dedicated highway on New Westminster District Subdivision Plan 19680, and further surveyed and identified as Parcel A on Explanatory Plan 74643. A strip of Dyke Road within Section 27 is paved, but Richmond's witness Jason Ho testified that Richmond does not consider this to be a public road. This portion of Dyke Road is surrounded by other Richmond Tl'uqtinus Lands.

b) BCP42299 Road: In 2009, Richmond dedicated a 668 square meter road parcel, from a part of Lot K. This parcel is shown dedicated as highway on New Westminster District Reference Plan BCP42299. This parcel of road forms part of Dyke Road in Section 27.

c) Dyke Road, Parcel B: Dyke Road, Sections 23, 24 and 26, B4N, R5W, shown as dedicated highway on Plan 19680, and further surveyed and identified as Parcel B on Explanatory Plan 74643. Dyke Road within Sections 23, 24 and 26 B4N, R5W is gravel and dirt. It is surrounded by other Richmond Tl'uqtinus Lands.

d) No. 7 Road, Sections 14, 22, 23, 26, and 27, B4N, R5W, New Westminster District, shown as dedicated highway on Plan 19680. No. 7 Road within Sections 14, 15, 22, 23, 26 and 27 is unpaved and contains drainage infrastructure and greenspace.

e) The "Blundell Road" and "No. 8 Road" parcel: In 1986 Richmond and Canada, as represented by the FRHC, completed an exchange of lands whereby Richmond closed several highways on the Lands of Tl'uqtinus and conveyed them to the FRHC. In exchange, Canada dedicated certain other Claim Area land held by Canada or the FRHC as highways including portions of No. 8 Road and Blundell Road through Sections 13, 14, 23, and 24 B4N, R5W and Section 18, B4N, R4N that were not already dedicated or gazetted as road at the time of

the road exchange. This contiguous road parcel is surrounded by Federal Tl'uqtinus Lands.

d) Creation of the Roads and State of Title Prior to 2003

[2409] The evidence with respect to the establishment of roads in Richmond is largely uncontroverted. However, it does not allow for a precise determination of the state of title to all the Richmond Tl'uqtinus Lands (Highways) before the enactment of the *Community Charter*.

[2410] Some roads, such as Dyke Road, were established by Richmond's resumption of land. On September 17, 1892, Richmond enacted By-law No. 45, *A By-Law to Open Up and Establish Certain Roads Within the Municipality of the Township of Richmond*, which resumed or expropriated a 66-foot-wide parcel of land along the south shore of Lulu Island, including through Sections 19, 23, 24, 26, and 27, and declared those lands to be road and public highway. By-law No. 45 also resumed land in the area identified as Section 33, which was dedicated as road in 1922. These roads were therefore likely excepted from the usual rule under s. 303(1) *Municipal Act, 1924* that the soil and freehold of the highway was vested in BC, and title was held by Richmond.

[2411] Richmond created the major part of the remaining roads in 1958. At that time, Richmond subdivided lands it held in nine sections within the Claim Area. Parts of Dyke Road were re-dedicated at this time, as were parts of Roads 7 and 8. Blundell Road was also created. Richmond did this by deposition of a subdivision plan with the authority responsible for land titles. This was a means for establishing roads provided in s. 112 of the *Land Registry Act*. Under s. 112, an owner may deposit a plan showing land as a highway, which functions to dedicate that land to the public as a highway. A deposit of a plan would be deemed to vest the title to the highway land in BC.

[2412] For these roads which were subsequently dedicated by deposit of a subdivision plan, there is ambiguity as to the state of title. Section 303(1) of the *Municipal Act, 1924* stated that a municipality would retain title to a road where it had

purchased the land and held title. Because Richmond owned the various parcels before subdividing them and dedicating the roads in 1958, this provision meant that title was not vested in the Crown. The *Land Registry Act*, s. 112, however, provided that dedication of a road by deposit of a plan operated to "vest in the Crown in right of the Province the title to such portion of the land subdivided as is shown thereon as a highway". BC says if it did hold title as a result of the operation of this provision, it was severely limited and did not amount to anything like a fee simple interest. Per the *Municipal Act, 1911*, Richmond was vested with possession from the outset and, for example, retained discretion to close the roads. Only in certain circumstances would BC as title-holder be required to grant approvals.

3. Analysis Re: Infringement

[2413] The effect of s. 35(1)(a) of the *Community Charter* was to vest soil and freehold in the Richmond Tl'uqtinus Lands (Highways) to Richmond. The state of title of those roads prior to the enactment of the *Community Charter* varied depending on how and when they were dedicated. Where title to the roads was vested in BC prior to 2003, Richmond nonetheless exercised possessory rights. I accept BC's submission that the *Community Charter* primarily transferred certain administrative responsibilities from BC to Richmond, with the result that Richmond gained the ability to authorize additional uses of roads, such as the addition of infrastructure crossing the road. Prior to the enactment of the *Community Charter*, state of title to the roads varied depending on how they had been created, but at no time since the issuance of the Crown grants did BC hold more than a limited form of title, which subsisted to the extent that those roads remained so designated.

[2414] The plaintiffs acknowledge that the Richmond Tl'uqtinus Lands (Highways) were dedicated according to a variety of legislated frameworks which may have vested Richmond with certain interests or rights respecting highway lands. The plaintiffs say it is unnecessary to dissect over a century of legislation to map out when and how each road was dedicated, transferred, managed, and vested. It is sufficient to note that 1) prior to the *Community Charter*, the *LTA* vested dedicated highways to the Province, not municipalities; 2) since the enactment of the

Community Charter, Richmond enjoys a greater interest in highway lands; and 3) BC admits the *Community Charter*, did, in fact, vest Richmond with fuller title to certain roads, allowing Richmond to directly and consistently administer all the roads in the municipality. The vesting of Richmond with a “fuller title” to the Lands of Tl'uqtinus, which includes the ability to undertake activities that would previously have required provincial approval, is enough to attract constitutional scrutiny.

[2415] Richmond agrees that it owns the soil and freehold interests in the Richmond Tl'uqtinus Lands (Highways), and that these roads pass through parcels — including through the Richmond Tl'uqtinus Lands. Richmond agrees that, subject to specific exceptions, s. 35(1)(a) of the *Community Charter* vests ownership and possession of “the soil and freehold of every highway” in a municipality.

[2416] I find the effect of s. 35(1)(a) was to vest the soil and freehold of the Richmond Tl'uqtinus Lands (Highways) in Richmond, which included the transfer of additional administrative responsibilities for the roads to Richmond, such as the ability for Richmond to authorize additional uses of roads. Prior to s. 35(1)(a), the state of title to the roads varied, and BC held a limited form of title to some of the roads. With the enactment of s. 35(1)(a) of the *Community Charter*, the soil and freehold in all Richmond Tl'uqtinus Lands (Highways) vested in Richmond.

[2417] I find that the vesting of title and related transfer of administrative responsibilities to Richmond in Cowichan Title Lands attracts constitutional scrutiny. The SCC in *Tsilhqot'in* SCC stated that any direct transfer of Aboriginal property rights to a third party is a meaningful diminution of the Aboriginal group ownership right and will amount to an infringement: at para. 124.

[2418] The vesting of Richmond with the soil and freehold of the Richmond Tl'uqtinus Lands (Highways) in the Cowichan Title Lands interferes with the Cowichan’s exercise of their Aboriginal title. While the lands were alienated via the Crown grants, the vesting under s. 35(1)(a) of the *Community Charter* is a further, additional, and continuing intrusion upon their title. It continues the Cowichan’s deprivation of the right of exclusive use, enjoyment, occupancy, and possession of

their land, and the right to determine the use to which the land may be put. BC's vesting grants Richmond the ability to authorize additional uses of the roads, which is another intrusion upon the Cowichan Title Lands.

[2419] The Richmond Tl'uqtinus Lands (Highways) in the Cowichan Title Lands cannot be used as a village or fishing station, or as the Cowichan choose. The Cowichan have no stake in deciding how the lands will be used and enjoy no economic benefits associated with Richmond's or other third-party uses. BC's vesting of Richmond with the soil and freehold of Richmond Tl'uqtinus Lands (Highways) in the Cowichan Title Lands is a continuing interference with all incidents of Aboriginal title, a meaningful diminution of the Cowichan's right of ownership, and therefore a *prima facie* infringement Cowichan Aboriginal title.

4. Article 13

[2420] Turning to the second ground on which the plaintiffs impugn the vesting under the *Community Charter*. The plaintiffs claim that BC's vesting of Richmond with the soil and freehold of the roads was without constitutional authority by virtue of being constitutionally limited by Article 13 of the *BC Terms of Union*.

[2421] The plaintiffs seek a declaration that BC's vesting of interests to Richmond under the *Community Charter*, s. 35(1)(a) is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of Article 13.

a) Positions of the Parties

[2422] There is significant overlap between the parties' positions with respect to whether BC's vesting of the soil and freehold of the roads to Richmond was infringing, and with respect to whether the vesting was unconstitutional by virtue of Article 13 of the *BC Terms of Union*.

[2423] As previously set out, the plaintiffs say the constitutional effect of Article 13 continues to limit BC's authority to dispose of Indian settlement lands. The Lands of Tl'uqtinus were appropriated and remained appropriated, such that the post-Confederation Crown grants were made without constitutional authority. The

same argument applies here. By virtue of its obligations under Article 13, BC did not have the constitutional authority to vest Richmond with the soil and freehold of the Richmond Tl'uqtinus Lands (Highways) under the *Community Charter*, or otherwise. BC attempts to minimize the significance of the *Community Charter* and the impact upon the plaintiffs to avoid constitutional scrutiny.

[2424] BC submits that Article 13 of the *BC Terms of Union* did not limit BC's constitutional authority to enact these statutes. BC's arguments with respect to Article 13 in relation to the constitutionality of the Crown grants apply to this aspect of the plaintiffs' argument: Article 13 relates to a federal head of power and did not constitutionally limit provincial legislation, including the *Community Charter*.

[2425] Richmond says that s. 35(1) of the *Community Charter* is a complete defence to the declaration that it is constitutionally inapplicable to the Richmond Tl'uqtinus Lands (Highways) that are in the Cowichan Title Lands.

b) Analysis

[2426] As previously set out, Article 13 of the *BC Terms of Union* provides that Canada assumes responsibility for the "charge of Indians, and the trusteeship and management of the lands reserved their use and benefit" and that "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union". To carry out that policy, "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government".

[2427] I found that Article 13 limited BC's authority to dispose of the Cowichan Title Lands because they were appropriated Indian settlement lands. As a result, the Crown grants of fee simple interest in the Cowichan Title Lands were made without constitutional authority. The appropriation of Indian settlement lands for the purpose of Indian reserve creation meant that BC could not alienate those lands by granting

fee simple estates to settlers without first dealing with the Cowichan's interest in the Lands of Tl'uqtinus and its commitment under Article 13.

[2428] The plaintiffs ask the Court to conclude that the constraints imposed by Article 13 extend to BC's vesting of Richmond with the soil and freehold in the Richmond Tl'uqtinus Lands (Highways). With respect to the municipal tax sales, I find that BC's obligations under Article 13 did not end when BC issued the Crown grants. I find with respect to the Cowichan Title Lands, BC's vesting of Richmond with the fee simple interests in the Richmond Tl'uqtinus Lands and Federal Tl'uqtinus Lands (other than the YVR Fuel Project lands) under s. 283 of the *Municipal Act*, as amended, was made without constitutional authority because it was constitutionally limited by Article 13 of the *BC Terms of Union*.

[2429] However, in my view, the constitutionality of BC's conduct with respect to the vesting of interests in roads is more appropriately considered under s. 35(1) of the *Constitution Act, 1982*, in light of the Cowichan having now established Aboriginal title. Section 35 limits provincial legislative power to regulate Aboriginal title and importantly, provides a framework for reconciliation of the Aboriginal interests with those of the broader public: *Tsilhqot'in* SCC at para. 118. I find that BC's vesting of the Richmond Tl'uqtinus Lands (Highways) in the Cowichan Title Lands infringes the Cowichan's Aboriginal title. This infringement is ongoing and, as I set out later in these reasons, BC is required to justify its ongoing intrusion in this regard.

[2430] Addressing this matter through the lens of infringement and justification could allow for reconciliation of the interests at stake, and a more nuanced analysis as to the extent, if any, of BC's authority to vest soil and freehold of highways in the Cowichan Title Lands to Richmond absent the Cowichan's consent.

[2431] Given my findings with respect to infringement, I decline to determine whether BC's vesting of highways to Richmond in the Cowichan Title Lands per s. 35(1)(a) of the *Community Charter* was unconstitutional by virtue of Article 13 of the *BC Terms of Union*. Therefore, I need not consider Richmond's submission that s. 35(1)(a) of the *Community Charter* is a defence to a declaration that BC's vesting of Richmond

with the soil and freehold of every highway in Richmond, as under s. 35(1)(a) of the *Community Charter*, is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of Article 13 of the *BC Terms of Union*.

G. CANADA AND VFPA ACTIVITIES ON THE FEDERAL TL'UQTINUS LANDS

[2432] Turning to the last category of alleged infringements. The plaintiffs submit Canada has infringed their Aboriginal title through activities on the Federal Tl'uqtinus Lands that Canada owns and the VFPA manages as Canada's agent (the "Federal Tl'uqtinus Lands (Canada)".

[2433] The plaintiffs allege five federal activities that individually and/or collectively interfered and interfere with the Cowichan Aboriginal title:

a) Canada has assigned authority to the VFPA and/or its predecessors to undertake port activities including management, leasing or licensing of the lands;

b) Canada has compelled the VFPA and/or its predecessors to develop land-use plans;

c) as Canada's agent, the VFPA and/or its predecessors have undertaken leasing of the lands and made other lands available for leasing;

d) Canada has failed to remove the lands it holds from the VFPA's letters patent to return those lands to the plaintiffs; and

e) as Canada's agent, the VFPA has refused to allow the plaintiffs to fish from the land.

[2434] The plaintiffs say that each of the interferences set out above are sufficient on their own to meet the threshold for infringement. In the alternative, the collective or cumulative effect of the interferences is an infringement.

[2435] In its pleadings, Canada denies that any of its authorization of port activities in the Claim Area interfered with or infringed the plaintiffs' Aboriginal title. In final argument, Canada said several of the plaintiffs' assertions of infringement are not properly characterized because they are overly broad, and do not lend themselves to the application of the *Sparrow* framework, or are premature. Judicial consideration of those asserted infringements should be deferred until they are either pleaded with specificity or are ripe for consideration. Canada also says the Court should not engage in an infringement analysis in respect of some of the impugned activities because they do not constitute Crown conduct that could interfere with the plaintiffs' Aboriginal title.

[2436] The VFPA relies on Canada's submissions with respect to infringement.

1. Canada's assignment of the Federal Tl'uqtinus Lands (Canada) to the VFPA

[2437] The Federal Tl'uqtinus Lands (Canada) are comprised of 11 lots in the Claim Area which Canada holds as federal real property. These are described in Part 1.

[2438] A summary of the history of Canada's dealings with the Federal Tl'uqtinus Lands (Canada) was provided by the plaintiffs in their final submissions. The summary recounts the assignment of those lands to the VFPA and its predecessors and is drawn in large part from the report of Canada's expert, Dr. Binnema, and admissions. The facts surrounding the assignment are not contentious. I relied on that summary in setting out some of the history, below.

[2439] In 1964, Canada enacted the *Harbour Commissions Act*, S.C. 1964, c. 32. The following year, it established the FRHC with harbour limits including the main arm of the lower Fraser River all the way to its mouth. In 1966, with BC's agreement, the FRHC assumed management of the river bed and foreshore for the lower south arm of the Fraser River including the submerged land to which the plaintiffs claim Aboriginal title.

[2440] Beginning in about 1968/1969, Canada and the FRHC acquired some of the Federal Tl'uqtinus Lands (Canada) from Richmond. These lands were generally undeveloped, poorly serviced by roads, and mostly vacant except for some peat extraction which was occurring. A significant portion of the lands were being used as a municipal dump.

[2441] In 1975, Canada, through the FRHC, acquired additional lands in the Claim Area, including Lots A and D in Sections 14, 15, 22, 23, 24, 26, 27, and 28; Lot 1 in Section 27; and Lot 2 in Section 22.

[2442] Canada came to hold most of the Federal Tl'uqtinus Lands by the late 1970s. While it was Canada who acquired and was the registered owner of much of the land, those lands were, as they were acquired, assigned by Canada to the FRHC to administer and develop per the *Harbour Commissions Act*.

[2443] On June 11, 1998, the *Canada Marine Act*, S.C. 1998, c. 10 received royal assent. The *Canada Marine Act* significantly overhauled Canada's management of its port systems. Local and regional harbours were transferred to provincial and regional authorities. Certain of Canada's harbour commissions were assigned to new port authorities and had considerably greater authority and autonomy to operate.

[2444] Port authorities were established to act as agents of Canada to manage federal real property assigned to it.

[2445] The FRHC was converted to a port authority, becoming the Fraser River Port Authority ("FRPA") on May 1, 1999 when Canada's Minister of Transport issued letters patent incorporating the former FHRC as the FRPA. By way of the letters patent, Canada assigned the following federal real property to the FRPA:

a) Lot 1 in Sections 22 and 27, B4N, R5W;

b) Lot 2 in Section 23, B4N, R5W;

c) Lot 3 in Sections 13 and 14, B4N, R5W;

d) Lot 4 in Section 18, B4N, R4W;

e) Lot 5 in Sections 18 and 19, B4N, R4W, and Section 13, B4N, R5W;

f) Lots 6, 7, and 8 in Section 24, B4N, R5W;

g) Lot 9 in Sections 23 and 26, B4N, R5W; and

h) Certain lands that, following subdivision in 2007, largely constituted Lot 8 in Section 19, B4N, R4W.

[2446] The plaintiffs have established Aboriginal title to Lots 1, 2 and 9, meaning the lands described in subparagraphs a), b), and g) are included in the Cowichan Title Lands.

[2447] The letters patent establish three management areas of port lands. “Schedule A” sets out navigable waters or navigational jurisdiction; “Schedule B” sets out real property held by the Crown; and “Schedule C” sets out lands acquired by a port for trade purposes.

[2448] The Federal Tl'uqtinus Lands (Canada) are “Schedule B” lands; where lands are assigned to a port authority’s administration under “Schedule B” or “Schedule C” of a letters patent, it takes on the sole responsibility for managing those lands. The plaintiffs’ infringement claim does not extend to the Federal Tl'uqtinus Lands owned by the VFPA, which are “Schedule C” lands. In any event, the plaintiffs have not established Aboriginal title to any “Schedule C” lands.

[2449] Canada says about 650 acres of the Claim Area, now within the VFPA’s jurisdiction, are “Schedule B” lands. Most “Schedule B” and “Schedule C” lands in the Claim Area are port terminal or industrial zones, but much of the lands is not fully optimized. It is likely to be developed as such to address a shortage of industrial land.

[2450] In 2007, the VFPA was created by an amalgamation of the FRPA with other ports. Under section 59.7 of the *Port Authorities Management Regulations*, the

newly-amalgamated VFPA assumed the rights and responsibilities of the prior port authorities including their property, rights and interests, and the management of any federal real property, including the Federal Tl'uqtinus Lands (Canada). By Order-in-Council 2007-1885, dated December 6, 2007, the Governor General in Council issued supplementary letters patent ("2007 Letters Patent") to the Vancouver Fraser Port Authority. The 2007 Letters Patent took effect on January 1, 2008.

[2451] Neither the *Canada Marine Act* nor the 2007 Letters Patent issued thereunder provide the VFPA with a mandate to address Aboriginal title claims, and the VFPA's code of conduct is silent on the matter.

[2452] The VFPA's authority to undertake port activities in the Claim Area is derived from s. 28 of the *Canada Marine Act* and the VFPA's letters patent and supplementary letters patent. The 2007 Letters Patent, as amended, are the means by which Canada currently delegates the VFPA with its authority to develop, use, lease, license, and otherwise manage the port lands, including the Federal Tl'uqtinus Lands (Canada). It is uncontested that the 2007 Letters Patent grant the VFPA the right (subject to some restrictions) to undertake a wide range of activities, including to:

a) develop, apply, enforce, and amend rules, orders, bylaws, practices, or procedures and issue/administrate authorizations respecting use, occupancy, or operation of the port, including on the Federal Tl'uqtinus Lands (Canada);

b) manage, lease, or license the Federal Tl'uqtinus Lands (Canada);

c) exchange the Federal Tl'uqtinus Lands (Canada) for other real property of a comparable market value;

d) grant road allowances or easements, rights of way, or licenses over the Federal Tl'uqtinus Lands (Canada) for utilities, service, or access;

e) sell, mortgage, pledge, or create security interests in fixtures located on the Federal Tl'uqtinus Lands (Canada);

f) construct, establish, repair, maintain, operate, remove, or demolish port facilities;

g) operate a marina or railway; and

h) pursue/exercise the remedies available to it as a lessor or licensor of premises situated on the Federal Tl'uqtinus Lands (Canada).

[2453] In accordance with s. 20 of the *Canada Marine Act*, the VFPA's board of directors is responsible for the management of its activities.

a) Positions of the Parties

[2454] The plaintiffs submit that Canada's issuance of letters patent and supplementary letters patent interfered and interferes with Cowichan Aboriginal title. Each time Canada assigned its interest in the Federal Tl'uqtinus Lands (Canada) to the VFPA, which it does by letters patent, it conferred upon the VFPA the authority to make decisions respecting the current and future use of the lands as Canada's agent. Each time Canada includes the lands in the VFPA's letters patent, it transfers to the VFPA the right to exclusively use, occupy, and determine the future of the Federal Tl'uqtinus Lands (Canada). This interferes with every incident of Cowichan Aboriginal title and amounts to an infringement.

[2455] Likewise, the plaintiffs say Canada's delegation of decision-making authority to the VFPA's board of directors comes at the direct expense of the Cowichan. It interferes with each incident of their Aboriginal title because it limits their rights to exclusively occupy the Federal Tl'uqtinus Lands (Canada) and to enjoy the economic fruits of the land.

[2456] The plaintiffs say Canada's delegation of authority is an infringement because it has the practical effect of transferring occupation, use, and management of the Federal Tl'uqtinus Lands (Canada) to the VFPA. The letters patent do not provide

the VFPA with any meaningful guidance on how to address Aboriginal title. The plaintiffs submit that the imposition of an "unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications" and that fails to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties is an infringement under the *Sparrow* test: *Adams* at para. 54.

[2457] Canada says neither the enactment of the *Canada Marine Act* nor the issuance of letters patent to the VFPA is Crown conduct that could, in and of itself, interfere with the plaintiffs' Aboriginal title. The plaintiffs have not sufficiently identified or particularized the conduct that adversely impacts their Aboriginal title. Further, the assignment of authority to the VFPA is not sufficient to establish a meaningful diminution of the Cowichan's rights.

[2458] Canada relies on *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2021 BCCA 155 [*Ahousaht* 2021] for the proposition that particularization of infringements is necessary for the justification analysis to have value and translate to substantive changes to the Crown's regulatory regime. The plaintiffs' assertion that their title is infringed because they cannot use, occupy or manage the lands is overly broad and too general; it does not afford this Court the ability to provide guidance on specific changes to Canada's port land-management regime that would permit Canada Port Authorities, including the VFPA, to operate in a non-infringing manner.

[2459] In reply, the plaintiffs say Canada's position amounts to an assertion that the Court is required to reject all alleged infringements absent granular, section-by-section guidance on each infringing provision of the *Canada Marine Act* or the VFPA letters patent. The plaintiffs say this departs from the SCC's direction on who bears the burden of proving infringement and who must prove justification.

[2460] The plaintiffs rely on *Yahey*, where the Court concluded:

> [521] ... it is clear from the jurisprudence that infringement can be brought about from the whole of a regulatory regime (*Gladstone* and *Ahousaht*) ... In

> other words, when looking at infringement, the governmental scheme can be considered as a whole, as can the history of development on the lands and the historical use and allocation of the resources and the impacts this has caused.

b) Analysis

[2461] With respect to Canada's assignment of the Cowichan Title Lands to the VFPA, as well as the other activities of Canada and the VFPA which are alleged to interfere with the Cowichan Aboriginal title, I do not find that the conduct complained of is overly broad or too general to consider under the infringement framework. These matters have been canvassed at length in this very long trial. The plaintiffs have articulated the specific interferences clearly enough to warrant a substantive response from Canada and a determination from the Court. Canada has rested its final submissions about this alleged infringement largely on the basis that it is insufficiently particularized and Canada's assignment of discretionary control of the Cowichan Title Lands to the VFPA is too general to ground an infringement analysis.

[2462] I do not agree. The plaintiffs' claim of infringement does not lack specificity. The evidence is before the Court. I have determined the extent of the Cowichan Title Lands and I am able to discern how the Cowichan have been impacted by Canada's authorization of port activities and the consequences of those activities on the Cowichan's ability to exercise their Aboriginal title.

[2463] I reject Canada's argument that the plaintiffs are required to specify which sections of the *Canada Marine Act* are infringing. I accept the plaintiffs' argument that this would depart from the SCC's clear direction on who bears the burden of proving infringement and who must prove it is justified. It is not the responsibility of an Indigenous claimant to lay out a roadmap for exactly what the Crown must do to make its conduct non-infringing. This granular approach is not required at the infringement stage in this case. Doing so would create too high a burden on the plaintiffs. As the plaintiffs have submitted, in *Tsilhqot'in* SCC, the Court did not suggest the plaintiffs were required to do a section-by-section analysis of the *Forest*

Act or to specify the precise terms of the impugned timber licenses that were infringing.

[2464] In *Ahousaht* 2021, the Court of Appeal found it was necessary for the Court to "painstakingly assess" each aspect of the regulatory regime in order to determine whether specific regulatory provisions contributed to the declared infringement of the plaintiffs' rights: at para. 154. In that case, in the first phase of the trial before Garson J., the plaintiffs had challenged Canada's fishing regime, including the *Fisheries Act* and regulations thereunder, as well as policy and operational measures implemented by the DFO. This case is different. The plaintiffs have not challenged the *Canada Marine Act* and all its provisions and effects. Rather, the plaintiffs say the infringing conduct is Canada's decision to include its Aboriginal title land in "Schedule B" of the VFPA's letters patent and supplementary letters patent. This action resulted in the delegation to the VFPA of broad authority and discretionary control with respect to undertaking activities on some of the Cowichan Title Lands.

[2465] In *Adams*, the exercise of an Aboriginal right to fish was only exercisable at the discretion of the Minister. The regulations did not provide sufficient direction to those exercising that discretion to fulfill the Crown's fiduciary duty to Aboriginal peoples. The Court found that this scheme was infringing (at para. 54):

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

[2466] The infringement inquiry is concerned with whether Crown conduct has interfered with an Aboriginal right and to what extent. Here, Canada has, through issuance of the letters patent, granted the VFPA broad authority to manage the

Cowichan Title Lands that Canada holds as federal real property. It was open to the plaintiffs to impugn Canada's assignment of the lands to the VFPA in addition to impugning specific activities that the VFPA undertakes as Canada's agent. The assignment or transfer of authority to manage Aboriginal title lands, in and of itself, in circumstances like this, where a broad suite of powers to undertake activities on the land accompanies the transfer, can ground an infringement claim. Infringement will depend on the particular factual context in which it arises; here, the nature of the plaintiffs' infringement claim is a near wholesale assignment of interest in the Cowichan Title Lands to the VFPA.

[2467] Consideration of the indicia of infringement from *Sparrow* illuminates the point. As previously set out, in assessing whether Crown conduct meaningfully diminishes an Aboriginal right, courts will consider whether the limitation is unreasonable, imposes undue hardship, or denies the holders of the right and their preferred means of exercising that right: *Sparrow* at 1112. The Cowichan's Aboriginal title includes the right to occupy, use, possess, enjoy and benefit from the land. Canada's assignment of the Cowichan Title Lands to the VFPA gives the VFPA a broad suite of powers over those lands, grounded the provisions of the *Canada Marine Act* and the 2007 Letters Patent, as amended. The VFPA may use, occupy, manage, lease and license the lands. The VFPA's ability to engage in these activities flows from Canada's assignment of authority. The powers that the VFPA may exercise over the Cowichan Title Lands diminish and impede the Cowichan's ability to exercise their title rights and manage their land. However, the assignment itself, which grants the VFPA these powers, is a significant intrusion on the Cowichan's ability to exercise its ownership rights. A transfer of a property interest to a third party will plainly amount to an infringement that must be justified: *Tsilhqot'in* SCC at para. 124. Canada's assignment of authority over the Cowichan Title Lands to the VFPA is such a transfer.

[2468] The Cowichan are unable to exercise any ownership rights in respect of the Cowichan Title Lands that Canada has assigned to the VFPA. Canada's assignment of authority over the Cowichan Title Lands to the VFPA and its predecessors is a

meaningful diminution of the Cowichan's Aboriginal title and a *prima facie* infringement.

2. Land-Use Planning

[2469] Canada requires the VFPA to develop detailed land-use plans containing objectives and policies for the physical development of the property it manages: *Canada Marine Act*, s. 48(1). The land-use plan does not require Crown approval and the VFPA was given few parameters for what its land-use plans must contain. Section 48(1) of the *Canada Marine Act* provides:

> A port authority shall, within twelve months after the issuance of its letters patent, develop a detailed land-use plan that contains objectives and policies for the physical development of the real property and immovables that it manages, holds or occupies and that takes into account relevant social, economic and environmental matters and zoning by-laws that apply to neighbouring lands.

[2470] Plans created in 2000 and 2014 prescribed land-use for the Federal Tl'uqtinus Lands (Canada).

[2471] The 2000 land-use plan included a deep-sea terminal over part of the Claim Area. These are not Cowichan Title Lands:

a) most of Lot 5, Section 13, B4N, R5W;

b) Sections 18 and 19, B4N, R4W; and

c) most of Lots 6, 7, 8, Section 24, B4N, R5W.

[2472] The 2000 land-use plan also included coastal marine port services and industrial uses for the lands described below, including Lots 1, 2 and 9 in the Cowichan Title Lands:

a) Lot 3, Sections 13 and 14, B4N, R5W;

b) Lot 4, Section 18, B4N, R4W;

c) Lot 2, Section 23, B4N, R5W;

d) Lot 9, Sections 23 and 26, B4N, R5W; and

e) Lot 1, Sections 22 and 27, B4N, R4W.

[2473] The 2000 land-use plan assigned open space and recreation uses over the following lands that are in the Claim Area but are not Cowichan Title Lands:

a) a portion of Lot 8, Section 24, B4N, R5W;

b) the southeast corner of Lot 5, Section 13, B4N, R5W; and

c) Sections 18 and 19, B4N, R4W.

[2474] When the VFPA was created through amalgamation in 2007, Canada allowed, as a temporary measure, the continued use of the 2000 land-use plan. There is no consideration for the exercise of Aboriginal rights, title, or interests in the 2000 land-use plan.

[2475] In 2010 and 2011, the VFPA engaged in a strategic exercise called “Port 2050” setting out its future land-use plan. The plaintiffs were not invited to participate.

[2476] On October 28, 2014, the VFPA adopted a new land-use plan. The 2014 land-use plan created land-use designations applying to lands that the VFPA holds and manages. The 2014 land-use plan explains the purpose of the designations as:

> ... to provide for the orderly development and management of lands and waters within [the VFPA’s] jurisdiction, and to provide clarity on long-term development. The designations apply to all lands and waters within the Port’s jurisdiction, and identify the types of uses that may be considered on each site.

[2477] The 2014 land-use plan designates port lands and waters for one of eight uses: port terminal, industrial, commercial, log storage and barge moorage, recreation, conservation, port water, and special study area.

[2478] The 2014 land-use plan designates the following Federal Tl'uqtinus Lands (Canada) for port terminal use. Lot 1 is in the Cowichan Title Lands:

a) Lot 1, Sections 22 and 27, B4N, R5W;

b) Lot 5, Section 13, B4N, R5W and Sections 18 and 19, B4N, R4W;

c) Eastern portion of Lots 6, 7 and 8, Section 24, B4N, R5W;

d) Waterfront, including submerged lands, of Lot 8, Section 24, B4N, R5W; and

e) Lot 2, Section 19, B4N, R4W.

[2479] The 2014 land-use plan designates the following Federal Tl'uqtinus Lands (Canada) for industrial use. Lot 2 is in the Cowichan Title Lands:

a) Lot 2, Section 23, B4N, R5W;

b) Lot 3, Sections 13 and 14, B4N, R5W;

c) Lot 4, Section 18, B4N, R4W;

d) Western parts of Lots 6 and 7, Section 24, B4N, R5W;

e) Western portion of Lot 8, Section 24, B4N, R5W, excluding any submerged lands; and

f) Lot 8, Section 19, B4N, R5W.

[2480] The 2014 land-use plan designates a portion of the centre of Lot 8, Section 24, B4N R5W for conservation use.

[2481] The port terminal use for Lot 1, Sections 22 and 27, and industrial use for Lot 2, Section 23 are relevant to the Cowichan Title Lands. None of the Cowichan Title Lands are designated for conservation purposes in the 2014 land-use plan.

[2482] Jennifer Natland, the Acting Vice President of the Real Estate Division for the VFPA, testified that the land-use plan is important because it influences the actual development and use of the port lands. Developments and applications that come

forward to the port must be consistent with the land-use plan in order to be accepted.

[2483] In Part 8, I further consider the VFPA's uses of the Cowichan Title Lands.

a) Positions of the Parties

[2484] The plaintiffs say the land-use planning interfered with Cowichan Aboriginal title. Canada did not provide guidance to the VFPA on how to address Aboriginal title when carrying out land-use planning. This is similar to the unstructured discretion to issue licenses at issue in *Adams*, discussed above, which the SCC held to be an infringement. The plaintiffs say the VFPA managed lands in a manner inconsistent with reconciliation. Canada's failure to direct the VFPA on how to deal with Aboriginal rights continues the legacy of excluding the Cowichan from accessing the lands and from exercising and enjoying other incidents of Aboriginal title.

[2485] The VFPA decides the uses to which the Cowichan Title Lands are put. Canada has given broad discretion to the VFPA in acting as Canada's agent to carry out land-use planning without any clear structure. The VFPA declined to designate any part of the lands for the Cowichan's use, occupation, or decision-making.

[2486] Canada says the requirement under s. 48 of the *Canada Marine Act* that Canada Port Authorities, like the VFPA, develop a detailed land-use plan is not Crown conduct that could, on its own, interfere with the plaintiffs' Aboriginal title. Canada suggests that the plaintiffs' complaint lies not with the requirement for land-use planning *per se*, but with the manner in which the VFPA implements that land-use planning. The plaintiffs say that the VFPA's land-use planning excludes the plaintiffs from using and managing their Aboriginal title land. If that is the case, Canada says the Court should not make a finding that the statutory requirement for a land-use plan itself is infringing Crown conduct. The assertion that the statutory requirement is an infringement is overly broad and does not permit the Court to offer guidance on how changes to Canada's requirement for land-use planning would allow the VFPA to operate in a non-infringing manner.

b) Analysis

[2487] I do not agree with Canada that requiring the VFPA to develop detailed land-use plans under s. 48 of the *Canada Marine Act* is not Crown conduct. Canada submits the plaintiffs' complaint lies not with the requirement for planning, but the manner in which it is implemented by the VFPA. This submission misinterprets the plaintiffs' claim. The plaintiffs contend that Canada required the VFPA and its predecessors to develop land-use plans, and as a result, the VFPA and its predecessors have undertaken land-use planning for the Cowichan Title Lands. This has occurred without any direction for addressing Aboriginal title claims, and the effect has been to interfere with the Cowichan Aboriginal title.

[2488] The requirement for land-use planning is as it sounds — a requirement to develop detailed land plans for physical development of the real property that the VFPA manages, which includes some of the Cowichan Title Lands. The VFPA has undertaken land-use planning and the VFPA's 2014 land-use plan for Cowichan Title Lands includes designating lands for port terminal use and industrial use. There is no accounting for the Cowichan's interests. I agree that the land-use planning continues the exclusion of the Cowichan from managing and lawfully accessing some of the Cowichan Title Lands and exercising any other incident of Aboriginal title. The land-use planning is an unreasonable limit on the Cowichan's Aboriginal title because the VFPA manages the land and the practical effect is to interfere with the exercise of the Cowichan's Aboriginal title in order to further the VFPA's objectives for the development of the Cowichan Title Lands. The Cowichan's Aboriginal title includes the right to pro-actively manage the land, but this authority is instead exercised by the VFPA, as Canada requires.

[2489] Canada's requirement that the VFPA engage in land-use planning, and the consequences of the land-use planning for the Cowichan, denies the Cowichan their preferred means of exercising their title and planning for the land at present and for the benefit of future generations. This is an unreasonable limit on the Cowichan's rights. Canada's requirement that the VFPA and its predecessors engage in

land-use planning for the Cowichan Title Lands interfered and interferes with the Cowichan's Aboriginal title and is a *prima facie* infringement.

3. VFPA Leasing of Federal Tl'uqtinus Lands (Canada)

[2490] Canada authorizes the VFPA and its predecessors to lease port lands to third parties. These leases give third parties the right to exclusive occupation of the Federal Tl'uqtinus Lands (Canada), in many cases on a long-term basis, for several decades or more.

[2491] Canada authorized the VFPA under the *Canada Marine Act*, s. 45(3), to lease or license any federal real property that the VFPA manages, subject to the limits in the letters patent. Canada authorizes the VFPA to retain and use any revenue received in respect of leasing the lands. Canada has minimal involvement in the selection of tenants with the exception of longer-term leases that require letters patent.

[2492] Article 8.1 of the 2007 Letters Patent imposes term limits on the VFPA's authority to lease the Federal Tl'uqtinus Lands (Canada). There is a general restriction on leases with a term of more than 60 years. For a prescribed list of activities, a lease may not exceed 40 years in length. The VFPA may lease "Schedule B" lands, such as the Federal Tl'uqtinus Lands (Canada), for up to 99 years, with the written consent of the Minister.

[2493] The VFPA and its predecessors have leased much of the Federal Tl'uqtinus Lands (Canada). Due to a sealing order and publication ban I made on December 21, 2022, I will not go into the details of those leases, nor the amount of revenue the VFPA receives from those leases, other than to say it is substantial. The *Canada Marine Act*, combined with the letters patent, authorizes the VFPA to collect and retain all lease revenue, subject to a small yearly stipend payable to Canada.

[2494] The Federal Tl'uqtinus Lands (Canada) that are *not* under lease or license as of September 2019 are:

a) most of Lot 1, Sections 22 and 27, B4N, R5W;

b) about 100 acres of Lot 5, Section 13, B4N, R5W; Sections 18 and 19, B4N, R4W; and Lots 6, 7 and 8, Section 24, B4N, R5W;

c) the northwest corner of Lot 3, Sections 13 and 14, B4N, R5W; and

d) Lot 2, Section 19, B4N, R5W.

[2495] Accordingly, as above, with respect to the Cowichan Title Lands, most of Lot 1, Sections 22 and 27 is not leased or licensed. This land is available for leasing under the 2014 land-use plan because it is designated for port terminal use.

[2496] The other Cowichan Title Lands that the VFPA manages, namely Lot 2 in Section 23 and Lot 9 in Sections 23 and 26, are leased by the VFPA.

a) Positions of the Parties

[2497] The plaintiffs say the legal effect of the VFPA's and FRPA's leasing of roughly 470 acres of the Federal Tl'uqtinus Lands (Canada) is to grant and transfer to the leaseholders a right of exclusive possession to those lands. This is a direct transfer of Aboriginal property rights to a third party that will plainly be a meaningful diminution of an Indigenous group's ownership right and an infringement: *Tsilhqot'in* SCC at para. 124. Benefits derived from leases are at the expense of the Cowichan. Likewise, each time a portion of the Federal Tl'uqtinus Lands (Canada) is sublet by a tenant the VFPA decides whether to approve it and how the land will be used. In making the remainder of the Federal Tl'uqtinus Lands (Canada) available for leasing as set out in the 2014 land-use plan, the VFPA has decided that these lands will be used for port terminal or industrial uses. Each of these interferences is a significant intrusion on Cowichan Aboriginal title.

[2498] Canada made a brief submission regarding whether the leasing of land in the Claim Area is infringing. Canada says that while the specifics of the leases are known, until the area over which Aboriginal title may be declared has been determined, it is impossible to know which leases are implicated by the Court's

declaration, and whether the issuance of those leases, or their terms, result in a meaningful diminution of the plaintiffs' Aboriginal title that must be justified. They submit the issue is premature and should be deferred until the specifics of any Aboriginal title declaration are known.

b) Analysis

[2499] I reject Canada's submission that a declaration setting out the extent of Aboriginal title is necessary before I can determine whether the leases are infringing. The plaintiffs' claim that the VFPA's leasing of its Aboriginal title lands is an infringement is not premature. The plaintiffs claim a broader area of land than that over which Aboriginal title was ultimately established. However, the leases on Cowichan Title Lands are in evidence. The evidence with respect to alleged infringements of those lands is before the Court and has been within Canada's knowledge throughout these proceedings. Canada has defended against alleged infringements over the whole Claim Area, which of course has included defending against the asserted infringements of the Cowichan Title Land. The issue has been thoroughly canvassed and the subject of a significant volume of evidence. It was open to Canada to make substantive submissions in final argument about why the leases in the Claim Area are not infringing. Canada declined to do so.

[2500] Canada authorized the VFPA to lease the Cowichan Title Lands, and the VFPA entered into leases in respect of some of the Cowichan Title Lands. Leasing land to third parties gives those third parties the right to exclusively occupy the lands thereby denying the plaintiffs the ability to exercise their right to occupy the land and to determine how it is used. The VFPA has instead made determinations about leasing the land, and the lessors may also make determinations about how to use it, subject to the terms of their leases.

[2501] Additionally, the VFPA retains and enjoys the lease revenue that it earns from leasing the Cowichan Title Lands, subject to a small annual stipend payable to Canada. The Cowichan have never shared in that revenue.

[2502] Aboriginal title encompasses the right to exclusive use and possession of the land, the right to enjoy it, pro-actively manage it, and profit from its economic development: *Tsilhqot'in* SCC at para. 73.

[2503] The VFPA's leasing of the Cowichan Title Lands interferes with the exercise of all the incidents of the Cowichan's Aboriginal title. The leases preclude the Cowichan's right of occupancy, use, management and enjoyment of the land. The VFPA's leasing of the Cowichan Title Lands interferes entirely with their right to enjoy the economic fruits of their land. Instead, the VFPA profits from its leasing of the Cowichan Title Lands.

[2504] The VFPA, as Canada's agent, in granting leasehold interests in the Cowichan Title Lands, has transferred property rights in the Cowichan's Aboriginal title land to a third party. The leases further the exclusion of the Cowichan from their land from exercising all rights associated with their Aboriginal title. The interferences arising from the leases are an unreasonable limit on the plaintiffs' title, a meaningful diminution of the rights associated with Aboriginal title, and a *prima facie* infringement.

4. Refusal to Return Lands to the Cowichan

[2505] On January 31, 2013, the Cowichan Tribes, Stz'uminus First Nation, Hwlitsum First Nation, Penelakut Tribe, and Halalt First Nation (collectively, the "Cowichan Nation Alliance") sent a letter to certain Canadian and British Columbian cabinet ministers asking the Crown to remove the Federal Tl'uqtinus Lands (Canada) from the VFPA's letters patent and to return those lands to the Cowichan Nation Alliance as Indian reserve lands. The letter was also sent to representatives of the VFPA, and included the Cowichan chiefs' understanding that the VFPA would not oppose removal of the lands from its letters patent.

[2506] The lands demanded in the letter included all of the Federal Tl'uqtinus Lands (Canada) except Lot 2, Section 19 and Lot 8, Section 19.

[2507] The lands the Cowichan Nation Alliance demanded were more expansive than the land over which the plaintiffs have established Aboriginal title.

[2508] The Cowichan Nation Alliance also demanded interim agreements that:

a) Canada hold revenue derived from these lands in trust for them; and

b) Canada and the VFPA would not transfer, alter, dispose, or otherwise alienate any interest in the Federal Tl'uqtinus Lands (Canada) without the consent of the Cowichan Nation Alliance (except 12 acres of land the Vancouver Airport Fuel Facilities Corporation proposed to lease — the YVR Fuel Project lands — which the Cowichan Nation Alliance did not oppose).

[2509] Canada was put on notice that if the demands were not agreed to by July 15, 2013, the Cowichan Nation Alliance would consider this a Crown failure to protect their land interests at Tl'uqtinus and a breach of ongoing fiduciary duty.

[2510] On April 2, 2013, the British Columbia Minister of Aboriginal Relations and Reconciliation advised the Cowichan chiefs that Aboriginal Affairs and Northern Development Canada was the lead agency to deal with the request. On April 8, 2013, the federal Minister of Justice advised the Cowichan that the matter fell within the purview of the federal Ministers of Transport and Aboriginal Affairs and Northern Development. On April 15, 2013, the Minister of Aboriginal Affairs and Northern Development suggested the Cowichan's concerns would need to be addressed by Transport Canada.

[2511] Having had no reply, the Cowichan chiefs wrote to the federal Minister of Transport on May 15, 2013, reiterating their demands and advising the Cowichan would consider failure to protect Cowichan interests at Tl'uqtinus to be a breach of the duty of honourable Crown conduct owed to them under Article 13 of the *BC Terms of Union*.

[2512] The Cowichan sent a further letter on June 20, 2013. On July 12, 2013, the Minister of Transport responded, and advised that the lands were managed by the VFPA and would be subject to consultation and accommodation, if appropriate, for any adverse effects on Aboriginal rights.

[2513] Canada was unable to locate any documents setting out discussions between federal departments respecting the 2013 demand letter.

a) Positions of the Parties

[2514] The plaintiffs submit that the circular and perfunctory nature of Canada's response to the 2013 demand letter, and its referral back to the VFPA, shows that Canada has not demonstrated an appropriate way of taking into account their Aboriginal title to the Federal Tl'uqtinus Lands (Canada). The plaintiffs draw a comparison to Justice Burke's observation in *Yahey* about persistent patterns of redirection on the part of government officials, and a lack of tools to address Indigenous concerns, which demonstrate that Canada is unable to take into account Aboriginal rights, contributing to a meaningful diminishment of those rights: at paras. 1749–1751, 1779–1782.

[2515] Canada makes no submissions regarding whether leaving the Federal Tl'uqtinus Lands (Canada) in the VFPA's letters patent infringed the plaintiffs' Aboriginal title.

b) Analysis

[2516] I accept the plaintiffs' submissions about the circular nature of Canada's response to the Cowichan Nation Alliance's letter. Canada did not substantively engage with the letter. Various Crown officials shifted responsibility for addressing the Cowichan's complaint. The manner in which the Crown responded to the issues raised by the Cowichan chiefs is indicative of a lack of diligence on the part of Canada to deal with the Cowichan's asserted Aboriginal rights. This shameful conduct contributed to the diminishment of the Cowichan's Aboriginal rights that arose when Canada assigned the lands to the VFPA.

[2517] However, I am not satisfied Canada's failure to remove the Federal Tl'uqtinus Lands (Canada) from the VFPA's letters patent to return those lands to the plaintiffs is an infringement. It was Canada's assignment of authority over the Cowichan Title Lands to the VFPA which interfered and interferes with the Cowichan's Aboriginal title. I found that the continuing assignment of authority over those lands to the VFPA is an ongoing, *prima facie* infringement. In my view, the refusal to return the lands in 2013 and leaving the Cowichan Title Lands on Canada's "Schedule B" lands in the VFPA's letters patent is addressed through that finding.

5. Refusal of Access to Land to Fish

[2518] The Cowichan have, on a number of occasions, requested that the VFPA provide them with access to the Federal Tl'uqtinus Lands (Canada) to engage in a food fishery on the south arm of the Fraser River. On April 27, 2012, Chief Harvey Alphonse of Cowichan Tribes wrote to the VFPA advising of the Cowichan's interest in fisheries-related accommodations involving the existing riverfront dock infrastructure currently controlled by the VFPA at the site of the Cowichan village and traditional fishing station.

[2519] The Cowichan sent a further request on July 31, 2012. On August 7, 2012, the VFPA responded that they could not authorize the Cowichan use of the Federal Tl'uqtinus Lands (Canada) for August. The VFPA did not provide the Cowichan any access to the Federal Tl'uqtinus Lands (Canada) during the 2012 fishing season.

[2520] Again, on May 6, 2013, the Cowichan made the same request. Four months later, the VFPA responded, stating they were unable to facilitate the requested access.

a) Positions of the Parties

[2521] The plaintiffs say the VFPA's refusal, as Canada's agent, prevents the Cowichan from using the land in the manner of their choosing, and in this case prevented the exercise of a fishing right central to their way of life. This significantly interferes with their Aboriginal title to the Federal Tl'uqtinus Lands (Canada).

[2522] Canada says the plaintiffs did not identify the VFPA's refusal as an infringement, and the Court should decline to consider it.

b) Analysis

[2523] The plaintiffs adequately identified this allegation in their further response to Canada's demand for particulars dated April 29, 2016.

[2524] The only waterfront Federal Tl'uqtinus Lands (Canada) are outside the Cowichan Title Lands. Canada and the VFPA do not have water access in Sections 23, 26 or 27 because Richmond owns the strip of land along the water (Lots E and K). As the plaintiffs have not established Aboriginal title to the VFPA's waterfront lands, I do not consider further whether the VFPA's denial of access to the waterfront to fish for food interferes with the Cowichan Aboriginal title.

6. Summary

[2525] The plaintiffs have established that the following acts interfered and interfere with the Cowichan's exercise of Aboriginal title to the Cowichan Title Lands and are *prima facie* infringements:

a) Canada's assignment of authority to the VFPA and its predecessors to undertake port activities including management, leasing and licensing of the Cowichan Title Lands;

b) Canada compelling the VFPA and its predecessors to develop land-use plans for the Cowichan Title Lands; and

c) As Canada's agent, the VFPA and its predecessors undertaking leasing of the Cowichan Title Lands.

[2526] Given my findings, it is not necessary to consider the plaintiffs' alternative argument that the cumulative effects of the VFPA's activities are an infringement.

PART 8 JUSTIFICATION OF INFRINGEMENT OF ABORIGINAL TITLE

[2527] Section 35 of the *Constitution Act, 1982* imposes limits on how the Crown can regulate and otherwise deal with Aboriginal title lands. As described in Part 7, the plaintiffs have established that certain actions of the Crown defendants, and the VFPA as Canada's agent, interfere with and are *prima facie* infringements of their Aboriginal title. Accordingly, the burden now shifts to the defendants to demonstrate that such infringements are justified in the broader public interest, and are consistent with the Crown's fiduciary duty to the Cowichan people: *Tsilhqot'in* SCC at paras. 119, 139.

[2528] I now consider a threshold issue, advanced by BC, Canada and the VFPA, that the justification analysis does not apply to historic Crown conduct. I find that it does. I then consider whether the interferences are justified, in this order: 1) the Crown grants of fee simple interest; 2) BC's vesting of Richmond with fee simple interests via tax sales under the *Municipal Act*; 3) BC's vesting of soil and freehold interests to Richmond under s. 35(1)(a) the *Community Charter*; and 4) Canada and the VFPA's activities on the Cowichan Title Lands.

A. POSITIONS OF THE PARTIES

1. Canada

[2529] Canada submits that the justification analysis should not be applied to Crown conduct that occurred prior to 1982, nor to conduct that occurred after 1982 but prior to a declaration of Aboriginal title. The criteria the Court is required to examine under the *Sparrow* framework is ill-suited to historical periods because the legal framework and standards of the time differ greatly from those of today. Canada says the Court can, however, ascertain in this case whether Canada met its duty to consult with respect to Crown conduct that occurred after 1982 and before a declaration of title.

[2530] In the alternative, Canada submits that not all elements of the justification analysis should be applied because the legal conception of Aboriginal title was different in the historical period when the interferences occurred. For example, the requirement to consult was unknown at that time. Accordingly, if justification applies,

Canada says the Crown was acting pursuant to a compelling and substantial objective when it engaged in the infringing conduct. Canada says this is the only element of the analysis that it is in a position to address in this case. The Crown was pursuing a compelling and substantial objective when it granted the lands in the Claim Area (the settlement of the Colony), and when Canada authorized port activities in the Claim Area (the facilitation of general economic development of Canada). As I found that Colonial Crown Grants were not made in respect of Cowichan Title Lands, justification with respect to those grants does not arise.

[2531] Similarly, Canada says the *Sparrow* framework should not be applied to Canada's pre-1982 and pre-declaration authorization of port activities in the Claim Area. Any deficiencies should be addressed under the duty to consult framework from *Haida* SCC.

2. BC

[2532] BC also says the justification analysis arising out of *Sparrow*, *Delgamuukw* SCC, and *Tsilhqot'in* SCC does not apply to the at-issue conduct, which was a series of distinct, historical decisions to issue the Crown grants of fee simple interest. This Crown conduct predates a determination of Aboriginal title and the coming into force of s. 35 of the *Constitution Act, 1982*.

[2533] BC agrees with Canada that the duty to consult may apply to Crown conduct after s. 35 came into force. Unlike Canada, BC says the Court should not ascertain whether BC met its duty to consult in this case with respect to post-1982 conduct because the plaintiffs did not plead it and cannot reframe their case at this late stage.

[2534] BC points to the *Ahousaht* litigation, in which Justice Garson declined to consider justification, accepting that Canada was not in a position to justify infringement, having just learned of the scope of the Aboriginal fishing rights: *Ahousaht* 2009 at paras. 865–870. I note in the present case, which was case managed for several years before trial, neither Canada nor BC applied to sever the

issues of Aboriginal title, infringement, and justification. It was always the plan to try these issues at the same time.

[2535] BC says the SCC has never actually applied the infringement and justification framework to Crown actions on Aboriginal title land. While the Court offered guidance in *Tsilhqot'in* SCC about how the justification test would apply to infringements of Aboriginal title, it assessed the issuance of provincial forestry licenses under the duty to consult framework. BC submits that in *Tsilhqot'in* SCC, the Court established that a declaration of Aboriginal title operates only prospectively — it does not alter the legal state of affairs that existed in the past. A declaration of title is a transitional moment of legal significance: the asserted Aboriginal right is established, and the Crown's obligation transitions from one of consultation and accommodation to infringement and justification: *Tsilhqot'in* SCC at paras. 89–92.

[2536] BC submits that none of the elements of the justification test can be applied coherently to the facts of this case, as there is no present Crown action or existing legislative restriction which requires justification, unlike *Sparrow* and *Gladstone* which dealt with whether a fishing regulation was justified.

[2537] Regarding the first element of justification — the procedural duty to consult and accommodate — BC says the duty to consult was not triggered in the 1800s. It is a correlate of s. 35 and does not arise until its enactment. With respect to the continued existence of fee simple interests throughout time, this could not trigger the duty, because the SCC found that prior and continuing breaches will only trigger a duty to consult if the present decision has the potential to cause a novel adverse impact on a present claim: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 49 [*Rio Tinto*]. Past and continuing breaches, including previous failures to consult, may be remedied in other ways, including through an award of damages: *Rio Tinto* at paras. 49, 83. With respect to the current fee simple interests, the discussion in *Tsilhqot'in* SCC at paras. 91–92 regarding the spectrum of Crown duties over time, through claimed title to asserted title, does not mean that at the moment Aboriginal title is declared, a renewed duty to consult is triggered in

every instance. Here, the Crown is not in the middle of a project with respect to the development of Aboriginal title land; there is no present conduct to re-evaluate.

[2538] Regarding the second element of justification — the existence of a compelling and substantial objective — the jurisprudence does not provide a model for determining the purpose of government actions taken a century earlier or the purpose of a law's ongoing effects divorced from its original purpose when enacted. The Court should refrain from engaging in this exercise. Further, BC cautions against conflating the separate elements of the inquiry into whether the Crown conduct was in furtherance of a compelling and substantial objective. BC notes that the Court appears, in *obiter* in *Tsilhqot'in* SCC, to consider whether a compelling and substantial objective existed for the particular cutting permits in issue. However, any inquiry in this case should focus on the overarching legislative objectives that motivated the systems for privatization of interests in land, and not the particular Crown grants. Such an approach follows well-developed *Charter* jurisprudence.

[2539] Regarding the third element of justification — fiduciary duty — BC says this case concerns the fiduciary duties owed in respect of the plaintiffs' established title going forward, and not any fiduciary duties that may have been owed to the Cowichan at the time of the Crown grants. The Court must assess Crown conduct from the 19th century in its context, and not according to modern standards. Any analysis of the three elements of proportionality — rational connection, minimal impairment, and proportionality of impact — would require the Court to consider whether the Crown fulfilled a duty which it did not owe at that time. This analysis would be strained, and should not be undertaken.

[2540] In the alternative, BC says any infringement arising from the Crown grants is justified. If justification applies, the key consideration is whether the Crown acted pursuant to a pressing and substantial objective. This follows from the fact that asserted Aboriginal rights are insufficiently specific to give rise to a fiduciary duty.

3. VFPA

[2541] The VFPA adopts Canada's submission that the infringement/justification analysis does not apply to historical Crown conduct. The VFPA emphasizes that the Court in *Tsilhqot'in* SCC plainly found that Crown conduct is subject to different standards prior to and after a declaration of Aboriginal title. There, the Court said that "[o]nce 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": at para. 92. The VFPA says the continuation of a project would be subject to the infringement and justification framework after title is established, as opposed to the Crown duty to consult framework that applies prior to title being established.

[2542] The VFPA further submits that any infringement of the plaintiffs' title resulting from its ownership, occupation, management, or control of the lands for port activities is justified. Further, if Aboriginal title is established, the Court should postpone a ruling on justification to permit the parties time to negotiate an agreement for the continued use of the lands by the VFPA.

4. Plaintiffs

[2543] Canada and BC plead justification, but also plead that justification does not apply, or its application should be modified or delayed. The plaintiffs say this places them in the curious position of responding to defendants that have invoked a defence that they themselves expressly reject the application of, and also responding to alternate, unpled defences or excuses for why no defence should be required at all.

[2544] The plaintiffs submit it is both possible and necessary for the Court to determine whether the Crown has justified pre-1982 and/or pre-declaration infringements in accordance with the justification framework set out in *Sparrow* and refined in *Tsilhqot'in* SCC. This is the only approach that accords with the jurisprudence to uphold the honour of the Crown and which advances reconciliation. There is no jurisprudence to support the defendants' assertion that the justification

framework does not apply if any of the impugned Crown conduct pre-dates 1982 or a declaration. Both *Sparrow* and *Tsilhqot'in* SCC considered infringements arising prior to the declaration confirming rights and title, and applied the framework to assess whether those infringements were justified.

[2545] The SCC's justification framework clearly applies to pre-declaration conduct and is capable of absorbing any complications that may arise when pre-1982 conduct is at issue. So long as the infringement is ongoing, the fact that some of the infringing conduct occurred pre-1982 is not a reason to disregard or reinvent the test.

[2546] In response to the Crown defendants' submission that it is not fair to assess historical conduct against present-day standards, the plaintiffs submit that the Court must determine what duties were owed by the Crown at the time, and then assess the Crown's conduct having regard to that duty. If the only duty was for the Crown to act honourably, then that is the standard against which the Crown conduct is assessed.

[2547] The plaintiffs say the Crown was under a duty to consult with the Cowichan at all relevant times. The level of consultation depends on the strength of the Cowichan claim. The consultation must be meaningful and may oblige the Crown to make changes to its proposed action based on information obtained through consultation. This duty is grounded in the common law (*Delgamuukw* SCC at paras. 165–169) having regard to the plaintiffs' Aboriginal title to the Lands of Tl'uqtinus, the Crown's appropriation of Indian settlement lands, and the honour of the Crown.

[2548] The next stage in the justification framework asks whether the Crown's actions were backed by a compelling and substantial objective. If that is made out, the Crown defendants must prove that their incursions on the Cowichan Title Lands were and are consistent with the Crown's fiduciary obligation to the Cowichan. The Crown must act (and have acted) in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future Cowichan generations.

[2549] The plaintiffs say that the infringement and justification framework can be adapted to respond to the specific factual context of a particular case: *Yahey* at para. 530. In *Saik'uz* BCSC, Kent J. rejected the defendant's proposal to modify the justification framework for infringements involving historical Crown conduct, recognizing that what would be required to prove justification should be reassessed as times change: at paras. 587, 592–596.

[2550] The ultimate objective of the justification framework is reconciliation in recognition of Indigenous societies' distinctive cultures and not, as the defendants suggest, to decide the entire question of justification based on an assessment of the Crown's conduct at a specific moment in time.

[2551] Finally, the plaintiffs say that only applying the justification framework to conduct that occurred after 1982 or after a declaration would run contrary to the principle of reconciliation and offend the honour of the Crown.

B. LAW

[2552] Before determining whether the justification analysis applies to the infringements in this case, I review the legal test below.

[2553] The SCC first introduced the test for justification in *Sparrow*, which concerned a claim for an Aboriginal right to fish for food, social, and ceremonial purposes. In determining whether the ongoing infringement was justified in that case, the Court asked two questions at 1113–1114: 1) is the Crown acting in furtherance of a valid legislative objective? and 2) is the Crown's conduct or legislation consistent with the fiduciary relationship between the Crown and Indigenous peoples?: see also *Tsilhqot'in* SCC at para. 13.

[2554] The special trust relationship and the Crown's responsibility to Indigenous peoples must be the first consideration in determining whether conduct is justified: *Sparrow* at 1114. In assessing the second question, the SCC identified several non-exhaustive factors, including: whether the infringement impairs the right as minimally as possible to effect the desired result; whether, in a situation of

expropriation, fair compensation is available; and whether the Crown has discharged its duty honourably, in that case, its duty to consult: *Sparrow* at 1119. The Court emphasized the importance of context and a case-by-case approach to s. 35(1); the contours of a justificatory standard must be defined in light of the specific facts of each case: at 1111.

[2555] In *Tsilhqot'in* SCC, the Court adapted the *Sparrow* test to infringements of Aboriginal title, refining it with attention to the contextual and factual considerations related to Aboriginal title as an interest in land. In assessing whether the Crown has satisfied its burden of justifying a *prima facie* infringement of an Indigenous group's Aboriginal title, the Court found that infringement will be justified where the Crown demonstrates that (at para. 77):

a) it discharged its procedural duty to consult and accommodate;

b) its action is backed by a compelling and substantial objective; and

c) its action is consistent with its fiduciary obligation to the Indigenous group.

[2556] The duty to consult is a procedural duty arising from the honour of the Crown prior to confirmation of title: *Tsilhqot'in* SCC at para. 78. 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 must consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right: *Tsilhqot'in* SCC at para. 78. This duty must be fulfilled prior to carrying out the action that could adversely affect the right. The degree of consultation and accommodation required rests on a spectrum: *Haida* SCC at para. 43.

[2557] The VFPA says *Mikisew* stands for the proposition that consultation is a factor to be weighed in the analysis, rather than an essential requirement of the justification test. In *Mikisew*, Justice Karakatsanis, writing for herself, Chief Justice Wagner, and Justice Garson, observed at para. 48 that where a *prima facie* infringement arises, the first consideration in determining whether legislation or Crown action is justified

is the honour of the Crown, and an “important part” of that inquiry is whether the Aboriginal group was consulted on the impugned measure: citing *Sparrow* at 1119; *Badger* at para. 97; *Tsilhqot’in* SCC at paras. 77, 80 and 125; and *Delgamuukw* SCC at para. 168.

[2558] In my view, the Court in *Tsilhqot’in* SCC was clear that the Crown’s discharge of its procedural duty to consult is a requirement of justification: see paras. 77, 80 and 125. I do not read Justice Karakatsanis’ reasons as moving the jurisprudence away from this approach. In *Mikisew*, a majority of the court determined, in three separate set of reasons, that the duty to consult does not apply to the law-making process. In her reasons, Karakatsanis J. observed that this does not mean Indigenous claimants are without recourse. She noted that while legislation cannot be challenged on the basis that the legislature failed to fulfill the duty to consult, whether consultation occurred may be a relevant consideration in the context of other available recourse, including in relation to claims of infringement of a s. 35 right: at para. 48. In my view, this discussion about other circumstances in which consultation may be a relevant consideration was not intended to, nor did it, modify the test for justification of infringement of Aboriginal title which was last squarely before that Court in *Tsilhqot’in* SCC.

[2559] Where Aboriginal title is unproven, the honour of the Crown requires it to comply with its procedural duties, and if appropriate, accommodate the unproven interest. Where title is established, the Crown must both comply with its procedural duties, and ensure that its contemplated actions are “substantively consistent” with the requirements of s. 35: *Tsilhqot'in* SCC at para. 80.

[2560] To establish a compelling and substantial objective, the broader public goal asserted by the Crown must further the goal of reconciliation, having regard to both the Indigenous interest and the broader public objective: *Tsilhqot'in* SCC at para. 82. This must be considered from both the Indigenous perspective and the perspective of the broader public: *Tsilhqot'in* SCC at para. 81.

[2561] In *Delgamuukw* SCC at para. 165, Lamer C.J.C. set out some examples of legislative objectives which may be capable of justifying interference with Aboriginal title:

> ... In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal 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 aboriginal 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.
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> [Underline emphasis in original; italics emphasis added.]

[2562] In addition to showing that the incursion on Aboriginal title is in accordance with a compelling and substantial objective, the Crown must also show that the action is consistent with its fiduciary duty to Indigenous peoples. As the Court explained in *Tsilhqot'in* SCC at para. 85, the Crown's underlying title is held for the benefit of the Indigenous group, and constrained by the Crown's fiduciary obligations to the group. This means that the Crown's actions must respect the fact that the beneficial interest in Aboriginal title lands is held communally for future generations. An intrusion that substantially deprives future generations of the benefits of the land cannot be justified: at para. 86. Additionally, any incursion must be necessary to achieve its goal (rational connection), go no further than necessary (minimal impairment), and the benefits of the goal must outweigh the adverse impact on the Indigenous group (proportionality of impact): *Tsilhqot'in* SCC at para. 87.

[2563] The onus is on the Crown to show that any infringement is justified. The justification standard places a heavy burden on the Crown: *Sparrow* at 1119. However, the Crown is not held to a standard of perfection. The concept of reasonableness forms an integral part of the justification test; the Court must have

regard to the particular circumstances: *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110, 1996 CanLII 245 [*Nikal*].

1. Does the Justification Framework Apply to Historical Crown Conduct?

[2564] I agree that s. 35 of the *Constitution Act, 1982* is the source of the justification analysis.

[2565] Section 35(1) protects Aboriginal rights that were in existence when the *Constitution Act, 1982* came into effect. As the Court said in *Sparrow* at 1110:

> ... 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 aboriginal right protected under s. 35(1).

[2566] As s. 35 did not come into force until 1982, I accept that the Crown's duty to justify infringing conduct may be generally inapplicable to discrete Crown conduct that occurred prior to that date where there is no ongoing infringement. However, in my view, the justification analysis applies to Crown conduct that began prior to 1982 and/or prior to a declaration of title where the interference with the Aboriginal right is continuing at the time the Aboriginal right is recognized. I agree with the plaintiffs that the infringement and justification analysis applies to pre-declaration conduct. The justification framework is capable of absorbing complications that may arise when historic Crown conduct gives rise to enduring interferences. I respectfully agree with Justice Burke's observation that "*Sparrow* and *Gladstone* anticipated that the contours of the standards for infringement and justification would be defined in the 'specific factual context of each case'": *Yahey* at para. 530.

[2567] In this case, the Crown grants to settlers between 1871–1914 in respect of the Cowichan Title Lands resulted in the alienation of the Cowichan from their lands, profoundly impacting their ability to exercise the incidents of title. Those interferences persist to present day. The issuance of the Crown grants effected a

seemingly permanent displacement of the Cowichan from their land and resulted in an ongoing infringement of their Aboriginal title. I find that in considering whether this infringement is justified, regard must be had to the duties that the Crown owed the Cowichan at the time of the Crown grants, and the duties that it owes to the Cowichan going forward, in light of the "new reality" — court recognition of Aboriginal title: *Tsilhqot'in* SCC at para. 92.

[2568] The decision in *Rio Tinto* does not preclude consideration of whether the infringements are justified. That case related to the construction of the Kenney Dam in the 1950s, erected without consultation of the Carrier Sekani Tribal Council, and resulted in the diversion of water from the Nechako River. The issue was whether BC was required to consult on a 2007 agreement for BC Hydro to purchase some of that power. The Court explained:

> [48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33 ...
>
> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.
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> [Italics emphasis in original; underline emphasis added.]

[2569] The nature of this case is different from *Rio Tinto*. There, the Court was concerned with an appeal from a judicial review of administrative action and constrained by the scope of the administrative decision itself. In my view, the Court's conclusion that no duty to consult arose in respect of a prior breach flowed from a determination that, absent a novel impact, historic failures to consult and historic and

ongoing harm are addressed through other remedies, such as damages, not in finding a fresh duty to consult.

[2570] As the SCC later explained in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 [*Chippewas of the Thames*] at para. 41, with reference to *Rio Tinto*, the duty to consult is not the vehicle to address historical grievances, but rather to address adverse impacts on a claimed right of current, contemplated Crown action. This is because the purpose of the duty to consult is to prevent damage to Aboriginal claims and rights while negotiations are underway: *Rio Tinto* at para. 48. An order compelling consultation will only be appropriate where the contemplated Crown action may adversely impact the right: *Rio Tinto* at para. 54.

[2571] The plaintiffs' claim is not grounded in the duty to consult, but in the infringement of their Aboriginal title. This case is concerned with historic infringements that are ongoing, and past and present Crown power and duties. To suggest that s. 35(1) recognizes existing rights but does not provide a means to address the present-day effects of historic Crown conduct presents a diminished view of the jurisprudence and runs contrary to reconciliation.

[2572] Justice Kent considered this issue in *Saik'uz* BCSC, acknowledging that *Rio Tinto* could be "interpreted to mean that historic infringements which continue to the present time 1) may be limited to claims for compensation and/or 2) may not trigger any 'fresh duty to consult'": at para. 583. However, he noted that the situation may change where damage to the resource continues after a formal declaration of an Aboriginal right and it is "necessary for the Crown to reassess prior conduct in light of the new reality": at para. 583, quoting *Tsilhqot'in* SCC at para. 92. This is such a case. The duties that the Crown owes to the plaintiffs have changed now that the plaintiffs' have established Aboriginal title, but justification is not a purely prospective exercise.

[2573] In considering how the justification analysis applies to the infringements in this case, I am guided by the Court's comments in *Tsilhqot'in* SCC regarding the spectrum of duties that the Crown may owe over time:

> [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.

[2574] In my view, these passages support a conclusion that, once Aboriginal title is established, the Crown has an obligation to justify ongoing interferences that flow

from Crown conduct which began before title was established. This may require the Court to assess whether an infringement is justified having regard to the spectrum of duties owed over time.

[2575] The SCC also said the appropriate lens through which to view how far the provinces can go in regulating land that is subject to Aboriginal title or claims for title is s. 35, "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": *Tsilhqot'in* SCC at para. 152. This supports the conclusion that the justification analysis may be adapted to apply to historic Crown conduct that is an ongoing interference with a constitutionally-protected right.

[2576] This is a case where a spectrum of duties was owed over time. It requires the Court to look both backward and forward, with regard to the claims and rights of the plaintiffs and the changing nature of the Crown's legal obligations over time. I agree with Canada that the function of modern Aboriginal law — rooted in the common law, the Constitution, and the north star of reconciliation — is to effect contemporary reconciliation. In this case, that cannot be achieved without a consideration of historical wrongs, the legacy of the Crown's exclusion of the Cowichan from their lands through to present-day, and the duties that the Crown owed and owes the Cowichan in respect of their Aboriginal title.

[2577] The infringement and justification analysis developed in *Sparrow* and refined in *Tsilhqot'in* SCC is sufficiently flexible to account for both historical interferences that are continuing and modern interferences with Aboriginal rights and title. This can be achieved through considering the duty owed at the time of the interference, the duties owed once title is established, and, with regard to historical interferences that persist to present day, whether prior conduct must be re-evaluated in light of the establishment of title and the Crown's associated fiduciary duty.

[2578] Canada and BC submit that the duty to consult did not arise until 1982. While Canada accepts that the Court can ascertain in this case whether Canada met its

duty to consult with respect to conduct after 1982, BC says the Court should not ascertain whether it met its duty to consult because the plaintiffs did not plead it. I do not agree with BC that the pleadings preclude a determination of whether the duty to consult was met, and as set out below, I am satisfied that it is appropriate to consider that duty in respect of all the infringements.

[2579] My conclusion in this regard flows from the Crown defendants' plea of justification and from the analysis that the Court undertook in *Tsilhqot'in* SCC in declaring that BC had breached its duty to consult the plaintiffs through its land-use planning and forestry authorizations. There, the plaintiffs claimed infringement of their Aboriginal title, and the Province had put consultation in issue through its plea of justification.

[2580] In my view, the issue of whether the Crown complied with its procedural duty to consult was put in issue when the Crown defendants elected to advance the defence of justification. The plaintiffs' pleadings are not deficient in this respect. However, if they are, any defect is minor and may be excused, consistent with the direction from the SCC that with regard to pleadings in Aboriginal rights claims, minor defects may be overlooked, absent clear prejudice: *Tsilhqot'in* SCC at paras. 20–23. The question of whether there was a duty to consult in respect of the infringements, including at the time of infringements and going forward, has been addressed by the parties. No unfairness arises.

C. CROWN GRANTS OF FEE SIMPLE INTEREST

[2581] I found that the Crown grants of fee simple interest adversely interfered and continue to interfere with the Cowichan's Aboriginal title to the Cowichan Title Lands and are a *prima facie* infringement. With regard to whether BC has justified that infringement, I begin by addressing two questions: 1) what were the duties that the Crown owed at the time the Crown grants were issued? and 2) what are the duties that the Crown owes now and going forward, in light of the Cowichan's established Aboriginal title?

1. Crown Duties at the Time of the Crown Grants

[2582] Consideration of this question requires a review of some of the foundational legal principles which govern the relationship between the Crown and Indigenous peoples.

[2583] As discussed in Part 5, Aboriginal title in British Columbia crystallized in 1846 when the Crown asserted sovereignty and acquired radical or underlying title to the land: *Delgamuukw* SCC at para. 145. The Crown's title to land is burdened by the pre-existing legal rights of Indigenous people, which are rooted in their prior use and occupation of the land: *Tsilhqot'in* SCC at para. 12, citing *Guerin* at 379–382. The Crown gained proprietary powers in respect of land at sovereignty, and had executive powers to dispose of land. At the same time, the assertion of Crown sovereignty in the face of pre-existing Indigenous occupation and sovereignty gave rise to a special relationship, and a duty of honour on the part of the Crown. This duty has since been enshrined in s. 35(1) of the *Constitution Act, 1982*. Accordingly, the Crown, in all its dealings with Indigenous peoples, "must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 24.

[2584] The honour of the Crown is also rooted in the *Constitution Act, 1867*: *Manitoba Metis* at para. 70. In 1871, BC joined Confederation and the provisions of the *Constitution Act, 1867* were applied to BC. Section 109 reads:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.
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> [Emphasis added.]

[2585] In *Delgamuukw* SCC, Lamer C.J.C. observed that s. 109 vests underlying title to land in the provinces, and qualifies provincial ownership by making it subject to

"any Interest other than that of the Province in the same". He noted that the Privy Council in *St. Catherine's Milling* held that Aboriginal title is such an interest: *Delgamuukw* SCC at para. 175.

[2586] In *Haida* SCC, the Province argued that s. 109 of the *Constitution Act, 1867* gave it exclusive right to the land in issue and that this right could not be limited by s. 35: at para. 58. At para. 59, the Court found that argument lacked foundation:

> The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59).
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> [Emphasis added.]

[2587] Accordingly, the Provincial Crown exercises proprietary power over land in the Province, but its power is qualified, and subject to Aboriginal title, and fulfillment of its requisite duties in respect of pre-existing Aboriginal interests and title. As above, per *Haida* SCC, BC took the lands in the Province subject to Aboriginal title and the duty to consult and accommodate. While the duty to consult is an "essential corollary to the honourable process of reconciliation that s. 35 demands" (*Haida* SCC at para. 38) it does not find its source in s. 35 and may therefore arise prior to its enactment. BC's constitutional powers as of 1871 regarding land management and disposition of its proprietary interest held pursuant to s. 109 have always been subject to the Crown fulfilling its requisite duties. These duties may include consultation and accommodation, pursuant to the honour of the Crown.

[2588] Additionally, on the facts of this case, as set out in detail in Part 6, colonial and post-Confederation policy with respect to Indian reserve creation required officials to meet with Indigenous peoples and consult with them on the location of their villages, and accommodate them, as the extent of Indian reserves was to be

defined “as they may be severally pointed out by the Natives themselves”. This policy continued through Confederation.

[2589] In *Tsilhqot'in* SCC, the Court held that where Aboriginal title is unproven, the Crown owes a procedural duty to consult, and if appropriate, accommodate, the unproven Aboriginal interest; this duty is imposed by the honour of the Crown: at paras. 78, 80. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution: *Haida* SCC at para. 32. The duty to consult is not solely rooted in s. 35, but is part of the process of reconciliation that flows from the honour of the Crown.

[2590] In *Haida* SCC at para. 34, the Court observed that in prior cases, it has found that Crown conduct prior to the establishment of a right is relevant to determining whether an infringement was justified:

> The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*, *supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour <u>before</u> determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.
>
> [Emphasis in original.]

[2591] In other words, where an infringement has occurred prior to proof of a right, whether the Crown complied with the duties that it owed at the time the infringement occurred will be relevant to the Court’s assessment of whether the Crown has justified the interference. I follow that approach.

a) Duty to Consult

[2592] In this case, BC issued the Crown grants in the Cowichan Title Lands after Confederation. The exercise of BC’s proprietary power under s. 109 was constrained by the Crown’s duty to consult arising from the honour of the Crown at the assertion of sovereignty. I find the duty was triggered when BC contemplated issuing the

Crown grants, and it was breached when the Crown failed to consult the Cowichan before the Crown grants were issued.

[2593] Both Crown defendants argue that the duty to consult arises only in respect of Crown conduct after 1982. As above, in my view, that position is not consistent with the jurisprudence and is also at odds with the established facts in this case.

[2594] I am satisfied that a duty to consult the Cowichan arose when BC contemplated issuing the Crown grants in the Cowichan Title Lands. I agree with the plaintiffs' submission that the foundation of the duty to consult arises from the honour of the Crown which derives from the Crown's assertion of sovereignty and the prior occupation of the land by Indigenous peoples. It is triggered by Crown knowledge of the claimed Aboriginal right. Adequate consultation is assessed according to a spectrum. The level of consultation and accommodation must be proportionate to the strength of the claim and the seriousness of the adverse impact contemplated by the Crown action: *Haida* SCC at para. 39.

[2595] The defendants argue that the duty to consult was an unknown concept at the time of the historical infringements, and that the Court should not apply modern standards to historical acts.

[2596] While I agree that the relevant duty is the one that applied at the time of the conduct — here, the Crown grants — I do not agree that consultation was an unknown concept when they were issued. The evidence in this case supports the opposite conclusion. Consultation with Indigenous people was a concept well within BC's knowledge at the time the Crown grants were issued. As previously set out, Indian reserve creation policy included conferring and consulting with Indigenous peoples as to the extent of their settlements. Colonial officials were under instructions from Governor Douglas to mark out Indian reserves based on the boundaries that Indigenous communities identified. This included summer and winter villages. These express directions engaged the honour of the Crown. The same general approach was carried out under CCLW Trutch, although with less regard for the views of Indigenous communities. After Confederation, consultation continued:

the JIRC had a mandate to visit “each Indian nation” to fix for each nation the number, extent and location of reserves, having regard to their “habits, wants and pursuits”.

[2597] I found that Douglas appropriated Indian settlement lands from the Crown’s land disposition processes. The evidence shows he preserved occupied village sites to encourage peaceful settlement of the Colony, as a matter of justice for the Indigenous people who had “equitable title” to the land they occupied and improved, and to establish permanent Indian reserves. Douglas’ appropriation of Indian settlement lands included the Cowichan Title Lands. These provisional Crown reserves were afforded administrative protections until such a time as they could be converted to an Indian reserve. Indian reserve creation was an ongoing project both prior to and after Confederation. As Commissioner Sproat wrote to the Lieutenant Governor in 1878, it was imperative to the Province that the work of Indian reserve creation proceed:

> It is extremely inconvenient to the Province to have lands locked up from preemption or sale in fine districts, owing to the non settlement of the Indian claims but this is a necessity, otherwise the Province might have to buy out the interest of white settlers.
>
> This is true in many parts of the country. I may mention one instance which will come up by and bye. The ancient fishing ground on the Lower Fraser of the Cowichan nation, where 700 to 1000 Indians have been accustomed to assemble to catch fish for their winter food, has been sold and now belongs to a white non-resident. What can be done in such a matter?

[2598] This process required consultation with Indigenous groups.

[2599] There was no consultation with the Cowichan prior to the issuance of the Crown grants. Crown officials did not consult with the Cowichan to stake out their interest in Tl'uqtinus in accordance with Douglas’ instructions to meet with the Indigenous occupants of villages and stake out Indian reserves. Instead, various colonial officials participated in or otherwise turned a blind eye to blatant land speculation in the entire Cowichan Title Lands which were granted to absentee owners. The plaintiffs submit that upholding the honour of the Crown even in its most

basic form surely did not involve selling off Indian settlement lands without consulting with its Indigenous inhabitants. I agree.

[2600] I also find that the Crown had actual or constructive knowledge of the occupied Cowichan village. The written historical record demonstrates that the Cowichan village was a well-known landmark on the Fraser River in the 1800s, as was the fact of Cowichan occupation of the village. Moody knew about the Cowichan village at Tl'uqtinus, through his commissioning of the Trutch survey, his role as CCLW in the colonial administration, and by virtue of his purchase of some of the village land. Trutch, who issued a number of the Crown grants in the Cowichan Title Lands, was aware of the existence of an Indian village on the shores of the south arm of the Fraser River, having personally surveyed it. The JIRC was aware of the Cowichan village, given Sproat's 1878 report to the Lieutenant Governor with respect to the Cowichan's complaint of the sale of their land. I am satisfied that at the time of the Crown grants, from 1871–1914, BC had actual or constructive knowledge of the Cowichan village on the Fraser River and the Cowichan's interest in it.

[2601] BC says that if the Province had an obligation to consult with the Cowichan at the time of the Crown grants, any such obligation was fulfilled through the reserve creation process. Prior to the first Crown grant, Douglas had taken steps to have reserve interests marked out by magistrates. Later, the JIRC commissioners began meeting with Indigenous communities and assessing their needs. This work began at the lower Fraser around 1876. The JIRC commissioners spent a month in the Cowichan Valley on Vancouver Island in 1877. The reserve creation process required considerable time to complete, and culminated in the establishment of reserves in 1938 by Order in Council No. 1036. This process occurred in tandem with the Crown's priority of settling and developing the Province. The Crown did not undertake separate consultations prior to each decision. This stands in contrast to modern consultation, but BC says it was reasonable given the limitations of communication and transportation in the late 1800s and early 1900s. BC says the

plaintiffs seek to impose a standard of perfection; the honour of the Crown does not require BC to provide a particular outcome.

[2602] There is no evidence that the Crown consulted with the Cowichan before the Lands of Tl'uqtinus were sold, nor did it provide the Cowichan notice. BC had knowledge of the Cowichan village and the Cowichan's occupation of the village before the issuance of the Crown grants. Prior to issuing at least one of the Crown grants (in 1914), the Crown had knowledge of the Cowichan's complaint to the JIRC that their land was being sold. There is no evidence that BC took any steps to address the Cowichan's concern. The fact that the Crown had and was implementing a reserve creation policy in British Columbia does not suffice to fulfill its duty to the Cowichan to consult with them in respect of the contemplated disposition of the Cowichan Title Lands. BC's failure to consult with the Cowichan about the sale of the Cowichan Title Lands was a breach of the duty it owed the Cowichan and it was dishonourable.

[2603] A breach in this case arises from the issuance of Crown grants of fee simple interest, assigning Cowichan property rights of exclusive use and occupation to third parties in the period of 1871 to 1914 and onward, continuing the Cowichan's exclusion today. During this period, the Cowichan held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Crown consult the Cowichan on uses of the land as Cowichan settlement lands, and accommodate their interests. The Crown did neither, and breached its duty.

[2604] At the time of the Crown grants, the Cowichan had an asserted but unestablished claim. In the 1870s, around 1,000 Cowichan people continued to return to their stl'ulnup on the Fraser River every summer to fish. They were still residing there when most of the lands were granted to settlers in 1871–1875. The actions of the Crown had grave consequences for the Cowichan — the alienation of their lands to third parties for well over a century. By the standards of the day — indeed, by any measure — BC's conduct was not in keeping with the honour of the Crown nor its associated duty to consult with the Cowichan.

b) Fiduciary Duty

[2605] The plaintiffs say that, in addition to the Crown's fiduciary duty going forward, the Court should generally examine the duties that the Crown owed at the time of the Crown grants and find that a fiduciary duty was owed historically in respect of the Cowichan Title Lands. The plaintiffs have not pleaded breach of fiduciary duty, but they say it is in issue by virtue of BC's plea that any infringement was justified.

[2606] BC says that the plaintiffs' submissions regarding an alleged historical breach of fiduciary duty has taken on the character of an independent cause of action, and it would be unfair for the Court to permit the plaintiffs to recast their case in this way. There are distinctions between what is required to justify an infringement on the basis that it is consistent with the Crown's fiduciary duty, and what a plaintiff must prove in order to establish breach of fiduciary duty as a cause of action.

[2607] With respect to an historic fiduciary duty, the plaintiffs rely on *Williams Lake* SCC at para. 61, where the Court upheld the conclusion of the Specific Claims Tribunal that the Williams Lake Indian Band had a specific and cognizable Aboriginal interest in their village site, in relation to which the Crown had assumed discretionary control sufficient to ground a fiduciary duty. They also rely on *Kitselas* at paras. 53– 54. There, the Federal Court of Appeal upheld Slade J.'s conclusion that the Kitselas First Nation had a cognizable interest in village land that was excluded from its reserve. This gave rise to a fiduciary duty in determining whether to exclude that land from their reserve.

[2608] In this case, the plaintiffs point to the Crown's assumption of discretionary control over Indian settlement lands in British Columbia, arguing that it engaged the honour of the Crown, and the Crown's fiduciary obligation to the Cowichan with respect to their stl'ulnup at the Lands of Tl'uqtinus at the time of the Crown grants. Applying *Williams Lake* SCC and *Kitselas*, the Cowichan had a specific cognizable interest in the Lands of Tl'uqtinus. The Crown assumed discretionary control of such lands as Indian settlement lands. The plaintiffs say this engaged the honour of the Crown and gave rise to a breach of fiduciary duty.

[2609] If it is open for the plaintiffs to allege a historic breach of fiduciary duty, BC points to the principle set out in *Haida* SCC at para. 18 that asserted but unproven Aboriginal rights are insufficiently specific to require the Crown to act as a fiduciary:

> ... Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.
>
> [Emphasis added.]

[2610] Absent a plea of breach of fiduciary duty, I am not prepared to determine whether the Crown owed and breached a fiduciary duty to the Cowichan in respect of the Cowichan Title Lands at the time of the Crown grants.

[2611] It is not open to the plaintiffs, based solely on BC's plea that the infringing Crown grants were justified, to assert a breach of fiduciary duty separate from the fiduciary duty that flows from their now recognized Aboriginal title. It was open to the plaintiffs to plead a breach of fiduciary duty of the kind at issue in *Williams Lake* SCC and *Kitselas*. They chose not to, and it is too late to advance it now.

[2612] I do not take the same approach in respect of whether there was a duty to consult at the time, because this is part of the infringement/justification analysis and, importantly, operates both before and after recognition of Aboriginal title. In *Tsilhqot'in* SCC, the Court determined that the infringing Crown conduct — forestry authorizations and land-use plans — occurred before title was declared and was a breach of the Crown's duty.

[2613] The jurisprudence regarding how the Crown may justify infringements does not support implying a fiduciary duty on the Crown prior to the proof of Aboriginal title, or require consideration of whether a fiduciary duty was owed and breached at the time of historic infringing conduct. It is an onerous standard and one that requires specificity. It may be made out where a plaintiff has advanced a cause of action for breach of fiduciary duty, but this is not such a case. As set out below, the Crown's fiduciary duty to the Cowichan which accompanies the Cowichan's

established Aboriginal title *is* in issue with respect to the continuing impacts of the Crown grants of fee simple interest and as part of the Crown's obligation to re-evaluate its prior conduct moving forward.

2. Current Crown Duties

[2614] I found that BC did not fulfill its duty to consult with the Cowichan prior to issuing the Crown grants of fee simple interest. I now consider the other elements of justification.

[2615] As above, to justify overriding the Cowichan's wishes with respect to the exercise of their Aboriginal title on the basis of the broader public good, BC 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 action is consistent with the Crown's fiduciary obligation to the group: *Tsilhqot'in* SCC at para. 77. These are the duties that the Crown now owes the Cowichan in respect of their land.

[2616] BC submits that in order to be required to reassess prior conduct going forward in light of the establishment of Aboriginal title, and on the basis that the interfering Crown conduct or project is unjustifiably infringing, the Crown must have an ongoing role in the project. One cannot cancel something that is complete.

[2617] Additionally, BC relies on *Rio Tinto* for the principle that the duty to consult is only triggered where there is a novel adverse impact that has not yet been fully realized and could be avoided. BC also submits the existing fee simple titles cannot be described as a "project" that the Crown could continue or cancel because, although the original Crown grants conveyed fee simple titles, those titles have been held by numerous third parties since. The fee simple estates are distinct from the Crown grants, which served only to transfer land from the Crown to third parties. According to BC, the existing fee simple estates do not rely on government or statute for continued existence; the *LTA* only adds a layer of statutory indefeasibility. How could the Crown be made to answer for the presence of fee simple titles on

Aboriginal title land when it is not the Crown that makes decisions to perpetuate the title's existence?

[2618] In *Saik'uz* BCSC, which like *Rio Tinto* also deals with the Kenney Dam's diversion of water on the Nechako River, Kent J. found that there was continuing displacement resulting in reduced fish populations and recurring flooding of ancient burial grounds. The original damage occurred in 1950 when the dam was built but the effects were felt annually to the present. Justice Kent noted at para. 586 that the Crown took land for dams, flooded other land for reservoirs, and radically reduced the hydrograph in the Nechako River. Further:

> [587] In my opinion, it is no answer to say that when the Dam was built, Aboriginal rights had not received judicial acknowledgement to the extent present today. It is a sad truth that in 1950, the cultural genocide resulting from residential schools and systemic discrimination was ongoing, and some of the more discriminatory provisions of the *Indian Act* were still in force. The existence of Aboriginal rights was given no consideration in 1950 and indeed the Crown denied their very existence in litigation extending well into the 1970s (see *Calder*). Even in the 1980s litigation, it was the Crown who opposed the First Nations joinder in the action and who launched an appeal to prevent their participation, notwithstanding the fact Aboriginal rights had by that time been recognized and affirmed in the *Constitution Act, 1982*.

[2619] I draw an analogy to the present case where the Crown grants of fee simple interest created the initial damage or infringement to Aboriginal title between 1871 and 1914. The ongoing alienation of the Cowichan Title Lands through the presence of fee simple estates has continued since that time. In any event, as above, *Rio Tinto* dealt with the requirement of a novel adverse impact to trigger a fresh duty to consult when an Aboriginal right or title is asserted, and not with Crown's obligation to justify infringements of established Aboriginal title.

[2620] BC submits that once the grants were issued, the Crown had no further involvement with the land. The only claim the Cowichan may have is for damages for BC's failure to consult with them before selling their village and fishing station.

[2621] BC cites *Wilson v. Esquimalt & Nanaimo Railway Co.*, 61 D.L.R. 1, 1921 CanLII 424 (U.K.J.C.P.C.) [*Wilson*] for the notion that the fee simple estates are private property rights "completely constituted and founded upon transactions

entirely past and closed": at 6. In that case, the Dominion Government had granted land to a railway company. The Judicial Committee of the Privy Council ("JCPC") heard an appeal from a decision of the British Columbia Court of Appeal. It was asked to decide, amongst other things, whether a statute and amendment passed after that grant to the railway company had the effect of displacing the railway company's title and vesting a fee simple title in new grantees. The JCPC referred to the Province's grants to the appellants (the new grantees) as "transactions entirely past and closed".

[2622] In my view, this decision does not mean that Crown grants of fee simple interest comprise Crown conduct that cannot be considered as ongoing for the purposes of an Aboriginal title claim. *Wilson* was about interests in land granted by the colonial state that did not involve or address Aboriginal interests in the land. It was decided before the enactment of s. 35 and key Aboriginal title jurisprudence. Aboriginal title is a *sui generis* pre-existing legal right and an independent legal interest that must also be reconciled with the interests of all Canadians. Its characteristics flow from the special relationship between the Cowichan and the Crown: *Tsilhqot'in* SCC at para. 72. I find the notion that the Crown grants of fee simple interest are "entirely past and closed" should be addressed differently in the context of a land claim by an Indigenous group, with reference to the Indigenous perspective and the special relationship with the Crown.

[2623] A declaration of Aboriginal title transitions the relationship between the Cowichan and the Crown into the sphere of fiduciary duty in respect of the Cowichan Title Lands. We know from *Tsilhqot'in* SCC that following a declaration of Aboriginal title, what remains of the Crown's underlying title to lands is a fiduciary duty owed by the Crown to the Cowichan when dealing with their land, and the right to encroach on Aboriginal title where justified under s. 35 of the *Constitution Act, 1982*: at para. 71. I agree with the plaintiffs that BC's submission that the Crown has no ongoing role with respect to the Crown grants of fee simple interest in the Cowichan Title Lands does not accord with BC's duties under s. 35 and the constitutionally-entrenched project of reconciliation.

[2624] In any event, as above, I find that with respect to historical Crown conduct, the requirement of a "novel adverse impact" — which applies in duty to consult cases following *Rio Tinto* — does not apply to historical Crown conduct that infringes Aboriginal title where the adverse impact of the historical conduct is continuing through to the establishment of Aboriginal title. This period of transition obliges the Crown to re-evaluate its conduct in light of its new duties to the Cowichan in respect of their Aboriginal title.

a) Substantive Requirements of Justification

i. BC's Position

[2625] BC submits that if the justification analysis is applicable to pre-declaration conduct, the key consideration for the Court should be whether the Crown acted pursuant to a compelling and substantial objective. Regard should be had to the overarching legislative objectives that motivated the system for privatization of interests in land, and not the specific objectives underlying the decision to issue the at-issue grants. The latter is only relevant to fiduciary duty.

[2626] BC submits that private property in land is foundational to British Columbia in Canada's market economy. The conveyance of private interests in land is intended to do nothing less than build the society of the Province, for the benefit of all British Columbians, by enabling and encouraging all manner of objectives: settlement, development of agriculture, construction of infrastructure, transportation, commerce, and the maintenance of public services, among others.

[2627] These are the kinds of objectives that the SCC identified as compelling and substantial and which could potentially justify infringements of Aboriginal title: *Delgamuukw* SCC at para. 165.

[2628] BC submits that the issuance of Crown grants resembles the kind of common law rule that cannot be truly understood in terms of purpose. There is no "specific enactment" that creates the power to issue Crown grants: *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 39, citing Peter W. Hogg, *Constitutional Law of*

Canada, 5th ed. Supp., vol. 2 (Scarborough: Carswell, 2007) (updated 2011, release 1) at s. 38.15. Conveying fee simple title by Crown grant is available to the Crown under its prerogative power. There is legislation that has systemized the process, but exercising that power is not understandable in terms of any objective.

[2629] The Crown grants occurred over a span of decades, at different times, with the involvement of different people when different legislative regimes related to land were in effect. It is difficult to locate a general purpose for the specific Crown grants. BC acknowledges the evidence on this point is not comprehensive, but points to an 1859 dispatch from Douglas to Lytton, which states that he is "anxious to encourage the actual settlement of the country, and that the process should commence on the sea coast, and spread from thence, as much as possible, continuously along the course of the great rivers to the interior". BC says there is some evidence that the lower Fraser River was prioritized for land sales because of its maritime accessibility and availability of arable land.

[2630] BC submits that the Court should accept that the Crown grants were backed by a compelling and substantial objective which animates the general purpose of Crown grants at the time: to settle the Colony and finance government. The fact that the lands which were the subject of the Crown grants remained vacant and idle for decades does not negate the objective. The ultimate success or failure of BC's encouragement of the settlement and development of land does not determine whether the attempt was made for a compelling and substantial objective.

[2631] BC says any purpose imputed to the interests held over the lands would have to consider the Province's role in the administration of the land title system. The Torrens system of registration assures indefeasibility of title upon registration. Title to land in British Columbia is a major part of the economy, underlying everything from family homes to industrial activities. If the Court appropriated a power to disrupt title to land in contravention of the statutory scheme, that system of security would be undermined.

[2632] BC submits that the maintenance of the integrity of the Torrens system is a compelling and substantial objective which justifies any ongoing infringement of the plaintiffs' Aboriginal title.

[2633] BC says considering infringement on an ongoing basis does not account for changing conditions in land ownership. Ownership of land in the Claim Area has changed over more than 100 years. Considering infringement that is ongoing raises issues about private interests being jeopardized.

[2634] With respect to fiduciary duty, BC submits it does not arise in the circumstances of this case. The Crown was not required to justify infringements and act as a fiduciary at the time of the Crown grants. If the Court finds otherwise, BC says the issuance of the Crown grants and the persistence of fee simple titles is rationally connected to the objectives of developing British Columbia's society and economy, both historically and currently.

[2635] BC submits that the fee simple interests are no more impairing than necessary. When the Crown grants were made, Indigenous interests were considered through the reserve creation process. BC also says there were historical reasons to prioritize settlement of the lower Fraser River specifically. There will conceivably always be an argument with respect to unjustified infringements of Aboriginal title, in that title could have been less impaired if the infringing conduct was undertaken elsewhere. Minimal impairment requires consideration of resource allocation and competing priorities with respect to finite land, and the Court is not in a position to resolve what is globally a just allocation of land. The Claim Area is relatively small in relation to other Cowichan territory, and the nature and extent of the infringing Crown grants are different when considered in that context.

[2636] Lastly, with respect to balancing the benefits that flow from the infringing Crown grants against the adverse effects on the Cowichan, BC says the plaintiffs' ancestors' access was not limited immediately and they could access their lands for some time after the Crown grants were issued. BC acknowledges that subsequently, the presence of modern infrastructure and rights of private parties prevented the

plaintiffs from using the Cowichan Title Lands, and that this is a significant adverse impact. BC proposes this must be weighed against the salutary effects of the current use of hundreds of landowners.

[2637] Maintaining the current fee simple interests respects the relationship of reliance that persons other than the plaintiffs have developed with the land and ensures the integrity of a property regime integral to British Columbia's entire economy. Undermining the system of indefeasibility of fee simple title presents the risk of great uncertainty and potential significant harm.

[2638] BC says reconciliation may require continual work by the plaintiffs and the Crown to achieve greater material recognition of Aboriginal rights including Aboriginal title. However, the Court must find that the Crown grants and the enduring security of fee simple title at issue are constitutionally justifiable.

ii. Plaintiffs' Position

[2639] The plaintiffs submit that the Lands of Tl'uqtinus held no particular significance to the Colony or to BC. The lands consisted primarily of peat bogs, unsuitable for European-style farming. Apart from the brief operation of a railway grade for less than a year and some peat mining, the lands were undeveloped and poorly serviced by roads for decades.

[2640] While BC relies on a single paragraph from an 1859 dispatch from Douglas which states that he is anxious to encourage settlement of the country, his later dispatches evince that there was little, if any, interest in the vicinity of Lulu Island. BC called no evidence to suggest the lands were of particular significance to the settlement of the country, or otherwise.

[2641] BC makes sweeping and unsubstantiated assertions about the social and economic benefits of the Crown grants, without pointing to whom these benefits accrued. In the absence of evidence, the plaintiffs say the Court should infer it was not to the benefit of the Cowichan or the Indigenous peoples of British Columbia. Even if settlement of British Columbia is a compelling and substantial objective, BC

ignores the evidentiary record that the Lands of Tl'uqtinus were being put to good and productive use by the Cowichan at the time of the Crown grants, and were put to little use once they were granted to settlers. The Crown grants did not in fact advance population settlement, and to constitute a compelling and substantial objective, the Crown conduct must actually advance the purported objective in some way.

[2642] If the Court finds the Crown had a compelling and substantial objective of settling the Province with a view to respecting and reconciling Indigenous interests in land, the Court must account for the fact that the justification analysis is site-specific, and in this case, the Crown grants were not honourable because they were not authorized.

[2643] With respect to fiduciary duty, the plaintiffs say that BC has not offered any evidence that would assist in determining the three elements of fiduciary duty. Alternatively, BC argues ongoing infringement from the Crown grants of fee simple interest is justified because otherwise the system of fee simple registration will be vulnerable. If the Court elects to consider this factor, it must be weighed against the impact of the continued fee simple interests on the Cowichan Aboriginal title.

b) Analysis

[2644] The recognition of Aboriginal title imposes obligations on the Crown. Because the plaintiffs hold Aboriginal title to the Cowichan Title Lands, the Crown must now seek their consent to develop the lands. Absent consent, the Crown cannot proceed unless it has first fulfilled its procedural duty to consult. Any intrusion on title must also be justified under s. 35. But what of the ongoing interference caused by the Crown grants of fee simple interest?

[2645] I found that at the time of the Crown grants, BC owed and breached its duty to consult with the Cowichan.

[2646] I agree with the defendants that once Aboriginal title is established, the duties that the Crown owes the title-holding group change, and that it is not appropriate to hold the Crown to that standard in respect of historical conduct.

[2647] However, the adverse impact of the Crown grants of fee simple interest in the Cowichan Title Lands continues today and the Crown grants comprise an ongoing infringement of the Cowichan's Aboriginal Title. The duties that the Crown owes the Cowichan in respect of those interferences have fundamentally changed because Aboriginal title is no longer asserted, but is established. Accordingly, I find that BC is now required to demonstrate that the ongoing incursion is substantively consistent with the requirements of s. 35. The duty to justify ongoing interference with the Cowichan Title Lands is triggered by the recognition of their Aboriginal title: *Tsilhqot'in* SCC at para. 90.

[2648] This means that BC must now demonstrate that the Crown grants are backed by a compelling and substantial objective and are consistent with its fiduciary duty.

[2649] In terms of historical purpose, the evidence demonstrates that BC's early land disposition processes and the issuance of Crown grants of fee simple interest in land generally were primarily aimed at the settlement and economic development of the Province. This is generally a compelling and substantial objective.

[2650] In *Tsilhqot'in* BCSC, Vickers J. noted there was no doubt forestry, generally, may have been a valid legislative objective; however, he held that BC was required to establish a compelling and substantial objective for the forestry activities in the claim area specifically. The impact of forestry activities on the Tsilhqot'in's title was disproportionate to the economic benefits that would accrue: at paras. 1089–1090, 1107–1108.

[2651] The Court of Appeal agreed with Vickers J.'s approach, finding that the analysis must "depend on the nature of the infringement alleged": *Tsilhqot'in* BCCA at paras. 327–329. Where an infringement is governmental conduct, the question is

whether the underlying governmental objective is justifiable: at para. 330. There was no valid governmental objective for logging the claim area: at paras. 332, 336.

[2652] The SCC agreed with this reasoning, noting that granting harvesting licenses to third parties on Tsilhqot'in land was a serious infringement that would not be lightly justified. If the Crown wished to do so in the future, it would have to establish that a compelling and substantial objective would be furthered by such harvesting: at para. 127.

[2653] I take this to mean that in considering whether the Crown has established a compelling and substantial objective for infringing conduct, I am to have regard to whether the specific infringement of the Cowichan Aboriginal title is backed by such an objective. BC has not established that the Crown grants of fee simple interest were supported by or furthered the settlement of British Columbia. The evidence demonstrates the opposite.

[2654] The lands were largely purchased by prominent, absentee settlers, such as CCLW Moody, who purchased some Cowichan Title Lands in 1863 shortly before leaving the Colony, never to return. Land was to be sold to farmers, not government officials who were also land speculators and who were leaving the Colony. The Cowichan Title Lands were not put to productive use as a result of the Crown grants. The Cowichan Title Lands sat largely idle and unoccupied by settlers for many years. The only productive use that the land was put to in the early years after the Crown grants were issued was by the Cowichan, who continued to use their land every summer to fish, through the 1870s and into the early 20th century. Eventually, during the 1920s and 1930s, the lands were forfeited for non-payment of taxes and Richmond was deemed the purchaser. In the 1950s, Richmond began using a significant portion of the Claim Area as a municipal dump.

[2655] On the facts, there was no compelling and substantial purpose for issuing the Crown grants in the Cowichan Title Lands. The goal of settlement of the Province was not furthered by the Crown grants of fee simple interest in the Cowichan Title Lands.

[2656] Now, BC bears the burden of demonstrating that the ongoing infringements are justified. BC points to the existence of an ongoing compelling and substantial purpose underlying the endurance of fee simple titles. Private property ownership is fundamental to British Columbia's and Canada's market economy and to socio-economic development, enabling settlement, agricultural development, construction of infrastructure, transportation, commerce, and maintenance of public services.

[2657] I accept BC's statements about the fundamental importance of private property ownership. For the purpose of considering whether BC has met its fiduciary duty, I will assume those goals are furthered by the present day settlement of the Cowichan Title Lands.

[2658] The Crown owes the Cowichan a fiduciary duty in respect of their Aboriginal title lands and the continuing interferences must be consistent with that duty. The Court in *Tsilhqot'in* SCC refined the test for justification of infringement of Aboriginal title to include a requirement that, where a compelling and substantial purpose is established, the Crown's fiduciary duty nonetheless requires government to act in a way that respects that Aboriginal title is a group interest held communally for present and future generations. Incursions on Aboriginal title land cannot be justified if they deprive future generations of the benefit of the land: *Tsilhqot'in* SCC at para. 86. It is plain that the Crown grants of fee simple interest in the Cowichan Title Lands run afoul of that principle, as they exclude the Cowichan from their land, while granting conflicting rights to the fee simple title holders to exclusively occupy and use it.

[2659] It is therefore unnecessary to consider the question of proportionality.

[2660] Going forward, BC owes a fiduciary duty to the plaintiffs in respect of the Cowichan's Aboriginal title. The Crown's underlying title in the land is held for the benefit of the Cowichan and constrained by the Crown's trust obligation to them: *Tsilhqot'in* SCC at para. 85. This is not negated by the presence of fee simple estates on the Cowichan Title Lands. The Crown must now act in a way that accords with the fact that Aboriginal title is held by the Cowichan. The Crown grants of fee

simple interest substantially deprive the plaintiffs, and subsequent generations, of the benefit of the Cowichan Title Lands. This ongoing intrusion cannot be justified. BC must now live up to its obligations to the Cowichan people.

[2661] In summary, I find that the Crown breached its duty to consult with the Cowichan when the Crown grants of fee simple interest were contemplated. I also find that the Crown grants of fee simple interest are incompatible and do not accord with the fiduciary duty that the Crown now owes the Cowichan. Accordingly, the Crown grants of fee simple interest in the Cowichan Title Lands are an unjustified infringement of Cowichan Aboriginal title.

D. RICHMOND TAX SALES UNDER THE *MUNICIPAL ACT*

[2662] With regard to the Cowichan Title Lands, I found that BC's vesting of Richmond with the fee simple interests in the Richmond Tl'uqtinus Lands and the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands) by operation of s. 283 of the *Municipal Act*, as amended, continued the Cowichan's exclusion from enjoying the rights and benefits associated with their Aboriginal title. The lands that Canada and Richmond currently hold which derive from the municipal tax sales are a continuing, meaningful diminution of the Cowichan's ability to exercise their rights in respect of the Cowichan Title Lands. The effects of the tax sale process upon the Cowichan's exercise of their Aboriginal title endure today.

[2663] BC denied that the tax sale process under the *Municipal Act*, as amended, was Crown conduct. BC denied the vesting amounted to an infringement and elected not to advance any argument related to justification.

[2664] Accordingly, BC did not lead evidence about consultation with the Cowichan regarding their title land prior to vesting Richmond with the fee simple estates. There is no evidence before me that the Cowichan were consulted. BC did not lead evidence about whether the tax sale process under the *Municipal Act*, as amended, was backed by a compelling and substantial objective or that the resulting interference with Cowichan Aboriginal title was consistent with the Crown's fiduciary duty.

[2665] As set out earlier, once an Aboriginal rights-holder establishes infringement, the onus shifts to the Crown to justify the infringements on the basis of the *Sparrow* test, as refined in *Tsilhqot'in* SCC. BC did not make submissions with respect to justification of this particular infringement. This infringement is continuing, and the Crown may only intrude upon the plaintiffs' Aboriginal title with their consent or if it can justify the interference. BC has not justified the infringement.

E. VESTING OF SOIL AND FREEHOLD TO RICHMOND UNDER THE *COMMUNITY CHARTER*

[2666] I found that BC's vesting of soil and freehold in certain highways to Richmond under s. 35(1)(a) of the *Community Charter* deprives the Cowichan of the right of exclusive use, enjoyment, occupancy, and possession of these lands, and the right to determine the use to which the land may be put. BC's vesting grants Richmond the ability to authorize additional uses of the roads, which intrudes upon the Cowichan Aboriginal title. BC's vesting of Richmond with the soil and freehold of these lands is a meaningful diminution of the Cowichan's right of ownership and a *prima facie* infringement.

[2667] In Part 7, in light of my finding on infringement, I declined to determine whether Article 13 of the *BC Terms of Union* constrained BC's authority to vest Richmond with the soil and freehold in the Richmond Tl'uqtinus Lands (Highways). In my view, the infringement and justification framework under s. 35 of the *Constitution Act, 1982* is the appropriate lens through which to assess whether that conduct is constitutionally permissible.

[2668] However, BC did not raise the defence of justification. Rather, BC argued that the statutory vesting of soil and freehold in the roads to Richmond did not impact the plaintiffs, or, even if the *Community Charter* could be said to affect the Cowichan's interest, it does not amount to an infringement.

[2669] Accordingly, BC has not justified this infringement.

F. CANADA AND VFPA ACTIVITIES ON THE FEDERAL TL'UQTINUS LANDS

[2670] I turn now to whether Canada and the VFPA's activities on the Cowichan Title lands are justified. In Part 7, I found that the following activities adversely interfered and interfere with the Cowichan's exercise of Aboriginal title and are *prima facie* infringements:

a) Canada's assignment of authority to the VFPA and its predecessors to undertake port activities including management, leasing and licensing of the Cowichan Title Lands;

b) Canada compelling the VFPA and its predecessors to develop land-use plans for the Cowichan Title Lands; and

c) as Canada's agent, the VFPA and its predecessors undertaking leasing of the Cowichan Title Lands.

1. Positions of the Parties

a) Canada

[2671] Canada maintains the justification analysis should not be applied to Canada's authorization of port activities in the Claim Area which occurred before 1982 and before a declaration of Aboriginal title. Canada says any deficiencies in conduct should be addressed pursuant to the duty to consult framework set out in *Haida* SCC. I found the justification analysis is sufficiently flexible to account for both historical interferences that are ongoing and modern interferences with Aboriginal rights and title. In this case, that requires consideration of the duty owed at the time of the interference. The duties owed now that title is established must also be considered, including, for historical interferences that persist to present day, whether prior conduct must be re-evaluated in light of the establishment of title and the Crown's associated duties.

[2672] Canada's alternative submissions focused on the requirement that the Crown act pursuant to a compelling and substantial objective. With respect to the port

activities, Canada says it consulted with the plaintiffs and other Indigenous groups where federal authorization of a particular activity was required, as when Canada acquired and disposed of land in the Claim Area in 2007. When federal authorization was not required, the VFPA consulted in respect of its proposed activities that could adversely affect the plaintiffs' and other Indigenous groups' claims.

[2673] Canada submits that its authorization of port activities occurred in furtherance of the compelling and substantial objective of sustaining and improving Canada's economic well-being and its position as an international trading partner. The port facility in the Claim Area is part of Canada's transportation system and facilitates the VFPA's role as both the end point of national trade corridors and a gateway to international markets. Canada's transportation system plays a crucial role in ensuring Canada's economic well-being and prosperity.

[2674] Within this system, the VFPA is a manager and operator of port facilities. These facilities constitute Canada's most important port, with a lengthy history and presence on the Fraser River. Due to Canada's expansive geography and relatively small and dispersed population, efficient transportation and access to international markets is crucial to the Canadian economy.

b) VFPA

[2675] The VFPA says the justification analysis applies to Crown conduct occurring after Aboriginal title is established. The VFPA says the Court should allow a period of time for negotiation with respect to any infringement, before the Court makes a determination on justification.

[2676] The VFPA submits that any infringement of the plaintiffs' title resulting from the VFPA's ownership, occupation, management, or control of the lands for port activities, services, and purposes is justified. The VFPA acknowledges that a finding of justification does not amount to extinguishment of title. The VFPA says if justification is made out, it would have lawful authority to continue its occupation, management, and control of the land for port purposes. The Cowichan would be provided ongoing compensation from the VFPA, Canada, or both, in recognition of

the limitation on the exercise of their Aboriginal title. In the event the lands were no longer used for port purposes, the limitation on Aboriginal title would come to an end and the Cowichan could exercise their title fully.

[2677] The VFPA relies on *Sparrow* for the proposition that Aboriginal rights and title are not absolute and may be overridden for the greater good. Section 35 gives a measure of control over government conduct and is a strong check on legislative power, but it does not promise immunity from government regulation: *Sparrow* at 1110.

[2678] Limits on s. 35 rights are permitted when the objectives furthered by those limits are sufficiently important to the broader community as a whole and compatible with the reconciliation of Aboriginal societies with the broader political community: *Gladstone* at para. 73.

[2679] The VFPA says the Cowichan's title claim was not self-evident nor particularly strong. In light of the uncertainty in the law, competing Aboriginal claims, and an incomplete and untested evidentiary record prior to trial, the level of consultation required prior to this Court's determination was not at the higher end of the spectrum. The VFPA says it consulted with the Cowichan. The fact that the plaintiffs are dissatisfied with the outcome does not support an alleged breach of this duty.

[2680] The VFPA submits Canada and the VFPA's continued control of the lands for port purposes is a compelling and substantial objective. Successful and efficient management and operation of the Port of Vancouver is one of the clearest instances of a government activity being pursued for the good of all Canadians. Constraints on the development and ongoing activity of the VFPA would detrimentally affect provincial and federal economies as well as thousands of Canadians.

[2681] The VFPA acknowledges that activities that result in a substantial deprivation of the benefit of the land for future generations would not be justified. The VFPA submits that ownership of land as a whole by the Crown would have less of a negative effect than land subdivided into parcels that would be indefinitely owned

and controlled by non-Indigenous individuals. The port's activities are not incompatible with future use by the Cowichan.

[2682] The VFPA challenges the plaintiffs' submission that the Court should take a site-specific focus to justification. A site-specific assessment would be too restrictive and almost inevitably lead to rejection of the defence of justification.

[2683] The VFPA says that while the loss of the specific lands would not entirely undermine the operations and success of the VFPA, it must be remembered that all of the lands owned and managed by the VFPA are subject to Indigenous land claims. If, as a result of this case, the VFPA is unable to continue its operations in the Claim Area, all of the VFPA's operations would be in some jeopardy.

c) Plaintiffs

[2684] The plaintiffs submit it is clear that the Crown defendants and their agents (including the VFPA and its predecessors) knew or ought to have known that the Cowichan had a strong Aboriginal title claim to the Lands of Tl'uqtinus at all relevant times.

[2685] The Crown was well aware of the Cowichan's interest in the Lands of Tl'uqtinus and that the Cowichan had been demanding that the Crown recognize their Aboriginal title since at least the 1870s.

[2686] The plaintiffs say Canada did not provide any substantive submissions related to its efforts to consult with and accommodate the Cowichan. Canada asserts that Transport Canada and the VFPA consulted with the Cowichan without any reference to specific exhibits or other evidence. There is no evidence that Canada and the VFPA or the VFPA's predecessors meaningfully consulted with or accommodated the Cowichan prior to any of the infringements.

[2687] Canada retains the ultimate responsibility for ensuring that the duty to consult has been met. Canada has delegated to the VFPA the authority to manage lands as Canada's agent. The plaintiffs submit the VFPA was therefore under an obligation to

meaningfully consult with and accommodate the Cowichan regarding the Crown activity on the Federal Tl'uqtinus Lands (Canada) on Canada's behalf. When Canada delegated its duty, it did not provide the VFPA with sufficient guidance on what was required to discharge the duty when it came to issues of Aboriginal title.

[2688] The plaintiffs submit that Canada provided the Canada Port Authorities ("CPAs") with minimal, if any, direction on how to engage in consultation and accommodation. There is no evidence that Canada has any policies or processes for overseeing the adequacy of a CPA's consultation and accommodation.

[2689] In response to Canada's submission about the existence of a compelling and substantial objective, the plaintiffs submit the only reason the port operates on the Lands of Tl'uqtinus is because the VFPA's predecessors acquired the land as part of their expansionist ambitions, without any consideration of feasibility or demand, in the late 1960s and early 1970s. The lands held by Canada and the VFPA are developed as warehouses and parking lots for at least two for-profit corporations that may enjoy some efficiencies based on proximity to other port infrastructure.

[2690] The plaintiffs submit Canada has failed to establish that ownership, development, or use of the Federal Tl'uqtinus Lands (Canada) are necessary to achieve Canada's economic and trade objectives. Canada did not lead any evidence respecting the volume or nature of freight transited specifically through the facilities on the Federal Tl'uqtinus Lands (Canada) or the degree of significance that volume of freight contributes to the VFPA's operations or the economy.

[2691] The plaintiffs submit there is no quantifiable evidence demonstrating the VFPA's activities must occur on these specific lands or that there was no other suitable alternative.

[2692] The indefinite assignment of lands to the VFPA fails to accord with the requirement to respect the Cowichan's future interests.

[2693] There is no rational connection between the infringements and the goal of sustaining and improving Canada's economic well-being and its position as an

international trading partner or the ongoing and future operations of the Port of Vancouver.

[2694] The plaintiffs say the Crown-authorized activities go further than necessary to achieve the purported goals. The evidence establishes the VFPA's activities do not need to occur on these particular lands.

[2695] Further, the benefits that may be expected to flow from the Crown-authorized activities are abstract, and are outweighed by adverse effects on the Cowichan Aboriginal title. The evidence fails to establish any meaningful connection between the Federal Tl'uqtinus Lands (Canada) and benefits to the VFPA.

2. Evidence Regarding Justification of Port Activities

[2696] Canada called three Transport Canada officials to testify about the significance of CPAs:

a) Marc Yves-Bertin, Director General of the Marine Policy Bureau;

b) Christian Dea, Chief Economist and Director General of Transportation and Economic Analysis; and

c) Erin Hunt, Director of Trade Policy.

[2697] Canada also referred to evidence from the examination for discovery of Ian Chatwell, Regional Director of Programs for Transport Canada - Pacific Region.

[2698] VFPA employee Peter Xotta testified about the VFPA's operations.

[2699] Canada called Dr. Binnema, a historian who gave evidence regarding the establishment of the Port of New Westminster and its evolution into the FRHC (a predecessor to the VFPA).

[2700] The VFPA tendered an expert report from Dr. Tretheway, who gave evidence of the economics of the Port of Vancouver.

[2701] Below, I have summarized the evidence regarding the role of Transport Canada in port governance and its role with respect to CPAs, such as the VFPA. It is largely uncontested. I have drawn, for the most part, from Canada's summary of the evidence and review of the legal framework governing the powers of CPAs provided to the Court in final submissions.

[2702] Ports fall under the purview of Transport Canada. Transport Canada's role in Canada's transportation system is to promote a competitive, economical, and efficient national transportation system that is safe, secure, and sustainable: see *Canada Transportation Act*, S.C. 1996, c. 10, s. 5.

[2703] Transport Canada's most recent policy framework, Transportation 2030, identifies five themes to guide the development of Canada's transportation system: efficient personal travel, safety and security, environmental responsibility, effective use of marine transportation, and improving trade to global markets.

[2704] Transport Canada's role in port governance is focused on policies, while CPAs are operationally oriented. Following policy change in the 1990s, the *Canada Marine Act* shifted port management from local Harbour Commissions (with varying degrees of federal oversight) to independent boards of directors of CPAs, giving the CPAs greater autonomy. CPAs operate at arm's length from the Crown as Transport Canada does not direct or control them.

[2705] Under the *Canada Marine Act*, CPAs are financially self-sufficient. They do not rely on the Crown for financial support. They do not require input from Transport Canada on commercial activities such as lease agreements, setting strategy, developing business plans, or land management plans.

[2706] The SCC in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 at para. 46 [*Lafarge*] described the powers of CPAs under the *Canada Marine Act*:

> ... Parliament authorized port authorities such as the VPA to engage *as Crown agents* in their traditional activities related to shipping, navigation, transportation of passengers and goods, handling of goods (s. 7(1)) to the

> extent that such activities are specified in the letters patent issued to each such port authority (s. 28(2)(*a*)). At the same time, port authorities were authorized on their own behalf and *not as Crown agent* (s. 28(3)) to undertake "other activities that are deemed in the letters patent to be necessary to support port operations" (s. 28(2)(*b*)).
>
> [Emphasis in original.]

[2707] Transport Canada works with CPAs when government policy or trading patterns change. For example, a CPA will seek guidance if they want to expand their commercial activity beyond their existing mandate as set out in legislation and their letters patent.

[2708] Transport Canada's Marine Policy Bureau advises CPAs on interpretive and strategic issues, such as policy views on business undertakings.

[2709] The *Canada Marine Act* sets parameters for CPAs, mandates ports to maintain navigational safety and environmental performance, provides the structure of port governance, and establishes key enabling authorities through letters patent. A CPA's board of directors has access to financial instruments, borrowing authority, and the ability to manage Crown lands and assets and to acquire lands in its own name. The board manages the port's day-to-day activities.

[2710] Letters patent delineate a CPA's authority and codify features of the CPA's internal governance and permissible activities. They are signed by the Minister of Transport. As described in Part 7, the schedules to a letters patent include three management areas of port lands: "Schedule A", the navigational jurisdiction; "Schedule B", real property held by the Crown; and "Schedule C", lands acquired by a port in its own name for trade purposes. The interferences on the Cowichan Title Lands pertain to "Schedule B" lands.

[2711] When lands are assigned to a CPA's administration under "Schedule B" or "Schedule C" of a letters patent, the CPA assumes sole responsibility for managing those lands.

[2712] A CPA has the power to engage in port activities related to shipping, navigation, transportation of passengers and goods, and handling and storage of goods, to the extent those activities are specified in the letters patent, and other activities that are deemed in the letters patent to be necessary to support port operations: *Canada Marine Act*, s. 28(2). Regulations under the *Canada Marine Act* can cover, for instance: navigation and use by ships, environmental protection, and maintenance of order and safety: see s. 62(1).

[2713] A CPA can also construct, purchase, lease, operate, and maintain railways on lands it manages, holds or occupies: *Canada Marine Act*, s. 29.

[2714] The *Federal Real Property and Federal Immovables Act* applies, wholly or in part, to federal real property and federal immovables of a port depending on that CPA's letters patent: *Canada Marine Act*, s. 44.

[2715] Canada relies on international trade to sustain economic activity and growth. Ports enable the movement of goods in and out of Canada.

[2716] Port infrastructure includes waterfront terminals, rail corridors, and trucking networks, as well as off-water facilities. The port infrastructure at issue in this case is a logistics hub.

[2717] The VFPA manages Canada's busiest port, the Port of Vancouver (see *Lafarge* at para. 1), which is Canada's largest gateway. The Vancouver Port Authority was amalgamated with other lower mainland ports in 2008 to become the VFPA. The Port of Vancouver includes the Fraser River site.

[2718] The plaintiffs do not dispute that the Port of Vancouver is Canada's largest port. However, the plaintiffs say that the evidence connecting the commercial lessees' warehouse activities on the Federal Tl'uqtinus Lands (Canada) to the VFPA's broader operations is anecdotal.

[2719] Erin Hunt of Transport Canada stated she understood the VFPA has limited lands and seeks to maximize the use of the lands it has. Projected growth over the next 10 to 20 years suggests it may soon reach maximum capacity.

[2720] Of the Claim Area within the VFPA's jurisdiction, approximately 650 acres are "Schedule B" lands. Almost all of the lands in the Claim Area listed in "Schedule B" and "Schedule C" of the VFPA's letters patent are zoned as "port terminal" or "industrial". Scarcity of industrial lands in the lower mainland is a long-standing concern for the VFPA and its predecessors.

[2721] Canada says the "Schedule B" and "Schedule C" lands in the Claim Area are significant for their off-dock facilities. Off-dock facilities do not have water access but may be used for facilities or services related to port operations, and for long-term use planning at the VFPA.

a) History of Port Activities on the Fraser River

[2722] Dr. Binnema provided a history of the establishment of the Port of Queensborough on June 15, 1859 (later known as the Port of New Westminster), and its evolution to the FRHC to the present. I generally accept his evidence as described below.

[2723] Briefly, in 1913, the federal government incorporated semi-autonomous Harbour Commissions, including the New Westminster Harbour Commission ("NWHC"). In the 1920s, Vancouver's port grew quickly. New Westminster's port initially lagged behind Vancouver, but saw shipping increase rapidly in that decade. Around the same time, as a result of the 1924 Six Harbours Agreement, the NWHC had jurisdiction only to the eastern end of Tilbury Island (conforming to the western boundary of the City of New Westminster). This resulted in the foreshore of the Claim Area falling outside of the NWHC's jurisdiction. A reorganization of Canada's ports was undertaken in the 1930s. Harbours of national importance were to be run by the National Harbours Board, while harbours of lesser significance were not: see *Lafarge* at para. 44. The NWHC was not placed under the authority of the National Harbours Board. This operational model continued into the 1960s.

[2724] As previously set out, in 1964, the *Harbour Commissions Act* was passed. The NWHC, reconstituted as the FRHC, elected to fall under that Act. In 1999, the FRHC was converted to the FRPA.

b) FRHC's Acquisition of Land in the Claim Area

[2725] As I touched on in Part 7, the FRHC acquired land in the Claim Area from 1968/1969 to 1974.

[2726] Beginning in the late 1950s, there were concerns about the availability of deep-sea sites on the Fraser River. As early as 1959, the NWHC had expressed concern about a potential shortage of industrial sites with deep-sea facilities within the coming decade. Dr. Binnema opined that when the FRHC acquired land in the Claim Area between 1969 and 1974, it did so with the aim of developing the land for deep-sea port activities and for industries reliant on deep-sea terminal access.

[2727] In 1966, regulatory changes increasing the permissible length of vessels along the Fraser River also led the FRHC to contemplate additional port development.

[2728] In 1966, the FRHC resumed jurisdiction downriver from New Westminster to the mouth of the Fraser River by way of a leasing agreement with BC. The FRHC began negotiating to acquire the Claim Area land shortly thereafter. Industry port activities were gravitating away from city centres. Richmond and the Fraser River generally were considered to have substantial potential for industrial growth; in 1968, the FRHC cited lower costs as a major reason for this shift. A 1968 annual report of the FRHC noted that the north bank of the south arm of the Fraser was attractive as a potential industrial complex because it was adjacent to railways, highways, and deep-sea mooring.

[2729] Dr. Binnema explained that when the FRHC showed interest in the Claim Area land, it could be acquired at low cost because most of it was undeveloped, and perhaps unused, as of the 1960s. By the late 1960s, most of the land in the Claim Area was zoned for industry, though poorly served by roads with very few

improvements. Other portions of the Claim Area were used as a landfill by Richmond from the 1950s to the 1980s, or appear to have been largely unused by their owners.

[2730] In the late 1960s, the FRHC acquired Parcel G of Section 24, B4N, R5W, from Richmond. Around that time, the FRHC also acquired Sections 13 and 24, B4N, R5W, and Parcel A of Sections 18 and 19, B4N, R4W in the Claim Area. Much of the land was acquired in a land exchange with the Township of Richmond. In 1970, the FRHC acquired the foreshore lands of Section 24 from Richmond. The plaintiffs have not established Aboriginal title in respect of these lands.

[2731] In 1974, the FRHC acquired land in Sections 14 and 23, B4N, R5W, from Fraser River Peat Moss Ltd. It also acquired land from the City of Richmond in Sections 23, 26, and 27, B4N, R5W. The plaintiffs have established Aboriginal title over Sections 23, 26, and 27. Eventually, the FRHC came to own nearly 700 acres in the Claim Area.

[2732] Dr. Binnema reported that through the 1970s and 1980s, the FRHC held the lands on Lulu Island for future port development. The land could not be developed for those purposes until fill was added to the land to raise its level and provide stability for heavy machinery.

[2733] In June 2007, Canada acquired Lots 2 and 3, B4N, R4W, in a land swap with Keiry Holdings Ltd. Lot 3 was eventually amalgamated with another parcel to form Lot 8, Section 19, B4N, R4W. The plaintiffs have not established Aboriginal title in respect of these lands.

[2734] In 1982, the FRHC established a policy of placing surplus revenues from rentals and leases into land acquisition.

[2735] Examination for discovery evidence of Canada’s witness, Mr. Chatwell, was read in at trial. At discovery, he admitted that throughout the history of Canada’s ownership of the fee simple titles in the Claim Area, Canada did not investigate any asserted Aboriginal rights or title to those lands in advance of their acquisition.

However, Mr. Chatwell gave evidence that Transport Canada did consult with Indigenous groups with respect to the Keiry land swap.

[2736] After acquiring the land, the FRHC allowed Richmond to continue using a portion of the land as a landfill until 1986. This was intended to improve the land's suitability for port development through extensive filling. In February 1975, the FRHC rejected a request to accept putrescibles (refuse subject to decay), which Dr. Binnema says represents a decision consistent with an intent to use the landfill to establish a firm base at the site.

[2737] The FRHC reported in 1984 that it awarded a $7 million dredging contract for sand removal from the Fraser River and placement on the Fraser Richmond site in the Claim Area.

[2738] In 1986, the FRHC reported that the development of the 269-hectare Fraser Richmond port terminal continued, with the closing of the landfill operation, the development of No. 8 Road for property access, and the calling for contracts to load the site with a further six million metres of sand dredged from the river.

[2739] In 1995, the FRHC reported that it was continuing site preparation on its Fraser Richmond development property.

[2740] Ultimately, the property was never developed as a deep-sea port. As at the time of trial, it was the site of a VFPA logistics hub.

c) VFPA Land Use and Operations

[2741] In final submissions, the VFPA provided a summary of the history of the establishment of the VFPA, an overview of its mandate and operations, as well as evidence respecting land use and consultation. I have drawn largely from that summary in setting out the evidence below.

[2742] The VFPA was established in January 2008 under the *Canada Marine Act*. In its 2018 financial report, the VFPA says it is responsible for the oversight and management of the federal lands and waters of the Port of Vancouver. The report

states that the Port of Vancouver is Canada's largest port and the third largest in North America in terms of total tons of cargo. It is home to 27 major marine cargo terminals and three Class 1 railroads.

[2743] The VFPA is financially self-sufficient. It divides port business into five different sectors: auto, breakbulk, bulk, container, and cruise ship. Each sector has different infrastructure needs.

[2744] The auto sector is primarily related to the import of automobiles. All cars manufactured in Asia that are destined for Canada come through the Port of Vancouver. There are two auto terminals for the sector and they both operate on the Fraser River.

[2745] By way of example of the scale of the VFPA's operations and the importance of the Port of Vancouver to the economy, the Port of Vancouver's 2016 Economic Impact Study provides that, in 2016: 1) the estimated value of the cargo passing through the Port of Vancouver was $202 billion; 2) the Port's total cargo value handled was equal to approximately 19% of Canada's total foreign trade; and 3) the Port handled 28% of Canada's non-US foreign trade by value.

[2746] The VFPA's expert, Dr. Tretheway, was qualified as an expert in transportation economics, including economic impact analysis, multiplier analysis, input-output models and the national system of product accounts which provide the data structures for the analysis.

[2747] The VFPA asked Dr. Tretheway to provide an expert opinion regarding: 1) the economic effect of the VFPA's facilities generally on the local and national economies; and 2) the economic effect of the VFPA's facilities situated on the lands that are the subject of this claim on the local and national economies. His report included a series of tables presenting the direct economic impact of the Port of Vancouver in Canada for 2008, 2012, and 2016. He also appended six studies that were previously prepared by InterVISTAS Consulting Group ("InterVISTAS") for the years 2001, 2002, 2006, 2008, 2012, and 2016. The original InterVISTAS studies

were authored by Dr. Tretheway and his consultant team for the VFPA to measure the economic impact of the port: see my ruling indexed at 2022 BCSC 104 at para. 65.

[2748] Dr. Tretheway did not opine on the second question, stating that he could not provide an opinion on the economic effect of the VFPA's facilities situated on the Lands of Tl'uqtinus because the pre-trial InterVISTAS Reports, upon which his report was entirely based, did not contain the data necessary to identify economic impacts for specific parcels of land. However, he said he could focus his results on Richmond and identify direct impacts of the port lands in Richmond.

[2749] This is a significant limitation in the usefulness of Dr. Tretheway's evidence because the VFPA's operations in the Claim Area are much narrower geographically, than its operations in all of Richmond. Dr. Tretheway further admitted that the data in the tables include the operations and activities of the Port of Vancouver and related businesses, extending beyond the VFPA's facilities.

[2750] Based on the work done in the earlier InterVISTAS studies in 2008, 2012, and 2016, Dr. Tretheway presented his opinion on the direct economic impacts of the Port of Vancouver with respect to employment, wages, GDP, and economic output in Canada. Direct economic impacts were contrasted with broader indirect impacts (meaning downstream economic impacts generated from the presence of the port, like indirect employment generated in industries that supply or provide services to the marine transport industry) and induced impacts (meaning economic impacts created by the spending of wages, salaries, and profits earned from direct and indirect economic activities, like employees of firms directly or indirectly connected to the Port of Vancouver spending their wages in the general economy).

[2751] Dr. Tretheway testified that both economic output and gross domestic product measure value of the services in the sense of the expenditure. The VFPA in its submissions acknowledged there are some difficulties with economic output data, saying it includes both the cost of material inputs and the additional cost of labour

and capital to increase the value of the inputs in creating the final product; this can overstate the economic contribution of services associated with the Port's activities.

[2752] In contrast, the VFPA says the measurement of GDP, a subset of economic output, measures the value added. Dr. Tretheway determined that the total direct GDP attributable to the VFPA and associated businesses exceeded $4.5 billion in 2016 for the entire Port of Vancouver.

[2753] As above, Dr. Tretheway could not narrow his opinion to the economic effect of the VFPA's facilities situated on the Lands of Tl'uqtinus. In cross-examination, he testified that he could have conducted new studies to gather that information if he had enough time. As above, the best he could do was isolate port activities to the City of Richmond.

[2754] The GDP for Port of Vancouver facilities in Richmond was $390 million in 2008, $400 million in 2012, and $240 million in 2016. In 2008, 5,700 workers representing 5,000 years of employment earned $190 million in wages. In 2012, 5,200 workers representing 4,700 years of employment earned $260 million in wages. In 2016, 3,500 workers representing 3,200 years of employment earned $160 million in wages.

[2755] On the decline in employment between 2012 and 2016, Dr. Tretheway testified that there were employers who left Richmond in 2016.

[2756] Dr. Tretheway determined that the VFPA-related employment in Richmond accounted for 7% of all direct jobs of the VFPA in Canada in 2016. It also constituted 2.8% of the city's employment base of 126,000 plus jobs.

[2757] The plaintiffs submit that Dr. Tretheway's evidence should be given little weight because he does not have a specialty in the economics of ports and their supply chains, he did not provide any opinion specific to the Lands of Tl'uqtinus, and the VFPA's role in commissioning the InterVISTAS studies underlying his report undermines its impartiality.

[2758] I have considered the plaintiffs' submission in reviewing Dr. Tretheway's evidence and report. I am satisfied that although he previously authored the studies for the VFPA through his consulting firm InterVISTAS, and then adopted them in his expert report, he sought to provide accurate economic impact data for their assessments. He did not alter that information for his expert report in any way. I generally accept Dr. Tretheway's opinion is reliable. However, I do agree with the plaintiffs that the evidence has limited usefulness because it was not tailored to the economic effect of the VFPA's operations in relation to the Claim Area. Evidence about the economic effect of the VFPA's facilities generally, and the economic effect of the VFPA's facilities in the whole of Richmond, is of little assistance in considering whether the infringing activities in the Cowichan Title Lands are justified.

[2759] The VFPA called Jennifer Natland, the Acting Vice President of the Real Estate Division for the VFPA, to testify about the VFPA's organizational structure and its particular focus on the acquisition, management, and use of lands under the jurisdiction or management of the VFPA.

[2760] She described the VFPA's focus on the network of businesses, communities, and infrastructure needed to transport goods in and out of port facilities. This network is described as the "gateway", which refers to the entire lower mainland of British Columbia, extending far beyond the lands owned or managed by the VFPA. The gateway includes rail lines, ship terminals, truck routes for bringing goods to and from port facilities, and the businesses and communities that interact with the port.

[2761] Peter Xotta, Vice President of Planning and Operations for the VFPA, testified that historically, ports focused on the nautical dimension of port activities. This evolved to the provision or facilitation of marine terminals. Increasingly, ports have taken on a more direct role in ensuring that capacity exists not just at the marine terminal but over the entire transportation network, ensuring connections with road and rail.

[2762] The VFPA says one of its strategic priorities, as described in its annual financial reports, is to anticipate, deliver, and optimize land supply. Ms. Natland

noted that around 2012, there was a shortage of industrial land in the region and an erosion of that industrial land base, as much had been converted to commercial and residential uses. Ms. Natland testified that more recently, estimates indicate 1,500 gross acres or 1,000 net acres of land are needed over the next decade or so to support the demand in the logistics sector. This does not include marine terminals. Gross acres are land needed not just for industrial or logistic facilities, but also for corridors for road and rail.

[2763] Ms. Natland could not recall any occasion where the VFPA disposed of land outright in the 14-year period she has worked with the VFPA.

[2764] The VFPA has examined the development potential of industrial sites along the Fraser River, mostly properties already in its portfolio. The VFPA sought to identify constraints to the development of those sites, such as road access for trucks, rail access, and navigation access for vessels along the river. The focus was on land with specific characteristics, such as land with an area greater than 20 acres, flat land that could be easily developed, land adjacent to road and rail networks, and waterfront land with substantial off-water lands. Ms. Natland testified that off-water lands are important because they support facilities like container terminals.

[2765] In the plaintiffs' cross-examination of Ms. Natland, they asked why the VFPA has not pursued a Calgary industrial land acquisition strategy. She testified that the additional costs for transporting goods to Calgary and back to the Lower Mainland is cost prohibitive and operationally inefficient. Mr. Xotta testified that locating sites a long distance from the lands managed by the VFPA would be less efficient from a cost perspective and an environmental perspective as it leads to higher emissions from transportation. Goods would have to be shipped long distances for distribution only to transport them back. If a shipping line can get a container back faster, that is advantageous.

[2766] In October 2014, the VFPA adopted its most recent comprehensive land-use plan. This was the first land-use plan for the amalgamated port authorities. The 2014

land-use plan noted increasing demand for industrial land with declining supply of lands. Ms. Natland testified lands in the Claim Area have a rail connection to the main CN rail line, with rail spurs connecting to some facilities. The land has road access to both Highway 99, running north-south, and Highway 91, the Westminster Highway, running east-west.

[2767] The VFPA says that the lands also contain many important port facilities, and have a size, a location and an interconnection between water, road and rail that render them suitable for further development to facilitate international trade.

[2768] There are two auto terminals that operate on the Fraser River. One is at the north end of Annacis Island, and the other is located in the south west corner of the Claim Area and is (as at September 2019) operated as an active port terminal for the import of automobiles. Neither is in the Cowichan Title Lands.

[2769] Ms. Natland identified the lands called Fraser Richmond lands on a map. She identified a large parcel of land used for industrial purposes. She located the Vancouver Airport Fuel Facility for storage of aviation fuels which spans both property owned by the terminal operator and a portion managed by the VFPA. The lands adjacent to the storage tanks are being prepared for building construction.

[2770] Further upstream is a large parcel known as Area 5, which is about 100 acres. Ms. Natland testified that the plan is to develop it as a port terminal, although there is high demand for warehousing and transload facilities. The VFPA is reserving the site because it may be the only 100-acre undeveloped waterfront, rail-served, truck-served site in the Lower Mainland. It has some challenges for development for port terminal use which is why it has not yet been developed. Archaeological site DgRs-17 is located on the foreshore of Area 5.

[2771] Most of the remainder of the Fraser Richmond lands are devoted to industrial activities, such as logistics facilities which are related to the port. Logistics refers to a range of activities for handling containerized goods and containers. Ms. Natland

testified that this work needs to happen in close proximity to marine terminals to be efficient.

[2772] There are two container terminals on the south shore of Burrard Inlet and a container terminal on the Fraser River upriver from the Fraser Richmond lands in Surrey. The location of these container terminals provides operational efficiencies in moving, handling, and processing containers. They accommodate substantial warehousing. Additionally, Ms. Natland testified that the Fraser Richmond lands are ideally situated for intermodal handling. Intermodal refers to the change in mode of transportation. The Fraser Richmond lands are in between two railyards, one in Surrey and one in Pitt Meadows, and the container terminals.

[2773] There are many tenants on the Fraser Richmond lands with their own facilities used to handle containers and containerized goods. The warehouses are often supported by storage yards for the containers while they wait to be loaded or unloaded. Some of these facilities are connected by rail spurs that come off the main track.

[2774] There is another area of land, over 100 acres in size, on the Fraser Richmond lands, west of No. 8 Road, that does not have warehousing on it. It is leased to one party which operates an auto auction facility. This is not a typical trade-enabling or port-related use. Ms. Natland testified that this site is challenging to develop because it is a former landfill site, and the soil conditions are unable to support development with heavy loading above. The current use generates revenue on a piece of land that Ms. Natland says will eventually become economical to develop. This land is outside of the Cowichan Title Lands.

d) VFPA's Evidence Related to Consultation

[2775] Ms. Natland testified that more than 20 First Nations have asserted claims over land managed by the VFPA. When engaging with Indigenous groups, the VFPA will consult with a subset, depending upon the particular application for development and the range, location, and extent of the claim.

[2776] Very few port functions — such as stevedoring, terminal operation, logistics, and warehousing — are operated directly by the VFPA. The VFPA operates primarily as a regulator and landlord, leasing lands to the tenants who provide port services and perform port functions.

[2777] Third parties who wish to operate on the lands owned or managed by the VFPA must submit an application to the VFPA. Applications that are approved will generally result in a lease, typically for a term of 20 years.

[2778] The current guide to the application process includes acknowledgement of the Crown's duty to consult with Aboriginal groups on projects that have the potential to adversely impact Aboriginal or treaty rights. It states that the port authority has been delegated authority to many federal lands by the *Canada Marine Act* and therefore leads consultation on behalf of the Crown.

[2779] Also available to applicants is a Port Metro Vancouver document entitled "Project and Environmental Review: Aboriginal Consultation – Information for Applicants". It provides a guideline for applicants on the required consultation process with Indigenous groups. It includes the following information:

> PMV operates in a complex jurisdiction, bordering one Treaty First Nation and intersecting the asserted traditional territories of up to 32 other First Nations. When Aboriginal consultation is required, the individual Aboriginal groups to be consulted will depend on the location of the proposed project, and the potential of the proposed project to adversely impact asserted or established Aboriginal and treaty rights.
>
> Aboriginal consultation is an iterative process and, as such, during implementation PMV may suggest changes to a proposed project that are required to mitigate potential impacts to asserted or established Aboriginal or treaty rights.
>
> …
>
> All projects requiring an authorization from PMV will be assessed to determine whether there is a requirement to consult with Aboriginal groups. This assessment is carried out by PMV's Aboriginal Affairs staff, in collaboration with other staff subject matter experts with knowledge of environmental, operational, legal or other matters.

[2780] Ms. Natland testified that the VFPA follows these guidelines.

[2781] At the time the document was prepared, the VFPA had an Aboriginal Affairs team who oversaw the process. As of the date of trial, that team was within the Project and Environmental Review department and led by a Manager of Project Consultation. The portfolio includes consultation with Indigenous groups and the public. There are dedicated Indigenous consultation advisors. None of these staff testified at trial.

[2782] After assessing an application, the VFPA sends out letters for consultation, explaining whether the duty has been triggered.

[2783] Participation funding is provided to Indigenous groups that have indicated they wish to participate in the consultation and whose participation would benefit from funding assistance. The VFPA provided no evidence that the Cowichan ever received funding assistance.

[2784] Consultation typically starts with the letter from the VFPA to affected Indigenous groups. For larger projects, the VFPA encourages the applicant to reach out to Indigenous groups directly in advance of submitting their application. It is not clear on the evidence how the VFPA identifies Indigenous groups who may be affected.

[2785] There is little evidence of consultation with the Cowichan prior to the creation of the VFPA. Ms. Natland recalled that there was some engagement with some Cowichan groups about the Delta Port's third berth project around 2006. In 2009, in connection with the YVR Fuel Project, the VFPA wrote to Chief Lydia Hwitsum of the Cowichan Tribes, to invite the Cowichan Tribes' comments regarding the YVR Fuel Project being proposed. The Cowichan Tribes had previously written to the BC Environmental Assessment Office on May 20, 2009 asserting that the Cowichan held Aboriginal title to their Cowichan village lands of the south shore of Lulu Island on the Fraser River. They requested deep consultation and accommodation.

[2786] In final submissions, the VFPA acknowledged that the Cowichan first asserted a plausible title claim in the above 2009 correspondence.

[2787] In 2010, the Cowichan Tribes, in alliance with the Chemainus First Nations, asserted a title claim to lands on the south shore of Lulu Island in a letter addressed to Legal Counsel and the Manager of Community and Aboriginal Affairs of the VFPA. They included a copy of a report prepared by Dr. Brealey the same year. Ms. Natland testified that the practice of VFPA is to review and confirm the validity of a strength of claim document prepared by a qualified professional, such as was the case with the Brealey report, and that informed their evaluation of when the duty to consult was triggered. Since receiving the Brealey report from the Cowichan Tribes, it has been the VFPA's practice to consult with the Cowichan Tribes on any projects in their Claim Area.

[2788] As previously set out, since 1999, Canada has required the VFPA (and its predecessor, the FRPA) to develop detailed land-use plans. There is no evidence of consultation with or accommodation of the Cowichan in connection with the preparation of the 2000 land-use plan.

[2789] The VFPA's 2014 land-use plan provided a framework for growth and development of port lands and water over a 15 to 20 year period. It was developed in consultation with more than 1,000 people representing municipalities, First Nations, government agencies, environmental organizations, businesses, industries, and members of the public.

[2790] The VFPA notified the Cowichan in 2009 of its development of the 2014 land-use plan. After an initial meeting, the VFPA told the Cowichan that it had commenced a two-year strategic planning exercise, Port 2050, to inform the longer-term vision of the VFPA. The Cowichan Nation Alliance sought to be involved in land-use planning decisions as it pertained to the Federal Tl'uqtinus Lands (Canada). In 2010, the VFPA advised the Cowichan in writing that it had no mandate to address issues of title. They endeavored to consult with the Cowichan about any activity that might lead to infringement of their Aboriginal rights. They urged the Cowichan to work through the treaty process to resolve land issues.

[2791] In 2014, the VFPA asserted that its mandate as articulated in the *Canada Marine Act* is to promote the "success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy" and that the statutory grant of management of the lands to the VFPA by the federal Crown does not impact Aboriginal right or assertions of Aboriginal title. The VFPA took the position that issues regarding reconciliation remain outside its mandate, and once again they urged the Cowichan Nation Alliance to address these matters directly with Transport Canada and Aboriginal Affairs and Northern Development Canada.

e) Evidence Regarding Crown Knowledge of the Plaintiffs' Claim

[2792] Below is a summary of evidence that the plaintiffs say demonstrates that the Crown was aware of their asserted claim to the Lands of Tl'uqtinus. This is in addition to the various demands for recognition of the plaintiffs' title beginning in the 1870s that are described elsewhere in these reasons:

a) In 1974, Alan Carl of the Archaeological Sites Advisory Board first observed and registered the provincial archaeological site DgRs-17 within the Lands of Tl'uqtinus. He suggested the village remains could be well preserved, buried under garbage, and dredged river sand.

b) In 1991, the parties to the Fraser River Estuary Management Program which included Canada, BC, Richmond, and the VFPA's predecessor, all signed off on a Statement of Intent that identified that the area was once the site of a "Kawichan Village".

c) In 1999, Golder and Associates Ltd. completed an environmental assessment for the FRHC in relation to developing the Lands of Tl'uqtinus that identified the waterfront as the site of a First Nations fishing village named Tl'ektines.

d) In 2002, the Hul'qumi'num Treaty Group filed a Statement of Intent for treaty negotiations with Canada and BC as part of the BC Treaty Commission process.

e) In 2003, the Cowichan Tribes and Chemainus First Nation, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation, and Penelakut Tribe filed protective writs in relation to the Lands of Tl'uqtinus.

f) In 2005, the Hul'qumi'num Treaty Group — which included the Chemainus First Nation, Cowichan Tribes, Halalt First Nation, Lake Cowichan First Nation, Lyackson First Nation, and Penelakut Tribe — responded to the Vancouver Port Authority's Environment Assessment Application for the expansion of the Delta Port Third Berth Terminal. Their response was sent to Crown agencies, including the Vancouver Port Authority. The Hul'qumi'num Treaty Group identified itself as representing several First Nations, all of whom "can establish a strong claim to the subject area". The member nations asserted their existing Aboriginal interest and rights throughout the entire traditional territory and specifically in the area of the proposed work. They referenced their Statement of Intent given to the BC Treaty Commission in February 2003 dealing with their traditional territory.

g) In 2007, the Cowichan brought a judicial review petition seeking to exclude from the TFNFA any reference to the territory within which the Cowichan have an overlapping claim of Aboriginal rights and title, in relation to the Lands of Tl'uqtinus, naming the Crown as a respondent.

h) In 2009, the Cowichan Tribes wrote to the VFPA asserting Aboriginal title to the Lands of Tl'uqtinus. The following year, the Cowichan Tribes provided the VFPA with expert evidence of the Cowichan's use and occupation of the village at Tl'uqtinus.

i) In 2012, the VFPA acknowledged in correspondence to the Cowichan that there is strong evidence that a First Nation village at Tl'uqtinus existed historically in the vicinity of the Federal Tl'uqtinus Lands (Canada).

j) In 2013, the plaintiffs wrote to the Crown defendants demanding the return and the interim protection of the Federal Tl'uqtinus Lands (Canada).

k) In 2013, Canada retained ethnohistorian Adrian Clark to prepare a report for Canada analyzing the Cowichan's historical use and occupancy of the south arm. The report supported the existence of an Indian village at the location of Tl'ektines and that the Cowichan traditionally used and occupied the Lower Fraser area for fishing and other purposes. Mr. Clark concluded that the Cowichan's occupation of Tl'ektines continued until 1877 and that the village site was sold in 1875. Canada shared this report with the VFPA in 2013. This report has been admitted for non-hearsay purposes.

l) In 2014, the plaintiffs served the Crown defendants with notice of this litigation, and in 2019, with expert reports about the Cowichan's occupation of Tl'uqtinus. The VFPA was added as a defendant in 2016.

[2793] I find Canada has had knowledge of the plaintiffs' claim at all material times.

3. Analysis

[2794] There is no doubt that Canada and its agent the VFPA have managed and benefitted from the Cowichan Title Lands to the exclusion of the Cowichan and in a manner that has adversely impacted (indeed, precluded) the Cowichan's exercise of their Aboriginal title. I find that most of the impugned activities of Canada and the VFPA constitute a meaningful diminution of the Cowichan's right to their exercise of title and are *prima facie* infringements. The Cowichan have not consented to these

activities. Accordingly, it falls to the Crown to justify overriding the Cowichan's wishes on the basis of the public good.

[2795] Before I consider justification, I first consider the VFPA's submission that the Court should postpone a ruling on justification to permit the parties time to negotiate an agreement for the continued use of the lands by the VFPA. The VFPA says only if the parties are unable to reach an agreement would it be necessary to return to Court for judgment on this issue. The VFPA points to the approach that Garson J. followed in *Ahousaht* 2009 at para. 871, and her observation that in the circumstances, it would have been unfair to find that Canada had not justified its infringement of the plaintiffs' Aboriginal rights without first providing an opportunity for consultation and negotiation, and, if necessary, the opportunity for Canada to adduce further evidence relevant to a more tailored justification defence.

[2796] I accept that the allegations of infringement arising from the VFPA's activities in this case were varied. However, in the course of the trial, the infringement claim was the subject of a significant volume of evidence, and the VFPA and Canada have adduced a substantial amount of evidence relevant to justification. Canada and the VFPA have had the opportunity to seek to establish how the VFPA's activities ensure that the Cowichan's Aboriginal title is respected. No party sought to sever the issue of justification.

[2797] This was a lengthy trial. As a matter of trial fairness, and from the perspective of the efficient use of scarce judicial resources, it is appropriate to decide the issue of justification now on its merits.

a) Duty to Consult

[2798] Canada retains ultimate responsibility for ensuring that the duty to consult has been met. Canada has delegated to the VFPA the authority to manage the Federal Tl'uqtinus Lands (Canada) as Canada's agent. Therefore, I accept that the VFPA was and is under an obligation to meaningfully consult with and accommodate the Cowichan regarding the activities on the Cowichan Title Lands on Canada's behalf.

[2799] The VFPA has put forward a significant volume of evidence related to their process for consulting with First Nations that have asserted claims in respect of lands managed by the VFPA. For example, since 2009, the VFPA has consulted with First Nations before entering into leases and has given notice of land-use planning and applications for different uses of the lands and the opportunity to provide feedback. The VFPA has consulted with the Cowichan on land-use planning and when applications for use of the claim lands were made.

[2800] However, to establish that the infringing activities in this case were justified, the evidence must prove that the Crown's duty to consult was discharged in relation to the specific infringements.

[2801] The VFPA asserts that the duty to consult prior to this Court's determination was not at the higher end of the spectrum given that the evidence was untested and there are competing claims. However, I find that both Canada and the VFPA have neglected to assess the strength of claim asserted by the Cowichan.

[2802] The Cowichan provided documents to Canada and the VFPA to support their claim in 2009.

[2803] By 2013, the VFPA had possession of the Clark report, which strongly supported the Cowichan's asserted claim. Mr. Clark concluded that: 1) speakers of Island Halkomelem (Nanoose, Nanaimo, Chemainus, and Cowichan) conducted a traditional fishery on the Fraser River from the 1820s through the 1860s that was probably a continuation of a pre-contact practice; and 2) fishing was conducted from permanent villages on the Fraser River that were used seasonally. He concluded the Cowichan's occupation continued until 1877 and then probably persisted for an unknown period of time.

[2804] I am mindful that the plaintiffs sought a strength of claim assessment from Canada, through the DFO, from 2011–2017, and were repeatedly promised the same during those years. The DFO then retained Mr. Clark in 2013. In 2017, with no explanation, the Cowichan received advice from DFO that it had no mandate to

assess the strength of claim. Canada's failure to fulfill its promise was not honourable.

[2805] I find that Canada and the VFPA did not assess the strength of the Cowichan's claim and disregarded Mr. Clark's opinion which suggested that the claim was strong. The DFO promised to assess their strength of claim, took a step in commissioning the Clark report, did not disclose the results to the Cowichan until late in this litigation, and did not fulfill their promise to the Cowichan to carry out an assessment. In *Haida* SCC at paras. 43–45, the Court explained that the duty to consult rests on a spectrum, connected to the strength of the asserted claim and the impact of the contemplated Crown conduct. The Crown has an obligation to assess the strength of a claim in the pre-proof phase in order to determine the depth of required consultation. That was not done. Here, without an assessment of the strength of the claim, the Crown's capacity for meaningful consultation was undermined from the outset. Additionally, both the VFPA and Canada treated the Cowichan claim as weak, despite the report that Canada had commissioned, indicating the contrary.

[2806] Although not proven, the Cowichan's claim was strong and the risk of non-compensable damage was high. The Lands of Tl'uqtinus are of high significance to them. The Cowichan have proven Aboriginal title to much of the land that they claimed.

[2807] In *Haida* SCC, the Court explained that pre-proof claims and the honour of the Crown require the Crown to act in good faith to provide meaningful consultation: at para. 41. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim attracts more stringent duties: at para. 37. The content of the duty varies with the circumstances — meaningful consultation in respect of the infringing activities in this case required more than notice.

[2808] The consultation should have included an opportunity for the Cowichan to make submissions, formally participate in the decision-making process, and receive reasons why a decision was made: *Haida* SCC at para. 44.

[2809] The Crown had notice of the plaintiffs' claim at all material times. The existence of the Cowichan village and its occupation by the Cowichan was known to the Colony. Trutch surveyed it, and gave the survey to CCLW Moody. Moody purchased the adjacent lands. Governor Douglas remarked on the Cowichan's seasonal journeys to the Fraser River. After the Crown grants were issued, the Cowichan complained to Sproat by 1877. The Cowichan petitioned the King in 1906 and 1909, and the King and Premier McBride in 1911. The Cowichan wrote to Prime Minister Borden in 1913 inquiring about their petitions. As summarized previously, in 1974 through to the service of notice of this litigation, the Crown has repeatedly been put on notice of the plaintiffs' claim.

[2810] Canada has not established that it consulted directly with the Cowichan in respect of the infringements. Canada called no witnesses from Transport Canada's Indigenous Relations Department to explain the process of consultation. None of the Transport Canada witnesses that did testify had any knowledge of the process. There is evidence of one consultation with the Cowichan regarding a land swap in 2007 which was led through the discovery evidence of Mr. Chatwell. This was in respect of land in the Claim Area over which the plaintiffs have not established Aboriginal title. Mr. Chatwell deposed that he could recall no other investigations done by Canada with respect to the acquisition of the Lands of Tl'uqtinus that are presently held federally. In response to a request for information arising from his examination for discovery, Mr. Chatwell deposed:

> Throughout the history of Canada's acquisition of fee simple titles to portions of the lands in issue (as alleged in Canada's Amended Response to Civil Claim), Canada did not investigate any claimed aboriginal title and rights to the lands in issue in advance of their acquisition.

[2811] That does not end the inquiry. The VFPA leads consultation on behalf of the Crown. The VFPA has established that it had implemented a consultation process for consulting with Indigenous groups with asserted claims to lands that the VFPA manages.

[2812] However, the VFPA has combined Indigenous consultation with environmental consultation and appears to consider the two issues to be synonymous. They are not. The plaintiffs raised concerns about the impact of port activities on their ownership rights and their ability to enjoy the land in the future.

[2813] For example, when the VFPA consulted with the Cowichan about the 2014 land-use plan, it told them it had no mandate or capacity to address title issues and recommended that the Cowichan use the treaty process. While the VFPA was aware of the Cowichan claim of a permanent village on the Fraser River, it took the position that it could not deal with the impact of its activity on the Cowichan's asserted ownership rights. It was only prepared to deal with the impact on the environment. There is no evidence that the VFPA responded to the Cowichan's concerns by amending its land-use plan or that it took any steps to minimize the adverse effects of its 2014 land-use plan on the Cowichan's asserted title.

[2814] Generally speaking, over the years, through various projects, the VFPA have consulted with the Cowichan. They have met with them, heard their concerns, and provided responses. However, it does not appear to me that they were ever prepared to change their policies or decisions especially as they related to the use of the land. There is no evidence that the VFPA changed their policies or contemplated doing so in order to minimize adverse effects on the Cowichan's asserted title. They were, however, mindful of the environmental impact of their projects and made efforts to minimize those.

[2815] In any event, this case is not concerned with the general. The evidence does not establish that Canada and the VFPA as its agent discharged the Crown's duty to consult the Cowichan with respect to the infringements that occurred in relation to Cowichan Title Lands, except as set out below in relation to the leasing of the YVR Fuel Project lands.

[2816] With respect to Canada's assignment of the right to the VFPA (and its predecessors) to exclusively use the "Schedule B" lands (the Federal Tl'uqtinus Lands (Canada)) to undertake port activities, and make decisions about the use of

the land, there is no evidence that Canada or the VFPA's predecessors consulted or accommodated the Cowichan prior to the assignments. The impact of assignment was grave for the Cowichan, because it effectively transferred use and management of the Federal Tl'uqtinus Lands (Canada) in the Cowichan Title Lands to the VFPA.

[2817] With respect to land-use planning, there is no evidence that Canada or the VFPA (or its predecessor, the FRPA) consulted with or accommodated the Cowichan in connection with the preparation of the 2000 land-use plan.

[2818] Regarding the 2014 land-use plan, the VFPA notified the Cowichan in 2009 about its contemplated development. After an initial meeting, the VFPA advised it had commenced a strategic planning exercise to inform the longer-term vision of the VFPA and to provide context for the 2014 land-use plan. As above, the VFPA advised the Cowichan it had no mandate or capacity to address issues of title and no ability to grant the Cowichan a land base in the lower mainland, redirecting the Cowichan to the BC Treaty Process and representatives of the federal government. The 2014 land-use plan did not include any designations of port-administered lands for the exercise of Aboriginal rights or interests, despite receiving feedback from the Cowichan on policy objectives and planning area descriptions that supported accommodation. Lot 1 is designated for port terminal use and Lot 2 is designated for industrial use.

[2819] Overall, given the potential impact of the 2014 land-use plan on the plaintiffs' asserted title, there is a lack of evidence to establish that the consultation efforts of the VFPA were sufficient to fulfill the Crown's duty to consult. I accept the plaintiffs' submission that the consultative inquiry must focus on the potential impacts to the Aboriginal right. Canada was responsible for ensuring its representatives in the consultation process had the proper capacity and mandate. The VFPA's unwillingness to discuss the Cowichan's Aboriginal title undermined the consultation process. This was compounded by a general unwillingness on the part of Canada to assess the strength of the Cowichan's claim. Lastly, there is a dearth of evidence that the VFPA responded to the Cowichan's concerns through attempting to mitigate

the adverse impacts of the land-use planning, amending its land-use policy proposals or otherwise altering its proposed actions.

[2820] In July 2009, the VFPA sought feedback from Cowichan Tribes about the YVR Fuel Project, which includes Federal Tl’uqtinus Lands (Canada). The Cowichan Tribes sought deep consultation. Ultimately, each of the plaintiff bands participated in the technical working group considering the project as part of the environmental assessment process. In November 2012, the Cowichan Nation Alliance, which include the plaintiff bands, entered into an accommodation agreement with the Vancouver Airport Fuel Facilities Corporation regarding the project, some of which occupies a portion of the Cowichan Title Lands.

[2821] With respect to the VFPA leasing the Cowichan Title Lands owned by Canada to third parties, those leases gave third parties the right to exclusive occupation of Aboriginal title land. There is a publication ban and sealing order in respect of the leases, to protect the commercially-sensitive information contained therein: see my reasons indexed at 2021 BCSC 262. Accordingly, I do not discuss details of the leases themselves, nor is it necessary to do so.

[2822] As above, I find the Cowichan’s claim was strong and the interference with their Aboriginal title rights arising from the leases was significant. Deep consultation was required.

[2823] The VFPA did engage in some consultation with the plaintiffs on other leases in the Federal Tl'uqtinus Lands (Canada) that are not part of the Cowichan Title Lands. However, there is no evidence of consultation with the Cowichan with respect to the leases on the Cowichan Title Lands, other than consultation that occurred in relation to the YVR Fuel Project lands. As above, the plaintiff bands entered into an accommodation agreement regarding that project and indicated their non-opposition to both the project and the issuance of the Environmental Assessment Certificate and any related provincial or federal approvals necessary for the project to proceed. In my view, this consultation and accommodation was sufficient. With respect to the remainder of the leases, the Crown’s duty to consult was not fulfilled.

[2824] In summary, leaving aside the YVR Fuel Project lands, Canada and its agent, the VFPA, did not fulfill the obligation to meaningfully consult with the Cowichan in respect of the infringing activities on the Cowichan Title Lands. The Crown breached its duty to consult with the Cowichan about these interferences.

[2825] Below, I consider the other requirements of justification.

b) Compelling and Substantial Objective

[2826] I turn now to whether the incursions on the Cowichan's Aboriginal title are substantively consistent with the requirements of s. 35(1) of the *Constitution Act, 1982*.

[2827] This stage of the justification analysis requires consideration of whether Canada and the VFPA's activities that infringe the Cowichan's Aboriginal title are backed by a compelling and substantial objective.

[2828] Canada says that its authorization of port activities in the Claim Area occurred in furtherance of the compelling and substantial objective of sustaining and improving Canada's economic well-being and its position as an international trading partner.

[2829] The VFPA submits that there is a compelling and substantial justification for limiting the Cowichan's Aboriginal title to permit Canada and the VFPA to continue to occupy, manage, and control the lands for industrial purposes, such as logistics facilities that are related to the port but not part of a marine terminal. They submit the successful and efficient management and operation of the Port of Vancouver is one of the clearest and most compelling instances of a government activity being pursued for the good of all Canadians. They also say the significance of international trade, particularly trade with Asia, to the overall success of the Canadian economy and the consequential economic well-being of all Canadians, is overwhelming.

[2830] I accept that the successful operation of the Port of Vancouver is important to Canada's economy. Canada's economic structure relies on international trade to

sustain economic growth and job creation. I accept that the VFPA requires a substantial land base for logistics, to permit its ports to load and offload goods to other modes of transportation. Containers need emptying and reloading on the site, and storage of containers is important for port operations.

[2831] I accept that the Cowichan Title Lands are unique in their flat topography and in their location, along the river, near railway and highways. They are also less expensive than lands in the city centre of Vancouver, and there is no space for these activities at the Port of Vancouver.

[2832] Chief Justice Lamer explained in *Delgamuukw* SCC that whether a particular government action can be explained with reference to a compelling and substantial objective is a question of fact to be examined on a case-by-case basis: at para. 165.

[2833] I am not satisfied that the operation of what are essentially warehouse lands in Richmond are of consequence to the Port of Vancouver's operations, or to Canada's economic well-being and position as an international trading partner. I find the evidence regarding a connection between the VFPA's activities on the Cowichan Title Lands and the asserted objectives is tenuous at best.

[2834] The trade objectives of Transport Canada are broad and unspecific to the Cowichan Title Lands, and the VFPA's activities on the land are not clearly connected to these broad trade objectives.

[2835] I reject the VFPA's argument that focusing on the specific land in issue will distort and mischaracterize this factor of the justification test. The VFPA says it can only assert a compelling and substantial objective if it expresses it in general terms of "international trade economic development of Canada" or the billions of dollars generated by the entire Port of Vancouver. I accept that these objectives are compelling and substantial, but the evidence falls short of showing how the specific activities complained of are in furtherance of them.

[2836] The VFPA submits that a site-specific assessment of the VFPA's use of land would almost invariably lead to the rejection of the defence of justification. Viewing

each individual parcel of land in isolation would require the VFPA to show the crucial importance of individual parcels to the industrial whole. In my view, this argument is without merit. There are no doubt many VFPA activities on parcels of land that can be explained with reference to the VFPA's objectives. However, in the circumstances of this case, the evidence that the VFPA has led about the uses, or contemplated uses, of the lands in issue supports my determination that some of those uses are not in furtherance of port activities at all.

[2837] I agree with the plaintiffs that the VFPA has failed to show how the infringing activities on the Cowichan Title Lands relate to Canada and the VFPA's stated objectives beyond generalized statements about the overall economic benefit of the VFPA's operations as a whole and throughout the entire Lower Mainland. Vague evidence about broad policy objectives is insufficient to discharge the Crown's burden of proving the specific interferences were backed by a compelling and substantial objective.

[2838] With respect to the YVR Fuel Project, Canada says that the project is an aviation fuel delivery system that is necessary to meet the future fuel requirements of the Vancouver International Airport. Canada and the VFPA offered little in the way of submissions about how the YVR Fuel Project, which is aimed at meeting the fuel requirements of the Vancouver International Airport, is connected to the objectives of the port.

[2839] The activities on these lands, held for future use, are not fundamental to port operations, and in some instances, are entirely unrelated. The Port of Vancouver may be Canada's busiest port, but the Fraser Richmond port land is not. Global numbers for the VFPA's revenue are of little use to the Court unless narrowed to the specific Fraser River site.

[2840] I accept that the use of the lands for port purposes, including the assignments and land-use planning, is connected to the broader public interest and objectives of the port but only tenuously. Further, the VFPA expert and lay witnesses did not

establish that the commercial leases operating on the Cowichan Title Lands actually contribute to port objectives.

c) Fiduciary Duty

[2841] Pursuant to its fiduciary duty, the Crown must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. Incursions on Aboriginal title that would substantially deprive future generations of the benefit of the land cannot be justified: *Tsilhqot'in* SCC at para. 86.

[2842] I emphasize again that an incursion must be proportionate, in that it is necessary to achieve the goal (rational connection), that the government go no further than necessary to realize it (minimal impairment) and that the expected benefits are not outweighed by the adverse effects on the right (proportionality of impact): *Tsilhqot'in* SCC at para. 87.

[2843] The Crown has not established that the first requirement — that the incursion does not substantially deprive the present and future generations of the land — is met, particularly with respect to Canada's assignment of the lands to the VFPA and the VFPA's leasing to third parties. This denies the present generation of the Cowichan title-holders of the benefits of the land. Some of the leases are long, depriving the next generation of the Cowichan title-holders' enjoyment of their land. This is inconsistent with the Crown's fiduciary obligation.

[2844] In my view, there is some analytical overlap, at least on the facts of this case, between the requirement that the government's actions be backed by a compelling and substantial objective and the requirement that the incursion be necessary to achieve the government's goal. As previously set out, the evidence does not show that the activities on the Cowichan Title Lands are in furtherance of the government's goal. Accordingly, the evidence falls well short of establishing that the incursion is necessary to achieve the goal.

[2845] The activities that are currently occurring on the Cowichan Title Lands could occur elsewhere. Continued port-related activity on the Cowichan Title Lands bars

the Cowichan from exercising any incidents of their Aboriginal title. Necessity is not established with respect to the lands that are currently leased, and it is not made out with respect to the lands that are vacant.

[2846] The limitations imposed on the plaintiffs by virtue of the VFPA holding these lands are not minimally impairing. The Cowichan have been excluded from the use of their stl'ulnup while the VFPA holds at least some of the land in abeyance for future development that may or may not occur. The Crown has taken no measures to minimize the impacts on the Cowichan people.

[2847] The supporting land base for the port in the Cowichan Title Lands could be moved to a different location. I accept this could be less cost-effective. The lands are well-situated near water and rail lines of highways. However, while the land in Section 23 is leased, much of land that the VFPA manages in Section 27 and 22 is vacant. Continuing to hold Cowichan Title Lands as vacant land for possible expansion of port terminals or warehousing so that service can be more efficiently run for the benefit of third-party companies, however, is not proportionate to the cost the Cowichan are paying. Some of the lands remain unused, and yet the Cowichan are wholly precluded from exercising their practices on their traditional territory. I reject the VFPA’s argument that it is significant that the Cowichan have not claimed that the lands are the place of great ceremonial significance or are regarded as sacred. The Cowichan do consider these lands sacred; they only ceased their traditional harvesting practices there following the Crown’s sale of the land to settlers.

[2848] The VFPA relies on the fact that the Cowichan have not occupied the land since the 1850s and claims that the land does not lie at the heart of the traditional Cowichan territories. I disagree. Firstly, I found that the Cowichan occupied the land into at least the 1870s and continued to use the land into the early 20th century. Secondly, the Cowichan have been excluded from this land because of colonial disruption. The sale of their lands, without their knowledge at the time, rendered

them trespassers. It is unfair to rely on the impact of that exclusion as grounds for minimizing their claim.

[2849] The Crown's fiduciary duty infuses an obligation of proportionality into the justification process. That means that Canada and the VFPA must prove the activities go no further than necessary to achieve its goals. This requirement is not made out on the evidence.

[2850] Container storage on site, rather than at a distant destination, means savings for the business transporting the goods and for the consumer. It is possible to store containers off site, but it is less economical. The economic benefits of efficiencies accrue to the lessees on the Cowichan Title Lands. As the Court of Appeal and the SCC said in *Tsilhqot'in*, the focus should be on the economic value of the activity (logging, in that case) compared to the detrimental effects it would have on Aboriginal rights, and not the economic viability of the activity from the sole perspective of the tenure holder: *Tsilhqot'in* SCC at para. 127. That is missing here. The benefit of efficiencies is accruing to third-party lessees. The VFPA does not consider the detrimental effects on the plaintiffs, nor do they balance the benefit and detriment in a manner which accords with the fiduciary obligations of the Crown.

[2851] The incursion on the Cowichan Title Lands is devastating. On the other hand, there is no evidence before the Court about the economic effect of the VFPA's facilities situated on the Cowichan's land on the local and national economies. The benefits that may be expected to flow from the port retaining land for storage purposes are outweighed by the adverse effects on the Indigenous interest in this land. Holding Aboriginal title lands indefinitely for possible deep-sea port development is not sufficient to render these activities justifiable. The activities that are currently occurring on the Cowichan Title Lands could occur elsewhere. Continued port-related activity on the Cowichan Title Lands bars the Cowichan from exercising any incidents of their constitutionally-protected Aboriginal title.

[2852] In summary, I find that Canada and the VFPA breached the duty to consult the Cowichan with respect to the infringing activities on Cowichan Title Lands,

except in relation to the leasing of the YVR Fuel Project lands. Further, Canada and the VFPA have not demonstrated that the infringing activities on the Cowichan Title Lands are consistent with the Crown's fiduciary obligations to the Cowichan in respect of their Aboriginal title. Accordingly, I find that Canada and the VFPA's infringing activities are unjustified.

PART 9 DEFENCES

[2853] I begin by considering whether the defendants are estopped from relying on their pleaded defences. Because I find that estoppel is not made out, I analyze the applicability of limitations legislation to ascertain whether the plaintiffs' claims are time-barred. Finally, I consider whether the equitable defences of *bona fide* purchaser for value and laches apply to the plaintiffs' claim.

A. ESTOPPEL

[2854] In the plaintiffs' third further amended reply, they plead the following:

> ... the Cowichan, in reasonable reliance upon Governor Douglas' promise, did remain at peace with settlers, and suffered a detriment when the Crown failed to resolve the Cowichan's continuing claim to the Lands of Tl'uqtinus in a timely manner or at all. As a result, the Defendants Canada, British Columbia, Richmond and VFPA are estopped from relying on any pleaded defences of alternative administrative remedies, immunity from suit, laches and acquiescence, statutory limitation periods, multiplicity of proceedings, and/or displacement, to defeat or deny the relief sought by the Plaintiffs in this claim. According to the doctrine of proprietary estoppel, the Plaintiffs are entitled to the relief they are seeking.
>
> [Emphasis added.]

[2855] I addressed Douglas' 1853 promise in Part 6 of these reasons. For ease of reference, I repeat what he recorded in his journal on January 7, the day he met with the Cowichan:

> ... I afterwards addressed the Indians who were there assembled, on the subject of their relations with the Colony, and the Crown. I informed them that the whole country was a possession of the British crown, and that Her Majesty the Queen had given me a special charge, to treat them with justice and humanity and to protect them against the violence of all foreign nations which might attempt to molest them, so long as they remained at peace with the settlements. I told them to apply to me for redress, if they met with any injury or injustice at the hands of the Colonists and not to retaliate, and above

> all things, I undertook to impress upon the minds of the chiefs, that they must respect Her Majesty's warrant, and surrender any criminal belonging to their respective tribes, on demand of the Court Magistrate and that resistance to the Civil power, would expose them to be considered as enemies. I also told them that being satisfied with their conduct in the present conference, peace was restored and they might resume their trade with Fort Victoria. The distribution of a little tobacco and some speechifying on the part of the Indians, expressions of their regard and friendship for the whites closed the proceedings and the conference broke up.
>
> [Emphasis added.]

[2856] In Part 6 of these reasons, I found that the promise, although not enshrined in constitutional legislation or treaty, bears the hallmarks of a constitutional obligation. I found that the assurance is a general promise of fair dealing on the part of the Crown with respect to the Cowichan and their interests, and a commitment to the Cowichan to address any injury or injustice that the Cowichan might incur at the hands of settlers. Accordingly, it is my view that the honour of the Crown was engaged when Douglas promised to treat the Cowichan with justice and humanity in exchange for peace.

[2857] I found the promise is to be afforded a broad and purposive interpretation (*Manitoba Metis* at para. 77) and that it could give rise to obligations with respect to the Cowichan's interest in land.

[2858] There are two aspects to the plaintiffs' plea of estoppel. First, the plaintiffs invoke promissory estoppel, relying on Douglas' promise, as precluding the defendants from invoking certain defences. Second, the plaintiffs say that proprietary estoppel provides a substantive basis for the relief they seek.

1. Legal Framework

[2859] Promissory estoppel deals specifically with a person's "assurance given to another that the former will not fully insist on the use or fulfilment of his or her existing rights or legal advantages to the detriment of the other": Bruce MacDougall, *Estoppel*, 2nd ed. (Toronto: LexisNexis, 2019) at s. 5.1.

[2860] Promissory estoppel cannot, on its own, give rise to a cause of action. It can therefore only be used as a shield and not a sword: MacDougall, *Estoppel* at s. 5.304. MacDougall says at s. 5.299 of *Estoppel*:

> ... In general it can be said that the promisor is held to the promise or assurance but this effect cannot result in the expansion of an existing obligation or the creation of a new obligation. The effect is thus usually confined to a suspension of the use of or a reduction of or even the elimination of the ability to use one or more of the rights or other legal stipulations in an existing relationship to which the promisor is a party, typically but not necessarily a relationship with the promisee.

[2861] In *Estoppel* at s. 5.92, MacDougall describes the necessary elements of promissory estoppel as follows:

a) The existence of a legal relationship between the parties where the promisor has the benefit of rights or some other legal stipulation that has an impact on the promisee;

b) An assurance or promise that the use of the promisor's rights or other stipulation will be altered in some way;

c) Reliance by the promisee on the promise or assurance of the promisor;

d) Detriment by the promisee associated with this reliance, possibly including costs already incurred and possibly including negative consequences if the promisor were allowed to resile from their promise or assurance; and

e) Equitable considerations where considerations of fairness demand it and where equitable considerations do not militate against it.

[2862] Although there are similarities between promissory and proprietary estoppel, proprietary estoppel relates specifically to the context of property rights and unlike other forms of estoppel, it can ground a cause of action: *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras. 16–17 [*Cowper-Smith*].

[2863] The SCC in *Cowper-Smith* at para. 15 explained that to establish proprietary estoppel, three things must first occur:

a) A representation or assurance is made to the claimant on the basis of which the claimant expects they will enjoy some right or benefit over property;

b) The claimant relies on that expectation by doing or refraining from doing something and their reliance is reasonable in all the circumstances; and

c) The claimant suffers a detriment as a result of their reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on their word.

[2864] Where all three elements are present, an equity arises at the time of detrimental reliance on the assurance: *Cowper-Smith* at para. 15. Where the person responsible for the assurance possesses an interest in the property which can fulfill the claimant's expectation, proprietary estoppel may arise, giving effect to the equity through making the assurance binding: at para. 15.

[2865] BC submits the plaintiffs seek to rely on an invocation of justice. MacDougall explains that the law of proprietary estoppel has grappled with the idea that injustice or unconscionability should displace all other criteria and serve as a separate overarching factor: MacDougall, *Estoppel* at ss. 6.54–6.55. MacDougall states at s. 6.55:

> ... Most Canadian authority still uses a variation of the traditional structured formulation and only uses a separate factor of unfairness or unjustness in unusual circumstances or not at all. While the five probanda ought to be replaced as the criteria for the estoppel, a structured formulation for establishing the need for proprietary estoppel serves the purpose of providing a useful and reasonably clear-cut method for predicting the estoppel. The replacement of such a structure by a single factor of "unfairness" or "unconscionability" leads, it is submitted, too open-ended and amorphous a doctrine that only encourages litigation ...
>
> [Footnote omitted.]

[2866] Chief Justice McLachlin, agreeing with this statement in *Cowper-Smith* at paras. 19–20, said: “Unfairness or injustice ... are not stand-alone criteria”.

[2867] Detriment is a separate element from the promise itself, meaning it cannot be made out based on non-fulfillment of the promise in itself. For example, in *Cowper-Smith*, a son agreed to move to Victoria from England to care for his mother after his sister assured him he would acquire her interest in the house after their mother’s passing. However, the sister attempted to go back on the promise. The detriment was not the sister’s refusal to sell her interest in the house. The detriment was the son moving from England, leaving employment and other family behind, to care for his mother in reliance of the sister’s promise.

[2868] Promissory estoppel can prevent reliance on a limitation period. MacDougall says it is a basic requirement that “there has to be a promise or assurance relating to a limitation period”: *Estoppel* at 5.152. In *Vancouver City Savings Credit Union v. Naidoo*, 2016 BCSC 914, Justice Schultes concluded that promissory estoppel may provide relief from the expiry of builders lien limitation periods, but in the case before him there was no representation or conduct intended to induce the applicant from not commencing an action: at para. 44.

2. Parties’ positions

[2869] BC submits that Douglas’ promise cannot ground estoppel because it is insufficiently clear. Douglas made no reference to Cowichan land. Although the requirement of clarity is less strict for proprietary estoppel than it is for promissory estoppel, the statement must relate to property rights. The plaintiffs have only sought a remedy in relation to the Lands of Tl'uqtinus, and not damages. Proprietary estoppel does not provide a basis for relief because those lands are not referenced in Douglas’ statement.

[2870] BC says that although promissory estoppel can be a basis to prevent a statutory limitation period from applying, there has to be a specific promise to do so. The only reference Douglas made to land is that the whole country was in the possession of the British Crown. He did not refer to the Cowichan’s property rights

nor to their rights to the Lands of Tl'uqtinus in particular. The promise is equivocal and it would be unreasonable to interpret it as a commitment on the part of BC to forgo reliance on defences in this action and as a promise that a specific property interest would be conferred.

[2871] BC submits that the plaintiffs have not pleaded an actual detriment of the kind necessary to ground estoppel, as their reply pleadings state that the Cowichan suffered a detriment when the Crown failed to resolve the Cowichan's continuing claim to the Lands of Tl'uqtinus in a timely manner or at all. With respect to BC's limitation defence, the plaintiffs have not pleaded that they would have brought this action earlier but refrained from doing so in reliance on Douglas' promise.

[2872] BC submits that the promise does not become binding by not being fulfilled. Something else is required, and the plaintiffs have not pleaded facts to establish this.

[2873] BC submits that the Crown generally cannot be bound in the exercise of its discretionary powers. As the Court of Appeal in *Langley (Township) v. Wood*, 1999 BCCA 260 at para. 13 said:

> ... the doctrine of estoppel can never interfere with the proper carrying out of the provisions of Acts of Parliament.
>
> [*Counties of Peterborough and Victoria v. Grant Trunk R.W. Co.* (1859), 18 U.C.R. 220 at 224.]

[2874] BC submits that public law estoppel cannot operate across space and time, unmoored from any substantial grounding in its application.

[2875] Finally, BC submits that the lands at issue are covered by fee simple interests held by parties other than BC. Section 23 of the *LTA* provides that such registered interests are indefeasible, subject only to enumerated exceptions. Proprietary estoppel is thus unavailable due to an express conflict with the *LTA*. BC submits that an estoppel cannot bind the Crown to do something that a statute explicitly states it cannot.

[2876] Richmond submits that the plaintiffs' argument on estoppel rests on Governor Douglas' 1853 statement to the Cowichan, which the plaintiffs say now estops the Crown from taking actions that allow the Crown to resile from its solemn commitments. Richmond is not the Crown. The plaintiffs made no submissions about why a statement Governor Douglas made 170 years ago would bind Richmond and prevent it from advancing defences in this action.

[2877] The plaintiffs submit that since the promise engaged the honour of the Crown, the Court must take a broad, purposive approach to interpreting it. The plaintiffs say the Crown's promise is tethered to the lengthy journal entry in 1853, and Governor Douglas repeated the promise again in 1856, as recorded in the 1857 dispatch to Queen Victoria's Principal Secretary of State. I pause to note that in Part 6 of these reasons, I found that the 1857 dispatch was not sufficiently specific to support an inference that Douglas reiterated to the Cowichan in 1856 that the Queen had given him a special charge to treat them with justice and humanity.

[2878] The plaintiffs urge the Court not to take a narrow view of the Crown's solemn commitments and the specificity required in the promise, and say that the doctrine permits a level of ambiguity. The plaintiffs say reliance is established because the Cowichan remained at peace with settlers and took their issues up with the Crown. In response to BC's submission that the plaintiffs have not pleaded detriment, the plaintiffs say that they pled that Douglas promised on behalf of the Crown, to protect the Cowichan's interests in exchange for peace with the settlers, and that the Cowichan did remain at peace.

[2879] The plaintiffs say judges have moved away from the strict requirements of proprietary estoppel that would constrain their ability to do justice, relying on *Cowper-Smith* at para. 18.

[2880] The plaintiffs agree that there are situations where estoppel against the Crown is limited for policy reasons. However, they submit it is available in a case like this where the Crown made express commitments that engage the honour of the Crown, and where the relief sought is declaratory in nature and is intended to uphold

those commitments. They submit that allowing the Crown to advance defences like displacement, laches, and limitations to defeat their title claim undermines the very commitment contained in the Crown promise (i.e., to protect the Cowichan's interests) and the honour of the Crown generally.

3. Analysis

[2881] To begin, the plaintiffs have not articulated a basis on which Richmond would be estopped from advancing the defences that Richmond relies on in this proceeding. Richmond is not the Crown. The plaintiffs do not allege that Richmond made a promise, representation or assurance to the Cowichan. I agree with Richmond that the plaintiffs have not articulated an argument for estoppel against Richmond. To the extent the plaintiffs contend that Richmond is estopped from advancing various defences, estoppel is not made out.

[2882] I turn now to consider the plaintiffs' claim that promissory estoppel precludes BC from advancing certain defences as a result of Governor Douglas' promise to the Cowichan. As stated above, Douglas' promise to treat the Cowichan with justice and humanity engaged the honour of the Crown. It was made at a time when the Cowichan population far exceeded the settlers and the Cowichan was a considerable military force. The Crown recognized the necessity of persuading Indigenous peoples that their rights would be better protected by reliance on the Crown: *Manitoba Metis* at para. 66, citing Slattery, "Understanding Aboriginal Rights" at 753. I found in Part 6 that while the promise falls short of a constitutional commitment, given the circumstances in which the promise was made and the nature of the promise, it bears the hallmarks of one, and it should be afforded a broad and purposive interpretation.

[2883] The promise must also be viewed in context. At the time, Douglas was engaged in concluding the Victoria and Fort Victoria treaties on behalf of the Crown. The Cowichan had expressed a wish for Douglas to dispose of their lands to the Crown. I found that it stands to reason that the promise related to the Cowichan's

interests generally, including their land. The specific obligations imposed by the honour of the Crown depend heavily on the circumstances: *Mikisew* at para. 24.

[2884] While I accept the honour of the Crown was engaged when Douglas made the promise to the Cowichan, the plaintiffs must nonetheless establish that the requirements of promissory estoppel and proprietary estoppel are satisfied. While the promise that Douglas made could possibly give rise to obligations with respect to land flowing from the honour of the Crown, I do not agree that the statement is capable of grounding the estoppel that the plaintiffs advance. There is no specific reference to land claims in the promise nor did Douglas reference the Cowichan's land. To trigger promissory estoppel or proprietary estoppel, a more specific promise is required. In my view, there is an insufficient basis to conclude that the statement was intended to induce a course of conduct to prevent the plaintiffs from beginning this action. A solemn promise to treat the Cowichan with justice and humanity, even if reliance and detriment were made out, is not sufficiently specific to give rise to an equity that would estop BC from raising defences in this action. The statement does not make reference to the subject matters the plaintiffs say BC is estopped from raising. Something more is required.

[2885] Similarly, the promise is insufficiently specific to ground a finding that an equity arises in favour of the plaintiffs, such that proprietary estoppel entitles the plaintiffs to the relief they are seeking.

[2886] The above finding is sufficient to dispose of the matter.

[2887] I find that the Cowichan did remain at peace with settlers. They did not exercise force in an effort to protect their interests and their village at Tl'uqtinus. The Cowichan followed formal channels and complained to Crown officials when their lands were sold to settlers. There is a lack of direct evidence as to whether the Cowichan did so in reliance on Douglas' promise. No witness testified about the promise and no expert opined as to any reliance on it.

[2888] The SCC explained the connection between a sufficiently specific promise and the reasonableness of reliance: “Reasonableness is circumstantial. As Lord Walker put it in *Thorne*r, “to establish a proprietary estoppel the relevant assurance must be clear enough”, that is, “[t]he promise must be unambiguous and must appear to have been intended to be taken seriously”: at para. 26, citing *Thorner v. Major*, [2009] UKHL 18. In the absence of a sufficiently articulated promise, and in the absence of evidence, reasonable reliance is not made out.

[2889] I also observe that detriment is not sufficiently pleaded. As above, the detriment suffered must be something more than the detriment that arises because the promise was unfulfilled. The plaintiffs plead the Cowichan suffered a detriment when the Crown failed to resolve the Cowichan’s continuing claim to the Lands of Tl’uqtinus in a timely manner or at all. In final argument, at its highest, the plaintiffs suggest that the Cowichan suffered a detriment in refraining from taking up arms at a time when they were in a position of relative strength. In my view, this is not sufficiently pleaded and the detriment that the plaintiffs plead relates to a detriment that arises from the Crown’s failure to fulfill Douglas’ promise. With regard to proprietary estoppel, which the plaintiffs rely on as a substantive basis in support of the relief sought, even if Douglas’ promise was sufficiently specific to ground an estoppel, the plaintiffs have not established a detriment that does not arise from non-fulfillment of the promise.

[2890] In summary, the promise is insufficiently specific to give rise to an equity which could estop BC from raising defences in this action or to provide a separate basis for the relief sought. The plaintiffs have not pleaded a separate detriment and rely on the failure of the Crown to fulfill the promise alone. I accept BC’s submission that the promise does not become binding by not being fulfilled. There must be some specific negative consequence that the plaintiffs suffered as a result of their reliance, beyond the fact that the promise was not fulfilled.

[2891] Therefore, I consider the defences on their merits.

B. LIMITATIONS

1. Overview

[2892] BC and Richmond advance limitation defences.

[2893] Richmond asserts generally that the plaintiffs' claims for relief are time-barred and also adopts BC's submissions. BC submits that certain aspects of the plaintiffs' claim are barred by limitation periods where they seek to challenge or invalidate the property interests of other parties. In particular, BC submits the sought declaration regarding the defectiveness and invalidity of certain fee simple titles is wholly time-barred. BC says the declaration does not fall within the exception set out in *Manitoba Metis* which provides that limitations legislation does not bar courts from issuing declarations on the constitutionality of the Crown's conduct. The relief sought here is personal, in that it seeks to remove the interests of other persons in order to establish the plaintiffs' entitlement to land.

[2894] With respect to a declaration of Aboriginal title, BC agrees that limitation periods do not extinguish Aboriginal rights, but submits they do limit the availability of remedies in respect of those rights. Remedies such as an order enforcing exclusive possession, or damages in lieu, are not available as ancillary relief. Similarly, any declaration regarding the duty to negotiate in respect of the fee simple interests cannot serve as a means to coerce an otherwise limitation-barred compensation claim.

[2895] BC says its view regarding tailoring declarations to avoid coercive relief similarly applies to the sought declaration that BC has a fiduciary duty to negotiate in good faith with the plaintiffs regarding the Aboriginal title lands (other than the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands).

[2896] BC says any remedies pertaining to unjustified infringement and the vesting of Richmond with soil and freehold under the *Community Charter* are only available to the extent that they do not invalidate another party's interest nor establish a personal entitlement to specified interests or damages in lieu.

[2897] Canada never asserted a limitations defence and amended its response to civil claim to withdraw the defence of laches and acquiescence.

[2898] The plaintiffs submit that no limitation statute applies because the declarations sought are constitutional, engage the honour of the Crown, are not personal nor coercive, and address ongoing conduct and rights. In the alternative, if the *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. IV, c. 27 [*Limitation Act, 1833*] or the *Statute of Limitations*, R.S.B.C. 1897, c. 123 [*Limitations Act, 1897*] are the relevant statutes, they cannot apply to their claims because they purport to extinguish Aboriginal title for which BC has no jurisdiction.

[2899] The plaintiffs argue in the further alternative that those Acts do not include the requisite clear and plain intent to extinguish their Aboriginal title. I already determined that there is no basis to revisit the settled principle that BC lacked jurisdiction to extinguish Aboriginal title, and I do not consider this point further. The plaintiffs submit, again in the alternative, that these Acts were inapplicable to local circumstances, or that the operation of the limitation periods were postponed because of concealed fraud.

[2900] In the further alternative, if this Court determines that the *Limitations Act*, S.B.C. 1975, c. 37 [*Limitations Act, 1975*] or the *Limitation Act*, R.S.B.C. 1996, c. 266 [*Limitation Act, 1996*] is the relevant statute, then the plaintiffs rely on the trespass exception in these Acts. Further, they say the cause of action did not arise until the SCC's decision in *Delgamuukw* SCC and equitable fraud committed by colonial officials postponed the running of the limitation period.

[2901] The SCC in *Shot Both Sides* at para. 60 observed that its prior decisions — including *Wewaykum*, *Canada (Attorney General) v. Lameman*, 2008 SCC 14 [*Lameman*] and *Manitoba Metis* — recognize that rules on limitation periods may apply to Aboriginal rights and treaty claims when captured by a particular limitation statute. These cases did not consider the constitutionality of applying limitation statutes to Aboriginal rights and treaty claims.

[2902] The SCC also reaffirmed the principle that it applied in *Manitoba Metis*, namely, that limitation legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct: *Shot Both Sides* at para. 63. As I explain below, I find that the plaintiffs, for the most part, seek declaratory relief that relates to the constitutionality of Crown conduct, such that it falls within the scope of the *Manitoba Metis* exception. Accordingly, limitation legislation does not apply to most of the relief sought in this case.

[2903] I conclude that one of the declarations that the plaintiffs seek, respecting the validity of fee simple interests in the Cowichan Title Lands, is personal and coercive relief which may be barred by limitation periods.

[2904] As previously set out, the Crown grants of fee simple interest in the Cowichan Title Lands are a continuing infringement of the Cowichan's Aboriginal title. As I explain below, the profound adverse consequences — the dispossession of the Cowichan people of their homeland — continue today, and this gives rise to a fresh cause of action each day it continues. As a result, the declaration respecting the validity of the fee simple interests is not barred by limitation periods.

[2905] In the alternative, if the plaintiffs' claim for that particular relief is affected by limitation periods, I conclude that the *Limitation Act, 1833* and *Limitations Act, 1897* do not bar that relief because they do not apply to the plaintiffs' cause of action. I find that the *Limitations Act, 1975* and the *Limitation Act, 1996* do apply but the plaintiffs' action is not statute-barred under those Acts. The plaintiffs' dispossession from their land amounts to trespass, which is a circumstance to which these Acts do not apply.

2. Law

[2906] Below, I review the law regarding the application of limitation periods to Aboriginal rights claims.

[2907] In *Wewaykum*, two Indian bands, the Wewaykum (Campbell River Band) and Wewaikai (Cape Mudge Band), claimed each other's reserve land: at para. 1. Each

band claimed that the federal Crown breached its fiduciary duty and sought financial compensation: at paras. 2, 4. The reserve creation process was completed in 1938, and the bands had formally abandoned the claim they now asserted. For over 60 or more years, each band relied on the *status quo* to make improvements to the reserves on which they resided: at para. 7.

[2908] The Cape Mudge Band argued that the applicable limitation periods should not be allowed to operate as "instruments of injustice": at para. 121. Justice Binnie observed that the policies behind a statute of limitation are well-known, citing *Novak v. Bond*, [1999] 1 S.C.R. 808 at paras. 8, 64, 1999 CanLII 685 [*Novak*]. He identified the following policy rationales at para. 121:

a) witnesses are no longer available;

b) historical documents are lost and are difficult to contextualize;

c) expectations of fair practices change; and

d) evolving standards of conduct and new standards of liability eventually make it unfair to judge past actions by today's standards.

[2909] In the circumstances of *Wewaykum*, Binnie J. said the need for repose was evident. The bands had settled their legitimate expectations with respect to the reserve each now inhabited. They recognized each other's need for repose, thus seeking compensation rather than the dispossession of the other band. Additionally, they pleaded the limitation period in their defence against each other: at para. 122.

[2910] The facts in *Wewaykum* are significantly different from the present case. There, the bands had independent legal advice by the 1930s and were aware at the time of the material facts on which their claims were based. Each band had elected not to disturb its neighbours. Justice Binnie said he was not suggesting that historical grievances should be ignored. However, the conduct of each band between 1907–1936 suggested the other band's occupation of its reserve was

acknowledged and considered as between the bands to be fair and equitable: at para. 123.

[2911] The Campbell River Band's cause of action with respect to the possession claim was complete no later than July 29, 1938: at para. 127. The *Limitations Act, 1897* applied until July 1, 1975 when the *Limitations Act, 1975* was proclaimed: at para. 125. Under s. 16 of the *Limitations Act, 1897*, the claim to possession was extinguished unless commenced within 20 years after the time at which the right to bring such action first accrued: at para. 127. The Cape Mudge Band's claim to recover land arose prior to 1888, and was extinguished around 1907: at para. 128. Even if the running of time was postponed because of a lack of pertinent information, the limitation period for possession expired no later than the end of 1957: at para. 129.

[2912] The *Limitations Act, 1897* imposed no limitation period for breach of fiduciary duty, and therefore the transitional provision of the *Limitations Act, 1975* applied to bar the claim. Moreover, all claims in the proceeding were caught by the 30-year ultimate limitation period in s. 8 of the *Limitations Act, 1975*: at paras. 131, 132.

[2913] A distinguishing aspect from the case before me is that *Wewaykum* was a Federal Court action. There, the provincial limitation legislation applied as federal law, by virtue of the *Federal Court Act*, R.S.C. 1985, c. F-7: at paras. 114–116.

[2914] Eleven years later, the SCC decided *Manitoba Metis*. As previously set out, that case concerned a commitment Canada made to the Métis people of the Red River Settlement, who agreed to become part of Canada in return for Canada's promise to grant 1.4 million acres of land to the Métis children. This promise was set out in s. 31 of the *Manitoba Act*: at paras. 5, 11. A majority of the Court concluded that s. 31 was a solemn constitutional obligation which engaged the honour of the Crown. The Métis were entitled to a declaration that Canada failed to implement s. 31 in accordance with the honour of the Crown: at para. 9.

[2915] In considering whether the claim for a declaration was statute-barred, the majority noted that limitation statutes cannot prevent the courts from issuing declarations on the constitutionality of legislation. By extension, limitation statutes cannot prevent courts from issuing a declaration on the constitutionality of the Crown's conduct: at para. 135.

[2916] The majority of the SCC explained that in previous cases (*Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1; *Ravndahl v. Saskatchewan*, 2009 SCC 7) while personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of the limitation period, it held courts retain the power to rule on the constitutionality of the underlying statute. The Métis sought no personal relief and made no claim for damages or for land: *Manitoba Metis* at paras. 134, 137.

[2917] The majority found that the reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts as guardians of the Constitution cannot be barred from issuing a declaration on fundamental constitutional matters: *Manitoba Metis* at para. 140. The majority went on to say:

> [141] Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:
>
> > The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification.
>
> ("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)
>
> [Emphasis added.]

[2918] The majority noted that despite legitimate policy rationales in favour of statutory limitation periods, in the Aboriginal law context, there are unique rationales

that must sometimes prevail. The principles of reconciliation demanded that the declarations not be barred: *Manitoba Metis* at paras. 141, 143.

[2919] The SCC again considered the application of limitation statutes in Aboriginal rights cases in *Shot Both Sides*. There, the Blood Tribe had long asserted that their reserve size did not accord with Treaty No. 7, which had established the reserve in 1877: at paras. 2–3. The trial judge found that the Crown had miscalculated the size of the reserve by underestimating the Blood Tribe's membership. The trial judge found that although the facts were discoverable around 1971, the limitation period did not begin to run until after the enactment of s. 35(1) of the *Constitution Act, 1982*, which created a new cause of action for treaty breaches: at paras. 23–24.

[2920] Both the Federal Court of Appeal and the SCC found that s. 35(1) of the *Constitution Act, 1982*, did not create a new cause of action: *Shot Both Sides* at para. 32. The Blood Tribe's claim was enforceable at common law prior to the coming into force of s. 35(1): *Shot Both Sides* at para. 51. Treaty rights flow from the treaty, not the *Constitution*: *Shot Both Sides* at para. 5.

[2921] The SCC addressed the narrow question of whether the Blood Tribe's claim was barred by the Alberta *Limitation of Actions Act*. This required a determination as to whether the breach of the treaty was actionable prior to the coming into force of s. 35(1). The constitutional applicability of limitation statutes was not in issue: *Shot Both Sides* at paras. 4, 34. The Blood Tribe did not contest that its claim was captured by the *Limitation of Actions Act*, which set a six-year limitation period for any other action not provided for in the Act: *Shot Both Sides* at paras. 58–59.

[2922] The SCC at para. 60 observed that the rules on limitation periods apply to Aboriginal rights and treaty cases, citing *Manitoba Metis* at para. 134, *Lameman* at paras. 12–13; and *Wewaykum* at paras. 121, 125–133. These authorities did not address the constitutionality of applying limitation statutes to Aboriginal rights and treaty claims. However, they recognized that such claims are subject to the general limitation periods of the province if captured by the respective limitation statute.

[2923] The SCC noted the importance of reconciliation efforts outside the courts, which may be meaningful in addressing the Crown's breach of its obligations to the Blood Tribe: *Shot Both Sides* at para. 61, referencing *C-92 Reference* at paras. 76–78; *Delgamuukw* SCC at para. 186; and *Desautel* SCC at para. 87.

[2924] In light of the prospect of future reconciliation efforts, the SCC said:

> [63] The law of limitations set out above does not preclude a declaration in this matter. Although claims for personal relief or damages flowing from treaty breaches may be subject to limitations statutes, limitations legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct. (*Manitoba Metis*, at paras. 135, 137, 139 and 143). At issue here is a constitutionally protected treaty right and the honour of the Crown, itself a constitutional principle (para. 136). This Court has recognized that declarations can be obtained to assist with extra-judicial negotiations with the Crown even where personal relief may be statute-barred as discussed below (para. 137).

[2925] Declarations are authoritative statements of legal states of affairs between parties. They can confirm or deny the breach of a right or declare the existence of a new legal state of affairs: *Shot Both Sides* at para. 66, referencing *Manitoba Metis* at paras. 6, 154.

[2926] The SCC at para. 69 of *Shot Both Sides* relied on the majority's decision in *West Moberly* 2020 at para. 343, where Chief Justice Bauman said "there is no obligation in the law of declaratory relief to litigate the range of a declaration's effects. The question is simply whether the declaration will have practical utility". The SCC affirmed its conclusion in *Manitoba Metis* that limitation statutes do not apply to declarations about the constitutionality of Crown conduct even though personal or coercive relief may be statute-barred: *Shot Both Sides* at para. 63.

3. Applicability of the Manitoba Metis Exception

[2927] As the SCC in *Shot Both Sides* explained, a bare declaratory judgment does not grant consequential or coercive relief. Rather, "[t]he essence of a declaratory judgment is a declaration, confirmation, pronouncement, recognition, witness, and judicial support to the legal relationship between parties without an order of enforcement or execution": at para. 65, quoting Lazar Sarna, *The Law of Declaratory*

Judgments, 4th ed. (Toronto: Thomson Reuters, 2016) at 6 [*Declaratory Judgments*]. In other terms, a declaratory judgment "does not order any party to do anything": *Starz (Re)*, 2015 ONCA 318 at para. 102, leave to appeal to SCC ref'd, 37259 (26 January 2017). As Sarna explains in *Declaratory Judgments* at 54:

> ... A remedial judgment carries within its own terms a solution for the cure of a dispute, be that an order to do or not to do, or more specifically, to pay, deliver over, seize, sell, dissolve, remove, or refrain. It is self-executing in the sense that the parties and the executing officer need no further direction or authorization than that contained in the judgment.

[2928] I accept BC's submission that a court must consider the substance as well as the form of the relief to determine whether it is truly declaratory and not remedial. In *Yellowbird v. Samson Cree Nation No. 444*, 2006 ABQB 434 at para. 35, aff'd 2008 ABCA 270, the Court set out the following test:

> If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"?

[2929] The parties disagree as to whether limitation periods preclude claims that affect or have the potential to affect third-party interests. BC and Richmond say that in order for the *Manitoba Metis* exception to apply, the declarations cannot include personal or coercive relief *and* cannot affect or have the potential to affect third parties. The plaintiffs submit there is no authority that says that because a declaration may have potential future impacts on third parties it is coercive or otherwise subject to a provincial limitation period. The plaintiffs say that the majority in *Manitoba Metis* only noted that the declaration in that case did not engage third-party interests, but did not make the absence of third party impact a requirement for the exception to apply. In *Shot Both Sides*, the SCC did not discuss the effects of granting such declarations on the legal interests of third parties, although it did say there is no need to litigate the range of a declaration's effects: at para. 69.

[2930] The Alberta Court of Appeal considered the issue of the effects of a declaration in *Wesley v. Alberta*, 2024 ABCA 276 [*Wesley*], leave to appeal to SCC

ref'd, 41515 (15 May 2025). The case management judge had held that some claims were barred by the passage of time while others could proceed: *Wesley* at para. 2. Alberta and the Stoney Nakoda First Nations both appealed. Each of the three justices rendered reasons and both appeals were dismissed by a majority of the panel: *Wesley* at para. 259.

[2931] Chief Justice Khullar, concurring in part, said:

> [237] The judgment in *Manitoba Métis* is ambiguous about whether the reasons for granting the declaration were relevant to (i) the scope of the exemption or (ii) the exercise of its discretion to issue the declaration. The Supreme Court did not assign the effect on third party legal interests to one or other stage of the analysis. Notably, *Shot Both Sides* did not discuss the effect of the declarations that the federal Crown breached its obligation to transfer reserve land to the Blood Tribe on the legal interests of third parties.

[2932] Chief Justice Khullar stated that the negative effects on third parties are relevant to whether a court should issue a declaration and what the content of the declaration should include. It is not a factor in determining whether or not the statute of limitations applies: *Wesley* at para. 238.

[2933] I find the plaintiffs' argument and Khullar C.J.A.'s words persuasive. In my view, the effects that a declaration may have on third parties should be considered at the remedial stage. In other words, the fact that a declaration may have implications for third parties does not mean that the exception in *Manitoba Metis* is unavailable.

[2934] Limitations legislation cannot bar declaratory relief regarding the constitutionality of the Crown's conduct: *Manitoba Metis* at paras. 135, 137, 139, 143; *Shot Both Sides* at para. 63.

[2935] In *Wesley*, Khullar C.J.A. explained that the declarations of constitutional rights sought by the Stoney Nakoda Nations regarding their Aboriginal title and rights to the claim areas, including to natural resources in those areas, were not time-barred because the asserted rights are constitutionally protected by s. 35: at para. 246. Under the constitutional exemption articulated in *Manitoba Metis* and

Shot Both Sides, declarations of constitutional rights and unconstitutional government conduct are exempt from the operation of limitation statutes: at para. 176. This exemption applies only against the Crown. Legislation and Crown action must conform to constitutional principles. It is a public law exception, and it does not impact private litigants: at para. 256.

[2936] Generally speaking, the plaintiffs seek declarations affirming their constitutionally-entrenched Aboriginal title and declarations regarding the constitutionality of the Crown's conduct. I found that the Crown grants of fee simple interest were issued without constitutional authority and unjustifiably infringe the Cowichan's Aboriginal title.

[2937] For the *Manitoba Metis* exception to apply, the remedy sought must be of a limited nature, and not include personal or coercive relief: *Manitoba Metis* at para. 143. Below, I set out the declarations BC or Richmond allege are time-barred, or otherwise affected by limitation periods, and determine whether they fit within the exception.

4. Does the Exception in Manitoba Metis apply to the Declarations?

[2938] BC and Richmond advance the limitations defence to all or aspects of the following declarations that the plaintiffs seek (following the lettering in their fifth FANOCC):

A. That the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, have Aboriginal title, to: (i) the Lands of Tl'uqtinus; (ii) in the alternative, the Village Lands at Tl'uqtinus; or (iii) in the further alternative, any portion of the Lands of Tl'uqtinus within the meaning of s. 35(1) of the *Constitution Act, 1982*.

B. The Crown Grants of fee simple interest and the Crown vesting of soil and freehold interest in the lands set out in para. A infringe Cowichan Nation Aboriginal title to these lands.

B.1 The Crown has not justified its infringement of the Cowichan Nation Aboriginal title set out in para. B.

C. The fee simple titles and interests in: (i) the Federal Tl'uqtinus Lands (other than the YVR Fuel Project lands) and (ii) the Richmond Tl'uqtinus Lands, are defective and invalid, in whole or in part.

D. BC's vesting of Richmond with the soil and freehold of every highway in Richmond, as under the *Community Charter*, s. 35(1)(a) is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of the *British Columbia Terms of Union*, s. 13.

F. With respect to the lands set out in para. A, other than the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands, BC has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, reconciliation of the Crown granted fee simple interests, and the Crown vesting of the soil and freehold, with the Cowichan Nation Aboriginal title therein.

G. The descendants of the Cowichan Nation, including the Cowichan Tribes Stz'uminus, Penelakut and Halalt are entitled as against BC to the lands set out in para. A.

[2939] With respect to a declaration of Aboriginal title, as above, BC acknowledges that limitation periods do not extinguish Aboriginal rights. However, BC says a declaration of Aboriginal title can only be granted in a form which recognizes the unavailability of personal relief, and could not, for example, serve as a means to obtain coercive personal relief, such as an order enforcing exclusive occupation. I am satisfied that the declaration respecting Cowichan Aboriginal title is not personal or coercive. Any discussion regarding impacts on third parties goes to whether the declaration should be issued, not whether it is time-barred.

[2940] In *Manitoba Metis*, the majority concluded that a declaration regarding the constitutionality of the Crown's conduct in implementing the land grant provision was not barred by limitations. Justice Rothstein, in dissent, was critical of the majority's decision to depart from the established principle in decisions like *Wewaykum* and *Lameman* that limitation periods apply to Aboriginal claims as much as other claims: at para. 254. Justice Rothstein noted:

> [255] Moreover, the legal framework of this claim is very different from a claim based on an Aboriginal right. Aboriginal rights are protected from extinguishment under s. 35 of the *Constitution Act, 1982*. Aboriginal rights, therefore, constitute ongoing legal entitlements. By contrast, the claims in this case concern a constitutional obligation that was fulfilled over 100 years ago.

[2941] In my respectful view, Rothstein J. is differentiating constitutionally-protected Aboriginal rights as an ongoing entitlement which cannot be barred by limitation periods, from the kind of historic constitutional obligation at issue in *Manitoba Metis*, which he would have found was time-barred. I am guided by *Haida* SCC at paras. 20, 25, in that s. 35 represents "a promise of rights recognition", enshrined in the *Constitution Act, 1982*, and that the honour of the Crown requires these rights be determined, recognized, and respected. The ongoing constitutional duty of the Crown to determine and respect Aboriginal rights is in many ways at odds with the concept of repose for defendants which underpins the application of limitation periods.

[2942] The Crown's constitutional obligation to recognize Aboriginal title is part of the ongoing work of reconciliation. In the context of Aboriginal title claims, there can be no reasonable expectation on the part of the Crown that it "will not be held to account for ancient obligations": *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at 29, 1992 CanLII 31 [*M.(K.)*]; and see *Manitoba Metis* at para. 141. This illustrates the point that in considering the application of limitation statutes in the Aboriginal law context, "reconciliation must weigh heavily in the balance": *Manitoba Metis* at para. 141.

[2943] In my view, declarations regarding both Aboriginal title and Crown infringement of constitutionally-protected Aboriginal title plainly fall within the *Manitoba Metis* exception. Here, the declarations are concerned with recognition

and respect for Aboriginal title and the constitutionality or lack thereof of the Crown's conduct in regulating, intruding upon, and granting interests in the Cowichan Title Lands.

[2944] Additionally, in Part 6 of these reasons, I found that Article 13 of the *BC Terms of Union* continued the appropriation of Indian settlement lands, including the Cowichan Title Lands, from the Crown's land disposition processes. Article 13 constrains the Province's power to dispose of the Cowichan Title Lands. BC had a constitutional obligation to preserve those lands for the purpose of implementing its obligations under Article 13. BC did not have the authority to unilaterally extinguish Crown protection for those lands, and acted without constitutional authority when it issued the Crown grants of fee simple interest in the Cowichan Title Lands.

[2945] Declarations confirm the parties' legal rights: *Shot Both Sides* at paras. 65–66. A declaration of Aboriginal title not only clarifies the plaintiffs' entitlement, but it also clarifies the fiduciary nature of the relationship between the Crown and the Cowichan in respect of the Cowichan Title Lands going forward. In my view, such a declaration is constitutional in nature, engages the honour of the Crown, and limits what the Crown can do in respect of the Cowichan Title Lands. It is neither personal nor coercive in nature. As in *Shot Both Sides*, a declaration of the Cowichan's Aboriginal title is a step toward restoring the historic, nation-to-nation relationship between the Cowichan and the Crown. It cannot be and is not precluded by provincial limitation statutes.

[2946] Declarations B and B.1 address the Crown's unjustifiable infringement of the Cowichan's Aboriginal title. The test attempts to reconcile Crown conduct or legislation with Aboriginal rights as required under s. 35 of the *Constitution Act, 1982*: *Tsilhqot'in* SCC at paras. 80 and 150. As above, I similarly find that these declarations are not statute-barred because they are about the constitutionality of Crown conduct. As the SCC explained in *Shot Both Sides* at para. 74, a declaration "setting out the Crown's infringement of an Indigenous party's rights may spur reconciliation efforts between the parties".

[2947] In *Manitoba Metis*, a majority of the SCC issued a declaration that the Crown failed to implement s. 31 of the *Manitoba Act* in accordance with the honour of the Crown: at paras. 133, 135, 154. In *Shot Both Sides*, the SCC declared that the Crown dishonourably breached certain treaty land entitlement provisions: at paras. 66, 73–74, 83. As in those cases, the declarations sought in this case with respect to unjustified infringement of Aboriginal title are neither personal nor coercive. If granted, they would recognize that the Crown has infringed Cowichan Aboriginal title and that the Crown did not fulfill its constitutional obligation to justify those infringements. These declarations can provide clarity to the parties about the scope of rights and offer guidance about conduct going forward.

[2948] Similarly, declaration G, if granted, would clarify that Aboriginal title is superior to any provincially held fee simple titles in the Cowichan Title Lands. This declaration, prospective in nature, is a corollary to a declaration of Aboriginal title. If granted, it would clarify the legal state of affairs, reflecting that the Cowichan's Aboriginal title burdens the provincial Crown's underlying title to the land. In my view, it fits within the *Manitoba Metis* exception for largely the same reasons as a declaration of Aboriginal title. I have more to say about the utility of this declaration in Part 11 of these reasons.

[2949] The plaintiffs also seek a declaration that BC's vesting of Richmond with the soil and freehold of every highway in Richmond is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of Article 13 of the *BC Terms of Union*. I have declined to consider that issue, finding that it is more appropriate to deal with it under s. 35 of the *Constitution Act, 1982*, relying on the *Sparrow* framework. Accordingly, this relief is not available and I consider the limitation defence no further.

[2950] Declaration F is about what the plaintiffs say is BC's fiduciary duty to negotiate in good faith with the Cowichan regarding the Cowichan Title Lands that are encumbered by private fee simple estates and the roads that remain vested in Richmond under the *Community Charter*. The SCC emphasized that the Crown has

a “legal duty to negotiate in good faith to resolve land claims” and “[o]nce 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”: *Tsilhqot'in* SCC at paras. 17, 92.

[2951] BC acknowledges that it has both a moral and a legal duty to negotiate in good faith to resolve land claims. BC does not argue that this declaration is wholly barred by a limitation period, and says this Court’s findings of fact will inform negotiations going forward. However, to the extent the sought declaration includes a fiduciary duty to negotiate reconciliation of Aboriginal title with fee simple titles, BC submits that is personal and coercive relief, and time-barred. In other words, a declaration which requires negotiating a particular topic in a particular way is coercive.

[2952] As I explain later in these reasons, a declaration that BC owes a duty to the plaintiffs to negotiate may assist with extrajudicial negotiations, guide the parties in the reconciliation process, and set out the parameters of the legal relationship between the Crown and the plaintiffs. Leaving aside, for now, the question of a *fiduciary* duty to negotiate, in my view a declaration regarding a duty to negotiate is thus in line with the SCC’s reasoning in *Shot Both Sides* at paras. 63, 66, 73. This declaration is constitutional in nature and is not personal or coercive. The fact that the declaration speaks to reconciliation of the other Crown-granted interests in the Cowichan Title Lands does not render the declaration substantively coercive in nature. It is the unfortunate reality that BC has encumbered the Cowichan Title Lands with third-party interests; this will inform any negotiation between the plaintiffs and BC. This declaration falls under the *Manitoba Metis* exception and limitation statutes do not apply to it.

[2953] In my view, declaration C is different. The plaintiffs seek a declaration that the fee simple titles and interests in the Federal Tl'uqtinus Lands (except the YVR Fuel Project lands) and the Richmond Tl'uqtinus Lands are defective and invalid. BC submits that although the relief claimed is purely declaratory, the plaintiffs are

seeking to establish entitlement to specific land. The recovery of land is remedial, and BC submits this relief is barred by limitation statutes.

[2954] A declaration that the fee simple interests in the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands are defective and invalid could flow from my findings that the Crown grants of fee simple interest were unconstitutional by virtue of Article 13 and that the fee simple titles and interests are an ongoing, unjustified infringement. These findings are a matter of constitutional import and such a declaration, if warranted, could further the righting of a historic wrong. Such a declaration would also clarify the parties' rights. Accordingly, much of the reasoning that underpins the *Manitoba Metis* exception applies in respect of declaration C. On balance, however, I determine that because it is substantively aimed at the recovery of land, the exception does not apply.

[2955] BC's focus is on the impact that the declaration will have on third parties. This is an appropriate argument to raise at the declaration stage, but it is not relevant to the applicability of limitation statutes. At this stage, when determining whether limitation statutes apply, my concern is whether or not the relief is statute-barred. I agree with BC in that declaration C is remedial and could be affected by a limitation statute.

[2956] In *Wesley*, the Alberta Court of Appeal held that the Stoney Nakoda First Nations' claims for an order "quashing" of authorizations, permits, leases, licenses, and contracts in the claim area, which were held by third parties, was non-declaratory relief and was subject to limitation legislation: at para. 250. In the present case, I find that a declaration about the validity of fee simple titles is similar in nature to the order sought in *Wesley*. Although *Wesley* dealt with an order to quash, rather than declaratory relief, in substance, I find the relief is directed at the same ends. Both impact the validity of interests in land. A distinguishing factor in *Wesley* is that the order sought related to quashing interests held by third parties. In this case, the declaration relates to interests held by parties to this litigation — Canada and Richmond.

[2957] In *Wesley* at para. 256, Khullar C.J.A. explained that the constitutional exception in *Manitoba Metis* is “for declarations of constitutional rights ... and this applies only against the Crown. ... The exception is limited as it is a public law exception and does not impact private litigants”. These comments are particularly relevant to the extent the declaration is against Richmond, who is not the Crown. In any event, I find the relief sought in declaration C is personal and coercive and does not fit within the *Manitoba Metis* exception.

[2958] In summary, I find limitations legislation does not apply to the declarations because they are declarations about the constitutionality of Crown conduct, except for declaration C which deals with the validity of Canada and Richmond’s fee simple titles.

[2959] Since I found declaration C could be subject to limitation periods, I consider the plaintiffs’ alternative argument that its claim is not time-barred because a fresh cause of action arises every day they are dispossessed from their land.

5. Continuing Breaches

[2960] The plaintiffs say, in the alternative, the Crown’s taking of their Aboriginal title lands was an unlawful entry which constitutes a trespass as it interfered, and continues to interfere, with the Cowichan’s possessory rights to the land. The plaintiffs say the Crown’s issuance of the Crown grants infringes their Aboriginal title. Because this infringement is ongoing, a new cause of action arises each day, thus giving rise to a new limitation trigger each day.

[2961] BC disagrees, asserting that the only Crown conduct that could have interfered with the Cowichan’s interest in the Claim Area was the issuance of the Crown grants. BC says once the Crown grants were conveyed/issued, the transactions were entirely past and closed. Crown conduct in relation to the Crown grants was limited to the time at which each grant was issued between 1871–1914. In the alternative, BC submits limitation periods apply to continuous breaches.

[2962] Richmond advanced no additional argument on this point.

[2963] As I found in Parts 7 and 8, the Crown grants of fee simple interest in the Cowichan Title Lands are an ongoing infringement of the Cowichan's Aboriginal title. The Crown grants of fee simple interest adversely interfered and continue to interfere with the exercise of the Cowichan's Aboriginal title to those lands.

[2964] As I explain below, I agree with the plaintiffs that a new limitation period is triggered each day they are kept out of possession of the Cowichan Title Lands.

[2965] In *Wewaykum*, both Indian bands raised a continuous breach argument to avoid their claims being statute-barred. Justice Binnie rejected this at paras. 134–135:

> The appellants contend that every day they are kept out of possession of the other band's reserve is a fresh breach, and a fresh cause of action. As a result, their respective claims are not yet statute barred (and could never be).
> ...
> Acceptance of such a position would, of course, defeat the legislative purpose of limitation periods. For a fiduciary, in particular, there would be no repose. In my view such a conclusion is not compatible with the intent of the legislation. Section 3(4), as stated, refers to "[a]ny other action not specifically provided for" and requires that the action be brought within six years "after the date on which the right to do so arose". It was open to both bands to commence action no later than 1943 when the Department of Indian Affairs finally amended the relevant Schedule of Reserves. There was no repetition of an allegedly injurious act after that date. The damage (if any) had been done. There is nothing in the circumstances of this case to relieve the appellants of the general obligation imposed on all litigants either to sue in a timely way or to forever hold their peace.

[2966] In *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124 [*Peter Ballantyne*], application for rehearing dismissed, 2017 SKCA 5, leave to appeal to SCC ref'd, [2017] S.C.C.A. No. 95, the Peter Ballantyne Cree Nation brought an action against the Crown for the flooding of their reserve land, caused by the construction of dams. They sought declarations and damages for breach of the honour of the Crown, and breach of fiduciary duty and trespass, including continuing trespass: at para. 1.

[2967] Justice Herauf, writing for the Court, found that the Crown failed to protect and preserve the Cree Nation's interest in the reserve land, which arguably

constituted a breach of fiduciary duty. However, Herauf J.A. went on to say that even if the Crown did breach its fiduciary obligation, the claims were subject to the applicable provincial limitation legislation: *Peter Ballantyne* at paras. 88–89.

[2968] Citing *Wewaykum*, Herauf J.A. rejected the Cree Nation's argument that the Crown's breach was of a continuing nature as there was repetition of the injurious act: *Peter Ballantyne* at para. 89. He then noted that:

> [90] ... The Crown's breach can be pinpointed to the specific point in time when it gave a licence to flood the Southend Reserve land intermittently through the operation of the Whitesand Dam. This is when the Cree Nation's right to initiate proceedings arose. The dam has been operating the same way in accordance with the licence since it was constructed, and the effects of removing and adding the stop logs have been consistent. The Crown has not given a new licence or allowed a change in the operation of the dam that would affect the reserve land in a new and negative way. In this sense, no wrongs were committed anew each day. As stated by the Chambers judge at para 77 of his reasons, "acceptance of the continuing fiduciary breach claim would allow the [Cree Nation] to skirt the issue of limitation periods, should they apply". This would be an undesirable result, as there is nothing in the circumstances to relieve the Cree Nation of the general obligation imposed on all litigants to sue in a timely way.

[2969] Accordingly, the limitation period began to run the year of the breach, when Canada consented to the flooding of the reserve land: *Peter Ballantyne* at para. 93.

[2970] In relation to the Cree Nation's continuing trespass argument, Herauf J.A. found that the flooding of their reserve land constituted a continuing trespass, as:

> [143] ... the flooding of the Southend Reserve, by directing the water from Reindeer Lake onto the land, interfered with possession. This interference with possession continues to this day. A wrongful omission is committed every day the water is allowed to interfere with possession.

[2971] Justice Herauf concluded that his interpretation was consistent with *Wewaykum* (where the SCC rejected the continuing breach argument as it related to breaches of fiduciary duty):

> [145] ... it might be suggested that my interpretation regarding continuing trespass cannot stand in the face of the legislative purpose of limitation periods. The Cree Nation could have sued for trespass when the flooding first occurred more than 50 years prior. Further, for the same reasons described in my analysis under the duty to consult issue, other than the potential for a

> continuing trespass there is nothing since then that can constitute anything "new or fresh" so as to defeat limitation periods. The case law and legal commentary agree that when an object interferes with another person's land, a new cause of action arises each day.
>
> [146] Trespass is sufficiently different from breach of fiduciary duty to allow for continuing breaches. Damage arising from a breach of fiduciary duty can be traced back to the specific point in time of the breach, which was when the limitation period began to run. The Cree Nation must rely on a fresh breach of the Crown's fiduciary duty to give rise to a new cause of action and, as explained above, the Crown has not given a new licence or allowed the operation of the dam to change that would affect the reserve land in a new and negative way. The Supreme Court's dismissal of the continuing breach of fiduciary duty argument supports this reasoning and prevents litigants from skirting the issue of limitation periods in the context of a fiduciary breach. On the other hand, a cause of action arises from trespass when there is an unjustifiable interference with possession. Trespass is actionable *per se*, and a new cause of action arises each day regardless whether actual harm was suffered or not until the time the plaintiff's possessory rights are restored. Unmistakably, this proposition has long been accepted by the courts and legal commentators. This distinctive nature of trespass justifies the effective extension of the limitation period when a wrong is not rectified and the trespass continues.

[2972] As I explained in Part 7, the Crown grants of fee simple interest in the Cowichan Title Lands effect a permanent displacement of the Cowichan, and this results in an ongoing infringement of their Aboriginal title. I therefore find that the plaintiffs' situation is akin to the continuing trespass that Herauf J.A. found in *Peter Ballantyne*. The issuance of Crown grants of fee simple interest continues to interfere with the plaintiffs' possession of the Cowichan Title Lands similar to how the dam's flooding interfered with the Cree Nation's possession of its reserve land in *Peter Ballantyne*.

[2973] As Herauf J.A. explained in *Peter Ballantyne* at para. 145, "when an object interferes with another person's land, a new cause of action arises each day". In the case before me, the interfering "object" is the Crown grants of fee simple interest to third parties, which continue to prevent the plaintiffs from possessing their lands. Accordingly, a new cause of action arises each day.

[2974] The plaintiffs contend that their claim is different from that in *Wewaykum*, which entailed a single historical breach that was not continuing. The plaintiffs' claim

is for Aboriginal title and infringement, where the title is unextinguished, and the infringement of that title is ongoing. I agree with the plaintiffs' position on this point. The Crown grants of fee simple interest are continual breach of the Cowichan's ongoing, constitutional entitlement to their Aboriginal title lands.

[2975] Interference with unextinguished Aboriginal title is different from a breach of fiduciary duty. In *Wewaykum*, "[t]here was no repetition of an allegedly injurious act ... The damage (if any) had been done": at para. 135. Further, as quoted above in *Peter Ballantyne*, Herauf J.A. noted:

> [90] ... As stated by the Chambers judge at para 77 of his reasons, "acceptance of the continuing fiduciary breach claim would allow the [Cree Nation] to skirt the issue of limitation periods, should they apply". This would be an undesirable result, as there is nothing in the circumstances to relieve the Cree Nation of the general obligation imposed on all litigants to sue in a timely way.

[2976] Both *Wewaykum* and *Peter Ballantyne* stand for the proposition that breaches of fiduciary duty cannot be characterized as "continuing". However, neither of these cases deals with ongoing infringement of Aboriginal title. I therefore find *Wewaykum* is distinguishable. I find *Peter Ballantyne* persuasive as it relates to Herauf J.A.'s analysis of continuing trespass.

[2977] BC also asserts that in *Rio Tinto*, the SCC rejected framing Aboriginal rights infringements as continuous breaches. Respectfully, I find this interpretation inaccurate, as the SCC's discussion was about the duty to consult with respect to asserted Aboriginal rights and whether prior and continuing breaches could trigger it. Specifically, the SCC noted:

> [48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. ...
>
> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of

> damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.
>
> [Italics in original; underlining added.]

[2978] As I previously explained in Part 8, the case before me is different from *Rio Tinto*, as the plaintiffs' claim is not grounded in the duty to consult. It concerns historic and ongoing infringements and past and present Crown powers and duties with respect to established Aboriginal title. The relief that BC says is time-barred is a declaration that Canada and Richmond's fee simple interests in the Cowichan Title Lands are defective and invalid, which, if granted, would flow from my findings that the Crown grants of fee simple interest are unjustifiably infringing and were made without authority. Considered in context, the determination in *Rio Tinto* that, in circumstances of a continuing breach, an adverse novel impact is required in order to trigger a duty to consult, is of little assistance in considering whether the Crown grants of fee simple interest are a continuing breach which give rise to a new cause of action every day.

[2979] At the time of trial, the lands were occupied, owned and leased, to the Cowichan's exclusion. Each day that occupation interferes with the Cowichan's rights.

[2980] I find that the Crown grants of fee simple interest, which are an ongoing infringement of the Cowichan's Aboriginal title, are a continuing breach in which a new cause of action arises each day that the Cowichan are kept out of their lands. As a result, the relief sought is not statute-barred.

[2981] In the alternative, in the event a continuing breach does not apply and declaration C is affected by limitation statutes, I will determine whether a limitation statute applies.

6. Does a Limitation Period Apply to the Declaration of Invalidity?

[2982] I next determine whether a limitation statute applies to declaration C. In a case such as this, which spans a period of time well over one hundred years, and

multiple statutory schemes respecting limitation periods, this task is not straightforward.

[2983] BC says the plaintiffs substantively raise a claim for recovery of land. BC submits that either s. 2 of the *Limitation Act, 1833* or s. 16 of the *Limitations Act, 1897* is applicable. BC says to the extent any consequential, personal remedies were not caught by the 19th century statutes, the claim is subject to the ultimate 30-year limitation period in the *Limitations Act, 1975* and the *Limitation Act, 1996*, which expired in 2005.

[2984] Both Richmond and BC concede the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act, 2012*] does not apply. Section 2(2) of the *Limitation Act, 2012* provides that it does not apply "to court proceedings based on existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed in the *Constitution Act, 1982*". Section 2(3) provides that those court proceedings are governed by the law that would have been in force with respect to limitation of actions if the *Limitation Act, 2012* had not been passed.

a) Limitation Act, 1833 and Limitations Act, 1897

[2985] As previously set out, I agree with BC that declaration C is substantively aimed at the recovery of land.

[2986] The *Limitation Act, 1833*, an English statute, was received into law in British Columbia on November 19, 1858: see *Law and Equity Act*, s. 2. The *Limitations Act, 1897* is a provincial statute that was in force in British Columbia from 1897 to 1975: see the discussion in *Wewaykum* at para. 125. Section 2 of the *Limitation Act, 1833* and s. 16 of the *Limitations Act, 1897*, which BC relies on as barring the relief sought, contain identical language, as follows:

> No person shall make an entry or distress or bring an action to recovery any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims ...

[2987] The plaintiffs challenge the applicability of these two limitation statutes on the basis that they purport to extinguish Aboriginal title.

[2988] Specifically, s. 34 of the *Limitation Act, 1833* expressly states that the right and title of the person seeking recovery of land is extinguished:

> ... at the Determination of the Period limited by this Act to any Person for making an Entry or Distress, or bringing any Writ of Quare impedit or other Action or Suit, the Right and Title of such Person to the Land, Rent, or Advowson for the Recovery whereof such Entry, Distress, Action, or Suit respectively might have been made or brought within such Period, shall be extinguished.
>
> [Emphasis added.]

[2989] Section 41 of the *Limitations Act, 1897* contains identical language to s. 34 of the *Limitation Act, 1833*.

[2990] In *Chippewas of Sarnia*, the Ontario Court of Appeal considered similar pre-Confederation limitation statutes in Ontario, which both provided for a 20-year limitation period with respect to actions for the recovery of land.

[2991] The Court in *Chippewas of Sarnia* found that neither statute applied because the Province had no jurisdiction to extinguish Aboriginal rights. The five-member panel said:

> [238] It is common ground that, prior to 1982, Parliament could unilaterally extinguish aboriginal title by statute. It is also agreed that Parliament could only do so, however, by the use of clear and plain language. While it would appear from recent decisions of the Supreme Court of Canada that, contrary to the motions judge's finding, Parliament's power in this regard extended to the extinguishment of treaty rights as well (see *R. v. Marshall*, [1999] 3 S.C.R. 456 at 496), it is not necessary to decide the matter because there is no dispute that, if Parliament had the power to unilaterally extinguish treaty rights, the legislation would also have to meet the "clear and plain" language test. In our view, it does not.

[2992] The Court went on at para. 239 to cite *Delgamuukw* SCC at para. 180, where Lamer C.J.C. said provincial laws of general application cannot extinguish Aboriginal rights. The standard laid down in *Sparrow* at 1099 was that to extinguish Aboriginal rights, "the Sovereign's intention must be clear and plain".

[2993] The Court in *Chippewas of Sarnia* then addressed the division of powers post-Confederation:

> [240] If the pre-Confederation statutes are considered to be continued as if they were laws of Parliament, of course no issue arises as to the constitutional division of powers. Nonetheless, these comments suggest that a mere inconsistency between a statute and an aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right.

[2994] In *Wewaykum*, the Court applied s. 16 of the *Limitations Act, 1897*, which I note has identical language to the *Limitation Act, 1833*. *Wewaykum* stemmed from a Federal Court action. The *Federal Court Act*, which does not apply here, incorporated the provincial limitation legislation into federal law.

[2995] The two bands in *Wewaykum* argued that the provincial limitation statutes did not apply to their claims of possession regarding reserve land because "provincial law cannot 'extinguish' the Indian interest, which is a matter of exclusive federal legislative competence": at para. 115. In response, Binnie J. stated at paras. 115–116:

> [115] ... Section 9 of the B.C. *Limitations Act* provides for extinguishment of the cause of action, but, as stated, it applies as federal law.
>
> [116] Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional body, as it may from time to time exist ... This is precisely what Parliament did when it enacted what is now s. 39(1) of the *Federal Court Act*.

[2996] While Binnie J. was referring to s. 9 of the *Limitations Act, 1975*, he later found that the *Limitations Act, 1897* applied to the claims by virtue of the same reasoning. Justice Binnie noted the following in relation to the *Limitations Act, 1897*:

> [126] The B.C. *Statute of Limitations* prior to the 1975 amendments applied to bar actions in the Federal Court by virtue of s. 38(1) of the *Federal Court Act*, S.C. 1970-71-72, c. 1 (reproduced in R.S.C. 1970 (2nd Supp.), c. 10), which took effect on June 1, 1971, and prior to that s. 31 of the *Exchequer Court Act*, R.S.C. 1952, c. 98. ...

[2997] Applying s. 16 of the *Limitations Act, 1897*, Binnie J. found that the claims to possession were statute-barred, as they were not commenced within 20 years from the date on which their cause of action arose: at paras. 127–129.

[2998] Unlike in *Wewaykum*, in this case, both the *Limitation Act, 1833* and the *Limitations Act, 1897* apply as provincial legislation and not as federal legislation. Further, in *Wewaykum*, Binnie J. noted that s. 9 of the *Limitations Act, 1975* provides for extinguishment of the cause of action: at para. 115. Here, s. 34 of the *Limitation Act, 1833* and s. 41 of the *Limitations Act, 1897* deal specifically with extinguishment of right and title: “the right and title of such person to the land ... shall be extinguished”.

[2999] BC relies on *Samson First Nation v. Canada*, 2015 FC 836 [*Samson*], aff’d *Buffalo v. Canada*, 2016 FCA 223, leave to appeal to SCC ref’d, 37277 (9 March 2017) in which the Federal Court held that limitation periods do not expunge rights, but rather bar remedies based on those rights: at para. 129. This principle was reiterated in *R. v. Jim Shot Both Sides*, 2022 FCA 20, rev’d in part by the SCC in *Shot Both Sides*, where the Federal Court of Appeal held at para. 211: “The argument that a limitation period extinguishes the treaty right has a fundamental flaw; limitation periods speak only to when a right might be enforced.” The important distinction in this case is that the *Limitation Act, 1833* and the *Limitations Act, 1897* expressly provided for extinguishment of title.

[3000] The ability to extinguish Aboriginal rights and title is beyond BC’s jurisdiction. The plain language of these provisions purport to extinguish the right and title to land altogether. The Province has no jurisdiction to extinguish Aboriginal title, and therefore these statutes cannot apply to the plaintiffs’ claim.

[3001] The doctrine of interjurisdictional immunity prevents provincial laws of general application from applying if they would impair the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. In *Tsilhqot'in* SCC, McLachlin C.J.C. held that the *Sparrow* framework under s. 35 of the *Constitution Act, 1982* displaces the doctrine of interjurisdictional immunity for the purposes of determining the validity of provincial legislative incursions on Aboriginal title land. Provincial laws of general application apply, subject to the s. 35 *Sparrow* framework. This appropriately

balances the Aboriginal right with the power of the Province to regulate matters within its jurisdiction: at paras. 150–151.

[3002] However, both the *Limitation Act, 1833* and the *Limitations Act, 1897* predate s. 35 and purport to extinguish common law Aboriginal rights. As previously set out, it is my view that the doctrine of interjurisdictional immunity continues to apply to common law Aboriginal rights pre-1982, because that was prior to the obligation of the Crown to justify infringements under s. 35. I accept the view stated by Kent McNeil and Thomas Enns in "Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches" (2022) Osgoode Hall Law School of York University, Working Paper No. 336 at 24–25 ["Procedural Injustice"] about the extent to which the decision in *Tsilhqot'in* SCC altered the applicability of the doctrine of interjurisdictional immunity:

> Moreover, if interjurisdictional immunity protection for Aboriginal and treaty rights was made unnecessary by section 35, as the Court suggested, then the division-of-powers protection those rights enjoyed up to the enactment of that provision should not have been affected. Before April 17, 1982, provincial statutes of limitations that impinged on the Aboriginal and treaty rights within the core of federal section 91(24) would have had to be read down to avoid that effect. This follows from Chief Justice Lamer's decision in *Delgamuukw*. When the Supreme Court in *Tsilhqot'in Nation* relied on section 35 to remove constitutionally-recognized Aboriginal and treaty right from the protection of interjurisdictional immunity, surely the [Supreme Court] did not intend to reverse the earlier case law relied upon by Lamer CJ in *Delgamuukw*.
>
> [Footnotes omitted.]

[3003] I also note that BC does not argue that provincial limitation statutes extinguish Aboriginal rights.

[3004] In sum, I find that the *Limitation Act, 1833* and the *Limitations Act, 1897* do not apply because extinguishment is beyond the jurisdiction of BC.

[3005] The plaintiffs also argue that the *Limitation Act, 1833* cannot apply to their claim, as it was inapplicable to the local circumstances when it was received into law in British Columbia. They further argue that the *Limitations Act, 1897* is also inapplicable because it is substantially the same as the *Limitation Act, 1833*, and

there is nothing in it that would extend the limitations regime to Aboriginal title claims.

[3006] Because I find that neither the *Limitation Act, 1833*, nor the *Limitations Act, 1897* apply to the plaintiffs' claim, it is not necessary for me to consider the merits of this argument. For the same reasons, it is also not necessary for me to consider the plaintiffs' argument that the operation of the limitation periods under the *Limitation Act, 1833* and the *Limitations Act, 1897* were postponed because of concealed fraud.

[3007] Lastly, BC pleaded s. 3 of the *Limitation Act, 1623* (U.K.), 21 Jas. 1, c. 16, but indicated in its final written submissions that the Court need not address it because either the *Limitation Act, 1833* or the *Limitations Act, 1897* is the relevant act. In written reply, BC submitted that if the Court considered the plaintiffs' arguments regarding the constitutional applicability of those statutes, it would become necessary to consider the *Limitation Act, 1623* but provided little in the way of submissions. I disposed of BC's limitations defence on other grounds, but considered the applicability of the *Limitation Act, 1833* and the *Limitations Act, 1897* as these issues were fully argued before me. As my findings about the inapplicability of those acts are made in the alternative, it is not necessary to address the *Limitation Act, 1623*.

b) Limitations Act, 1975 and Limitation Act, 1996

i. Trespass

[3008] BC and Richmond also rely on the *Limitations Act, 1975* and the *Limitation Act, 1996*. Unlike the *Limitation Act, 1833* and the *Limitations Act, 1897*, these statutes expressly extinguish causes of action, not interests in land: see *Limitations Act, 1975*, s. 9; *Limitation Act, 1996*, s. 9; *Wewaykum* at para. 115.

[3009] The plaintiffs alternatively claim that if these statutes apply, the exception for trespass in s. 3(3)(a) of the *Limitations Act, 1975* and s. 3(4)(a) of the *Limitation Act, 1996* applies. Relying on *Peter Ballantyne*, the plaintiffs say the Cowichan's

dispossession from their land amounts to a continuing trespass, interfering with their right to use the lands.

[3010] BC argues that the plaintiffs have not brought a claim for trespass. They only plead it in their reply submissions. Therefore, the exception cannot apply. However, if this Court finds otherwise, BC states that the plaintiffs' claim cannot be characterized as trespass. BC says the trespass exception in the *Limitations Act, 1975* and the *Limitation Act, 1996* do not apply to claims where the substance is a challenge to another party's legal right of possession.

[3011] I address the pleadings issue first. I agree with BC that the plaintiffs only raised the claim of trespass in response to BC and Richmond's reliance on the limitation statutes. However, the plaintiffs' trespass reply pleading has been known to the defendants since September 2015, well before trial. Accordingly, I do not see a trial fairness issue.

[3012] The trespass exceptions in the *Limitations Act, 1975* and the *Limitation Act, 1996* contain essentially identical language.

[3013] Section 3(3)(a) of the *Limitations Act, 1975* states that limitation periods do not apply to "an action for possession of land where the person entitled to possession has been dispossessed in circumstances amounting to trespass".

[3014] The Federal Court in *Mathias* at para. 760 explained that the trespass exception in s. 3(3)(a) of the *Limitations Act, 1975* applies only if three elements are met:

a) the plaintiff was entitled to possession of the land in question;

b) the plaintiff was dispossessed of the land; and

c) the dispossession occurred in circumstances amounting to trespass.

[3015] The plaintiffs submit that the above three elements are met because:

a) they are entitled to possession of the Cowichan Title Lands;

b) they were dispossessed of physical possession by the Crown through the issuance of the Crown grants; and

c) this dispossession amounts to trespass because the Crown grants were made without statutory and/or constitutional authority (i.e., without legal right), as the Cowichan had unextinguished Aboriginal title to the land.

[3016] The first two elements are met; I agree with the plaintiffs' first two assertions. They have Aboriginal title to the Cowichan Title Lands which confers the right to exclusive use and occupation: *Delgamuukw* SCC at para. 117. Further, they were dispossessed of their land through the issuance of Crown grants, and they no longer have physical possession nor access to the Cowichan Title Lands.

[3017] However, it is less clear whether the third element is met. The question turns on whether trespass in this context requires a physical act, or whether the issuance of legal instruments (in this case, the Crown grants) which resulted in dispossession, amounts to trespass.

[3018] In *Mathias*, the Burrard Indian Band argued that s. 3(3)(a) of the *Limitations Act, 1975* applied to their action for possession of land because:

> [761] ... by denying the Burrard the use and benefit of the Reserve by not recognizing its reserve interest after 1923, the Crown and/or the Squamish engaged in conduct "amounting to trespass", as described in section 3(3)(a) of the *Limitation Act*. They relied on a number of definitions of trespass. However, in my view, the one taken from Salmond and Heuston, *The Law of Torts*, is the most relevant. It reads (at p. 46):
>
> > The trespass to land is committed by entering upon, remaining upon or placing or projecting any object upon land in the possession of another without lawful justification.

[3019] The Court noted that this definition suggests that trespass is "a physical act". However, when the Burrard was allegedly "dispossessed" of their interest in the reserve land, the Crown was not in physical possession of it, and so, the Crown

could not have been a trespasser at that time: *Mathias* at para. 762. Further, the above definition includes the notion of physical trespass. Accordingly, in the circumstances (i.e., in the *Limitations Act, 1975*) the Court concluded that possession must mean "physical possession": *Mathias* at para. 764.

[3020] In *Mathias*, there was no evidence that the Burrard lived on or used the reserve land at the material time. Therefore, the Court concluded that they could not have been "dispossessed in circumstances amounting to trespass" as described in s. 3(3)(a) of the *Limitations Act, 1975*: at para. 764.

[3021] *Mathias* indicates that the trespass exception requires the act of trespass as well as the plaintiff's possession to be physical in nature.

[3022] In *Peter Ballantyne*, the Saskatchewan Court of Appeal accepted the following definition of trespass: "the act of entering upon land, in the possession of another, or placing or throwing or erecting some material object thereon without the legal right to do so": at para. 128. Accordingly, BC argues that the trespass exception does not apply to claims disputing another person's legal right of possession to land. Like *Mathias*, this definition suggests that trespass is a physical act.

[3023] As described above, in *Peter Ballantyne*, the Court found that the flooding of the Cree Nation's reserve resulted in a continuing trespass each day it continued: at paras. 143, 265. The Court's finding also supports the notion that trespass is a physical act. There was a physical object (i.e., water) interfering with possession.

[3024] The SCC in *Wewaykum* concluded that none of the exceptions in the *Limitations Act, 1975* applied: at para. 132. BC argues that since *Wewaykum* is analogous to the Cowichan's case, the trespass exception should similarly not apply here. The plaintiffs argue it is not analogous because *Wewaykum* concerned equitable claims for possession of reserve land and compensation for breach of fiduciary duty. Neither Indigenous group in *Wewaykum* brought a claim for trespass

against the Crown nor did they argue that their claim fell within the trespass exception.

[3025] Although the SCC in *Wewaykum* concluded none of the exceptions to the 30-year ultimate limitation period applied, the SCC did not specifically address the trespass exception.

[3026] In any event, as explained above, the facts and issues in *Wewaykum* differ significantly from those in this case.

[3027] In *Costello v. Calgary (City)*, 163 A.R. 241, 1995 CanLII 9302 (Q.B.) [*Costello* ABQB], rev'd in part on other grounds 1997 ABCA 281 [*Costello* ABCA], leave to appeal to SCC ref'd, [1997] S.C.C.A. No. 566, the plaintiffs lost possession of land in 1974, which arose from a purported expropriation in 1972 by the City of Calgary: at para. 1. In 1983, the SCC declared that the expropriation was void and of no force and effect, as the City failed to comply with certain statutory procedures: see *Costello and Dickhoff v. Calgary (City)*, [1983] 1 S.C.R. 14, 1983 CanLII 137. After this decision, the plaintiffs brought an action on the basis that the City's occupation of their land amounted to trespass.

[3028] Justice Rooke found that the plaintiffs were entitled to damages for trespass. The City had no lawful authority for its taking of title or possession of the land since the expropriation was "void and of no force and effect": *Costello* ABQB at paras. 12, 32, 49.

[3029] In making this finding, Rooke J. stated the following:

> [45] (1) A purported expropriation by an authority authorized to do so, but who does so without strict compliance with the statutory procedures required, unless expressly or impliedly consented to by the owner, resulting in a declaration of a void expropriation, constitutes an unlawful entry on land, and, in effect, a conversion, which constitutes in law, a trespass to land, if it interferes with the owner's rights and prevents the owner dealing with it or using it as if owned. This is because not only is physical possession of the land taken (in due course), but even before that, "possession" of the title is taken, which recognizes an intention to physically possess the land and the exercise of control over, or interference with possession and use of the land (as purported owner) to the exclusion of all others, including the former

> owner. This is even though physical possession of the land itself may not be taken (although taking physical possession forcefully or by acquiescence of the former owner would certainly also constitute trespass to land). The only difference between possession of the title only, and physical possession of the land, is one of a quantum of damages.
>
> [Emphasis added.]

[3030] The Alberta Court of Appeal upheld Rooke J.'s finding on trespass, noting that "a trespass occurs if an authority takes possession of land pursuant to an expropriation that subsequently is determined to be invalid": *Costello* ABCA at paras. 5–6. The City argued that it enjoyed statutory authority to occupy the land until the expropriation was declared void by the SCC. However, the Court disagreed, stating: "As the City lacked authority to occupy the land from the outset, it was a trespasser": at para. 8.

[3031] The City further argued that the trespass was a mere "technical" trespass, since the expropriation failed for a technical reason in that it was contrary to the relevant expropriation statutory provisions. The Court disagreed:

> [10] ... I nevertheless resist characterizing the trespass as being merely "technical". The City was in possession of the property for nearly a decade, during which time it leased it to a third party for profit. At the same time, the Costellos [landowners] were excluded from their land and were denied an opportunity to earn profit on it. There is nothing "technical" in those facts.

[3032] The plaintiffs also rely on *Skway Indian Band Council et al. v. James et al.*, 2005 BCSC 300 [*Skway*]. In the 1980s, the Skway Indian Band gave the defendant financial assistance to build a home on the reserve: at paras. 5–7. Skway later sought a writ of possession for the land, claiming it was never lawfully allotted to the defendant: at paras. 23–24. The defendant argued that the *Limitation Act, 1996* barred the action: at para. 26.

[3033] The Court found that the instrument purporting to grant the defendant exclusive possession of the land was *ultra vires* Skway's authority, and it conferred no right of possession on the defendant: *Skway* at para. 30. Skway had surrendered the lands to the Crown in the 1950s for leasing purposes. Accordingly, the lands ceased to be part of the reserve under the *Indian Act*; Skway did not have capacity

to allot the land to the defendant: at para. 27. The defendant was therefore unlawfully in possession, and the Court granted the writ. The claim was not precluded by the *Limitation Act, 1996*. Because the possession was unlawful, this amounted to trespass: at para. 35.

[3034] I find that the trespass exception in limitation statutes can apply to claims disputing another person's legal right of possession to land. In my view, the facts in *Costello* ABQB and *Skway* are more akin to this case than *Mathias* and *Peter Ballantyne*. The latter two cases suggest that trespass may require a physical act. However, the former two cases demonstrate that depending on the circumstances, the test may instead be met through an unlawful act, which is what occurred here.

[3035] The plaintiffs are entitled to possession based on their Aboriginal title, and have been dispossessed of their land. The dispossession occurred in circumstances amounting to trespass because the Crown grants were made, in most instances, without statutory authority, and in all instances, without constitutional authority (i.e., without legal right).

[3036] I therefore find that the trespass exception in s. 3(3)(a) of the *Limitations Act, 1975* and the trespass exception in s. 3(4)(a) of the *Limitation Act, 1996*, apply. This means that the plaintiffs' claim is not governed by a limitation period, and the relief sought concerning declaration C is not time-barred.

ii. General Limitation Period and Postponement Due to Fraud

[3037] As a further alternative finding, if the plaintiffs' action does not fit within the trespass exception, then the general limitation period in the basket clauses in the *Limitations Act, 1975* (s. 3(4)) and the *Limitation Act, 1996* (s. 3(5)) applies. In both statutes, the basket clause stated, in similar terms, that any action not specifically provided for may not be brought after the expiration of six years after the date on which the right to do so arose.

[3038] The *Limitations Act, 1975* and the *Limitation Act, 1996*, in their respective ss. 8, both contained an ultimate limitation period of 30 years. Section 8 of the

Limitations Act, 1975 stated “no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose.” Although redrafted somewhat, s. 8 in the *Limitation Act, 1996* was effectively the same. British Columbia submits that any consequential, personal remedies sought by the plaintiffs that are not barred by the 19th-century statutes are barred under the general (six year) or ultimate (30 year) limitation periods and expired by 2005.

[3039] Per ss. 14(1) and (2) in both the *Limitations Act, 1975* and the *Limitation Act, 1996*, both Acts apply to actions that arose before July 1, 1975 that were not statute-barred on that date.

[3040] The plaintiffs argue that if s. 3(4) of the *Limitations Act, 1975* or s. 3(5) of the *Limitation Act, 1996* apply, then the limitation period has not expired because their cause of action arose on December 11, 1997 with the release of *Delgamuukw* SCC. The plaintiffs say no right to bring an action for infringement of Aboriginal title existed prior to that date. There was no recognition that Aboriginal title in British Columbia was not extinguished, and therefore, the Cowichan could not sue for a declaration of title and infringement until the date of that judgment. The plaintiffs submit that the case law is well-established that the phrase “right to do so arose” means the date on which all the elements of the cause of action came into existence: *Novak* at para. 68; *Bera v. Marr*, 27 D.L.R. (4th) 161, 1986 CanLII 173 (B.C.C.A.). However, the plaintiffs say this includes a collateral right to bring an action in connection with those facts, and that the right to bring an action for Aboriginal title and infringement did not come into existence until *Delgamuukw* SCC was decided in 1997.

[3041] Additionally, the plaintiffs say the limitation period was postponed due to equitable fraud on the part of colonial officials. Section 6(3)(d) of both the *Limitation Act, 1975* and the *Limitation Act, 1996* provide the running of time with respect to the limitation period may be postponed for actions based on fraud and deceit. The plaintiffs say the claim was not discoverable until 2013, such that the general limitation period did not expire until 2019.

[3042] The plaintiffs' position rests, as a starting point, on when the right to bring the cause of action arose. Accordingly, I first consider their submission that a right to bring the action did not arise until *Delgamuukw* SCC was decided in 1997.

[3043] The plaintiffs submit that *Calder* did not answer whether Aboriginal title was extinguished in British Columbia. Three justices found that Aboriginal title was extinguished, and three found that it was not. I agree that until *Delgamuukw* SCC, the law was unclear on this point. However, I find that it was still open to the plaintiffs to advance their claim as the plaintiffs did in *Delgamuukw* SCC.

[3044] The Court of Appeal in *Edgeworth Construction Ltd. v. Thurber Consultants Ltd.*, 2000 BCCA 453 at paras. 28–29, leave to appeal to SCC ref'd, [2000] S.C.C.A. No. 503, rejected the notion that changes in the law could revive a cause of action. This would render limitation periods virtually meaningless and manifestly unfair. The would-be plaintiff who sues immediately would have their action dismissed, while the one that waits for a change in law to sue would acquire an action.

[3045] The Federal Court of Appeal came to a similar conclusion in *Peepeekisis First Nation v. Canada*, 2013 FCA 191 at para. 50. The Court considered the argument that Indian bands have only been able, practically, to exercise their legal rights with respect to Crown breaches of its fiduciary duty since *Guerin*. The Court agreed that prior to *Guerin* the so-called "political trust" theory of the Crown-Indigenous relationship made it difficult for First Nations to resort to the courts to pursue claims. Still, since *Guerin*, the SCC has "stated that limitation periods apply to such a claim from the discovery of the material facts underlying it (*Wewaykum*; *Lameman*)": at para. 50 (emphasis added).

[3046] In light of the jurisprudence, I reject the plaintiffs' submission that no limitation period could begin to run until the SCC released its reasons in *Delgamuukw* SCC.

[3047] The evidence supports a determination that the plaintiffs' cause of action was complete at least by 1914 when the last of the Crown grants in the Cowichan Title Lands was issued. There is therefore no need to consider whether the plaintiffs'

claim was postponed due to fraud and not discoverable for some period of time. Even if it had been, the 30-year ultimate limitation period would bar the plaintiffs' claim as of 2005.

c) Summary

[3048] I found that declaration C regarding the validity of Canada and Richmond's fee simple titles is not statute-barred owing to continuing breaches.

[3049] I summarize my alternative findings pertaining to declaration C as follows:

1) The *Limitation Act, 1833* and the *Limitations Act, 1897* do not apply because they purport to extinguish Aboriginal title. Extinguishment is beyond BC's jurisdiction.

2) The *Limitations Act, 1975* and the *Limitation Act, 1996* are applicable. The trespass exceptions in s. 3(3)(a) of the *Limitations Act, 1975* and s. 3(4)(a) of the *Limitation Act, 1996* apply to the plaintiffs' claim as they were dispossessed of their land in circumstances amounting to trespass. Accordingly, the relief sought is not time-barred.

3) In the further alternative, the plaintiffs' cause of action did not arise only when *Delgamuukw* SCC was released.

7. Constitutionality of Limitation Acts in Aboriginal Rights Cases

[3050] In the plaintiffs' third further amended reply, they make four constitutional arguments. The plaintiffs say any limitation period cannot bar their claims because to do so would be:

1) inconsistent with Article 13 of the *BC Terms of Union*;

2) *ultra vires* provincial jurisdiction under the *Constitution Act, 1867*;

3) inapplicable by virtue of the doctrine of interjurisdictional immunity based on s. 91(24) of the *Constitution Act, 1867*; and

4) an unjustifiable infringement of their Aboriginal title and of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

[3051] In *Shot Both Sides*, the SCC stated:

> [60] ... Although the constitutionality of applying limitations statutes to Aboriginal right and treaty claims was never addressed in these authorities, [*Manitoba Metis*, *Lameman*, *Wewaykum*] they recognized that such claims are subject to the general limitation periods of the province in which the action was commenced if captured by the respective limitations statute (Woodward, at § 20:18; J. T. S. McCabe, *The Law of Treaties Between the Crown and Aboriginal Peoples* (2010), at p. 421).
>
> [Emphasis added.]

[3052] This passage leaves the door open on whether it is constitutional to apply limitation statutes to Aboriginal right and treaty claims.

[3053] The plaintiffs provided written submissions on some of the above constitutional arguments, and BC provided written submissions in reply. In their oral submissions, the plaintiffs' acknowledged that these were alternative arguments. They did not serve a notice of constitutional question, nor do they seek an order that all or part of a limitation statute be struck down as unconstitutional.

[3054] Above, I addressed some of the plaintiffs' challenges to the applicability of certain statutes as being outside the jurisdiction of BC. The argument hinges on whether the limitation statutes extinguish rights rather than remedies. BC had notice of the plaintiffs' position since it amended its reply in November 2020. While the notice requirements under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, were not strictly met, there is no prejudice to the Attorney General as the Province was on notice through the pleadings, the issue has been fully argued by the Province, and my findings are made in the alternative. This is distinguishable from the facts in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, 1997 CanLII 366, where prejudice to the Attorney General was established. Further, the Court in that case contemplated that there may be cases in which the failure to serve written notice is not fatal because there has been *de facto* notice: at para. 54. In my view, this is such a case.

[3055] I do not address the plaintiffs' constitutional challenges further, as this is not necessary to determine the issues. I now analyze the equitable defences as raised by BC and Richmond.

C. LACHES AND *BONA FIDE* PURCHASER FOR VALUE WITHOUT NOTICE

1. Overview

[3056] BC and Richmond advance the defences of *bona fide* purchaser for value without notice and laches to the plaintiffs' claim.

[3057] Richmond argues that it is a *bona fide* purchaser for value without notice of the plaintiffs' Aboriginal title. Richmond says this defence is applicable to Aboriginal title, which it submits is a *sui generis* property interest that imbues many equitable principles.

[3058] Richmond also argues the defence of laches applies to the declaration of Aboriginal title and declaration that the fee simple interests in the Richmond Tl'uqtinus Lands are defective and invalid. Richmond argues that these two declarations are barred because the plaintiffs have unjustifiably delayed bringing their claim.

[3059] BC invokes the defence of *bona fide* purchaser for value on behalf of numerous third parties (i.e., private fee simple title holders within the Claim Area), and says those parties were good faith purchasers for value. BC does not invoke the defence on its own behalf as it is neither a purchaser nor an owner of any of the dry land or existing fee simple titles in the Claim Area. Rather, BC says the defence of good faith purchaser for value protects innocent third party purchasers and in this case speaks to the equities the Court must consider.

[3060] The same goes for the defence of laches. BC does not rely on laches for itself, as BC admits that it has not changed its position in reliance on the actions of the Cowichan. Instead, as above, BC says it does not raise this equitable doctrine as

a defence applicable to the Crown directly, but rather as principles that must weigh heavily in the balance in the exercise of the Court's remedial discretion.

[3061] With respect to the defence of *bona fide* purchaser for value, the plaintiffs say the court must exercise caution in considering whether to expand the application of the defence to defeat Aboriginal title. The plaintiffs deny that Richmond is a *bona fide* purchaser for value. They say this defence does not apply to *sui generis* constitutionally-protected Aboriginal rights. Alternatively, Richmond had notice of (or was wilfully blind to) Cowichan's claim before acquiring the at-issue lands.

[3062] The plaintiffs submit that laches does not apply to the declarations because: 1) their claim is not an equitable one; and 2) laches cannot be used to defeat declarations that concern the honour of the Crown and constitutional rights and responsibilities.

[3063] Alternatively, if the defence of laches does apply, the plaintiffs say it does not bar their declarations because the elements are not made out. This is because: 1) there was no undue delay or acquiescence; and 2) neither Richmond nor BC have changed their position in reliance on Cowichan's conduct/delay in bringing their claim.

2. BC's Advancement of Bona Fide Purchaser for Value and Laches

[3064] Before I determine whether the defences apply, it is first necessary to address BC's position in invoking them, not on its own behalf, but on behalf of third-party landowners in the Claim Area. I find that BC cannot advance such defences on behalf of others. It would be unfair to private landowners for this Court to assess the availability of defences without them having an opportunity to lead evidence and present their own arguments. Nor is it possible to consider the availability of these defences to private landowners in the absence of evidence. However, I accept BC's position that the impacts of declarations on third parties is a factor when considering whether to exercise discretion to grant relief, and to the extent BC's submissions relate to that exercise of discretion, I consider them in Part 11.

3. Availability of Equitable Defences in the Context of Declarations of Aboriginal Title

[3065] I first consider whether the equitable defences of *bona fide* purchaser for value without notice and laches are available to Richmond in this Aboriginal rights and title case.

a) Law

[3066] The *bona fide* purchaser for value without notice defence is an equitable one. Its effect is to strip away a plaintiff's pre-existing equitable proprietary rights that they had prior to the transaction by which a defendant acquired its legal proprietary rights: *i Trade Finance Inc. v. Bank of Montreal*, 2011 SCC 26 at para. 60, citing Lionel D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997) at 386.

[3067] Laches is also an equitable defence that applies to equitable claims only: *Saugeen First Nation* ONSC at para. 1148. It requires a claimant to prosecute their claim without undue delay: *Manitoba Metis* at para. 145.

[3068] It is well established that declaratory relief is an equitable remedy and awarding such relief is at the discretion of the court: see *Chippewas of Sarnia* at para. 279. Likewise, equitable defences are available at the discretion of the court, not as of right.

[3069] There is some suggestion that, in recent years, courts have tended to downplay (and in some cases even disregard) the distinctions between legal and equitable rights. This is reflected in *Chippewas of Sarnia*, where the Court did not accept that a claim to Aboriginal title is strictly legal in nature and immune from the overriding principles of equity: at paras. 284, 290. The Court noted the SCC's rejection of "the traditional dichotomy between law and equity", and embraced the "modern conception of our private law as a fusion of equitable and legal principles": see paras. 289–290. The SCC's recognition that Aboriginal title is a legally enforceable right does not mean it is immune from the principles of equity: at para. 285. Rights of equitable origin are just as legally enforceable as rights flowing from the common law: at para. 285. The juridical character of Aboriginal title has been

influenced and shaped by equitable principles; for instance, the very nature of Aboriginal title gives rise to a fiduciary duty: at paras. 287–288.

[3070] The equitable defence of good faith purchaser for value protects the security of title to land acquired without notice of a claim: *Chippewas of Sarnia* at para. 303. The Court in *Chippewas of Sarnia* noted that the doctrine of laches has been applied in other cases to bar Aboriginal land rights claims: at para. 298. However, the Court observed that in claims of Aboriginal title, the court must approach the issue of delay with "extreme caution and with due regard to the nature of the right at issue": at para. 267. The Court continued:

> Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples.

[3071] In that case, the Court applied the defences of *bona fide* purchaser for value without notice and laches to the claim, because the Chippewas had accepted the terms of the transfer of their lands to a third party: at paras. 299, 302, 309. Two years later, the SCC cited *Chippewas of Sarnia*, noting that laches may bar claims of an Indian band in appropriate circumstances: *Wewaykum* at para. 110.

[3072] In *Manitoba Metis*, the SCC considered whether a declaration about the constitutionality of Crown conduct was barred by laches. The majority concluded that neither acquiescence on the part of the Métis, nor a change in Canada's position, were made out: at paras. 148-152. At para. 153, the majority observed:

> [153] This suffices to answer Canada's argument that the Métis claim for a declaration that the Crown failed to act in accordance with the honour of the Crown is barred by laches. We add this, however. It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional division of powers question. (See also *Attorney General of*

> *Manitoba v. Forest*, [1979] 2 S.C.R. 1032.) The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.
>
> [Emphasis added.]

[3073] More recently, in *Chippewas of Saugeen* ONSC, Justice Vella considered whether the defence of laches barred the Saugeen's claim for equitable relief as against the defendant landowners in relation to a treaty-protected reserve interest. She held that laches is only available as a defence to equitable claims and relief, including those brought by First Nations, such as for declaratory relief. She concluded that the defendants had not established acquiescence or that they had changed their position, and that the balance of justice favoured permitting Saugeen to pursue its claim: at paras. 645, 651, and 653. As previously set out, she also found that one of the landowners had established the constituent elements of the defence of *bona fide* purchase for value but determined that its application in the circumstances would work an injustice: at para. 603. Her determinations with respect to the availability of the *bona fide* purchase for value defence were upheld: *Chippewas of Saugeen* ONCA at paras. 233 and 241-243. The Court of Appeal concluded (at para. 241):

> There is no principled reason that a treaty-protected reserve interest of a First Nation should, in every case, give way to the property interest of a private purchaser, even an innocent, good faith purchaser for valuable consideration. Such an approach is inconsistent with this court's decision in *Chippewas of Sarnia*, fails to recognize the *sui generis* nature of Indigenous land interests, and would not move us closer to reconciliation.

b) Analysis

[3074] I previously described the nature of Aboriginal title, but it bears repeating that it is distinguishable from other estates such as fee simple. It is not a "normal" proprietary interest — it pre-dates Crown sovereignty, and its characteristics cannot be completely explained by reference to the common law or Indigenous legal systems. Aboriginal title has been described as a legal interest: *Guerin* at 385; *Tsilhqot'in* SCC at para. 69. It is also apparent that Aboriginal title is infused with

equitable principles, such that it is intertwined with the unique fiduciary duty the Crown owes to Indigenous peoples: *Tsilhqot'in* SCC at paras. 69, 74.

[3075] The *sui generis* nature of Aboriginal title, as a pre-existing interest in land, does not neatly fit into any one legal framework. It involves a nuanced approach, with reference to Indigenous laws, the common law, and equitable principles. This suggests that, in the context of Aboriginal title, it is not as simple as saying that an equitable remedy, such as declaratory relief, will be subject to equitable defences.

[3076] Meaningful reconciliation is to be achieved through negotiation and governments have a legal duty to negotiate ancestral land claims in good faith: see *Tsilhqot'in* SCC at paras. 17–18; *Manitoba Metis* at para. 137. This cannot occur "when the courts place the parties on an unlevelled playing field": Hamilton, "Private Property and Aboriginal Title" at 350. Further, "reconciliation should be the predominant policy to be considered when limitations statutes and laches are pleaded by the Crown": McNeil & Enns, "Procedural Injustice" at 55. The SCC in *Shot Both Sides* observed that declaratory relief has a "unique tenor" in Aboriginal and treaty rights cases because it is a means through which courts can foster reconciliation and promote restoring the nation-to-nation relationship: at para. 70. Accordingly, there are unique considerations when equitable defences are advanced in Aboriginal title cases, particularly when advanced by the Crown.

[3077] As quoted above, the majority in *Manitoba Metis* expressed doubt that the court could apply an equitable defence to defeat a claim for a declaration that the Constitution has not been fulfilled in line with the honour of the Crown: at para. 153. I agree with Richmond that there, the SCC was speaking specifically to a failure of the *Crown* to carry out its constitutional promise. Richmond is not the Crown. Additionally, while the majority in *Manitoba Metis* queried how a court could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution had not been fulfilled, it nonetheless considered the application of laches to the declaration on its merits and determined that it did not bar the relief: at paras. 145-152.

[3078] Although *Manitoba Metis* was decided in the context of a solemn constitutional obligation by the Crown to Métis people, which engaged the honour of the Crown, the decision militates towards a re-examination of the role of equity in Aboriginal title litigation given the SCC's statement, cited above, that "[i]t is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown": at para. 153. In that paragraph, the SCC called attention to its previous decision in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, 1993 CanLII 72, where Lamer C.J.C. noted that the doctrine of laches does not apply to a constitutional division of powers question.

[3079] There is uncertainty in the case law on whether the defence of laches applies to declarations of Aboriginal rights and title. In both *Chippewas of Sarnia* and *Wewaykum*, the defence of laches applied to the Indigenous groups' claims: *Chippewas of Sarnia* at paras. 297–302, 310; *Wewaykum* at paras. 110–111. However, only *Chippewas of Sarnia* dealt with Aboriginal title.

[3080] In *Wesley*, the Stoney Nakoda First Nations sought declarations of Aboriginal title and rights. Chief Justice Khullar (concurring in part) remarked that "[t]he question is open whether the defence [of laches] can apply in a constitutional aboriginal rights case as a matter of principle": at para. 255.

[3081] Further, the Court in *Saugeen First Nation* ONSC, referencing *Manitoba Metis*, explained that the doctrine of laches does not defeat a claim for a declaration of breach of the honour of the Crown: at paras. 1143–1147. There, Ontario accepted that laches does not defeat a claim for a declaration of Aboriginal title, based on para. 153 of *Manitoba Metis*: *Saugeen First Nation* ONSC at para. 1146.

[3082] As above, in the *Chippewas of Saugeen* proceedings, the doctrine of laches and *bona fide* purchaser for value were considered on their merits in the context of a treaty-protected reserve interest.

[3083] The granting of declaratory relief is itself an equitable remedy. However, Aboriginal rights are *sui generis*, and as such the court should consider the objectives of reconciliation when evaluating whether to exercise its discretion to accede to an equitable defence. This approach was endorsed in *Chippewas of Saugeen* ONCA at paras. 234-243, albeit in the context of the application of *bona fide* purchase for value to a claim for a treaty-protected reserve interest.

[3084] The jurisprudence militates against framing the defences of *bona fide* purchaser for value and laches in absolute terms, especially when the interests involve an Aboriginal right. Accordingly, I find Richmond may advance these defences in this case, and that in balancing the interests, the court should have regard to the principle of reconciliation in determining whether to exercise discretion to apply them.

[3085] I need not determine whether it is open to the Crown, in this case BC, to advance the defence of laches and *bona fide* purchase for value. To the extent BC has sought to advance these defences on behalf of private landowners, I found it would be unfair in the circumstances to consider them.

[3086] Therefore, in the context of this case, specifically in regard to Richmond, I now consider the *bona fide* purchaser for value and laches defences.

4. *Bona Fide* Purchaser for Value Without Notice

a) Law

[3087] To qualify as a *bona fide* purchaser for value, a person must acquire their interest in property by grant, rather than by operation of law: John McGhee & Steven Elliot, *Snell's Equity*, 34th ed. (London: Thomson Reuters, 2020) at 4-022 [*Snell's Equity*].

[3088] The defence requires more than "nominal consideration": Robert Chambers, *The Law of Property* (Toronto: Irwin Law, 2021) at 251 [*Law of Property*]; McGhee & Elliot, *Snell's Equity* at 4-022.

[3089] In *Saugeen First Nation* ONSC, the plaintiffs sought ownership over certain roads and road allowances owned by several municipalities. No breach of obligation was alleged against the municipal defendants: at para. 10. The municipalities relied on the *bona fide* purchaser for value defence. The Court noted that evidence of value must be particularized:

> [1276] SON submits that the municipal defendants are more properly characterized as volunteers, rather than purchasers, because they did not pay for the land when it was vested by statute in 1913. However, valuable consideration need not be exchanged on the date of the transfer, nor need it be money: M. McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis, 2014), at p. 1567. The municipalities had significant maintenance obligations imposed on them in relation to the roads and road allowances.
>
> [1277] An admission has been made about expenditures on maintenance. SON has admitted that from 1858, when the roads and road allowances first came under the jurisdiction of the municipal defendants, the municipal defendants have expended significant resources building roads and highways and maintaining and repairing them. A party who provides value in exchange for land ought not be viewed as a volunteer: *Benzie v. Hania*, 2012 ONCA 766, 112 O.R. (3d) 481, at para. 37.
>
> [1278] The municipal defendants therefore have a strong foundation for their claimed status as BPVs. However, the above admission only goes so far. At this stage, there is no breakdown of the expenditures by property, even at a high level. This is significant given the difference between the statutory maintenance obligations for opened roads and the lack of those obligations for unopened road allowances. SON has claimed beneficial ownership of many roads, including both opened and unopened road allowances.
>
> [Footnote omitted; emphasis added.]

[3090] I note that the availability of this defence in Aboriginal title cases was not challenged. Justice Matheson concluded that the municipalities had not established that they fell within the exclusion in the plaintiffs' statement of claim for *bona fide* purchasers for value, which recognized that a claim for beneficial ownership will be unsuccessful against a *bona fide* purchaser for value. However, they were granted leave to raise the issue again, at phase two of the litigation, should it proceed: *Saugeen First Nation* ONSC at para. 1289.

[3091] On appeal, the Court in *Chippewas of Nawash* ONCA dismissed the action against the municipalities on the basis that a constructive trust on the roads and

road allowances was not an appropriate remedy: at para. 275. The Court agreed with Matheson J. that deferral of the *bona fide* purchaser for value without notice issue was an appropriate exercise of discretion: at para. 254. However, the Court did not address whether the municipalities could be qualified as *bona fide* purchasers for value without notice.

[3092] The recipient of property must also have acted in good faith and without notice. The question is whether the circumstances known to a defendant should have led them to inquire into any competing interests: Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed. (Toronto: LexisNexis, 2022) at 2120–2121 [*Unjust Enrichment & Restitution*]. The purchaser must have had no notice of the equitable interest when they gave consideration for the conveyance: McGhee & Elliot, *Snell's Equity* at 4-027. *Black's Law Dictionary* provides the following definition of "notice":

> ... A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording.

See Bryan A. Garner, *Black's Law Dictionary*, 12th ed. (St. Paul, Minn.: Thomson Reuters, 2024).

[3093] Notice in the context of equity may take the form of actual, constructive, or imputed notice of an equitable interest: McInnes, *Unjust Enrichment & Restitution* at 2121–2123; McGhee & Elliot, *Snell's Equity* at 4-027; Bruce Ziff, *Principles of Property Law*, 7th ed. (Toronto: Thomson Reuters, 2018) at 522. I do not discuss imputed notice further, as it is not relevant in this matter.

[3094] A purchaser has actual notice where the equitable interest was within the purchaser's own knowledge. A person has actual notice if they were informed of the equitable interest (or its possible existence) at some point, even without knowing whether it really exists or if they have since forgotten: McGhee & Elliot, *Snell's Equity* at 4-027; Chambers, *Law of Property* at 252.

[3095] A purchaser will have constructive notice where the equitable interest would have come to their knowledge if proper inquiries had been made: McGhee & Elliot, *Snell's Equity* at 4-027; Chambers, *Law of Property* at 252. In *Law of Property* at 252, Chambers describes the general principle as follows:

> A person has *constructive notice* of something when they are treated as if they received actual notice even though they never did. ... Someone will have constructive notice of an equitable interest if a reasonable person in their shoes would have discovered its possible existence. What a reasonable person does depends on the circumstances.
>
> [Emphasis in original.]

[3096] The two main heads of constructive notice are: 1) the purchaser had actual notice the property was encumbered — constructive notice of anything the purchaser would have discovered if they had investigated the encumbrance; and 2) the purchaser deliberately or carelessly failed to make inquiries that a prudent purchaser would have made: McGhee & Elliot, *Snell's Equity* at 4-029. The existence of constructive notice depends on the nature of the property and the circumstances surrounding the transfer: McInnes, *Unjust Enrichment & Restitution* at 2122.

[3097] Wilful blindness with regard to the existence of an equitable interest is equivalent to actual knowledge of it: McGhee & Elliot, *Snell's Equity* at 4-028. *Paul First Nation v. K & R 2014 Inc.*, 2021 ABQB 32 provides the following helpful summary:

> [72] Wilful blindness occurs "where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant": *Sansregret v The Queen*, [1985] 1 SCR 570 at 584 [*Sansregret*]. Wilful blindness is "a subjective standard of fault that depends on the stranger's actual state of mind" rather than a failure to take reasonable steps to inform oneself of the existence of facts: *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v Garcia*, 2020 ONCA 412 at para 37 [*Caja Paraguaya*]; *R v Stewart*, 2020 ABCA 252 at para 56. A finding of wilful blindness can be made where a person "shut his eyes because he knew or strongly suspected that looking would fix him with knowledge": *R v Briscoe*, 2010 SCC 13 at para 21; *Caja Paraguaya* at para 35.

[3098] The Court in *Martin v. 11037315 Canada Inc.*, 2022 ONCA 322 [*Martin*] noted that in assessing whether the defendant there had actual notice, it was necessary to consider the inferences arising from the circumstances of the arrangement of the purchase, how it was handled, what the purchaser knew about the property, and the terms and conditions of sale: at para. 76.

[3099] It is open to a trier of fact to draw factual inferences from the evidence. These inferences must be reasonably and logically drawn from a fact or group of facts established by the evidence. As I stated in Part 5 of these reasons, however, an inference that does not flow logically and reasonably from established facts is considered conjecture and speculation: *Morrissey* at 209.

b) Analysis

[3100] BC granted the lands in question to settlers. As I found in Part 6, the Crown grants in Cowichan Title Lands were made without statutory (except the grant to CCLW Moody) and constitutional authority because they were appropriated Indian Settlement lands.

[3101] Richmond is now the registered owner of fee simple interests in respect of Lots E and K in Cowichan Title Lands.

[3102] The first question is whether Richmond was a purchaser for value.

[3103] As discussed in detail in Part 7 of these reasons, Richmond acquired these Lots through tax sales in the 1930s when they were put up for public auction because of delinquent municipal taxes. Richmond was declared the purchaser because there were no bids equal to or greater than the upset price. As a result, Richmond forwent the delinquent taxes owed to it. There is no evidence before me of the amounts owed to Richmond. Richmond suggests the number must be greater than zero, as the properties would otherwise not have been put up for public auction. It is open to me to conclude, as I do, that Richmond received these lands for nominal value that did not reflect the value of the land. The upset price was the total amount of the delinquent taxes (and associated enforcement costs and expenses).

[3104] I do not see forgoing the delinquent taxes as Richmond effectively paying that amount to 'purchase' Lots E and K amounting to due consideration. Instead, Richmond 'acquired' (not 'purchased') Lots E and K. These lands were vested to Richmond by operation of the *Municipal Act*. The details of this process are set out in Part 7, and I do not repeat them here. The municipality unavoidably took hold of the lands under the legislation, as long as the necessary bid was not elicited; it did not provide any consideration. I find that acquiring such land by operation of a statute is not a purchase for value for the purposes of the *bona fide* purchaser defence in this case.

[3105] For these reasons, I do not find Richmond was a purchaser for value of Lots E and K. This is a complete answer to Richmond's *bona fide* purchaser for value defence. However, I provide alternative findings as to whether Richmond acted in good faith and without notice, or was wilfully blind.

[3106] There is of course the issue of whether Richmond 'acted' at all in purchasing the lands, given that the land came to it by operation of statute. However, Richmond submits it effectively paid the amount of delinquent taxes to 'purchase' Lots E and K by accepting the lands in satisfaction of the tax debt, and that it was therefore a purchaser.

[3107] For the defence to apply, Richmond must have had no notice (either actual or constructive) of Cowichan's interest when it gave consideration for the conveyance. In regard to wilful blindness, Richmond must not, if it had become aware of the need for some inquiry, have declined to make such an inquiry.

[3108] When assessing whether Richmond had notice, the Court can make inferences and consider the totality of the circumstances surrounding the transaction: *Martin* at para. 76. The inferences must be reasonable and logical, based on the evidence.

[3109] Richmond presented evidence through testimony of senior staff going to notice of the plaintiffs' claim for more recent land acquisitions. However, Richmond

was unable to provide evidence on the issue of whether it had notice in the 1930s, at the time of Richmond's acquisition of Lots E and K.

[3110] The plaintiffs rely on evidence dating from on or before 1859 and into the 2000s, which they say leads to the conclusion that Richmond had notice of Cowichan's interest before its 'purchase', or was wilfully blind to this interest. However, the only evidence before me that is relevant to Richmond's knowledge of the claim at the time of its acquisition of Lots E and K is the 1859 Trutch survey. The other evidence speaks to what occurred decades after the acquisition of the Lots.

[3111] Trutch completed his survey of Lulu Island on September 30, 1859. It demarcated sections throughout Lulu Island. The sections identified on the Trutch survey also identified an "Indian Village", "Fishing Station", and "Indian trails". The plaintiffs submit that the Trutch survey formed the foundation for BC's land system, and that the sections are the same sections Richmond relied on for municipal planning, including tax sales. This is uncontested. The grants appear to be based on the same demarcated sections of Lulu Island surveyed by Trutch. This suggests that Richmond officials in the early years may have been aware of the Trutch survey. Given the limited evidence before me, with the exception of the Trutch survey, there is no indication that Richmond had knowledge of Cowichan's interest prior to recording an interest in Lots E and K. Nor is there sufficient evidence for me to conclude that Cowichan's interest would have come to Richmond's knowledge if proper inquiries had been made at the time. The same goes for the allegation of wilful blindness — the evidence before me does not indicate that Richmond became or reasonably would have become aware of the need for some inquiry, and declined to do so.

[3112] I find, based on the totality of the evidence before me, that Richmond did not have notice — actual or constructive — of Cowichan's interest in Lots E and K before it acquired those lands. I also conclude that it was not wilfully blind. Nevertheless, I find that this defence must fail because Richmond was not a

purchaser for value of Lots E and K. Accordingly, I now turn to Richmond's laches defence.

5. Laches

a) Law

[3113] A majority of the SCC in *Manitoba Metis* described the defence of laches as follows:

> [145] The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 76-80.

[3114] Further, as described by the SCC in *M.(K.)* at 77–78:

> ... there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[3115] Accordingly, there are two branches of laches: 1) plaintiff's acquiescence; and 2) defendant's reliance. If either is made out, laches can bar a claim in equity.

b) Analysis

i. Plaintiff's Acquiescence

[3116] Under the first branch, acquiescence will be made out where "the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver": *Wewaykum* at para. 111, citing *M.(K.)* at 76. Further, "there must be unreasonable delay coupled with acquiescence akin to waiver": *Saugeen First Nation* ONSC at para. 1183.

[3117] Richmond argues that the plaintiffs' delay in bringing their claim constitutes acquiescence because the evidence shows that they did not continuously oppose the issuance of Crown grants and the loss of the Lands of Tl'uqtinus. However, I agree with the plaintiffs that the Cowichan have been anything but silent regarding their dispossession from the Lands of Tl'uqtinus.

[3118] The following evidence establishes that there was no acquiescence on the part of the plaintiffs.

[3119] Since the late 1800s up until the filing of this action in 2014, the plaintiffs and their ancestors have continuously opposed the issuance of the Crown grants and complained about the loss of the Lands of Tl'uqtinus.

[3120] In 1909, Cowichan requested a Crown fiat to have their Aboriginal title case heard in court, but they were rejected. The Cowichan were barred from bringing their claim without a fiat until at least 1974, when the *Crown Proceedings Act*, S.B.C. 1974, c. 24 was enacted.

[3121] Even after 1974, the Cowichan were continuously pursuing and negotiating their Aboriginal title claim.

[3122] In the 1990s, the plaintiffs began pursuing their Aboriginal title claim within the BC Treaty Commission process.

[3123] In 2003, the plaintiffs filed a Writ of Summons to protect their interest in the Lands of Tl'uqtinus against limitation defences.

[3124] In 2007, the plaintiffs brought a judicial review application in relation to their interest on Lulu Island at Tl'uqtinus.

[3125] In 2011, the plaintiffs provided Canada with a letter setting out their historical use of the Claim Area seeking to substantiate their Aboriginal right.

[3126] In 2012, the plaintiffs filed a Federal Specific Claim about the Lands of Tl'uqtinus, and they provided Canada with a strength of claim submission in support of their Aboriginal rights.

[3127] In 2013, the plaintiffs formally demanded the return of the Federal Tl'uqtinus Lands from Canada.

[3128] I note again that the SCC has repeatedly emphasized that meaningful reconciliation is to be achieved through negotiation rather than in the courts: see *Shot Both Sides* at paras. 61, 71; *Delgamuukw* SCC at para. 186; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 24; and *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 47. I find that, based on the above evidence, this is what the plaintiffs have attempted to do for decades. They have relentlessly sought to resolve their claim in and out of court and through various processes.

[3129] Richmond also argues that the plaintiffs did not complain about the issuance of the Crown grants and the loss of the Lands of Tl'uqtinus with Richmond directly, which constitutes acquiescence. Based on the evidence of X'tli'li'ye, it was between 2007 and 2008 that the plaintiffs became aware that Canada owned their village lands. The plaintiffs submit they did not become aware of Richmond's ownership of Lots E and K until 2013. It is not clear to me on the evidence when they actually became aware.

[3130] As explained in *Saugeen First Nation* ONSC:

> [1156] The first branch of the laches defence has a significant knowledge requirement. It is not enough that a plaintiff knows of the facts that support a claim in equity. The plaintiff must also know that the facts give rise to the claim ... The knowledge of one's claim is measured by an objective standard.

[3131] The plaintiffs did file a Writ of Summons in 2003 claiming unextinguished Aboriginal title over a vast amount of land and water from the Gulf Islands to the Fraser River, including the Salish Sea and all the way up the Fraser River. However, viewed objectively, I find it is implausible that the plaintiffs knew of the facts that

would have given rise to their *site-specific* claim to the Lands of Tl'uqtinus prior to at least 2008. Prior to 2008, the plaintiffs did not have the requisite knowledge to acquiesce.

[3132] In 2013, the plaintiffs made a request to Richmond to access Lots E and K to conduct a heritage assessment/investigation. Mr. Eldridge was not permitted by Richmond to conduct work in Lot K, and so his observations of it were limited to surface features.

[3133] In 2014, the plaintiffs filed this action and amended their writ to add Richmond as a defendant before serving the writ.

[3134] A period of five or six years of inaction (i.e., from 2008 to 2013/2014) cannot, in my opinion, constitute an “unreasonable delay”, which is required for laches. Richmond’s argument that the plaintiffs’ lack of direct complaints to them constitutes acquiescence cannot stand.

[3135] Further, acquiescence depends on “knowledge, capacity and freedom” of the plaintiff: *Manitoba Metis* at para. 147. In this case, I find that the evidence of colonial disruption interfered with the Cowichan’s capacity and freedom to acquiesce.

[3136] From 1927–1951, the *Indian Act* prevented Indigenous people from hiring lawyers. As I previously explained, under the *Crown Proceedings Act*, the Cowichan could not legally bring their Aboriginal title claim without a Crown fiat until at least 1974. They requested a Crown fiat before that date but were denied.

[3137] Any delay in bringing their claim cannot be interpreted as acquiescence, as they legally did not have the capacity nor the freedom to bring such a claim for many years.

[3138] This is not a case like *Chippewas of Sarnia*, where laches applied because the Indigenous group “actively acquiesced in the transfer by seeking and receiving payment of the proceeds” of the lands: at para. 302. Here, the Cowichan were not involved in the issuance of Crown grants, nor did they seek or receive compensation

from such grants. Since at least the late 1800s, the Cowichan have been actively seeking recognition of their interests in the Lands of Tl'uqtinus.

[3139] Further, when considering the defence of laches, “the court must carefully consider the explanation for the delay with due regard for the historically vulnerable position of Indigenous peoples”: *Saugeen First Nation* ONSC at para. 1153 citing *Chippewas of Sarnia* at para. 267. Also, each case must be considered in its surrounding circumstances: *Saugeen First Nation* ONSC at para. 1154. *Manitoba Metis* emphasizes this consideration:

> [147] ... In the context of this case — including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants — delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver.

[3140] Here, I find that colonial disruption created enormous barriers to the Cowichan pursuing their claim. I heard evidence of the Cowichan enduring marginalization, discrimination, cultural genocide, poverty, and other social issues since Crown sovereignty. Given this historical context, I do not find that the plaintiffs acquiesced to the Crown grants.

[3141] My conclusion is further supported by *Saugeen First Nation* ONSC. There, the plaintiffs faced “significant systemic barriers” which impaired their ability to pursue litigation of their claim: at para. 1166. Some of these systemic barriers included the *Indian Act*, which prevented Indigenous peoples from accessing legal assistance, as well as the establishment of residential schools. These barriers substantially impaired the Indigenous group’s ability to bring their claim: at paras. 1167, 1179–1180. Ultimately, although “it took a very long time” for the plaintiffs in *Saugeen First Nation* ONSC to commence the litigation, this did not amount to acquiescence: at para. 1183. The same is true in this case. I review additional evidence of colonial disruption in Part 10 of these reasons which further supports my determination that the plaintiffs did not acquiesce.

[3142] Based on the above, I find that the first branch of laches is not made out.

ii. Defendant's Reliance

[3143] Under the second branch of laches, the Court considers whether there was any change in the defendant's position as a result of the plaintiff's delay: *Manitoba Metis* at para. 152. The question is whether the plaintiff "caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb": *Manitoba Metis* at para. 152, citing *M.(K.)* at 77.

[3144] Richmond only advances arguments on how it purchased six properties on Triangle Road and 14831 Steveston Highway between 1998–2014 in reliance on Cowichan's delay. However, I found that the Triangle Road properties and the 14831 Steveston Highway property are not part of the Cowichan Title Lands.

[3145] The only relevant lands are Lots E and K, which are part of the Cowichan Title Lands. Richmond, however, advances no laches arguments in relation to these properties. In any event, in relation to these lots, I find that Richmond did not alter its position in reliance on the Cowichan's delay nor would it be unjust to disturb the current situation. I come to this conclusion for two reasons.

[3146] Firstly, Richmond acquired Lots E and K through tax sales in the 1930s, and spent no money acquiring them, beyond forgoing some amount of taxes owing.

[3147] Secondly, based on the evidence before me, Lots E and K are mostly undeveloped, unoccupied, and unimproved. Specifically, Jason Ho, Manager of Richmond's Engineering Planning Section, explained that these lots are undeveloped, are used for diking purposes, and have diking on them. I describe the nature of Lots E and K in more detail in Part 11. My ultimate conclusion is that Lots E and K remain unoccupied and undeveloped except for the dike and possible improvements to it. There are no set plans for occupation.

[3148] This is not a situation like in *Chippewas of Sarnia* or *Wewaykum*, where in both cases, the second branch of laches was made out. In *Chippewas of Sarnia*, third parties had bought and sold property in the claim area for 150 years, spending

millions of dollars in improvements. The landowners had relied on the Crown patent of the original conveyance of the lands as a valid source of title: at paras. 274, 299. In *Wewaykum*, the two Indian bands claimed each other's reserve land. The Indian bands, relying on the *status quo*, each improved their reserve, on the understanding the other band made no claim to it. Accordingly, it would be unreasonable to prosecute the action: at para. 111.

[3149] In the present case, Richmond has made minimal improvements to the lands in question, and acquired them through forgoing an unknown amount of unpaid property taxes. I therefore find that Richmond has not in any material way changed its position in reliance on any delay on the part of the plaintiffs, and so the second branch of laches is not made out.

6. Conclusion

[3150] In relation to the *bona fide* purchaser for value defence, Richmond was not a purchaser for value of Lots E and K. Alternatively, if I am wrong, I find that Richmond acted in good faith and without notice of Cowichan's Aboriginal title claim prior to recording an interest in Lots E and K, and was not wilfully blind.

[3151] In relation to the laches defence, the elements of laches are not made out, as there was no acquiescence on the part of the plaintiffs, and Richmond did not change its position in reliance on the plaintiffs' delay in bringing their claim.

[3152] In the next Part of these reasons, I assess the plaintiffs' sought Aboriginal fishing rights.

PART 10 ABORIGINAL RIGHT TO FISH THE SOUTH ARM FOR FOOD

A. INTRODUCTION

1. Positions of the Parties

[3153] The plaintiffs claim an Aboriginal right to fish the south arm of the Fraser River for food within the meaning of s. 35(1) of the *Constitution Act, 1982*. They say the Cowichan had a practice, tradition, or custom of fishing the south arm of the

lower Fraser River for food prior to and at European contact. This was integral to their distinctive culture. I found that the Cowichan were an Indigenous people prior to and at the time of European contact in the early 1790s. They are continued by the descendants of the four plaintiff bands and the Lyackson. I already found that as the modern-day successor groups to the Cowichan as an Indigenous people, the four plaintiff bands and the Lyackson are the proper rights and title holder in this case. Further, the plaintiffs submit the Cowichan reasonably continued this culturally integral practice, tradition, or custom after European contact, and continuing through the late 1800s and reasonably thereafter in the circumstances of Crown and colonial disruption.

[3154] Canada admits the plaintiffs' ancestors had a pre-contact practice of fishing for food in the south arm of the Fraser River. At the end of trial in closing argument, Canada admitted the plaintiffs have established integrality of that practice.

[3155] Canada submits that whether or not the plaintiffs have also established continuity will turn on the Court's factual findings with respect to the issue of permission. Canada says if the Court finds that the plaintiffs' ancestors' pre-contact practice of fishing in the Fisheries Claim Area was conditional on receiving permission from Musqueam or TFN, then there is insufficient continuity between that ancestral practice and the unconditional modern practice to establish rights. Canada defines the Fisheries Claim Area as the south (i.e., "main") arm of the Fraser River, from the mouth of the river at the Salish Sea up to the point where the south and north arms of the Fraser River meet, northeast of Annacis Island.

[3156] Canada admits that the four plaintiff bands and Lyackson are the proper modern rights holders for any Aboriginal rights and title held by the 11 local groups. Canada takes no position on whether the 11 local groups composed a single rights-holding collectivity at first contact. As above, I found in Part 5 that they did.

[3157] If the Court finds that permission was not historically required, then Canada submits the plaintiffs have established continuity and, with it, have established rights.

[3158] Canada seeks to restrict those rights to Aboriginal rights to fish for all species of fish for food in the Fisheries Claim Area between June 15 and October 15.

[3159] Musqueam asserts that the 11 local groups harvested fish on the south arm of the Fraser River with the permission of their hən̓q̓əmin̓əm̓-speaking kin, which includes Musqueam. When the 11 local groups did fish the south arm, it was for sockeye and pink salmon. Musqueam submits that the plaintiffs claim a right which is not a continuation of a pre-contact practice that was integral to the distinctive culture of the 11 local groups. Rather, the constitutional right the plaintiffs seek to have recognized breaks from the historic practice, and is qualitatively and quantitatively different from it.

[3160] TFN submits that the evidence does not establish that the plaintiffs' ancestors were fishing the south arm of the Fraser River at the time of contact. To the extent they did fish the south arm, they did so with permission. TFN further submits that the Cowichan Nation was not and is not a rights-holding collective.

2. Preliminary Issue

[3161] On October 27, 2023, two weeks before the conclusion of the trial, the plaintiffs informed the Court that the plaintiffs and Canada had reached an agreement regarding the claimed infringements of the plaintiffs' Aboriginal fishing right. They said that, while it is still necessary for the Court to determine whether to declare the existence of the plaintiffs' Aboriginal right to fish the south arm of the Fraser River for food, it is no longer necessary for the Court to determine the infringements of Aboriginal fishing rights alleged by the plaintiffs, and consequently the justification alleged by Canada.

[3162] Musqueam and TFN objected, arguing that, if the plaintiffs were no longer alleging that their claimed Aboriginal food fishing right has been infringed, then it would no longer be open to the Court to make a finding with respect to the claimed Aboriginal fishing right, citing *Cheslatta*, *Haida Nation* BCCA, and *Dzawada'enuxw First Nation v. Canada*, 2021 FC 939 [*Dzawada'enuxw*]. Musqueam argued alternatively that, if the Court does not find that the claim for fishing rights should be

withdrawn or struck, the Court should instead exercise its discretion not to issue declaratory relief, again referring to *Cheslatta*.

[3163] The effect of accepting this submission would be that, once an Aboriginal right or title claim is made by an Indigenous nation, they would be discouraged from negotiating issues of infringement with the Crown during trial for fear of jeopardizing the balance of the claim. This alone provides a good reason not to accede to these arguments. Accepting these submissions would undermine the aim of reconciliation. Reconciliation is, of course, the animating purpose of s. 35: *Van der Peet* at paras. 31, 42–43; *R. v. Sappier; R. v. Gray*, 2006 SCC 54 at para. 22 [*Sappier; Gray*]; *Desautel* SCC at paras. 22–33; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 12 [*Lax Kw'alaams*].

~~[3164]~~ A clear priority in favour of negotiation over litigation as a means of achieving reconciliation exists within the jurisprudence: see *Haida* SCC at para. 14; *Shot Both Sides* at paras. 61, 71; *C-92 Reference* at paras. 77, 90; *Desautel* SCC at para. 87; *Delgamuukw* SCC at para. 186.

[3165] Musqueam and TFN submit that, despite the extensive efforts by all the parties in this case to bring focus to the Cowichan claims of Aboriginal fishing rights through the pleadings and at trial, it is now no longer open to the Court to make a finding with respect to the claimed fishing rights because of Canada and the plaintiffs' agreement on infringement.

[3166] Musqueam refers to *Whiteduck v. Ontario*, 2023 ONCA 543 [*Whiteduck*], leave to appeal to SCC ref'd, 40955 and 40954 (25 April 2024), for the proposition that reconciliation requires consideration of all Indigenous parties before the Court.

[3167] In my view, the reasoning within *Whiteduck* would appear to militate against striking the claim for Aboriginal fishing rights because of the agreement on infringement. The Ontario Court of Appeal reversed a decision to strike parts of the Algonquins' claim to declaratory relief at the pleadings stage. This case pitted the

Algonquins against the Métis Nation of Ontario. Justice Lauwers noted that, in such a context, “the imperative of reconciliation also applies to competing Indigenous rights”: at para. 17. He concluded that the Algonquins had a sufficiently credible claim to proceed: at paras. 48–49. The logic of this case seems to be that, because reconciliation applies to competing Indigenous rights, the Court should not lightly throw out the claims of one Nation. Yet, it appears to me that this is what Musqueam and TFN are saying should now happen in this case, through an exercise of discretion on the basis of *Cheslatta*.

[3168] The agreement between the plaintiffs and Canada in the present case was reached near the conclusion of this four-year long trial. During the preceding years, neither Musqueam nor TFN took a position on infringement or justification applicable to the Cowichan’s sought Aboriginal fishing rights.

[3169] The plaintiffs and Canada submit that, in the event the Court is of the view that *Cheslatta* applies, an alternative would be for the Court to nevertheless proceed to consider infringement and justification with respect to only two of the alleged infringements, related to the 2018 fishing season. The first alleged infringement is a restriction on area access, including the entirety of the south arm, and any area upstream of Kirkland Island, including at Tl’uqtinus. The second alleged infringement is a restriction on fishing equipment, a refusal to allow a beach seine fishery. Canada admits both of these restrictions are infringements. Canada says the area access restriction was justified, and admits the beach seine infringement was unjustified.

[3170] In my view, adopting the approach of determining these issues, which have been resolved by way of agreement, would be problematic. Not only would this be a burden on the judicial economy, but it places the Court in a position of deciding an issue the parties have agreed upon. If the rule in *Cheslatta* required that the issue of infringement and justification be decided, even though an out of court agreement was reached, I would address them rather than dismissing the fishing right claim entirely. However, as below, the Court in *Cheslatta* was concerned with utility, and it

would be a contortion of that principle to conclude that *Cheslatta* precludes a determination of the fishing right in the circumstances of this case.

[3171] I am of the view that reconciliation provides a strong basis not to accede to the submissions of Musqueam and TFN, and supports deciding the fishing right issue on its merits.

[3172] Aboriginal rights and title trials are notoriously long and complex, and the present case is no exception. Not only would it be contrary to reconciliation, but also to the just, speedy, and inexpensive determination of Aboriginal rights and title claims to find that, once an Aboriginal right and title claimant has pleaded that their rights have been infringed, and the issue then thoroughly canvassed at trial, the claimant may jeopardize the balance of their claim by settling certain issues.

[3173] In addition, I find the argument is misplaced on its merits. The procedural argument is principally made on the basis of *Cheslatta*, *Haida Nation* BCCA, and *Dzawada'enuxw*.

[3174] In *Cheslatta*, Newbury J.A. upheld an order striking out the Cheslatta Carrier Nation's amended statement of claim for disclosing no reasonable cause of action. The Cheslatta had sought a declaration of an existing Aboriginal right to carry on ancestral fishing generally. However, the amended statement of claim did not allege any infringement of this right to fish. Accordingly, Newbury J.A. considered that the declarations sought would serve no utility, addressing no live, present-day dispute: at paras. 9, 13–15. The declaration sought would, in essence, be no different from a declaration that any private person has a right to fish on Crown land: at para. 17.

[3175] Justice Newbury then went on to say:

> [19] ... it is clear that any aboriginal "right to fish" that might be the subject of a declaration would not be absolute. Like other rights, such a right may be subject to infringement or restriction by government where such infringement is justified. The point is that the definition of the circumstances in which infringement is justified is an important part of the process of defining the right itself.
>
> [Emphasis added.]

[3176] *Dzawada'enuxw* resolved this in much the same way. There, the Dzawada'enuxw First Nation sought to file a second further amended statement of claim, which would remove all allegations of infringement to the plaintiffs' alleged fishing rights. The proposed amendments disclosed no real dispute between the parties, and so the test for seeking declaratory relief was not met. The claim would have had no reasonable prospect of success, and the Dzawada'enuxw First Nation had not demonstrated that a bare declaration of Aboriginal rights would serve a useful purpose: at paras. 63–64.

[3177] Finally, in *Haida Nation* BCCA, the Court of Appeal dismissed an appeal of a trial management decision that severed an Aboriginal rights and title claim into two different phases. The Haida Nation sought to have only the issue of Aboriginal rights assessed in phase one, with compensation for interference with the alleged rights assessed later. Justice Hunter said that seeking to define rights separately from the limitations on those rights "directly engages the principle in *Cheslatta*": at para. 33.

[3178] Justice Hunter noted that acceding to the proposal would not have been an error in principle if the case management judge thought this would result in greater efficiency in resolving the issues, or otherwise met the goals of severance: at para. 35. Trial management decisions are accorded significant deference on appeal, and the decision was not an error of law: at paras. 3, 35.

[3179] Earlier in the decision, Hunter J.A. referred to the distinction between a presently exercisable right versus the underlying Aboriginal right:

> [28] I agree with the Haida Nation that the term "Aboriginal rights" is commonly used in two distinct ways, depending on the context. The Haida Nation describes the distinction as being between "the presently exercisable right" and "the underlying right which existed before there were any Canadians". The presently exercisable right is one in which issues of infringement and justification have been considered. It is this concept of Aboriginal rights to which the case management judge was referring in the passage criticized by the Haida Nation.
>
> [29] What the Haida Nation refers to as the "underlying right" is the modern-day manifestation of a practice, custom or tradition that was integral to the distinctive culture of the Aboriginal group at the time of contact. This is the concept of Aboriginal rights which is embedded in s. 35 of the *Constitution Act*: *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 63. In

> theory, this can be described independently of issues of infringement and justification. It does not follow, however, that a Court should grant a declaration of rights on this basis.
>
> [Emphasis added.]

[3180] He then went on to interpret the above extract of *Cheslatta*, and said:

> [32] I do not take Justice Newbury as saying in this passage that an Aboriginal right is incapable of description in broad terms, such as a fishing right, but rather that a Court will not issue a declaration of rights in such broad terms. For a declaration of rights issued by a Court of law, any limitation on the right must normally be included as part of what the Court declares to be the right.
>
> [Emphasis added.]

[3181] Lastly, I note that TFN also argues that the present situation bears some analogy to *Tsilhqot'in* BCSC, and the application of *Cheslatta* therein. Justice Vickers refused to make a declaration of rights in relation to private lands because no infringement was pleaded in respect of the private lands: at paras. 991-993. Plainly, this situation is distinguishable from the case at bar; the plaintiffs have pleaded infringements of the fishing right and the issue has been fully litigated.

[3182] The concern in *Cheslatta*, and to a substantial degree in *Dzawada'enuxw*, was whether the matter as pleaded revealed a live controversy to which declaratory relief would be of utility. *Haida Nation* BCCA was an appeal of a severance order, where one proposed approach seemed to engage the principle in *Cheslatta*, but still may have been permissible had it resulted in greater efficiency in resolving the trial issue, or otherwise met the goals of severance. All three cases were at the pre-trial stage, and were preoccupied with how a later substantive trial would proceed. The jurisprudence must be understood in that context, and informs the next point.

[3183] The limitation spoken of in *Cheslatta*, i.e., that rights are not absolute and the infringement and justification inquiries define circumstances where the exercise of a right may be restricted, concerns the present exercise of the right. It is important that Aboriginal rights and title claimants plead infringements so they may orient the Court toward a live controversy at trial, and so that the Court can provide guidance to the

parties as to how rights or title interests may be presently exercised. The declaratory relief thereby becomes useful in resolving a real dispute between the parties.

[3184] My understanding of the law is that, in an action where a plaintiff seeks a declaration of Aboriginal rights, the usual rule against exercising jurisdiction in the absence of a live controversy applies, and will generally require the plaintiff to plead an interference with those rights: *Cheslatta* at para. 18. However, it is not a matter of general law that in every case, infringement and any related defence of justification must be adjudicated. The focus for the Court remains on whether the relief sought will resolve a live controversy between the parties.

[3185] The plaintiffs pleaded the at-issue infringements based on Canada's fishery regime in the 2008–2018 fishing seasons. The infringements were litigated before the Court. Both parties called many witnesses who testified on related matters for over 70 days. There were almost 900 exhibits entered for this part of the claim. As the trial progressed to final argument, Canada admitted some of the infringements and made a few admissions regarding a lack of justification.

[3186] The plaintiffs submit that, because of this litigation, and because the issue was tried, both parties eventually came to agree on this aspect of the claim. This is a marked difference from *Cheslatta*. In that case, without a pleading of infringement in that case, the parties and the Court were not oriented toward the reconciliatory purpose of Aboriginal rights and title.

[3187] In *Shot Both Sides*, the SCC unanimously provided declaratory relief despite the claim at issue being statute-barred, and in light of a belated concession from Canada that the Crown had breached the Blood Tribe's treaty land entitlement: at paras. 63–64, 80–82. Justice O'Bonsawin said at para. 81 that allowing a belated concession to prevent declaratory relief "would privilege form over substance with respect to the nature of the "real" dispute before [the Court], and would overlook the protracted nature of the dispute that led the parties to this point".

[3188] The same can be said here. The declaratory relief presently sought will assist in resolving whether the plaintiffs have established fishing rights. This includes resolving issues such as whether the Cowichan historically fished with permission from Musqueam or other Indigenous groups and whether any fishing rights are seasonal, or are in respect of all fish. Where warranted, declaratory relief will substantially resolve issues between the parties. Canada and the plaintiffs both confirm that, because of the conditional nature of the agreement, it is necessary for the Court to determine whether the Cowichan have an Aboriginal right to fish the south arm for food.

[3189] There is also utility in granting a declaration because DFO has refused to grant a permanent fishing license to the Cowichan until this case is heard and a declaration clarifying the Cowichan's entitlement is made. For years, DFO has applied what they referred to as an "Interim Approach" to management of the Cowichan fishing opportunities pending this Court's decision.

[3190] Accordingly, I reject the argument that I am bound by or should use my discretion to throw out the fishing rights claim.

[3191] I will proceed with an assessment of whether or not the plaintiffs have established Aboriginal fishing rights on the south arm for food.

B. LAW OF ABORIGINAL RIGHTS

[3192] Much of the doctrinal content of Aboriginal rights flows from the premise outlined by Lamer C.J.C. in *Van der Peet*:

> [30] In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries ...
>
> [Emphasis in original.]

[3193] The Aboriginal rights recognized and affirmed by s. 35 are hence rights held by Indigenous peoples to continue participating in the distinctive cultures and traditions of their forebearers: see *Sappier; Gray* at paras. 40, 45.

[3194] Aboriginal fishing rights are not property rights *per se*. They are instead treated by the common law as *sui generis* rights: *Sparrow* at 1111–1112.

[3195] Aboriginal rights often entitle Indigenous peoples to engage in particular activities or practices: *Adams*; *R. v. Côté*, [1996] 3 S.C.R. 139, 1996 CanLII 170 [*Côté*]. A regularly recognized class of such rights is harvesting rights, for example rights to hunt or fish: see, e.g., *Desautel* SCC; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237 [*Ahousaht* 2011]. Such is the claim to rights in this case.

[3196] While an Aboriginal right need not be sustained by an underlying Aboriginal title interest, Aboriginal rights may nonetheless be "site-specific": *Adams* at paras. 26, 30. The practice of the claimant group's ancestors may have been tied to a particular place, and so too may the modern practice of that right.

[3197] Properly understood, such rights are not rights to a particular resource, but are based in ancestral practices: *Sappier; Gray* at paras. 21–22. But, where the practice is site-specific, the right necessarily confers with it a right of site access. As Lamer C.J.C. said in *Côté* at para. 57: "a right to fish for food upon a certain tract of territory would be meaningless without a right of physical access to that territory".

[3198] The right itself is not determined by reference to how it may have been regulated before 1982: *Sparrow* at 1091. This would "freeze" Aboriginal rights, and "incorporate into the Constitution a crazy patchwork of regulations". However, rights may be validly regulated by the Crown: *Sparrow* at 1097–1099, 1110.

[3199] I repeat that in Aboriginal rights and title claims, the claimant must be the appropriate contemporary rights-bearing group. This is because Aboriginal rights are grounded in the existence of both a historic and modern community and, once

proven, held by that modern community: *Powley* at para. 24; see also *Sappier; Gray* at paras. 24–26.

[3200] As previously discussed, proof of Aboriginal rights focuses on the period prior to first contact with European settlers: *Van der Peet* at paras. 60–61; *Sappier; Gray* at para. 34. This is different from Aboriginal title, where proof is assessed at the date the Crown asserted sovereignty: *Delgamuukw* SCC at paras. 144–145.

[3201] Like Aboriginal title, this test takes into account both the common law and the Indigenous perspective: *Van der Peet* at paras. 49–50; *Marshall; Bernard* at paras. 45–53. As McLachlin C.J.C. said in *Marshall; Bernard* at para. 48:

> ... The question is whether the aboriginal practice ... translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.

[3202] Courts must be sensitive to the evidentiary difficulties faced by claimants in Aboriginal rights and title claims who are put to proof of matters that may have occurred centuries ago: *Van der Peet* at paras. 62, 68; *Mitchell* at para. 27. Further, the test uses English terminology such as “culture”, which may not find a precise equivalent in some Indigenous languages. As Justice Bastarache said, “the concept of culture is itself inherently cultural”: *Sappier; Gray* at para. 44.

1. The *Van der Peet* Test

[3203] In *Van der Peet*, after noting the language used in *Sparrow* to establish the test for a Musqueam fishing right, Lamer C.J.C. articulated the following general test for Aboriginal rights:

> [46] In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an

> applicant has established an Aboriginal right protected by s. 35(1): in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.
>
> [Emphasis added.]

[3204] Justice Rowe recently laid out the "*Van der Peet* test" in *Desautel* SCC:

> [51] The analysis under *Van der Peet* was restated by this Court in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 46:
>
> (a) Characterize the right claimed in light of the pleadings and evidence (*Van der Peet*, at para. 53; *Gladstone*, at para. 24; *Mitchell* at paras. 14-19).
>
> (b) Determine whether the claimant has proven that a relevant pre-contact practice, tradition or custom existed and was integral to the distinctive culture of the pre-contact society (*Van der Peet*, at para. 46; *Mitchell*, at para. 12; *Sappier*, at paras. 40-45).
>
> (c) Determine whether the claimed modern right is "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice" (*Lax Kw'alaams*, at para. 46).

[3205] The analysis must begin with characterizing the right claimed by the plaintiff: *Sappier; Gray* at para. 20; *Mitchell* at para. 14; *Lax Kw'alaams* at para. 46. Characterizing the right helps frame the claim to be met: *Van der Peet* at para. 51. The court "is, in essence, determining what the [claimants] will have to demonstrate to be an aboriginal right": *Gladstone* at para. 23. The focus at this stage is not on the merits of the claim: *Mitchell* at para. 14.

[3206] It may be necessary and appropriate for a court to re-characterize an overly broad or narrow claim: *Lax Kw'alaams* at para. 44; *Mitchell* at paras. 14–15. But caution is necessary when doing so. As McLachlin C.J.C. said in *Mitchell*:

> [15] ... The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society: see *R. v. Pamajewon*, [1996] 2 S.C.R. 821.

[3207] Next, the Court will determine whether the claimant has proven the existence of an integral pre-contact practice, tradition or custom. This requirement is not so onerous that the pre-contact practice must have been at the core of the society's identity, in the sense that it was the single most important defining feature of the pre-contact society: *Sappier; Gray* at para. 40. But, the claimant must show that the practice, custom, or tradition was integral to their distinctive culture, in the sense that it was one of the things that made the society what it was: *Van der Peet* at para. 55. A traditional means of sustenance, such as the practice of fishing, may meet this standard: *Sappier; Gray* at para. 37; *Ahousaht* 2013 at para. 27.

[3208] The test does not require that the practice, custom, or tradition be unique to the claimant community relative to other Indigenous nations, but does require that it be of independent significance to the community claiming the right. It will not suffice if the practice, custom, or tradition is merely an incident of another right: *Van der Peet* at paras. 70–71. A practice, custom, or tradition developed solely in response to European influences will not meet the standard: *Van der Peet* at para. 73.

[3209] Continuity can play a role at this second stage. Because Indigenous nations face evidentiary difficulties in proving pre-contact practices, claimants may rely upon evidence of post-contact practices as evidence of their pre-contact practices, customs, and traditions: *Desautel* SCC at para. 53.

[3210] Finally, the claimed modern right must be "demonstrably connected to, and reasonably regarded as a continuation of, the pre-contact practice". At this stage, "the Court should take a generous though realistic approach to matching pre-contact practices to the claimed modern right": *Lax Kw'alaams* at para. 46. The claimed modern activity or practice must fall within the scope of the pre-contact practice or activity, which the right protects: *Desautel* SCC at para. 54.

[3211] The Court at this stage must be alert to the contours of the pre-contact and modern practice. A "pre-sovereignty Aboriginal practice cannot be transformed into a different modern right": *Lax Kw'alaams* at para. 51, citing *Marshall; Bernard* at para. 50. The pre-contact practice may also be exercisable by modern means:

Lax Kw'alaams at paras. 49–50. It is not frozen in time, and may evolve into modern forms: *Desautel* SCC at para. 54; *Mitchell* at para. 13; *Sparrow* at 1093; *Sappier; Gray* at paras. 23, 48. But it is the practice that may evolve, not the subject matter of the right: see *Lax Kw'alaams* at para. 51; *Sappier; Gray* at para. 48.

[3212] *Ahousaht* 2011 provides a useful example of what continuity means in this sense. On appeal in that case, the finding of a commercial Aboriginal right to fish for "all species of fish" was varied to exclude commercial geoduck fishing: see *Ahousaht* 2011 at paras. 67–69. As Justice Hall reasoned:

> [69] ... because the commercial geoduck fishery is what I would describe as a high tech fishery of very recent origin, there can be no viable suggestion that the ancestors of the respondents could have participated in the commercial harvesting and trading of this particular marine resource at some time before contact with explorers and traders late in the 18th century. There is simply no adequate basis in the evidence to support an ancestral practice that would translate into any modern right to participate in harvesting and selling this marine food resource.

[3213] *Lax Kw'alaams* provides another example. There, the plaintiffs also sought to prove commercial fishing rights, but were unable to show that the pre-contact practice grounding the sought right amounted to trade in anything other than eulachon grease: at paras. 56, 58. This meant that the claimed modern right was both qualitatively and quantitatively different than the pre-contact practice upon which it was said to have rested.

[3214] Before moving to my analysis, I note finally that the requirement of continuity does not mean that the claimant group must have engaged in the practice, custom, or tradition constantly from the pre-contact period to the modern day. The impact of colonization upon Indigenous communities in Canada has often been such as to prevent those communities from continuing to engage in their traditions or access culturally important locations: *Desautel* SCC at para. 33; *Saik'uz* BCSC at paras. 172–177. In *Van der Peet*, Lamer C.J.C. said:

> [65] I would note that 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. It may be that for a period of time an Aboriginal group, for some

> reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an Aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the Aboriginal group making the claim to an Aboriginal right.

C. CHARACTERIZING THE RIGHT

[3215] The plaintiffs seek judicial recognition of an Aboriginal right to fish the south arm of the Fraser River for food. Several things flow from this proffered characterization.

[3216] The right claimed in this case is site-specific: *Adams* at para. 30; *Côté* at para. 39. A site-specific right may be claimed despite the fact that the claimant group does not currently have a settlement on that area: *Adams* at para. 28. The plaintiffs' sought right has inherent geographical limits; it is a right to fish only the south arm of the Fraser River.

[3217] The plaintiffs have not defined the south arm of the Fraser River. I accept Canada's description of it as being from the mouth of the river at the Salish Sea up to the point where the south and north arms of the Fraser River meet, northeast of Annacis Island.

[3218] There is some controversy as to what comprises the mouth of the river.

[3219] TFN queries where the mouth of the Fraser River ends and the Salish Sea begins. The Musqueam consider the mouth of the Fraser River to be at the "light ship" — a manufactured rock jetty with a navigational light located at the western edge of the flats at the drop off point of the riverbed into the Salish Sea.

[3220] DFO has divided the Pacific coast into 48 management areas, with numerous sub-areas. The south arm of the Fraser River is within management area 29. It falls within the following two subareas that DFO manages as in-river areas:

a) almost all of subarea 29-13; and

b) all of subarea 29-14, located in a portion of the Fraser River near its mouth.

[3221] DFO Fishing subarea 29-9 covers the flats at the entrance to the Fraser River. Musqueam fishermen do not consider subarea 29-9, which is located in the flats, as being ocean.

[3222] There is a substantial transition area between the Salish Sea and the land where the river has carved a channel through the flats and where the ocean water can be too shallow for passage at low tide. Area 29-9 covers this area.

[3223] I have no submissions from the plaintiffs specifically about how they define the mouth of the Fraser River. In their questioning of DFO witnesses they defined the south arm of the Fraser River as being from the east end of Annacis Island and Lulu Island to the line between Garry Point to the north tip of Reifel Island and from the western border of Canoe Pass at the south end of Westham Island. As TFN submitted, much of subarea 29-9 is in the flats of Roberts Bank which dry to mud flats during low tide. The plaintiffs say, in the context of their submission on infringement, that the south arm includes “a very small portion of subarea 29-9”.

[3224] A sketch drawn by Kevin Conley, Aboriginal Affairs Advisor, South Coast, Pacific Region, DFO, was entered for the truth of its contents depicting subarea 29-9 as I have described above.

[3225] On review of the Area 29 map, and the sketch and description of subarea 29-9 attached to Kevin Conley’s August 30, 2014 email to Loren James, I describe the northeastern boundary of subarea 29-9 as a line drawn between the north end of Reifel Island north to a mid-point on Steveston Island and down to the eastern tip of Steveston Island across to Steveston. The southeastern boundary of subarea 29-9 is from the southwest tip of Westham Island across Canoe Passage to Brunswick Point near the Brunswick cannery in Delta.

[3226] For the purpose of characterizing the right sought, I consider the mouth of the south arm of the Fraser River as starting at the eastern boundary of subarea 29-9. In

other words, subarea 29-9 is outside the Fraser River and subarea 29-14 and subarea 29-13 are inside the Fraser River. The eastern boundary of subarea 29-9 reflects one way of defining the mouth of the river and neither DFO nor the plaintiffs consider subarea 29-9 by itself to be in the river. The plaintiffs' infringement claim focused on access to subareas 29-13 and 29-14 (which sometimes included the small in-river part of subarea 29-9). Further, the plaintiffs will be negotiating fishing access with DFO, and so there is utility in defining it this way.

[3227] I conclude that the south arm is from the eastern tip of Annacis Island and Lulu Island (which includes most of subarea 29-13 and all of subarea 29-14) and extends to the mouth of the south arm of the Fraser River as defined above as starting at the eastern boundary of subarea 29-9.

[3228] The plaintiffs are not claiming a right to fish for certain species, but a right to fish generally: see *Ahousaht* 2011 at para. 61.

[3229] The plaintiffs claim a right to fish for food. Accordingly, their claim is of a non-commercial character.

[3230] The claim is not described in the plaintiffs' pleadings or written argument to be a right to fish for food, social, and ceremonial purposes ("FSC").

[3231] Rights to harvest for FSC purposes are well recognized in the jurisprudence: see e.g., *Sparrow* at 1099–1101; *R. v. Kapp*, 2008 SCC 41 at para. 4; *Desautel* SCC at para. 80. The plaintiffs seek only a declaration that "the descendants of the Cowichan Nation ... have an aboriginal right to fish the south (i.e., main) arm of the Fraser River <u>for food purposes</u>, within the meaning of s. 35(1) of the *Constitution Act, 1982*" (emphasis added). While the plaintiffs refer at times in their written argument to evidence that showed that fishing in and along the south arm of the Fraser River was a practice engaged in for social and ceremonial purposes, again, they framed their claim in their pleadings as a right to fish for food.

[3232] I address Canada's submission that any right should be seasonally delineated, and Musqueam's submission that the evidence does not establish that the Cowichan had a practice of fishing all species, later in these reasons.

D. INTEGRALITY OF PRE-CONTACT PRACTICE

1. Identity of the Historic Rights-Bearing Community at Contact

[3233] The issue of identity of the historic rights-bearing community has been resolved. I found in Part 5 that the Cowichan were an Indigenous people in the early 1790s at the time of European contact. I also found that the members of the plaintiff bands and the Lyackson are the descendants of that collective, and are the proper rights and title holders.

[3234] I found that the Cowichan people shared a common way of life: they shared language, customary dwellings, and some social organization, although they did not have a highly structured society. They came together for harvesting on the Fraser River, and relied on fishing, gathering, and hunting for their food, which required travelling to various regions for various resources. As part of the seasonal round, they travelled to the Fraser River and resided at the Cowichan village at Tl'uqtinus as a collective.

[3235] I now explore the Cowichan practice of fishing the south arm prior to and at contact.

2. Pre-Contact Practice Integral to Plaintiffs' Distinctive Culture

[3236] To determine whether the plaintiffs have shown that a relevant pre-contact practice, tradition, or custom existed and was integral to the distinctive culture of the pre-contact society, I first look to the oral history evidence.

a) Oral History

[3237] The plaintiffs submit that the Cowichan mythology reveals ideological ties and deep knowledge connecting the Cowichan to the landscape of the Fraser River and its abundant fisheries since the dawn of time. They say that these legends explain

how the Cowichan came to be. Sum'shathut (the Sun) sent Xeel's to prepare qə'wəcən (the warm land) for the coming people at the beginning of time. Dr. Brealey says in the variety of narratives, the common denominator is the agency of Sum'shathut. The plaintiffs reference stories that I have previously set out above, such as the Abandoned Boy story accounting for the origin of different types of salmon on the Fraser River and the Cowichan travelling back and forth across the Georgia Strait. They submit that Cowichan mythology also explains their knowledge of salmon migrating to the Fraser River.

[3238] Mrs. James testified that the Cowichan were not known by their reserves but by their homeland and traditional ways of moving around their homelands. She shared the Cowichan mythology about each of the salmon species that are found in the Fraser River, which she learned from her uncle Leonard Sylvester from Penelakut. He taught her that when each species of salmon jumped they told a certain story about the way they jumped, their physical attributes, their ability to swim up rivers, how long they lasted at the river, and how they were prepared for food. These included me'qum (spring or chinook salmon), the'wun (coho salmon), thuqi' (sockeye salmon), kwaluhw (chum salmon), and haan (humpback or pink salmon).

[3239] The plaintiffs submit that Cowichan legends also connected the Cowichan to sturgeon in the lower Fraser River. Dr. Kennedy referenced the story of Sowittan the Grumbler, referred to above, who travelled to the lower Fraser River and convinced Transformers to make the world smaller so the people could use everything. This legend included the transformation of sturgeon so they were not so large.

[3240] Another story told by Mary Rice to Beryl Cryer during the time of "Xeel's" (χeːl̓s in həṅq̓əmiṅəm̓) was that in those days her people and all the people from Hwmuthkwi'um (Musqueam) used to catch lots of big sturgeon in the Fraser River. She said that every year they would all go there for sturgeon fishing. According to the story, the sturgeon temporarily disappeared from the Fraser River as a result of the refusal of a Musqueam couple to share their cooked sturgeon with a traveller who turned out to be Xeel's. They were turned to stone and all the sturgeon left the

Fraser River. Mary Rice did not specifically say she was talking about the Cowichan. She did, however, refer to “my people” and made it clear elsewhere that her people were the Cowichan. Dr. Kennedy relied on this story, and historical records and ethnographic evidence, to conclude that the Cowichan, as well as the Musqueam, used to fish sturgeon in the Fraser River.

[3241] In another story, Mary Rice indicated that the Penelakut fished sturgeon at Canoe Pass.

[3242] Mrs. James testified about her great-grandfather gathering food for his family. As previously laid out, she testified that “they said that the salmon at Fraser River, the Shnuwiilh, you could walk — almost walk on it across; there was so much salmon”. She described a net they used, called the tqép, as a funnel net, which had a large end and a small end made of cedar skin. It could be pegged to the bottom of the river or creek and stood up if it was in the ocean. These cedar nets were used for thousands of years. It was the kindest way to catch salmon.

[3243] Mrs. James’ grandfather, Qwulthimult-hw (Fred Joe), held knowledge of traditional fishing practices. He spoke of the weirs that their ancestors had. It was called shxétl', the one for the mouth of the river was called tqép, and shumuntun if one was fishing on the reef with a net. Mrs. James did not specify in which rivers these were used.

[3244] Mrs. James’ grandfather, Qwulthimult-hw, also made herring rakes, and fished for cod and many different species with a te’ulh (a two-pronged spear).

[3245] Luschiim’s oral history is that the s-tseelhtun (fish, including salmon and sturgeon) was abundant at Shnuwiilh by Tl'uqtinus. He testified that some families would have thousands, or canoe loads of s-tseelhtun. He testified about the traditional methods of fishing salmon including using drift nets at Shnuwiilh at an appropriate section on the river, in the main channel by Tl'uqtinus.

[3246] Luschiim fished with his father, Hwiinumetse’, using a huw'qw'e'yun' (net) on the south arm to fish for thuqi' (sockeye salmon), haan (pink salmon), and stth’a’qwi

(spring salmon). His father taught him that the Quw’utsun traditionally fished this way using one or two canoes. With two canoes, a rope would be passed from the canoe with the net to the other canoe, and the net was put in the water. The canoes would drift along the river with the net and they would pull it out at the right time. Another traditional fishing practice was to use a set net. He testified that a good place to practice this style of traditional fishing is across from the Tl'uqtinus village where the water is slower. He did not say his ancestors used this method at Tl'uqtinus.

[3247] As mentioned in Part 5, Luschiim shared oral history about Quw’utsun people fishing the south arm for food from their stl'ulnup at Tl'uqtinus. He testified that when he spoke of the Quw’utsun people, he was speaking of the time from long before contact to early contact, and at least up to the time that reserves were being made. The Quw’utsun were a large group of people. One of the places they lived at was Tl'uqtinus; they harvested together, lived there together and defended their territory together.

[3248] Luschiim testified that the reason the Cowichan would go to their village on the Fraser River historically was to 'aluxut, to harvest the resources that they acquired there. When asked what sort of resources he was talking about, he answered: s-tseelhtun, stthoom, ma'uqw, and tu ts'i'ts'usum. Stthoom covers the berries. S-tseelhtun covers salmon and fishes, including qwtaythun (sturgeon), which was for some definitely one of their 'ulhtuneen — special or favourite foods.

[3249] Luschiim testified that Alphonse George talked about getting sturgeon at Tl'uqtinus across from the village of Tl'uqtinus, where the Quw’utsun were, as one of the places they fished for sturgeon. Luschiim mentioned fishing for sturgeon in the main channel in front of the Tl'uqtinus village and out by the salt water downstream from Tl'uqtinus on the Fraser River in what is now called the south channel. It is shallow out there. It is also where they fished qwtaythun using a type of spear.

[3250] Luschiim testified that the Quw’utsun harvested significant quantities of fish on the south arm of the Fraser River. South arm-caught salmon were put up in the smokehouses there by the hundreds and thousands. Luschiim’s ancestors would

travel over to where they knew there were runs of salmon, including the thuqi' (sockeye salmon), the haan (pink salmon), and the stth'a'qwi (spring salmon), which were not as abundant as the sockeye. The sockeye and pink run would be in mid-summer in July and August on the Fraser River.

[3251] Sulipt'un spoke about smoking fish on the Fraser River. If they left it fresh, it would be spoiled by the time they got across to Vancouver Island.

[3252] Councillor Thomas learned from his grandfather, Ben Thomas, that they all travelled to the Fraser River to harvest fish that were in abundance, such as salmon, eulachon, and sturgeon.

[3253] Sulipt'un testified that his uncle, Bob Thomas, went downriver (Fraser River) with him and showed him places where their ancestors, the Cowichan, fished. He showed him "the area Tl'uqtinus, and the one right across Katzie and that little island under the bridge there"; "McKinnon [*sic*, probably McMillan] Island, where Kwantlen is"; and "a little place over — right across Hope — town of Hope and up Yale", but they did not go there. When they passed Tl'uqtinus, he said "that was our Cowichan people's place".

b) Historical Record

[3254] The written historical record speaks of a time post-contact. The plaintiffs submit the earliest written records from 1791–1808 corroborate the Quw'utsun's practice, custom, or tradition being in place prior to and at contact.

[3255] As discussed above, Spanish navigators in 1791 saw a great number of Indigenous people in canoes around the entrance to Burrard Inlet. These people carried an abundance of fish, including salmon. Dr. Brealey reported that it is possible the Indigenous people seen by Captain Narváez by Point Roberts were Cowichan. I agree with Musqueam that the records do not identify the people as Cowichan. Dr. Brealey arrived at his conjecture based on his understanding of subsequent records.

[3256] I have inferred that the Indigenous people seen by the Spanish explorers in June 1792 around Porlier Pass were Cowichan because of Luschiim and Mrs. James' evidence about the Cowitchen villages on Valdes and Galiano Islands. I accept Dr. Kennedy's opinion that the presence of the old men and 19 lads but no able-bodied fisherman and female processors in June of that year is suggestive that they had left for the Fraser River fisheries.

[3257] The historical records kept by the HBC in 1824 noted Cowichan on the Fraser River. John Work recorded that they were taken into the "Coweechin River", which according to Dr. Brealey suggests that the Cowichan were the dominant presence on the river or the lower reaches of the river at that time. In order to achieve this status, I find it likely that the Cowichan had been coming to the river for some time. I come to this conclusion when I combine the oral history with the historic record.

[3258] In December 1824, Annance recorded seeing Indigenous people scattered in the small rivers catching salmon, but did not identify them as Cowichan. However, the village he observed was the Cowichan village, indicating their presence on the lower Fraser River.

[3259] Work noted a canoe with six Indigenous people near the entrance of the Fraser River who were of the Cowichan Tribe and who had just come across from Vancouver Island where they lived. They were armed with long spears.

[3260] On August 20, 1825, McKenzie noted a large canoe with 14 men, who he was informed were the Cowichan. McKenzie noted on August 21, 1825, that the Cowichan were a tribe who resided at the Fraser River during the salmon season, then returned to Vancouver Island.

[3261] Other references in the historical records to the Cowichan fishing the south arm of the Fraser River are set out in Part 5, and as reviewed below, are referenced in the ethnographic record and expert evidence.

c) Ethnographic Record as Interpreted by the Experts

[3262] Dr. Lovisek testified that at and prior to contact the Fraser River was attractive to various Indigenous groups for harvesting fish because of the runs of sockeye salmon and availability of sturgeon, particularly around the mouth of the Fraser River. Dr. Lovisek confirmed in cross-examination that humpback salmon was one of the fish that the plaintiffs' ancestors harvested in the south arm of the Fraser River.

[3263] Relying on the ethnographic records from Rozen and Duff, Dr. Lovisek agreed that the plaintiffs' ancestors fished for sockeye salmon during the summer months at the Fraser River. Dr. Lovisek found ethnographic evidence that the Island Halkomelem harvested fish at Canoe Passage, what is now the Tsawwassen reserve area, Tl'uqtinus, Kikéyt (opposite New Westminster under the Pattullo Bridge), and Yale (at the lower end of the Fraser Canyon). The exact location of marine resource harvesting at or near Tl'uqtinus was not evident. In her report, Dr. Lovisek said she could find no ethnographic evidence that the Island Halkomelem fished at a place named Tl'uqtinus in the pre-contact period; however, she changed her view in cross-examination and agreed that Barnett provided evidence that the Cowichan "before whiteman" used to come to Lulu Island to take sturgeon and some sockeye. She noted there is ethnographic evidence that the Quamichan, Somenos, and Penelakuts were first reported in the historical record at the village subsequently given the place name "Cowitchin villages" in 1827. In her opinion, the Island Halkomelem first occupied this village sometime after the smallpox epidemic in 1782, after the displacement of former permanent residents on the lower Fraser River, and after the onset of the Lekwiltok raiding circa 1790.

[3264] Musqueam submits that Boas refers to all tribes of the Quaitschin dialects and the Sqchomisch fishing for salmon on the Fraser River in the spring, but without geographic specificity. He did not include the Stz'uminus, Yekwolas, or Koksilah in the Quaitschin dialects. He did not note the year-round village on the Fraser River delta or at Tl'uqtinus.

[3265] Diamond Jenness says that those near Chemainus all abandoned their villages in the middle of the summer and netted sockeye and humpback salmon “on the mainland, off the mouth of the Fraser River” (not in the Fraser River).

[3266] Barnett in *The Coast Salish of British Columbia* recorded that the Cowichan would winter on Cowichan Bay, where they took their spring, dog, and silver salmon. Barnett states that in May, the camas drew diggers to Saltspring Island and other nearby islands off the coast. Herring, seal, porpoise and halibut drew the men to Mayne, Prevost and North Pender Islands. Then, with “the coming of the sockeye in July, all the able-bodied Cowichans left for the Fraser River for two months, where they camped on Lulu Island on the south arm of the river”. Musqueam submits Barnett identifies Cowichan dispersing to four different areas, only one of which is on the Fraser River.

[3267] In Barnett’s 1936 *Coast Salish Field Notebook*, he recorded Chief Harry Joe of Tsawwassen saying Cowichans, “before whiteman”, used to come to Lulu Island and take sturgeon and some sockeye. They “didn’t bunch up with Tswasûn but had separate camp”. According to Dr. Lovisek, the Tsawwassen camp that Chief Harry Joe is referring to is at Tl'uqtinus.

[3268] In Duff’s 1952 *The Upper Stalo Indians*, he situated the Cowichan as fishing salmon up-river (Fraser River) at the rapids sometime after the beginning of July until mid-August. His opinion is derived from his reading of the Fort Langley Journals. He wrote that large numbers of Cowichan and Nanaimo came over from Vancouver Island each summer to fish, and had summer villages along the lower reaches of the river. They were then observed passing down-river toward the end of September in laden canoes or rafts. Duff noted McMillan’s September 22, 1828 entry that 345 Cowichan canoes had passed, with another 160 passing down in the next two days. The majority of the “Island people” went home for the winter soon after, although visitors or raiding parties were around at the river throughout the winter. He summarized that the Fraser River salmon runs were an extremely

important factor in Coast Salish economic life, and caused a great congregation of tribes to the vicinity of the Fraser mouth during the summer.

[3269] In Suttles' *Katzie Ethnographic Notes*, he relied upon Duff's interview of Simon Pierre of Katzie in 1952:

> ... at the time the first whites arrived, the Musqueam ... occupied the mouth of the North Arm of the Fraser [River] and Burrard Inlet and the Tsawwassen ... occupied the south shore of the main mouth and the west shore of Point Roberts. On Lulu Island, on the north shore of the main mouth, were camps occupied by several Vancouver Island tribes during the salmon season ...

[3270] In Rozen's 1985 thesis, he wrote that some men from Kulleet Bay and the Penelakut people travelled to the lower Fraser River in the summer to fish sockeye or humpback salmon. He also said that the Chemainus from Westholme netted humpback salmon off the mouth of the Fraser River in July and August.

[3271] Dr. Kennedy relies on Rozen's 1978 *The Ethnozoology of the Cowichan Indian People of British Columbia* for the conclusion that sockeye and humpback salmon and sturgeon were available to the Cowichan near the Lulu Island village, and that the Cowichan Valley local groups, the Halalt, and others residing in the Chemainus District, fished the Fraser River itself.

[3272] Dr. Lovisek was questioned about her failure to consider whether the south arm of the Fraser River including the waters immediately up and down river from the Cowichan village was an optimal location for the plaintiffs' ancestors to harvest and preserve food. In cross-examination, Dr. Lovisek accepted that Dr. Suttles' opinion that the presence of permanent structures on the lower course of the Fraser River belonging to the Vancouver Island tribes would be consistent with them mostly fishing nearby. Musqueam submits that Suttles was referring to the Vancouver Island tribes, not the Cowichan specifically. The Vancouver Island tribes could include the Nanaimo or Saanich.

[3273] Dr. Lovisek opined that, prior to contact and at contact in 1790, the plaintiffs' ancestors (Chemainus, Halalt, Penelakut, Cowichan, and Lyackson) harvested fish for food and social purposes in the south arm of the Fraser River from the mouth of

the Fraser River up to and including the point where the south and north arms of the Fraser River met.

[3274] Dr. Lovisek concluded in cross-examination that her opinion was prior to and at contact, the plaintiffs' ancestors harvested fish in the south arm of the Fraser River for food and social purposes. This was a collective practice. Sockeye was one of the principal species they fished from the south arm. They would have fished the south arm for humpback and pink salmon as well. She agreed that the Lands of Tl'uqtinus was a principal location on the Fraser River's south arm identified in the ethnographic record where the plaintiffs' ancestors harvested fish, including sockeye and humpback salmon.

[3275] Dr. Lovisek agreed that the plaintiffs' ancestors fished the south arm for food annually from European contact through to 1824, and continued at least until the 1850s. Prior to and at contact, the plaintiffs' ancestors harvested marine resources as part of the seasonal round of resource exploitation from early spring to late fall. Fishing for food was part of their way of life prior to and at contact. They harvested a diverse variety of fish. Dr. Lovisek agreed that fishing for food was central to their way of life prior to and at contact.

[3276] Pre-contact, the plaintiffs' ancestors used several methods to harvest fish. They primarily used hooks, lines, harpoons, spears, rakes, nets, weirs, and fish traps. Dr. Lovisek agreed that the pre-contact plaintiffs' ancestors' use of several methods to harvest fish is an indication that fishing for food was a significant part of their way of life prior to and at contact. Traditional fishing practices continued up the lower Fraser Canyon until 1858 with the influx of gold miners, which disrupted Indigenous fisheries and resulted in violence against Indigenous peoples.

[3277] Dr. Lovisek opined that with the development of canneries and industrial fishing in the 1870s, the Island Halkomelem fished for various companies. Most of the canneries were in the Steveston area of Richmond. Traditional methods for catching salmon using weirs, dip nets, and spears continued in both the Indigenous

fishery and industrial fishery. The industrial fishery also introduced new techniques and gear.

[3278] Dr. Kennedy's opinion is that, prior to and continuing after the time of European contact, the Cowichan had a general practice of fishing the south arm of the Fraser River for food. She relied in part on the oral traditions of the Cowichan, which reveal ancient ideological ties that connect the Cowichan of Vancouver Island and the Gulf Islands to the Fraser River. Cowichan mythology explains the origin of the Fraser River salmon, including sockeye salmon, as well as sturgeon, which were available in abundance on the river, and rarely, if at all, on southeast Vancouver Island and the Gulf Islands. The Cowichan stories speak of their people travelling across the Strait of Georgia for salmon and sturgeon fishing. The Halalt group of Cowichan were known to host a ritual to celebrate the arrival of the first salmon caught in the reef nets.

[3279] Dr. Kennedy relied on the historical journals from the HBC from 1824 and 1827–1830, which confirm large numbers of Cowichan people went annually to the south arm to fish salmon between June and early October, travelling with their household possessions. In her opinion, this is consistent with the observations in the region in 1792. She reported that the historical sources indicate that this practice continued after 1827, and that the Cowichan use of the Fraser River fisheries continued through the 1860s and 1870s. She relied on the accounts of Gibbs and Sproat to form this conclusion.

[3280] Dr. Kennedy's opinion is that salmon, sturgeon, eulachon, herring, and various species of trout, including rainbow and cutthroat, would be available to the Cowichan on the south arm of the Fraser River. Around the mouth of the river, types of groundfish, including flounder, sole, and rockfish would be available. The Cowichan ate fresh fish while they were harvesting, and dried species, such as salmon, for winter consumption. It is her opinion that the Cowichan customarily harvested such species through the south arm of the Fraser River, its mouth, and offshore waters prior to and after European contact.

[3281] The Cowichan were in possession of technology for harvesting various species of fish, including hook and line, gaffs, leister spears and harpoons, traps, and nets, including reef nets, trawl nets, bag nets, set nets, and dip nets. In April 1829, McDonald recorded in the Fort Langley Journals that a number of Cowichan had arrived to fish for sturgeon in their vicinity. They were also in time for the eulachon run that is said to have lasted for two or three weeks.

[3282] Drs. Kennedy and Brealey concluded it is probable that some Cowichan caught eulachon in the spring during the sturgeon fishery. Eulachon entered the Fraser River between March and May. There is no direct evidence in the historical records that the Cowichan were seen fishing eulachon. Luschiim and Councillor Thomas make reference to a few Cowichan individuals fishing for eulachon.

[3283] Dr. Brealey concluded that the large Cowichan village on the south side of Lulu Island was part of a larger multi-seasonal occupied Cowichan settlement of much antiquity at European contact circa 1792; before and after the Oregon Treaty of 1846; before, at, and after the creation of the mainland Colony; and before and after Douglas' correspondence with the CCLW on October 7, 1859. It served as a base of operations for fishing and drying fish.

[3284] In Dr. Brealey's opinion, the Cowichan people had a defined land and water use regime that involved repetitive visits to particular camps, fisheries, or resource-gathering areas on the south arm of the Fraser River generally, and at Tl'uqtinus in particular, from first contact in 1792, through the Oregon Treaty of 1846, and up to and after the establishment of the Colony in 1858.

3. Conclusion

[3285] I conclude that the written historical record supports a Cowichan presence for food fishing on the south arm of the Fraser River after 1824. Combined with the oral history, this supports my finding that this food fishing practice had been in place for hundreds of years, and perhaps longer, prior to contact in the early 1790s.

[3286] I am satisfied there is sufficient evidence that the Cowichan fished the south arm of the Fraser River from its mouth up to the rapids in the summer months prior to contact. The evidence is somewhat conflicting and not site-specific, but supports that general conclusion.

[3287] The stories of the Abandoned Boy, Sowittan the Grumbler, and Xeel's, and the story of how the salmon spoke of their differences, support a finding that fishing was of central significance to the Cowichan's ancestors. Extensive Cowichan traditional fishing technologies satisfy me that fishing for food was an important pre-contact practice for their ancestors. A combination of oral history from Mary Rice and interpreted by Dr. Kennedy, as well from Mrs. James, Luschiim, Sulipt'un, Councillor Thomas, and the HBC records of Work, Annance, and McKenzie link the fishing practice to the south arm. The ethnographic material from Barnett, Suttles, Duff, and Simon Pierre, and the opinions of Drs. Kennedy, Brealey, and Lovisek all support my conclusion that fishing the south arm of the Fraser River for food was a central and embedded pre-contact practice that was integral to the distinctive culture of pre-contact Cowichan society.

E. CONTINUATION OF THE PRE-CONTACT PRACTICE

[3288] Under the *Van der Peet* analysis, there must be continuity between the practices, customs, and traditions that existed prior to contact and a particular practice, custom, or tradition that is integral to the Indigenous community today: *Van der Peet* at para. 63; *Gladstone* at para. 28; *Adams* at para. 47.

[3289] The plaintiffs submit that, notwithstanding the effect of colonial disruption, the Cowichan have reasonably continued their practice of fishing for food even on the south arm as best they could, given the DFO restrictions and regulations imposed upon them. Their ability to fish for food throughout the south arm remains integral to what makes Cowichan culture distinctive today.

[3290] The plaintiffs submit that they continued their seasonal round into the 1900s and have attempted to maintain their connection to the south arm fishery through the limited legal means available to them. They participated in commercial fishing,

preserving and passing on their traditional knowledge, and continued to fish for food throughout their traditional territory, which includes the south arm. In the past two centuries, the Cowichan have been subject to a maelstrom of disruption, and yet have tried to continue the practice. They have been compelled to adapt to historical realities, such as salmon canneries, increasing fisheries regulation, and the decline of the Fraser River fish populations.

[3291] Dr. Kennedy opined that the Cowichan practice of fishing on the south arm for food continued well after European contact. She noted that extensive movement of Cowichan from Vancouver Island to the Fraser River and back was noted throughout the 19th century. This pattern likely occurred in earlier times and continued at least into the first decades of the 20th century. In Part 5, I determined that the Cowichan continued to fish at the site of their village on the south arm into the early 1900s.

[3292] Dr. Kennedy referenced Douglas' dispatch to the Colonial Secretary in September 1856, noting that during his visit to the Cowichan, 1,000 warriors were away on an expedition to the Fraser River. In the report in the *British Colonist* on the Governor's Cowichan expedition, it was noted that the major portion of the tribe was absent fishing in August 1862. In 1867, Reverend Lomas, writing from his mission at Quamichan, noted that the "Indian villages" were almost entirely deserted, and all had left to go to their different stations around the mouth of the Fraser River where they caught their main supply of salmon.

[3293] Commissioner Sproat's communication with the Lieutenant Governor dated January 12, 1878, references the sale of the "ancient fishing ground on the Lower Fraser of the Cowichan nation, where 700 to 1000 Indians have been accustomed to assemble to catch fish for their winter food" to a white non-resident. In his Memorandum on Cowichan Reserve dated January 20, 1878, Sproat noted the old fishery station on the Fraser known as the "Cowichan Fishery" and annually used by them from time immemorial in getting fish for winter food was sold many years ago. He noted that "[a]bout one thousand Indians encamped there last season [1877]".

[3294] The plaintiffs submit that, by the 1870s, most of the Fraser River salmon canneries were located on the south arm. The Cowichan people sought employment fishing for the canneries, and harvested fish for food and social use as well. Dr. Lovisek's opinion is that the Cowichan harvested sockeye in the south arm until about 1915. She based her conclusion on Rozen's work discussing the severe impact on the seasonal round caused by the arrival of settlers, and the heavy exploitation of salmon by commercial fisheries in the 1890s.

[3295] The plaintiffs submit that many Cowichan witnesses testified about their personal recollections of learning to fish and the trips to fish the south arm with family members, several of whom worked as commercial fishers. Mrs. James' grandfather fished for sturgeon on the Fraser River using a spear. During her lifetime, her father fished the Fraser River commercially with the gillnet and trolling equipment. He was obliged to sell his fish to BC Packers, but he kept the good salmon for his family. Mrs. James' mother also fished and worked at the canneries when Mrs. James was a child.

[3296] Mrs. James' father taught her to fish when she was as young as six years old travelling to Shnuwiilh in the 1950s. She learned about the tides and the risks. She returned to fish the Fraser River often as an adult with her late husband to practice their traditional way of fishing up to about 1989, when her husband passed away.

[3297] Mrs. James testified that even today most of what she eats lives in the sea.

[3298] Luschiim's father and great-grandfather were commercial fishers. Luschiim's father was under a contract to sell only to BC Packers until Luschiim was about ten years old. Luschiim testified that other Cowichan, like Christine Edwards, worked in the cannery. He knew of the following Cowichan involved in commercial fishing on the Fraser River in the 20th century: Able Charlie, Simon Charlie, Abner Thorne, Bill Thorne, Tom Kanu [ph]; Alec Seymour, and Ji-Jon Sun [ph].

[3299] Sulipt'un testified that when he was a child, fish was a staple food. They got it from wherever they could. His grandfather built boats and had several fishing boats.

When Sulipt'un was small, a lot of men from Penelakut were longshoremen and fishermen. His grandfather, Louis Norris, caught fish in the local rivers, but Sulipt'un recalls eating Fraser River sturgeon caught by his uncle, Bob Thomas. Everyone in the community fished because it was their staple diet and what sustained them.

[3300] When Sulipt'un returned from residential school in the 1950s, his family continued to fish and build boats. His father, brother, Uncle Dave, Uncle Bob, great-Uncle Francis Thomas, Abner Thorne, and Roy Edwards all fished. Later on, he and his cousin, Harvey Alphonse, worked on a commercial seiner.

[3301] Qwestenuxun learned to spear fish from his father and older cousins in the 1940s and 1950s.

[3302] Qwestenuxun's, X'tli'li'ye's, and Councillor Thomas' families taught them processes to preserve fish for later use.

[3303] X'tli'li'ye testified that fishing was a central critical aspect of Quw'utsun way of life. She learned how to fish with her brothers when she was a child in the 1960s and 1970s. Growing up, there was always fish in the community as it was a regular staple of their diet, including Fraser sockeye. She testified that her people would go over to the Fraser River and were still trying to access their natural foods.

[3304] X'tli'li'ye described the various locations that fish were harvested when she was growing up as being on the Fraser River, the Cowichan River, and Cowichan Bay and from the Salish Sea.

[3305] Councillor Thomas grew up fishing on rivers and lakes around Vancouver Island using spears and gaff hooks. He was taught how to eat dried chum salmon dipped into a jar of eulachon grease.

[3306] John Elliot's uncles had commercial fishing boats in the 1970s. His father fished the south arm of the Fraser River, and his brother fished there for many years. He recalled Gordon Crocker and John Elliot's cousins, Dennis and Ivan, fishing the south arm of the Fraser River annually. He started fishing with his father

when he was between six and nine years old. By the time he was 13 or 14, he was fishing on his own locally, and by the time he was 17 or 18, he was fishing the Fraser River by himself using the skills his father taught him. To this day, Mr. Elliott still fishes and hunts with his brothers. He fishes year-round for himself and for his community. He also did some commercial fishing in the 1980s and in 2000. He has fished for every species of salmon, herring, lingcod, and rock cod.

[3307] The testimony of these witnesses supports the plaintiffs' claim that fishing the south arm of the Fraser River for food is a practice that remains integral to Cowichan culture today. Continuing that practice into the present time has been very difficult. I next explore the impact of colonial disruption on the Cowichan practice of fishing and on their way of life.

1. Impact of Colonial Disruption

[3308] The Cowichan Title Lands were alienated by way of Crown grants of fee simple interest between 1871–1914. The effect of the Crown grants was to render the Cowichan as trespassers on their stl'ulnup at Tl'uqtinus.

[3309] The Cowichan witnesses shared how colonialism and residential schools have impacted them, and the resulting trauma they and their families have suffered and continue to suffer. I respectfully set out their stories below.

a) Indian Act

[3310] Previous colonial legislation respecting "Indians" was consolidated into the *Indian Act, 1876*, S.C. 1876, c. 18 [*Indian Act, 1876*] giving powers to the federal Superintendent General of Indian Affairs. In the *Indian Act, 1876* and subsequent iterations, the federal government assumed the power to control every aspect of life on the reserves of Indigenous people. Canada controlled where "Indians" lived and worked, where they could travel, and how they could educate their children. The goal was to assimilate "Indians" into colonial culture.

[3311] As I have outlined in a previous section, historically, the plaintiffs' ancestors did not stay in one space, but moved around seasonally to harvest resources.

Canada disrupted this movement by imposing residential requirements on the Cowichan, mandating that they stay on reserves. Ernest Elliott described it as putting the Cowichan into little pockets and silos.

[3312] In 1885, Canada instituted a “pass system” requiring permission from the Indian Agent before “Indians” could leave their reserve: see Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 1, Canada’s Residential Schools: The History, Part 1 — Origins to 1939 (Montreal: McGill-Queens University Press, 2015) at 3, 127 [TRC Final Report, vol. 1, pt. 1].

[3313] X'tli'li'ye testified that her mother taught her about her grandmother’s experience with the pass system in the late 1800s and early 1900s. X'tli'li'ye’s grandmother needed a card signed by an Indian Agent or Superintendent of Indian Affairs to “legitimately” be off the reserve. It made it difficult for the Cowichan to harvest seasonally. They could not continue the cycles they had been following. If an “Indian” was off the reserve without a pass, they could be put in jail.

[3314] As I have referred to in Part 9, under the *Indian Act* from 1927 to 1951, “Indians” and their supporters were prohibited from raising funds to pursue land claims without the consent of the Superintendent General.

[3315] Dr. Brealey explained this shift in attitude toward Indigenous people from the Crown’s “benevolent imperialism” to “administrative colonialism”. The plaintiffs submit that administrative colonialism saw the Crown forcibly controlling the Cowichan through reserve creation, Indian Agent control, residential school system implementation, as well as the banning of cultural practices, customs, and traditions.

[3316] Indigenous people were denied access to their traditional territories. Colonial administrators wanted the Cowichan to abandon their traditional way of life and live like colonizers on plots of land with fences. The pass system confined the Cowichan to their Vancouver Island and Gulf Island reserves.

[3317] Mrs. James described the impact of feeling cut off from that homeland and "what you know and ... feel there" due to government trespass laws. She said:

> ... they had to put aside their teachings the way we were taught and to obey; we have to obey all the laws, including yours, your government laws. We had our own, but we had others. My grandmother Margaret Crocker said that we have to obey it. You obey it, whatever they say. So that made us feel the feeling we're cut off.

[3318] No discussion of the impact of colonialism on Indigenous people would be complete without a discussion about racism, which kept the Cowichan separate and confined. X'tli'li'ye described being judged "really harshly" and facing ridicule and racist comments. Her mother told her not to speak her language around non-Indigenous persons, and her brothers were regularly beaten up. It was not safe.

[3319] Ernie Elliott, Chief Seymour, and Sulipt'un described the isolating effects of racism they experienced growing up. They were not allowed in bars, liquor stores, certain restaurants, or stores. The movie theatre that Indigenous people were allowed to attend was segregated. Doctors had separate waiting rooms for them. There was a curfew in Duncan for Indigenous people. Even the mainland ferry would not allow Indigenous people above the car deck.

[3320] Chief Seymour described the racist comments he was subjected to while attending public school in Duncan about the colour of his skin and that "we were dirty, we were dumb". In his view, the racism that Indigenous students have experienced has contributed to a high drop-out rate in schools.

b) Residential Schools

[3321] Canada began funding residential schools in 1883. The legislative intent of the residential school system was to separate Indigenous children from their families "to minimize and weaken family ties and cultural linkages, and to indoctrinate children into … the legally dominant Euro-Christian Canadian society": Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015)

at v (preface). Children were placed in residential schools far away from their reserves to discourage parents from visiting them. The goal was to assimilate Indigenous people and "kill the Indian in the child": Statement of Apology — to Former Students of Indian Residential Schools from the Right Honourable Stephen Harper, Prime Minister of Canada, on behalf of the Government of Canada (11 June 2008).

[3322] The late Honourable Justice Murray Sinclair, Chair of the Truth and Reconciliation Commission of Canada (the "TRC"), wrote in his introduction to the TRC Final Report, vol. 1, pt. 1 at vii:

> The residential school system established for Canada's Indigenous population in the nineteenth century is one of the darkest, most troubling chapters in our nation's history. While some people regard the schools established under that system as centres of education, they were, in reality, centres of cultural indoctrination. The most alarming aspect of the system was that its target and its victims were the most vulnerable of society: little children. Removed from their families and home communities, seven generations of Aboriginal children were denied their identity through a systematic and concerted effort to extinguish their culture, language, and spirit. The schools were part of a larger effort by Canadian authorities to force Indigenous peoples to assimilate by the outlawing of sacred ceremonies and important traditions. It is clear that residential schools were a key component of a Canadian government policy of cultural genocide.

[3323] By 1894, *Indian Act* amendments and regulations made it compulsory for Indigenous children to attend day school. A child could only be committed to residential school if the government agent determined they were not being properly cared for or educated, but in 1920, the new amendment to the *Indian Act* made attendance of all Indigenous children at day, industrial, or boarding school mandatory. Truant officers could be appointed to enforce attendance. These officers could enter any place where he had reason to believe there were Indigenous children between the ages of 7 and 15 years. Parents who refused to comply could be fined or imprisoned, and the child arrested and brought to school.

[3324] There were seven industrial residential schools and two boarding schools in British Columbia. Kuper Island Industrial School opened in 1890. Many Cowichan children attended it, and some attended other residential schools. It closed in 1975.

[3325] As was reported by the TRC, the legacy of residential schools continues today. It is reflected in the significant educational, income, and health disparities between Indigenous people and other Canadians: Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 5, Canada's Residential Schools: The Legacy (Montreal: McGill-Queen's University Press, 2015) at 3 [TRC Final Report, vol. 5].

[3326] The loss of Indigenous languages is another legacy of the residential school system. Witnesses in this trial have spoken about their inability to receive teachings from their Elders because they lost their language when they went to residential school, or because they were not taught their language due to their parent or grandparents' fears of retribution.

[3327] The plaintiff bands and Lyackson were deeply affected by residential schools. Pahalicktun, Sulipt'un, John Elliot, Chief Seymour, Mr. George, X'tli'li'ye, Councillor Thomas, and Mrs. James courageously shared their experiences, as well as their families' experiences, at residential school.

[3328] The witnesses spoke about the separation of siblings and punishment for talking to relations who were not at the school.

[3329] Children were subjected to physical, sexual, and emotional abuse. Discipline was not monitored or regulated, and this abuse went unaddressed. The residential schools were unsanitary and incubators for disease. Many children died in residential school or otherwise never returned home.

[3330] There was no cultural teaching, and children could not observe Indigenous practices while at school. Some children did not receive more than a grade one or two education, and were made to do chores or farm work. Pahalicktun testified that "residential schools weren't there to teach us; they were there to take the Indian out of us". He said the Kuper Island Residential School was "like a prison".

[3331] Indigenous children were punished for speaking their language. Residential school disconnected Sulipt'un from his language, and he is still trying to relearn it.

Chief Seymour shared that, at the time of his testimony, he could only speak a few words of his language and could not carry on a conversation. This impacted his ability to learn harvesting knowledge and his relationship with Cowichan Elders, as he could not understand when they shared stories with him. The bighouse is an important space for passing on cultural knowledge, and the work is conducted in Hul'qumi'num. Mr. George testified that it is difficult to fully understand the intent or purpose of ceremony without speaking the language. As a ripple effect of Councillor Thomas' grandfather attending residential school, he insisted that Councillor Thomas stop learning Hul'qumi'num as a child. Mr. Elliott's grandfather would not teach his children or grandchildren the language because he did not want to lose his children to residential school again.

[3332] Residential school also impacted engagement with traditional practices. The witnesses testified about grandparents refusing to share traditional ways, stories, culture, and history. Mr. Elliott spoke of the impact of grief and fear on the family and community when their children were removed. His mother and uncles are all residential school survivors. His grandfather could not fish after they went to residential school: "His boat sat on the beach, and it never went in the water again".

[3333] The witnesses spoke to how the ripple effect of family and community estrangement and trauma from residential schools affects their communities today. Many survivors and their families experience substance use disorder.

[3334] Pahalicktun described how the loneliness and lack of love experienced at residential school impacted his closeness to his family. His mother lacked parenting skills as a consequence of residential school. Pahalicktun's own residential school experience impaired his ability to show love for his children.

[3335] Mr. Elliott said the Cowichan "can't get over it because it still lives within us ... it'll take us generations to recover".

[3336] Chief Seymour testified that, even though today's children never went to residential school, they still suffer from the loss of parenting skills. Cowichan Tribes

enacted a state of emergency in 2013 to address high youth suicide rates in the community. He said: “We were losing our kids one at a time almost on a daily basis. We had to call a state of emergency ... Every year since I’ve been chief I’ve been asked, are you ready to go off of that state of emergency? I’m not. Those social issues are still there today”.

[3337] Mr. Elliott testified about colonial disruption causing present-day social and infrastructure issues. For example, Cowichan Tribes has a serious housing shortage and people are living in overcrowded homes or are living off reserve because of this.

[3338] I accept this difficult evidence and thank all the witnesses for their bravery in sharing these painful stories. Huychq’u.

c) Canada’s Fishing Regime

[3339] The plaintiffs submit that prior to contact, the Quw’utsun managed the fisheries they used in accordance with their own legal system and resource management practices. They say that, beginning in the late 1800s, Canada’s fishing regime significantly disrupted the continuity of their practice, custom, or tradition. As previously set out, infringement is no longer in issue, but Canada’s restrictions on the plaintiffs’ fishing practice remains relevant to continuity.

[3340] The plaintiffs submit that, between 1867–1977, Canada’s fishing regime increasingly restricted the Cowichan’s ability to fish the south arm. They were effectively shut out from the fishery because they were classified as “extraterritorial”.

[3341] Canada’s *Act Respecting the Extension and Application of “the Fisheries Act” to and in the Provinces of British Columbia, Prince Edward Island and Manitoba*, S.C. 1874, c. 28 [*Fisheries Act*], came into force in British Columbia in 1876.

[3342] In *Sparrow*, the Crown took the position that the Musqueam Band’s Aboriginal right to fish had been extinguished by regulations under the *Fisheries Act*. Before British Columbia’s entry into Confederation in 1871, fisheries were not regulated in any significant way. Indigenous people were encouraged to continue fishing for their

own food requirements. As noted above, the federal *Fisheries Act* was proclaimed in force in the Province in 1876, and the first *Salmon Fishery Regulations for British Columbia* were adopted in 1878. The regulations provided that “Indians” were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter (see *Sparrow* at 1095–1096).

[3343] In *Jack* at 310, the Court found that there was an increasing subjection of the “Indian fishery” to regulatory control. First, Canada began to regulate the use of drift nets. Then, it restricted fishing for food purposes, and required permission from the Chief Inspector of Fisheries. By 1917, Canada had the power to regulate food fishing by means of conditions attached to the permit.

[3344] The Court in *Sparrow* held that the respondent’s argument confused regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is extinguished. The Court held that there is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Aboriginal right to fish. These permits were simply a manner of controlling the fisheries, not defining underlying rights: at 1097, 1099.

[3345] In 1890, Canada began restricting the total number of licenses for salmon fishing in the Fraser River to 500, 350 of which were allocated to the canneries.

[3346] Canada refused to license the Cowichan to fish the south arm because they were not “white men” nor recognized by Crown agents to be “River Indians”. It also confined Cowichan fishing to Vancouver Island and the Gulf Islands.

[3347] In 1894, Canada adopted regulations requiring Indigenous persons to get a permit to food fish. In 1895, the Cowichan complained to W. H. Lomas, Indian Agent about the loss of their ability to fish for their food without permission from the Inspector of Fisheries.

[3348] In 1896, the Superintendent General of Indian Affairs forwarded another petition from the Cowichan to the Minister of Fisheries, wherein the Cowichan complained about their lack of fishing rights.

[3349] In 1908, Canada prohibited any fishing, including food fishing on the south arm, with nets except under license. Regulations introduced the concept of different fishing districts in the Province.

[3350] In 1917, Canada amended its regulations to empower DFO to fix the place, method, and timing of any Indian food fishery.

[3351] As was noted in *Jack* at 310 by Dickson J.:

> ... In 1917, we find the first complete provision relating to control of the Indian fishery, more or less identical to the present day [1979] s. 32 of the British Columbia Regulations. An Indian was allowed, with the permission of the Chief Inspector of Fisheries, to catch fish to be used as food for himself and his family but no other purpose. The Chief Inspector was empowered to limit or fix the area of the waters in which, the means by which, and the time in which, such fish might be caught.

[3352] Because Canada adopted the stance that the Cowichan were not “River Indians”, they were denied access to the Fraser River to fish for food.

[3353] The 1977 regulations remained essentially the same as the 1917 regulations. An “Indian” could fish for food under a special license specifying method, locale, and fishing times. In 1981, Canada adopted communal Band food fishing licenses: *Sparrow* at 1096–1097.

[3354] In 1978, DFO formalized its practice of only licensing Indigenous persons to fish for food in areas where their band had fished in the previous 25 years, ignoring the fact that the Cowichan could not have done so because they were prevented the opportunity by DFO. The DFO would only include a new area on a band’s license if DFO deemed them to be “local” or “resident” to the area. The local resident band was defined as a band with reserves near or adjacent to a specific area. This is referred to as DFO’s ‘Adjacency Policy’. The plaintiffs say they were never deemed local or resident to the Fraser River because the Crown sold their land out from under them, and so they remained excluded from fishing the south arm for food.

[3355] DFO adopted a further policy in 1978 that any Indigenous fishers looking to fish in that “extraterritorial” area must get authorization by the “local” band already fishing there (sometimes referred to as protocol).

[3356] In 1982, Canada told Musqueam that it would not license members of local bands to fish in Musqueam’s fishing area without their permission.

[3357] A letter from the Musqueam Indian Band to the United Native Nations dated June 18, 1986 states that the Musqueam Indian Band “will not issue native food fishing licenses in any of its territorial areas to anyone who is not of Musqueam descent”. DFO responded on June 24, 1986, saying to Musqueam that its position was duly noted, and the DFO would adhere to the Musqueam Band’s position on the issuance of “Indian Food Fish Licenses” in the Band’s territorial waters, as set out in its letter.

d) Post-Sparrow Fishery Regime: 1990–2007

[3358] After the *Sparrow* decision, DFO introduced interim policies for Aboriginal fisheries in British Columbia that acknowledged Indigenous peoples could have fishing rights in areas not near or adjacent to their reserves.

[3359] The plaintiffs submit that this recognition has been meaningless for them.

[3360] On September 13, 1990, DFO told the Cowichan, who claimed that they historically fished the Fraser River each year, that they would have to take it up with the Fraser River bands, in particular, Musqueam. Musqueam was informed of the long-standing policy and were told that DFO had informed Cowichan that they would have to clear it with Musqueam.

[3361] The South Coast Division 1990 Compensatory Fishery Re: Management Area 29 policy says:

> South Coast Division has upheld the long standing policy of respecting traditional Indian fishing areas in our response to Vancouver Island Coast Salish Tribes’ requests to re-establish former traditional Fraser River sockeye fisheries. In our response to those Bands, we have taken the position that this issue can only be resolved through either a negotiated agreement, maybe by

> the land claims process, or established through litigation. Any other consideration would be only by approval of a Band to host a fishery within the context of their own territorial fisheries and allocation levels. We have been explicit in our response to all South Coast Division Bands' requests that the only harvesting the Fraser River bound sockeye for I.F.F., outside the usual A-12, A-13, A-16, A-18 and A-20 I.F.F. net fisheries, would be conducted on the basis of compensatory fisheries which compensate Bands for reducing their traditional harvest levels on local depressed salmon stocks ...
>
> The position taken by South Coast Division does not circumvent the process for the Cowichan or any other Bands' need to achieve an agreement with the Musqueam Band or any other relevant Bands on the Fraser River with respect to traditional territories in conducting food fisheries in those particular areas.

[3362] In 1992, DFO released its Aboriginal Fisheries Strategy (the "AFS") governing fishing access for FSC purposes. DFO developed agreements regarding fishing areas and allocations, referred to as AFS Agreements or Comprehensive Fisheries Agreements ("CFAs").

[3363] Musqueam and TFN had the south arm included in these early CFAs, while the plaintiff bands did not.

[3364] In 1993, DFO released its Policy for the Management of Aboriginal Fishing, introducing its historic use policy which still applies today. Indigenous groups could fish, and have priority of access to food fish, in areas they historically used. Historic use means an Indigenous group fished in an area pre-contact or at the time of contact.

[3365] The policy does not expressly incorporate the Adjacency Policy or the policy requiring extraterritorial bands to get protocol from local bands, but the plaintiffs have proven that DFO continued to follow that approach.

[3366] Cowichan Tribes, Penelakut, Stz'uminus, and Halalt made requests to access the Fraser River based on their Aboriginal rights in June 1990, August 1990, and June 1994. DFO responded to these requests by confirming the Adjacency Policy, and requiring the Cowichan to get local band permission before DFO would consider providing fishing access.

[3367] In 2005, DFO required Cowichan to get protocol with local bands. DFO staff began questioning the conflict between DFO's policies and how they applied to Cowichan south arm fisheries. Al Gould, the South Coast Aboriginal Affairs Advisor, noted the DFO's current approach to licensing Cowichan was losing traction with these groups. He said that "there is some legal risk in continuing to do so in light of the Haida/Taku decision". In response, DFO reversed its decision and licensed Cowichan Tribes and Penelakut to fish a portion of the south arm without protocol.

[3368] In 2006, DFO began implementing policies to evaluate permanent and interim access change requests for fishing areas (the "2006 framework") to guide DFO in making permanent area decisions. One question to be asked was whether the Indigenous group met the DFO Historic Use Policy. The 2006 framework did not revoke the Adjacency Policy. DFO maintained an operational requirement for extraterritorial bands to get permission from local bands.

[3369] The 2007 policy confirmed that the Adjacency Policy was still in place, and stated that fisheries "should occur within the areas used historically by the Aboriginal groups near or adjacent to their communities". It also confirmed protocol discussions were relevant to DFO decisions regarding area change requests.

[3370] In 2007, DFO took the stance that they were concerned about safety and proper management, and as a result it was "vitally important" the Cowichan develop protocol with Musqueam and TFN.

[3371] According to Rebecca Reid, Regional Director General for DFO Pacific Region, DFO was not concerned that the plaintiffs' fishing could cause safety issues, but were concerned about the response from other First Nations.

e) Modern Fishery Era: 2008–2019

[3372] Canada refused to make a permanent decision on the Cowichan south arm access between 2008 and 2019.

[3373] DFO continued to apply its Adjacency Policy, which largely prevented the Cowichan from accessing their south arm fishery. DFO "required" the Cowichan to engage in protocol discussions with local bands. DFO's supplemental licensing procedures instructed staff to inquire about protocol prior to providing the Cowichan with south arm access. I have put the word "required" in quotation marks because DFO policies say that protocol is not a requirement, and yet list in all of their license issuance procedures the practice of asking whether protocol is in place. It was certainly the Cowichan's impression that protocol was in fact a requirement, and I can understand why.

[3374] The plaintiffs say protocol was an important criterion in DFO deciding whether it would allow Cowichan access to the south arm food fishery. The Supplemental Licence Issuance Procedures for 2009–2018 instructed managers to ask bands whether they had protocol with local bands. The policies stated "it is highly desirable to have [protocol] in place". DFO repeatedly told the Cowichan they needed to engage in discussions with local bands to get south arm access.

[3375] Jennifer Nener (Director of Salmon Management and Client Services for Pacific Region and the Canadian Chair of the Fraser River Panel) was asked if DFO had communicated that a protocol is not required, but is something that DFO urges or encourages the parties to reach. She testified that they had communicated their encouragement for protocols with the plaintiffs and others, including Musqueam.

[3376] Cowichan Tribes Lands and Governance Director Larry George was asked about seeking protocol from Musqueam. Mr. George testified that, every year, DFO encourages them to discuss their south arm fishing plans with other First Nations, mainly Musqueam and TFN, to talk about an agreement or protocol. Even though it is not a criterion in the process they have to follow, Mr. George reported that DFO suggests "it should be done to help the situation".

[3377] I have reviewed evidence from Jennifer Nener, Larry George, and Kevin Conley. I agree with the plaintiffs' submission that DFO continued to require that a protocol be in place between them and Musqueam or TFN, even though in later

years they couched the words carefully by saying it was not required, but encouraged.

[3378] In 2012, neither Cowichan Tribes nor Stz'uminus sought a protocol with Musqueam, yet DFO issued a license to fish a portion of the south arm that summer. In response, Musqueam and TFN held a protest fishery. Because of this protest, DFO denied Cowichan Tribes any more south arm sockeye fishing opportunities in 2012 “unless a proper, orderly fishery could be achieved”.

[3379] On August 14, 2012, Greg Thomas, South Coast Area Chief, Fisheries Management, Pacific Region, DFO, advised two Cowichan Tribes councillors that DFO had received notice from Musqueam that they would be conducting an unauthorized fishery in the river near the south arm, directed against DFO’s planned authorization of the Cowichan Tribes sockeye fishing in the area. He advised that due to safety concerns, DFO would not be providing the proposed supplemental licensing opportunity to Cowichan Tribes. Chief Alphonse wrote to Mr. Thomson the same day and demanded that the usual supplemental license to fish the south arm near the mouth of the Fraser River be issued to Cowichan Tribes urgently.

[3380] On August 15, 2012, Andrew Thomson, Area Director, South Coast, DFO, sent a letter to Chief Alphonse referencing the DFO’s authorization of Cowichan Tribes to gillnet fish for 48 hours on August 8–10 in the Fraser River. The letter reads in part:

> ... As you are aware, this fishery was protested by Musqueam First Nations and the RCMP and Conservation and Protection staff were required to attend the fishery. It is DFO’s view that First Nations should be able to resolve fishing area issues themselves. However, the need for the RCMP presence during the last fishery speaks to the very real risk of violence. Subsequent conversations and correspondence with Musqueam has indicated that a further escalation of the protest is likely during any subsequent opportunities that might be considered for Cowichan in the Fraser River. Based on the best available information, the Department remains extremely concerned about further protests and the significant threat this poses to ensuring a safe, orderly and manageable fishery. It was for this reason departmental staff contacted Cowichan Tribes yesterday to alert you to the potential conflict.
>
> As a result, the Department is not prepared to authorize a food, social and ceremonial fishing opportunity for Cowichan Tribes in the Fraser River at this

> time, until the concerns about ensuring a safe, orderly and manageable fishery can be resolved. The Department is prepared to assist where possible to facilitate discussions between Cowichan Tribes and Musqueam First Nations to resolve the dispute. Given that fishing opportunities are rapidly diminishing because of impending late-run sockeye stock concerns, we have arranged a meeting with you and your staff for this afternoon to discuss opportunities. In the interim, I encourage you to take advantage of fishing opportunities that are currently authorized under your communal license or potentially available in Johnstone St. under authority of a supplemental license.

[3381] From that point on, the plaintiffs submit that DFO used the threat of a protest fishery to link safety and manageability concerns to its constant push for protocol agreements between Cowichan, Musqueam, and sometimes TFN. Larry George confirmed the Cowichan Tribes relied on the statements contained in this letter. His understanding was that their license request would go no further on the Fraser River because there was a safety concern and there seemed to be a need for their Nations to meet with Musqueam to have further discussions. DFO issued no further licenses in 2012 to Cowichan Tribes.

[3382] In 2013 onward, DFO told the Cowichan it would only provide them with south arm access if they could ensure an “orderly and well managed fishery”. This is an unusual requirement, given that it was not the plaintiffs who protested or fished without authorization. The DFO’s approach meant the plaintiffs bore the brunt of Musqueam’s tactics.

[3383] By the 2018 fishing season, DFO was still “strongly encouraging” that the plaintiffs reach an agreement with Musqueam about fishing the south arm of the Fraser. It was DFO’s policy that “requesting” First Nations who were seeking to fish there had to consult with the “host” First Nation. The host would be the First Nation who already had the area in question as part of its regular fishing area.

f) Conclusion

[3384] Continuity requires reasonable similarity between the pre-contact practice and the Aboriginal right being claimed, such that the components of the modern practice of the right demonstrably originate from the pre-contact society: *Van der Peet* at

paras. 63–67. The practice may change over time, but there must still be a linkage between the past and present practice. As was said in *Marshall; Bernard* at para. 25: “Modern peoples do traditional things in modern ways”.

[3385] In this case, the plaintiffs’ historical practice of fishing the south arm of the Fraser River for food has not changed, although it has been disrupted.

[3386] Canada acknowledges the profound impact of residential schools on the plaintiffs’ traditional way of life, and that colonial disruption generally has negatively impacted the plaintiffs’ traditional practice, including the continuation of their ancestors’ practice of fishing for food in the south arm of the Fraser River.

[3387] The Cowichan have made their best effort to continue fishing the south arm when permitted to, even though the asserted right is to an area they were prevented from fishing by government regulation. This is similar to *Côté* and *Adams*, where the fishing at a specific location had been interrupted by government regulation.

[3388] In *Desautel* SCC, the Sinixt were displaced from their traditional territory in a similar manner to that of the Cowichan. The Sinixt had not abandoned their claim to their traditional territory. Until the 1930s, members of the Lakes Tribe continued to hunt in British Columbia despite living in the United States. At para. 33, the SCC quoted from the RCAP Report at 139–140:

> Aboriginal peoples were displaced physically — they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools — which undermined their ability to pass on traditional values to their children, imposed male-oriented Victorian values, and attacked traditional activities such as significant dances and other ceremonies. In North America they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions.

[3389] This is the disgraceful backdrop against which the law requires Indigenous people to prove continuity of Aboriginal practice. On the one hand, Crown authorities make it difficult or near impossible for Indigenous people to practice their traditional harvesting rights. On the other hand, the law creates legal tests that make it a

requirement. Clearly, the requirement must be sufficiently flexible to consider the impact of colonialism on the Indigenous group's ability to exercise their traditional practice.

[3390] The Court said in *Desautel* SCC that an interpretation of "aboriginal peoples of Canada" in s. 35(1) that excludes Indigenous peoples who were forced to move out of the country would risk "perpetuating the historical injustice suffered by Aboriginal peoples at the hands of colonizers": at para. 33, citing *Côté* at para. 53. An interpretation that risks excluding Indigenous peoples who have been forcibly displaced *within* Canada from their traditional territory must also be avoided.

[3391] The Cowichan have faced over a century of colonial disruption that has interfered with their ability to fish the south arm for food. Yet, I accept that fishing the south arm for food still has a profound significance to their core identity and way of life, and remains an essential element of their culture.

[3392] Fishing for food is a core aspect of Cowichan culture. They teach their children about Cowichan culture through foods such as salmon. Larry George testified that it is in their genes "to taste it and want to have it".

[3393] John Elliott fishes all five Fraser River salmon species for food for his family and community. He has continued the role of hwkwunkwunlhnénum (gatherer). His brothers are gatherers, and he is teaching his children to be as well.

[3394] Seafood is a staple of the Cowichan diet. I heard from X'tli'li'ye, Luschiim, Sulipt'un, Mrs. James, and Councillor Thomas about its importance in their culture.

[3395] Luschiim explained that living at Tl'uqtinus would give the Cowichan an opportunity to practice their culture so their children and grandchildren could apply the knowledge they learned from their Elders. John Elliott spoke about how proper knowledge transmission involves hands-on experience to learn about the south arm, and to receive accompanying cultural and traditional teaching.

[3396] The Cowichan Elders described their lived experiences fishing on the south arm during their lifetimes.

[3397] John Elliott testified that fishing the south arm would “bring the traditions and the strength of who they are back into them where they're proud to go fishing and they're proud to get it home and ... building the tradition back into the community to being the proud people we are”.

[3398] X'tli'li'ye spoke about harvesting for her community on the south arm in 2011 in the presence of their ancestors:

> ... it was really a powerful experience for me ... as we were pulling the net in, an eagle flies by ... I could feel the presence of the ancestors. I was doing the right thing ... You know, it was really momentous. It felt like a turning point, you know, in some ways to be able to be there and representing the people in the best way I could, understanding that we had lost so much ... Yeah, it was just a very powerful experience for me to be there, to be the leader of my peoples, selected by them and being there and exercising rights that had been ... stolen and squashed for so long.

[3399] Councillor Thomas spoke of the reward of catching fish and providing for one’s family and local Elders. He said that fishing at Tl'uqtinus would spiritually connect the Cowichan to their ancestors and consequently their own identity. It would “bring a spiritual connection back to our ancestors ... that lived there. I think that is an overwhelming feeling ... I can’t explain it. And I want my grandchildren to feel that and realize that. It’s really important for us to get our home back”.

[3400] Councillor Thomas would like to pass his ancestors’ traditions of fishing the south arm down to his children and grandchildren, and any other children who want to learn.

[3401] In a letter dated March 30, 2016, the Cowichan Nation Alliance wrote to DFO:

> Fishing the south arm of the Fraser River is our preferred means of exercising our culturally integral Aboriginal right to fish for food. The south arm of the Fraser River is our homeland. It is where we were embedded at our permanent village at Tl’uqtinus, and it is where we obtained fish that sustained us as a people, at all legally relevant times. Fishing the area together is part of what makes us who we are as a nation. As a people we need to be able to practice who we are, fishers of the south arm of the Fraser

> River. Our elders need the opportunity to teach the next generation of our people their fishing knowledge of the south arm; to be whole our fishers and people need the opportunity to engage in their ancestral custom of fishing the south arm of the Fraser River.
>
> Every single day that Canada prohibits us from fishing the south arm ... [interferes with] the continuity of our culture.

[3402] A significant consequence of over a century of disruption is that the Cowichan now have minimal capacity to engage in their practice of fishing the Fraser River. Most of their members no longer have boats and most have been unable to fish there for a century. There is a significant power imbalance now between the Cowichan and Musqueam. As a result, the Cowichan have to rely on Musqueam to conduct their fishing. They would prefer to do their own fishing once they have the boats and have redeveloped a skill that has been diminished. They agreed to the modern protocol letters because if the Cowichan did not ask Musqueam for protocol, they ran the risk that DFO would not license them. More will be said about this below.

[3403] The Cowichan have gone to significant lengths to maintain a connection in the south arm and they have done so. It would be a great injustice if the Cowichan were denied an Aboriginal right to fish the south arm for food because they followed DFO's requirement to access fisheries.

2. Permission

[3404] I turn now to consider whether the plaintiffs' ancestors fished with the permission of Musqueam, Tsawwassen or other Indigenous group, such that there is insufficient continuity between the Cowichan's historical fishing practice and the unconditional right to fish that the plaintiffs claim in this action.

a) Positions of the Parties

[3405] Musqueam submits the evidence establishes that fishing by members of the 11 local groups for any species on the south arm was a family-based activity pursued by permission from their hən̓q̓əmin̓əm̓-speaking kin. Musqueam asserts that they controlled access to the Fraser River, which was their traditional territory.

[3406] Musqueam relies on *Desautel* SCC to argue that the post-contact or present practice of obtaining permission from Musqueam may be probative of the nature of the pre-contact practice.

[3407] TFN pleads that if the Cowichan fished the south arm, they did so pursuant to the rights of other First Nations or Aboriginal groups, including TFN, to share access to the fisheries and with permission of TFN or those other groups.

[3408] Canada submits if the Court finds that the plaintiffs' ancestors' pre-contact practice was dependent historically on permission from the Musqueam or other hən̓q̓əmin̓əm̓ kin, then the plaintiffs have not established continuity. On the other hand, Canada admits that if permission was not required, the plaintiffs have established an Aboriginal right to fish the south arm for food.

[3409] The plaintiffs say there is no evidence that the modern practice of asking permission from Musqueam is integral to the Cowichan culture. They asked for permission because it was a DFO requirement, not a cultural practice. This does not prove permission was required pre-contact; the Musqueam protocol process came into existence around 200 years after European contact.

[3410] The plaintiffs submit Canada has acknowledged that colonial disruption has impacted their ability to continue to fish the south arm for food. This disruption included being treated as extraterritorial to the south arm due to the Crown's own failure to provide the plaintiffs with a reserve at the Lands of Tl'uqtinus.

b) Ethnographic Evidence

[3411] In Part 5, I reviewed the ethnographic evidence related to occupation of Tl'uqtinus, and of Boas, Jenness, Barnett, Suttles, and Duff regarding fishing. I now examine the ethnographic evidence regarding permission.

[3412] In 1887, Boas did not record anything about Cowichan fishing on the Fraser River being subject to permission or kinship ties.

[3413] In 1913, Curtis did not mention a need for permission or kinship ties for the Cowichan to participate in their seasonal round on the Fraser River.

[3414] In the 1930s, Barnett did not record anything from Chief Jack of Musqueam about the Vancouver Island people's presence on the Fraser River being subject to permission or kinship ties.

[3415] In 1952, Suttles recorded that the Penelakut, Halalt, Chemainus, and Tataka came to Tl'uqtinus to fish. Suttles did not record anything about permission or dependency on kinship ties.

[3416] Jenness said the Cowichan had no fishing rights on the mainland, which is inconsistent with the historical record and oral history evidence that I accept.

[3417] Rozen's opinion is the Island Halkomelem fished the summer months for sockeye around Lulu Island with the permission of Musqueam and other Mainland Halkomelem. Rozen also discusses family kinship rights in the context of the Island Halkomelem's ability to fish around what is now the entrance to the Tsawwassen Ferry Terminal causeway. He described that some of the extended family from the Westholme area (Halalt territory) may have had other, more specific rights to fish adjacent to Tsawwassen, but it is clear that Tsawwassen villagers had rights over all other groups. I question the time frame that Rozen is referring to because Tsawwassen was not present at the mouth during the relevant historical time period.

[3418] Dr. Suttles said in *The Ethnographic Significance of the Fort Langley Journals* that it is likely that the Tsawwassen village at English Bluff had been abandoned at this time, and reoccupied a generation or so later. Dr. Lovisek had not considered this and could not comment on the later reoccupation of the village. She observed no reference to Tsawwassen in the Fort Langley journals.

[3419] In *Point Roberts in Native Traditions*, Dr. Suttles says that the ancient village site of Tsawwassen on Point Roberts may have been vacant during the early 19th century. According to "Native tradition", the Tsawwassen were almost wiped out by the first smallpox epidemics, which came in 1775 and 1801. The earliest Europeans

in the region made no mention of the village on the site or a tribe named Tsawwassen. The first notice of a village on the site dates from 1857, and it was first identified as Kwantlen — later that year as “Chea-wassen” and in subsequent reports with variations on the name Tsawwassen.

[3420] Dr. Lovisek relied on Rozen’s 1985 thesis, where he said tl'ektínes is where the Cowichan and Nanaimo came during the summer months to fish for sturgeon, sockeye salmon, and humpback salmon. This originally was “probably a summer campsite of the Musqueam, but eventually their Island Halkomelem relatives established winter village-style houses with the permission of the Musqueam and other Mainland Halkomelem ... Apparently some Island Halkomelem stayed year round at the site, at least in historic times”.

[3421] Rozen cited Drs. Lane and Barnett, who do not refer to Tl'uqtinus originally being a Musqueam campsite. Musqueam submits this information must have come from Rozen’s Indigenous informants.

[3422] No other Indigenous informants passed this theory on to other ethnographers. Rozen did not follow his usual practice of following each statement with a citation. The plaintiffs and Dr. Kennedy conclude that the statement must have been based on Rozen’s own opinion because there is no other reference that supports this statement in the ethnographic materials.

[3423] Rozen interviewed Abel D. Joe and Abraham Joe in 1978, and made no reference to Cowichan occupying Tl'uqtinus with Musqueam’s permission. In his thesis, Rozen relied on the same interviews he conducted from 1974–1978 and did not conduct new interviews. It is therefore unusual that he would opine about Musqueam permission in 1985 from interviews conducted prior to 1978, when he did not mention it in 1978.

[3424] Arnold Guerin was an informant for Suttles’ *Musqueam Reference Grammar*. He did not say anything about Tl'uqtinus originally being a Musqueam campsite or Island Halkomelem relatives establishing plank houses there with the permission of

the Musqueam and others. Suttles said that ƛəqətínəs was a summer village of the Cowichan. He made no reference to permission.

[3425] Dr. Kennedy opined that the Rozen citation, relied on by Dr. Lovisek, is not supported by any evidence. She found no clear evidence of anyone asking for or giving permission to the Cowichan for their establishment or maintenance of a village or for their resource harvesting at ‘Long Shore’, Tl'uqtinus. Nor did she find evidence of the Cowichan seeking permission from any other group, or for that matter, permission to the Cowichan being warranted. She noted the significance of the relative population of the Cowichan to the Musqueam, which indicates that the former was recognized as a large powerful tribe while the latter was seen as a minor group of individuals. She referenced the Yale census, which showed Cowichan were seven times stronger in number than the Musqueam. They possessed three times the number of guns, and seven times the number of canoes. In 1857 and 1858, George Gibbs referred to the Musqueam as a small tribe situated on the north arm. The largest number of Cowichan ever estimated was the Douglas assessment of 5,879 Cowichan, although Dr. Kennedy believed this figure was inflated. The largest estimate of Musqueam was 200, provided by J. M. Yale to Gibbs in 1858. I observe that some of this evidence relates to the post-contact period.

[3426] Dr. Kennedy’s opinion is that permission amongst the Central Coast Salish occurred only at the level of individual and family, and not at the level of the largest social group.

[3427] Dr. Lovisek agreed in cross-examination that the statement that Tl'uqtinus was probably a summer campsite of the Musqueam was Rozen’s opinion. As previously set out, I do not accept that opinion, which is not attributed to a source and which runs counter to the bulk of the evidence.

c) Coast Salish Law

[3428] In Part 5, I discussed Coast Salish law, which I will not repeat here. The Cowichan and Musqueam subscribe to the same lessons or snuw’uyulh (snəẘeyəɬ in həńq̓əmiṅəm̓). These include the importance of knowing who their ancestors are;

maintaining connections with extended family; and principles of sharing resources with one's family and generosity, how to harvest, how to be a good person, and harvesting in the sense of being respectful for everything you harvest. Many of these lessons or morals are taught in the stories of Xeel's/Xe:l's.

[3429] sʔəyəɬəq testified about the interactions between families being guided by the snəẇeyəɬ, or teachings, which include teachings about the importance of knowing and maintaining connections with extended family, as family ties provide a combination of privileges and obligations between family members.

[3430] Kinship arrangements and agreements were made between families who had the responsibility of either being guests in your territory or being hosts.

[3431] The principle of nuts'a'maat (nə́c̓aʔmat in həṅq̓əmiṅəm̓) teaches the importance of working together to make decisions and resolve issues, or being of one mind. As X'tli'li'ye, sʔəyəɬəq, and Mr. Guerin said, in the context of fishing, nuts'a'maat is the understanding that there is a responsibility to work together for the sustainability of the resource.

[3432] It is with this understanding of Coast Salish laws of generosity, kinship, and stewardship that I review the submissions regarding protocol.

d) Modern Protocol Requests

[3433] The imposition of the *Fisheries Act* and DFO's regulation of the fisheries impacted Musqueam peoples' traditional harvesting activities. Until 1970, DFO did not permit Musqueam to fish for food; they could only source fish from commercial fishers. Chief Sparrow testified that Musqueam people were taught by their Elders and elected leaders that they never relinquished the right of access to the fish. They did not agree to the boundaries imposed by DFO.

[3434] In *Sparrow*, the SCC upheld the Court of Appeal's decision that the Musqueam have an existing Aboriginal right to fish in the area where Ronald Sparrow was fishing, which was Canoe Passage at the mouth of the Fraser River.

They also held that the DFO licensing restrictions did not extinguish that Aboriginal right to fish.

[3435] In the 1990s, after the *Sparrow* decision, Musqueam acquired access to fishing the south arm of the Fraser River, which became their licensed area. In 1993, Musqueam and TFN along with a number of other First Nations negotiated an agreement under DFO's AFS.

[3436] Musqueam says a big component of the AFS Agreements was co-management of the fisheries in its "Traditional Territory", putting conservation first.

[3437] Musqueam submits that before and after *Sparrow*, there were discussions in the bighouse setting and political meetings between Coast Salish people about the implementation of s. 35 rights. A process for resource sharing post-*Sparrow* was developed. DFO decided the allocations of salmon to other First Nations, but once they had done so, Musqueam managed access to fishing in its territories.

[3438] The plaintiffs submit because of DFO's Adjacency Policy, it was DFO who required that "non-resident" Indigenous groups seek permission from Musqueam to fish in Musqueam's licensed area. There is no evidence that the modern practice of asking permission is integral to Cowichan culture today.

e) 1990 Esquimalt Longhouse Meeting

[3439] In 1990, Musqueam held a meeting at the Esquimalt Longhouse in which Coast Salish Nations discussed managing access to each Nation's traditional territory through protocol. Musqueam did not define their traditional territories.

[3440] The late Joe Becker was Musqueam's first Fisheries Manager in the 1990s. He circulated a memo summarizing what was said at the meeting. No agreement was reached to follow the process of asking Musqueam for permission. Musqueam Councillor Wendy John was present and recalled that Musqueam expressed concern about seiners fishing at the mouth of the Fraser River immediately before a

Musqueam in-river fishery and Musqueam had asked for advance notice of the timing of seine fisheries occurring in the river mouth immediately before Musqueam's in-river fishery.

[3441] After this meeting, Joe Becker prepared a protocol form letter that referenced Musqueam traditional territory, which is an undefined term. At the time of trial, Chief Sparrow could not define it because "that was work that is still going on".

[3442] On September 3, 1991, Joe Becker prepared a memo to "All Coast Salish Nations" regarding "Fishing in Musqueam Traditional Territories". The memo indicates "Musqueam has authorized regular fisheries permits to be issued out of the Nanaimo office of the Department of Oceans and Fisheries once confirmation has been given". Musqueam did not have authority to issue permits. I infer that this must be a statement directed at DFO who did have the authority.

[3443] Musqueam submits that the 1991 memo proposed but did not *impose* a protocol process on other First Nations.

[3444] First Nations with family connections to Musqueam could make requests to Musqueam to fish in Musqueam's licensed area, and in keeping with their kinship and sharing principles; if there was an abundance then Musqueam helped their relatives, and requests were rarely denied.

[3445] Musqueam says many Coast Salish First Nations have followed the protocol process and requested permission to access Fraser River sockeye in Musqueam licensed fishing areas. The plaintiff First Nations and Lyackson have done so.

[3446] Musqueam submits that this contemporary protocol process continues the Central Coast Salish traditional practice that has been adapted to a way of life disrupted by colonization and by federal legislation. As above, Musqueam submits that the present-day practice may be probative of the nature of the pre-contact practice.

[3447] Musqueam claims it created its contemporary protocol process in 1990, after the SCC upheld the finding that Canoe Passage was an ancient Musqueam tribal territory where Mr. Sparrow's ancestors had fished for salmon from time immemorial and that Musqueam's Aboriginal right to fish had not been extinguished by government regulation. After the *Sparrow* decision which only dealt with Canoe Passage, Musqueam negotiated with DFO to extend its fishing area into the entire south arm.

[3448] On August 31, 1994, Chief Peter Seymour of Chemainus wrote to Joe Becker of Musqueam regarding a one-day fishing opening in Areas 29-9 and 29-10, which were part of Musqueam's permanently-licensed fishing area. He requested "tribal protocol" to fish, saying "opportunity and abundance presents" for two days.

[3449] Chief Sparrow spoke to the term "tribal protocol" used by the late Chief Peter Seymour. Chief Sparrow testified that respected Elders had taught him that "tribal protocol" means the traditional, pre-contact Coast Salish practice of resource access in the territories of other Nations through family connection and brotherhood in the ethics of sharing. I accept this evidence applies to the territories of other Nations. In modern times, Areas 29-9 and 29-10 were part of Musqueam's permanently-licensed fishing area and considered to be part of their modern territory. Resource sharing with kin in times of abundance is part of Musqueam culture.

[3450] I do not draw the inference Musqueam invites me to draw. The fact that Chief Seymour asked for tribal protocol to fish in Musqueam's permanently-licensed fishing area does not mean that asking for permission was a historical practice. In my view, as demonstrated by the historical, ethnographic, and expert evidence, the south arm of the Fraser River was a shared territory; none of the First Nations who fished there during their seasonal rounds controlled that portion of the river.

[3451] Musqueam submits that the letter from Chief Seymour to Joe Becker contains admissions against the interests of Stz'uminus. Chief Seymour was Chief of Stz'uminus First Nation in 1994. In my view, Chief Seymour's statement is not an

acknowledgement of traditional territory or of historical protocol practice, but an acknowledgement of the state of affairs in the 1990s because of DFO's licensing practices. The following statement in Chief Seymour's letter supports my conclusion:

> ... except for the blink of time in the last few decades in which we, like you, were unable to gain fair access to them, have of course been our usual and accustomed fishing grounds for many thousands of years, in concert and brotherhood with your tribe [Musqueam] and many others.

[3452] The "blink of time in the last few decades" when Stz'uminus and Musqueam were unable to gain fair access to this fishing area references DFO's licensing restrictions imposed on both Indigenous groups.

[3453] I interpret the words "in concert and brotherhood" to reference the Coast Salish practice of sharing resources, fishing side by side.

[3454] Pahalicktun testified that if the people from another Coast Salish First Nation wanted to fish or harvest resources in Lyackson's territory or waters, they would be expected to seek permission first. He agreed that the practice of requesting permission to access resources in the territory of another First Nation is deeply rooted in the culture and history of the Coast Salish people. He did not say that the south arm was Musqueam historic territory. He could not recall ever hearing that the Musqueam Indian Band included the south arm of the Fraser River within its historic territory. He had never heard of the Musqueam Declaration.

[3455] On August 11, 1998, Pahalicktun wrote to Musqueam seeking permission to access Fraser River-bound sockeye. He said: "We understand we need a protocol Agreement in place before we will be allowed to fish in your respected territory". By 1998, Musqueam had a permanent license to fish the south arm. I believe that this is what Pahalicktun was referring to as "your respected territory".

f) 2001 Meeting Between Musqueam and the Plaintiffs

[3456] In support of their position that protocol agreements to fish were historically required, Musqueam relies on statements of oral history made at a joint meeting between the Cowichan Tribes, Lyackson, Halalt, Stz'uminus, and Musqueam on

May 28, 2001. The meeting was convened to discuss charges against two Cowichan Tribes members who were claiming an Aboriginal right to fish without permission from Musqueam. Wayne Sparrow (now Chief Sparrow) said the reason they called this meeting was because the charges were going ahead and the DFO was phoning him to ask what Musqueam's stance was.

[3457] At the meeting, Stz'uminus Elder Willie Seymour conveyed oral history about how he was connected to Musqueam through his great-great-great-grandmother, who was Musqueam. Mr. Seymour gave an opening statement acknowledging that the ancestors used to come together in times of need:

> We are revisiting the practice and commonality of our ancestors, who used to always come together at any need, at any time, traditionally, culturally, socially, our people came to visit and Musqueam came to the island to visit. Shared very common concerns and looked after one another. It is a tradition that this practice for thousands of years caring for one another, realized each other's bloodlines. Reminds me of my dad's stories, my late father.
>
> It was here, down on the flats here, where he received his mask from his family from Musqueam. Shows the closeness and the bloodlines that we carry with each other. He talks of the old people. He talks of those that he worked with when he lived on this side of the water. It is only the governments that have created barriers between our families and our communities, and today we can come together and speak openly.
>
> It is good to revisit the historical words and ways of our great grandfathers and great grandmothers, because they only expressed concern, compassion and embraced each other.
>
> We need to, to revisit <u>those sacred ways</u> ...
>
> And it's long overdue as a Coast Salish people. We have not come together for too long. We have a sacred drum being stored away up in Stó:lō. It's time we brought the drum back out and revisit <u>the agreements, the protocol</u> agreements that our ancestors made and honored and had profound respect for each other. So I thank you.
>
> hay čxʷ qə. Thank you.
>
> [Emphasis added.]

[3458] Chief Campbell of Musqueam also relayed oral history about how the Cowichan Tribes had a fishing village, but it was with the cooperation and permission of Musqueam. He said the men who were charged were claiming an Aboriginal right to fish the Fraser River without permission from Musqueam.

[3459] Mr. Seymour said he understood there was a protest fishery and the men were invited to participate with TFN. The men supported TFN and were charged. Mr. Seymour said the men did not inform their Council that they were going to participate in the fishery. He added that they came with the understanding that Island Hul'qumi'num peoples had fishing stations at ƛəqtinəs and summer villages on Canoe Pass. Mr. Seymour made the following oral history statements:

> Historically there was times that our people from the Island traveled over to the mainland, to the Fraser, to do fishing. But it was always with the understanding with, with Musqueam. It was always that understanding that there was a time that our people will come. You hear the stories about them camping at Active Pass, waiting for the tide, waiting for the wind, waiting for the right time. And they would cross over and they would come with many, many canoes.
>
> But it was my understanding that there was an agreement made prior. It's not just me coming and — it's like me walking into your house and helping myself at any time at will. I don't think it was like that.
>
> It's, you know, like I say it's my understanding that there was pre-arrangements made that at such and such a time I'll be there. So there's an expectation, it's not just me and not me walking in and taking over. And so that is — but like I say we can, we can have our Elders guide us with, with their history, with their oral history on, on that ...

[3460] Chief Ernie Campbell stated that:

> ... talking to a lot of Elders prior to their ... They're not with us now obviously, tiyáχʷθət ... and my grandfather, and ... Ed Sparrow, and a lot of the later ones. And they always used to tell me that when they had ... like at Point Grey there, we had a look out there and at Point Atkinson, one up at New Westminster, and one up in Indian River. And I know even they call it the Haida Trail when they put up Totem Poles and that.
>
> But our Elders tell me and tell us, and I always remember, is that … they <u>even said themselves that you stay right of the grey wall because that's Musqueam there, and if you go there you come in peace or bearing, you know, the protocol or ahead of time, otherwise ... you were in for a battle. And we had runners doing the same up in ... Westminster and the Stó:lō up there recognize that and respect that</u>.
>
> [Emphasis added.]

[3461] Mr. Seymour did not say that the Cowichan needed Musqueam's permission to fish the Fraser River. He said he had a vague understanding about protocol that some arrangements were made prior to his people travelling from the Islands to the mainland to fish.

[3462] I accept Mr. Seymour's oral history evidence about the close family connections between the Cowichan and Musqueam, and that there was usually a spirit of cooperation. I do not accept Musqueam's interpretation of his evidence to mean that the Cowichan required Musqueam's permission to fish the south arm of the Fraser River. This runs contrary to the bulk of the evidence that I have heard, and reads too much into Mr. Seymour's statements. At best, the statement is a recognition that there was communication between the two Indigenous groups and an understanding that the Cowichan would come in the summer months to fish the Fraser River. I do not interpret this to mean that the Cowichan recognized that the Claim Area or the south arm of the Fraser River was under Musqueam control. I found that, during the relevant time period, it was not.

[3463] I understand Chief Campbell to say that Musqueam territory is left of the grey wall when he said "stay right of the grey wall because that's Musqueam there, and if you go there you come in peace or bearing, you know, the protocol or ahead of time, otherwise ... you were in for a battle". This supports my conclusion that, historically, agreement was required when entering into another Indigenous group's territory.

[3464] It is unclear what Chief Campbell meant by the "Musqueam fishing villages on the Fraser for the Cowichan Tribes". He did not identify the location spoken of, and there is nothing to suggest that he was commenting about Tl'uqtinus. As I found earlier, the evidence does not support a finding that the Cowichan used and occupied Tl'uqtinus with permission from Musqueam.

[3465] Larry George testified that if another Coast Salish First Nation wanted to fish or harvest in Cowichan Tribes territory, there would be communication with Cowichan Tribes about their request to do so. Cowichan Tribes executed many modern protocol letters requesting permission to fish in Musqueam territory. These letters show that the plaintiffs required protocol letters to fish in Musqueam's permanently-licensed fishing area.

[3466] These letters are, however, not an admission that Musqueam controlled the south arm of the Fraser River historically, and that the plaintiffs' ancestors had to

seek the permission of Musqueam historically in order to fish the south arm of the Fraser River.

[3467] The territories referred to in the protocol letters have been established by DFO licensing practices. For instance, in a 1990 letter to Joe Becker, DFO stated that “reaching agreement on expansion of the Musqueam fishing area cannot be taken as a [DFO] endorsement of your claim ... any such agreement must be subject to approval by all other affected bands”.

[3468] The plaintiffs wrote the protocol letters because it was their view that DFO required it before they would amend the plaintiffs’ licenses to enable them to fish in an area that was the permanently-licensed fishing area of Musqueam.

[3469] In 2011, Cowichan Tribes decided to stop asking Musqueam for permission. They participated in the salmon fishery at the mouth of the Fraser River without communicating or engaging in dialogue with Musqueam.

[3470] DFO’s Adjacency Policy dated back to 1978, which predated Musqueam’s protocol process.

g) Analysis and Conclusion

[3471] I find that the Cowichan did not require permission from Musqueam or other Indigenous groups as part of the Cowichan’s pre-contact practice of fishing the south arm of the Fraser River.

[3472] The modern-day protocol letters reflect the DFO requirement that the Cowichan seek permission before they could fish the south arm of the Fraser River. This is not a historical practice, but the construct of colonial disruption.

[3473] Musqueam submits that the south arm of the Fraser River is considered by Musqueam to be part of Musqueam territory, relying on Morgan Guerin’s testimony that Musqueam people have always been at the mouth of the river.

[3474] sʔəyəɬəq did not define Musqueam territory, but said they have been in it for a long, long time.

[3475] Mr. Guerin said he was taught that:

> ... the Musqueam people have always been at the mouth of what's known as the Fraser River ... where we're sitting now hasn't always been the mouth of the river ... Lulu Island it's called now or the city of Richmond is on top of Annacis Island, Queensborough, all those areas were actually part of the sea. And they were our doorstep is the way they said. So that was at our front and it was just sea. Shallow sea, but sea ... the Musqueam people kept moving down with that as they went. Still retaining the original villages but building more as they went along. So very long connection to the river with the Musqueam people ... So where the north arm, the middle arm, the south arm are now connected, that history going back that they've given me that goes back to those times before even those existed ...

[3476] Musqueam considers its modern territory to include the south arm of the Fraser River, the Flats, and the Mouth of the River area. These areas are included in Areas 29-9 and 29-10 (Mouth of the River and the Flats, and the main river channel running from Steveston to the lightship), Areas 29-13 and 29-14 (in River) and Areas 29-3, 29-4 and 29-6 (Mouth of the River by the drop-off area). This does not clarify Musqueam's traditional territory, but defines its current fishing area.

[3477] I conclude that during prehistoric times, when the Fraser River delta was still forming, Musqueam may have been at the mouth of the Fraser River far east from where the mouth now sits. The evidence before me is that in the relevant time period, prior to and at the early 1790s and through to, at, and after 1846, Musqueam were at the mouth of the north arm and had a small village at Tree Island and fishing camps at Garry Point and Canoe Pass. They fished the south arm, as did numerous Indigenous groups. The extent of Musqueam territory is undefined.

[3478] The historic and ethnographic record establishes that the Cowichan coexisted with Musqueam on the Fraser River. The Cowichan had a permanent village on the south arm and came there *en masse*. I find that Musqueam knew who they were, when they were coming, and why they were there.

[3479] The Coast Salish people have a long history of sharing and of respecting one another's territories. Dr. Kennedy said that, apart from the resource loci by elite families, members of the village held vested interests in their residential lands and surrounding environs, establishing what Coast Salish expert anthropologist Michael Kew has called a "proprietary interest", referring to the attachment that people held for these lands and waters. She cited the following excerpt from Michael Kew:

> There were no precise boundaries setting out village or tribal districts, although occupants of villages took a general proprietary interest in lands and waters in the vicinity of their villages and would unite to repel strangers or interlopers with physical force.

[3480] Dr. Kennedy adopted Diamond Jenness' view that:

> ... the sea near the villages, the hunting grounds and berry patches round about, were common property; any villager, whatever his station in life, might fish and hunt wherever he wished within the village territory.

[3481] Barnett remarked that a "proprietary interest" directed some common activities. Villagers were free to roam provided they did not interfere with others — they had to respect others' property rights in hunting and fishing just as they expected others to respect theirs. Dr. Kennedy added: "To this fundamental law described by Barnett should be added the commonly reported principle that 'permission' would be sought prior to others using particular areas or resources" (emphasis added).

[3482] Suttles described permission-seeking behaviour in his discussion of the control of the Katzie cranberry bogs in the Pitt River area of the Fraser Valley. Resource owners required outsiders to ask permission before harvesting a berry crop. Outsiders who wished to fish at Pitt Lake in Katzie territory were expected to request permission at the village on the outlet.

[3483] Barnett's Squamish field notes provide another example. Others who wished to use the owned dip-net sites on the Squamish River, along with the net itself, presented the owner with a blanket or similar payment, and requested permission.

[3484] I accept the evidence of Dr. Brealey that it would be difficult and perhaps pointless to control access to the abundant Fraser River fish runs generally. The plaintiffs have established that they had the intention and capacity to control the Cowichan Title Lands, but they did not assert the ability to control access to the Fraser River fishery.

[3485] I set out the oral history evidence of Musqueam's witnesses at some length in Part 5. As I explained, Musqueam's evidence fell short of showing that Musqueam controlled the Cowichan's access to the south arm or that the Cowichan fished with Musqueam's permission. This oral history goes against the weight of the other evidence in this case.

[3486] I conclude that historically, the Cowichan would announce their arrival at a Musqueam village or its surrounding waters, and they would not harvest in this area without an agreement. However, the Cowichan did not historically require or seek the permission of Musqueam or any other Indigenous groups to fish the south arm. Musqueam did not control the south arm of the Fraser River. I accept that Musqueam fished the south arm along with many other Indigenous groups, including the Cowichan. At the time of contact, they were not in a position of power over the much larger Indigenous group, nor did kinship permissions extend to the Cowichan fishing the south arm.

[3487] I found in Part 5 that as a matter of customary Coast Salish law, the Cowichan had a perpetual right to their land and environs at Tl'uqtinus, established through occupation and maintained through intimidation and force. I accept Dr. Kennedy's opinion that the Cowichan had a perpetual right to fish the south arm, which they fished year round and seasonally, returning as a collective, year after year. The evidence demonstrates that this was a collective right, independent of any extraterritorial right of access obtained through kinship or permission.

[3488] I do not accept Dr. Lovisek's opinion that the Cowichan required permission from Musqueam and TFN to fish the south arm because those tribes were "permanent residents of the Fraser River" and the Cowichan were not. I found that

the Cowichan were permanent residents of their village at Tl'uqtinus, which they occupied seasonally. I accept Dr. Kennedy's opinion that the Cowichan did not require permission to fish the south arm, but might have required permission to use a specific fishing trap, net, or platform. The converse would be true if Musqueam sought to use a Cowichan resource.

[3489] Colonial disruption impacted the Cowichan's ability to continue their practice of fishing the south arm for food. The facts of colonial disruption in this case do not negate continuity. I am satisfied that fishing the south arm of the Fraser River for food is a practice that is integral to the plaintiffs' distinctive culture and that the plaintiffs have maintained that practice as best they can by pursuing fishing opportunities relentlessly.

[3490] The Cowichan have been treated by Canada as extraterritorial to the south arm due to the Crown's failure to recognize their interest in the Cowichan Title Lands. This forced the Cowichan to seek permission from First Nations who were considered "local". The DFO protocol policy came into effect, along with the Adjacency Policy, in 1978. As with the Cowichan, colonial disruption also negatively impacted Musqueam's Aboriginal fishing right. Following the recognition of their Aboriginal rights in *Sparrow*, Musqueam was able to resume some traditional stewardship practices; Musqueam developed its contemporary protocol system in this context. However, the Cowichan historically did not require permission from Musqueam to fish the south arm of the Fraser River for food, and Musqueam's assertion that the contemporary protocol system is an extension of a traditional Coast Salish practice in respect of Cowichan fishing on the south arm is not made out.

F. LIMITATIONS ON FISHING RIGHTS: TEMPORAL AND SPECIES

[3491] Canada submits that an established right must be clearly delineated, consistent with the historical fishing practice evidence adduced at trial, so that the rights-holders, government, other Indigenous groups that share the same resource, and other users of the fisheries, know and understand the scope of the modern right

that is being exercised. Canada submits this is particularly important in fisheries like those in the Fraser River, which operate with significant demand on a very limited resource. They rely on *Ahousaht* 2021, where the Court of Appeal said that Aboriginal rights should not be characterized as being artificially narrow, but equally, the Court should avoid extravagant articulations of them that are inconsistent with the need for them to exist within a broader social context. This statement was made in the context of a commercial right, but Canada submits it is applicable to Aboriginal rights to fish for food as well.

[3492] Canada asks the Court to seasonally delineate the plaintiffs' Aboriginal fishing rights. They submit that a delineation including all species of fish is an appropriate reflection of the plaintiffs' ancestral practice of fishing whatever was available on the south arm of the Fraser River while they were there primarily targeting the sockeye runs between June and October.

[3493] Canada submits that the historical evidence does not identify specific dates for the timing of the Cowichan's seasonal round to the south arm of the Fraser River, but in their submission, late June to early October is the longest period reasonably supported by the evidence. They submit that June 15 to October 15 for delineation of the modern rights is a reasonable interpretation of the evidence that would provide clarity and scope of the right for all parties. Canada says delineating the rights ensures that the plaintiffs' modern rights do not impact other Indigenous groups beyond what was practised historically.

[3494] Canada says the plaintiffs' evidence of the year-long practice of fishing the south arm of the Fraser River is limited. Much of that evidence relates to the plaintiffs' fishing for eulachon and sturgeon. The eulachon spawn in the Fraser River from approximately February to April or May, and sturgeon are in the Fraser River year-round, including during the salmon runs in late June to early October.

[3495] Canada submits Luschiim's evidence alone is insufficient to support a finding of communal practice of harvesting eulachon outside the time period the communal practice of fishing in the south arm of the Fraser River took place.

[3496] Canada says that, with respect to sturgeon, the plaintiffs rely on general references to the importance of sturgeon without information on timing associated with fishing sturgeon. They referred to limited expert evidence, but that expert evidence relies primarily on small groups of individual fisheries or individual households fishing outside the June to October period, and not a collective practice.

[3497] Canada says evidence of occasional travel to the region outside the seasonal round, or to individual harvesting, cannot support a finding of an integral, collective, year-round practice.

[3498] Musqueam submits that the plaintiffs' oral history does not support the plaintiffs' ancestors having a practice of fishing for spring, coho and chum salmon, and sturgeon, eulachon, or other species on the south arm.

[3499] The plaintiffs say Canada and Musqueam elected not to plead that the Cowichan's right should be recharacterized to limit seasons and/or species.

[3500] The plaintiffs further submit that Canada confuses communal rights, or in other words, who holds the right, with who exercised the right. Communally-held rights do not require everyone to exercise a right *en masse* at a particular place or time. The plaintiffs' ancestors fished for food on the south arm of the Fraser River and they kept what they caught. Their predominant fishery was salmon, but they fished whatever was available when they were present on the river.

[3501] In *Nikal* at para. 104, the SCC confirmed the Aboriginal right to fish for food and ceremonial purposes in that case included the right to determine when fishing available species will occur. In *R. v. Victor*, 2007 BCSC 802 at para. 25 [*Victor*], Justice Grist came to the same conclusion, relying on *Nikal*, and said Indigenous peoples "fished all the runs as they presented themselves in the river".

[3502] The plaintiffs submit that, in *Tsilhqot'in* BCSC, Vickers J. found that the Tsilhqot'in were semi-nomadic in their movement about the claim area to acquire whatever nature had to offer. Their Aboriginal right to hunt and trap birds and

animals for specified purposes was nevertheless held to be throughout the claim area without limits on season, method, or species.

[3503] In *Lax Kw'alaams*, Justice Binnie noted:

> [57] The "species-specific" debate will generally turn on the facts of a particular case. Had it been established, for example, that a defining feature of the distinctive Coast Tsimshian culture was to catch whatever fish they could and trade whatever fish they caught, a court ought not to "freeze" today's permissible catch to species present in 1793 in the northwest coastal waters of British Columbia. As the oceans have warmed, new species have come north from southern waters and the migratory pattern of some of the old species may have shifted towards Alaska. To ignore the evolution of the fisheries resources of the Pacific Northwest would be uncalled for in the absence of some compelling reason to the contrary on the particular facts of a particular case ...

[3504] Canada and Musqueam provided no authorities supporting their proposition that the plaintiffs' Aboriginal right to fish for food should be delineated as to time and species.

[3505] I am satisfied that the plaintiffs have established an Aboriginal right to fish the south arm of the Fraser River for food, grounded in a pre-contact practice which included fishing all species at any time of year, and which should not be delineated to certain species or months of the year. Here, the evidence before me demonstrates that the Cowichan primarily pursued sockeye salmon, but fished whatever was available in the river.

[3506] I am persuaded by *Nikal* that the Aboriginal right to fish for food includes the right to determine when fishing available species will occur. This is also grounded in the evidence about the Cowichan's pre-contact fishing practice. The ability of Cowichan fishers to determine what species are available is part of their Aboriginal right.

[3507] There are distinguishing facts in *Victor*, in that there, the Crown admitted the Indigenous fishers were entitled to exercise the right to fish, and did not suggest a time limit on the right. However, just as in that case, I am satisfied the Cowichan, too, "fished all the runs as they presented themselves in the river": at para. 25.

[3508] It is true that the Cowichan did not fish for sturgeon or eulachon *en masse*, but it was part of their food fishery that some members of their Nation engaged in during times of the year other than the summer months. These are foods that were not available on Vancouver Island or the Gulf Islands. There is no requirement that an Indigenous group must exercise a communally held right *en masse*. Individual members and small groups of the Cowichan could and did fish the south arm year round as part of the Cowichan's integral, pre-contact food fishing practice and as a matter of perpetual right, which was held as a collective right and which was exercisable individually. The Cowichan fished for species year-round as they presented in the river, and were not limited to salmon.

[3509] In summary, the plaintiffs have established an Aboriginal right to fish the south arm of the Fraser River for food. It is a site-specific right and it is a food fishing right. Limitations or regulation of this constitutionally-entrenched right must meet the justificatory standard under s. 35 of the *Constitution Act, 1982*.

[3510] I conclude the 11 local groups who comprised the Cowichan had a practice, custom, or tradition of fishing the south arm of the Fraser River for food prior to, at, and continuing after European contact. The Cowichan practice, custom or tradition of fishing for food was integral to their distinctive culture, including fishing the south arm for food. It was a focal point of their annual seasonal round. The Cowichan did not fish the south arm with permission from other Indigenous groups. I am satisfied that, taking into account colonial disruption, and in spite of colonial disruption, the right claimed is demonstrably connected to the pre-contact practice.

[3511] As previously set out, the Cowichan people existing prior to and at European contact in the early 1790s are continued today by the members of Cowichan Tribes, Stz'uminus, Penelakut, Halalt, and Lyackson.

PART 11 REMEDIES

[3512] The Cowichan seek declarations to confirm and give effect to their legal rights related to their Aboriginal title and their Aboriginal right to fish for food on the south arm of the Fraser River.

[3513] In particular, the Cowichan seek declarations that:

A. The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, have Aboriginal title to: (i) the Lands of Tl'uqtinus; (ii) in the alternative, the Village Lands at Tl'uqtinus; or (iii) in the further alternative, any portion of the Lands of Tl'uqtinus, within the meaning of s. 35(1) of the *Constitution Act, 1982*.

B. The Crown grants of fee simple interest and the Crown vesting of the soil and freehold interest in the lands set out in para. A infringe Cowichan Nation Aboriginal title to these lands.

B.1 The Crown has not justified its infringement of the Cowichan Nation Aboriginal title set out in para. B.

C. The fee simple titles and interests in:

(i) the Federal Tl'uqtinus Lands (other than the YVR Fuel Project lands) and

(ii) the Richmond Tl'uqtinus Lands

are defective and invalid, in whole or in part.

D. British Columbia's vesting of Richmond with the soil and freehold of every highway in Richmond, as under the *Community Charter*, S.B.C. 2003, c. 26, s. 35(1)(a) is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of the *British Columbia Terms of Union, 1871*, s. 13.

E. With respect to the YVR Fuel Project lands in the Federal Tl'uqtinus Lands, Canada has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, reconciliation of the Crown granted fee simple interests with Cowichan Nation Aboriginal title therein.

F. With respect to the lands set out in para. A, other than the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands, British Columbia has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, reconciliation of the Crown granted fee simple interests, and the Crown vesting of the soil and freehold therein, with Cowichan Nation Aboriginal title therein.

G. The descendants of the Cowichan Nation, including the Cowichan Tribes Stz'uminus, Penelakut, and Halalt, are entitled as against British Columbia, to the lands set out in para. A.

H. With respect to the Federal Tl'uqtinus Lands, in the alternative to para. C(i), Canada and/or its agent the Vancouver Fraser Port Authority holds (i) the Federal Tl'uqtinus Lands, or (ii) any portion thereof, as a constructive trustee for the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt.

I. The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, have an Aboriginal right to fish the south (i.e., main) arm of the Fraser River for food purposes, within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[3514] The plaintiffs initially sought declarations that Canada unjustifiably infringed their Aboriginal right to fish, but Canada and the plaintiffs reached an agreement at the end of trial and this relief is no longer sought.

[3515] The plaintiffs do not seek damages.

[3516] The plaintiffs submit that declaratory relief confirming the Cowichan's legal rights is warranted and necessary. The Cowichan land and fishery at the Lands of Tl'uqtinus were wrongfully taken from them and the declarations will resolve longstanding disputes over who has the right to use and benefit from the land. They

do not seek to displace private owners on the land in this action. Although recovery and restoration of their village and surrounding lands may be their ultimate objective, they accept that this may not happen all at once. They say the declarations will help set the Crown and the Cowichan on the road to reconciliation at the negotiation table and help uphold the honour of the Crown.

[3517] The defendants seek dismissal of the plaintiffs' action.

[3518] With respect to an Aboriginal right to fish, if the Cowichan did not need Musqueam's permission to fish, Canada concedes the plaintiffs have established a right to fish. Canada opposes a finding of Aboriginal title, but if the Court finds Aboriginal title, and concludes that a declaration of Aboriginal title should be made, Canada says the title area must be precisely defined. Canada submits its fee simple interests are valid. A declaration requiring Canada to negotiate is inappropriate and unnecessary. Nor is an alternative declaration of a constructive trust in respect of Canada's fee simple interests necessary; if the plaintiffs establish Aboriginal title, Canada's management of those lands will be governed by the honour of the Crown, fiduciary obligations and the *Sparrow* framework.

[3519] The VFPA adopts Canada's submissions.

[3520] BC opposes the declarations. BC submits that if the plaintiffs have met the test to establish historic Aboriginal title, the Court can support reconciliation through making that determination. However, full development of any modern, presently exercisable right will require negotiation, a process to which the Province is committed. The declarations sought lack utility, will not bring clarity to the dispute, and should not be made in the absence of affected parties, particularly the private landowners who have fee simple interests on the Cowichan Title Lands. Additionally, the jurisprudence has yet to fully delineate the remedies that may be available in respect of historical Crown conduct, but suggests that damages will be the appropriate remedy where Crown conduct has terminated an Indigenous group's right to exclusive use and occupation of land, absent of a "unique need, special connections to the land in question, or a potential change in the character of the land

in question": *Canada (Public Works and Government Services) v. Musqueam First Nation*, 2008 FCA 214 at para. 59.

[3521] Richmond's submissions focused on the Aboriginal title declaration and the declaration that its fee simple interests are defective and invalid. Richmond says that even if the plaintiffs have proven their case there are good reasons to decline to grant the declarations. Richmond submits that it did not commit an actionable wrong against the plaintiffs or their ancestors. Richmond is not the Crown and should not be held liable for the Crown's actions. The Court should chart a course between a corrective justice approach, which would restore the plaintiffs' interest in land, and a remedial justice approach, which would preserve the reliance interests in the area. The Court should decline to exercise its discretion to grant a declaration of Aboriginal title and a declaration of invalidity regarding fee simple interests because to do so would undermine the rule of law, destroy the land title system and the *LTA*, wreak economic havoc and harm every resident of BC.

[3522] TFN submits that a declaration is an equitable discretionary remedy, neither automatic nor formulaic. The question for the Court is how best to do justice among the parties. In cases with a public law component, the public interest must be considered as well. A declaration should not be issued where it would only guarantee the proliferation of legal disputes and uncertainty into the future. Aboriginal rights are not solely decided based on the asserted interests of the claimant group; they must necessarily be decided in light of the impact of the relief sought on others.

[3523] There is a geographic overlap and engagement between TFN's modern treaty rights and the Cowichan's asserted Aboriginal title and right to fish the south arm for food. The Court should adopt a rebuttable presumption against the recognition of Aboriginal title and rights where doing so would result in the diminution of the s. 35 rights of other First Nations already established through modern treaties.

[3524] Musqueam opposes the relief the plaintiffs seek, primarily on grounds that have fallen away given my conclusions that the plaintiffs have established Aboriginal

title to the Cowichan Title Lands and an Aboriginal right to fish the south arm of the Fraser River for food.

A. LAW OF DECLARATORY RELIEF

[3525] The parties agree on the legal test for granting declaratory relief as set out in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 [*S.A.*]. At para. 60, the majority stated that declaratory relief is granted on a discretionary basis, and may be appropriate where the following criteria are present:

a) the court has jurisdiction to hear the issue;

b) the dispute is real and not theoretical;

c) the party raising the issue has a genuine interest in its resolution; and

d) the responding party has an interest in opposing the declaration sought.

[3526] These four conditions are generally necessary, but not in themselves sufficient, for declaratory relief to be awarded: *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at paras. 308–309 [*West Moberly* BCCA]. The court must look at the practical value of the declaration in assessing whether it should exercise its discretion to grant the remedy: *West Moberly* BCCA at para. 310, citing *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11 and *S.A.* at para. 61.

[3527] A declaration will have practical utility if it resolves a “live controversy” between the parties: *Daniels* at para. 11. In *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36, the BC Court of Appeal described the key question as “whether a ‘useful purpose’ would be served by granting the order”: at para. 71.

[3528] Declarations must be connected to legal rights, rather than, for example, facts detached from those rights or law generally: *West Moberly* BCCA at para. 312;

1472292 Ontario Inc. (Rosen Express) v. North Ridge General Insurance Company, 2019 ONCA 753 at para. 30.

[3529] While declarations must define or clarify the rights of parties to some extent, there is no obligation to comprehensively map out all the changes to rights stemming from a declaration. In *West Moberly* BCCA at para. 331, Bauman C.J.B.C. in his majority reasons explained:

> ... By nature, many aspects of the parties' relationship in any legal proceeding are not before the courts. It is a matter of both practicality and logic that courts do not have to understand what a requested declaration would mean for any and every associated right in order to have recourse to this remedy.

[3530] The court must determine the degree of specificity needed in a declaration: *Yahey* at para. 1872. In some cases, a broad, general declaration may be sufficient, while in others, specificity may be required to facilitate negotiations and consensual resolution of disputes between the government and Indigenous people: *Yahey* at para. 1872. Ultimately, in *Yahey*, Justice Burke crafted a combination of broad declarations regarding the infringements of Blueberry River First Nations' treaty rights along with more specific declarations to guide the parties about what was required to remove the breaches and uphold Blueberry River First Nations' treaty rights.

[3531] Specific declarations will be preferred where broad declarations are likely to serve little purpose or translate into substantive change: *Saik'uz* BCCA at para. 405, citing *Ahousaht* 2021 at para. 154 and *Daniels* at paras. 52–57.

[3532] Declaratory relief may be denied on a number of discretionary grounds. The British Columbia Court of Appeal set out a non-exhaustive list in *Gook Country Estates Ltd. v. Quesnel (City of)*, 2008 BCCA 407 at para 10:

> ... When an action is brought by a plaintiff seeking a declaration, the court may deny relief on several discretionary grounds, including standing, delay, mootness, the availability of more appropriate procedures, the absence of affected parties, the theoretical or hypothetical nature of the issue, the inadequacy of the arguments presented, or the fact that the declaration sought is of merely academic importance and has no utility. I do not suggest that this list is exhaustive.

[3533] Declarations can serve a particularly important function in Aboriginal rights cases. The SCC in *Shot Both Sides* observed that declaratory relief takes on a "unique tenor" in Aboriginal and treaty rights cases because it is a means through which courts can foster reconciliation and promote restoring a nation-to-nation relationship: at para. 70. This is particularly so because the non-coercive nature of declaratory relief can assist in the resolution of issues without resort to an overly adversarial approach: at para. 72. The SCC's observations about the important role declarations can play in the Aboriginal rights contexts are reproduced below:

> [71] The reconciliation process differs from the conflict driven, adversarial litigation process that is often antithetical to meaningful and lasting reconciliation. As the Court noted in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, at para. 24, "[t]rue reconciliation is rarely, if ever, achieved in courtrooms." The Court has repeatedly emphasized the importance of reconciliation between Indigenous peoples and the Crown outside of the courts (see, e.g., *C-92 Reference*, at para. 77; *Desautel*, at para. 87; *Haida Nation*, at para. 20; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 47).
>
> [72] Reconciliation can be fostered by declaratory relief. The non-coercive nature of declaratory relief can help "the parties to the dispute to resolve the issues without an excessively hostile or adversarial approach" and can help to restore the honour of the Crown (Sarna, at p. 178). Academic commentary has recognized that this approach "is especially appropriate given the non-adversarial, trust-like relationship Canadian governments are supposed to have with Aboriginal people" (K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at § 15:31). Avoiding expensive, lengthy, and adversarial litigation is an important step for reaching reconciliation-oriented results where Aboriginal and treaty rights are at issue.
>
> [73] In Aboriginal and treaty rights claims, declaratory relief can assist in providing a clear statement on the legal rights of Indigenous parties, the duties placed on the Crown, and the Crown's conduct in relation to those sacred promises. Clarity on these rights, duties, and conduct can help to uphold the honour of the Crown, guide the parties in the reconciliation process mandated by s. 35(1) of the *Constitution Act, 1982*, and assist with efforts to restore the nation-to-nation relationship.

[3534] The SCC noted that in the context of breach of treaty claims, declarations can serve an important corrective function by demonstrating that the Crown has breached an Indigenous nation's treaty rights: at para. 78. In my respectful view, declarations may serve a similarly corrective function in claims for infringement of Aboriginal title and rights.

[3535] With these legal principles in mind, I make some general observations about the availability of the declarations that the plaintiffs seek, before turning to a consideration of each.

B. DISCUSSION

[3536] I am satisfied that the declarations the plaintiffs seek meet the four criteria set out in *S.A.* The Court has jurisdiction to hear the issues, the dispute is real and not theoretical, the plaintiffs have a genuine interest in its resolution, and the defendants have an interest in opposing the declarations. Additionally, almost all of the declarations sought have practical utility or serve a useful purpose in that they would resolve a live controversy between the parties. I discuss this factor in more detail when I address the specific declarations. I agree with BC's submission that the Court should refrain from making a declaration that lacks utility.

[3537] Generally speaking, the declarations sought would define the rights and obligations of the parties. Aside from the declaration of invalidity of the fee simple interests, the declarations sought do not have a remedial aspect nor venture into coercive direction.

[3538] I find that declarations are necessary in this case to clarify the Cowichan's rights and legal position as they return to negotiations with the Crown. A finding of Aboriginal title alone, without a declaration, is not a sufficient recognition of the Cowichan's rights, nor adequate to aid in the resolution of the conflict between Aboriginal title and fee simple title.

[3539] In light of the findings I made, I consider it my obligation to define the Aboriginal rights and title of the descendants of the Cowichan Nation. As Justice Rowe said in *Desautel* SCC: "When the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by the enactment of the *Constitution Act, 1982*, this gave rise to an obligation for the courts to 'give effect to that national commitment'": at para. 85, citing *Marshall* at para. 45. In this case, it is not sufficient to make findings and send the parties on their way; declarations are

necessary to bring a degree of finality and clarity to the Cowichan's claim and to do justice between the parties.

[3540] I am mindful of the unfair past dealings between the Crown and the Cowichan. The honour of the Crown requires Canada and BC to act honourably and to participate in the process of negotiation. I find it is in the interests of justice and in furtherance of reconciliation to clarify the Cowichan's rights, which will aid in negotiations.

[3541] BC submits that the plaintiffs ask the Court to declare Aboriginal title over lands that are currently occupied by third parties and that their objective is to ultimately recover and restore the Cowichan owned village and surrounding lands at Tl'uqtinus. That is a matter for another day. Before me, the Cowichan do not seek recovery of the private fee simple lands but rather a mechanism for negotiating the reconciliation of their Aboriginal title. They are not pursuing exclusive use and occupation of privately-owned lands in the Cowichan Title Lands at this time. What they may choose to do in future negotiations or litigation is speculative and does not alter my determination that declaratory relief is appropriate.

[3542] Any uncertainty with respect to the plaintiffs' Aboriginal title rights in respect of land encumbered by privately-held fee simple interests will have to be resolved at a later date. As Bauman C.J.B.C. said in *West Moberly* BCCA at para. 331: "... while the declaration must 'define' or clarify the rights of the parties to some extent, there is no obligation to comprehensively map out all changes to rights stemming from a declaration."

[3543] I agree that the prospect that a declaration may affect non-parties is a consideration when determining whether to exercise my discretion to grant relief. The private fee simple title holders have no relationship with the Cowichan and the plaintiffs do not seek to invalidate their fee simple interests in this action. I heard from Richmond in its capacity as a fee simple title holder and I heard lengthy submissions from BC about the impacts of a declaration of Aboriginal title on fee simple title holders and on the land title system generally. I accept that a declaration

of Aboriginal title may give rise to some uncertainty for the fee simple title holders and it may have consequences for their interests in land. However, so long as the fee simple interests exist, the ability of the Cowichan to exercise the incidents of Aboriginal title are constrained to the extent they conflict with the rights of the private fee simple title holders. As I explain when considering the Aboriginal title declaration, I determine that the existence of privately-held fee simple estates on the Cowichan Title Lands does not preclude, and should not preclude, a declaration of Aboriginal title.

[3544] The declarations I grant do not restate settled law, but rather define rights and serve as a corrective function. I find that the Crown has exceeded its constitutional authority in issuing the Crown grants of fee simple interest and unjustifiably infringed the Cowichan's Aboriginal title. The proper role of the courts, as guardians of the Constitution, includes issuing declarations on the constitutionality of Crown conduct: *Manitoba Metis* at para. 135. A declaration about the Crown's conduct may assist in guiding the relationship between the Cowichan and the Crown going forward, as was the case in *Shot Both Sides*.

[3545] Declarations are not required to resolve all legal disputes. Some uncertainties may remain for future resolution but that is not a reason to refrain from making declarations that clarify some legal issues and resolve some disputes. Overall, these declarations will bring clarity to a long-standing dispute.

[3546] In response to TFN's submission that Aboriginal claims cannot be decided in a contextual vacuum, I am aware of the competing interests of TFN and Musqueam, Richmond and the private landowners, and I take those into consideration in deciding to exercise my discretion.

[3547] I considered TFN and Musqueam's asserted interests in the Claim Area in determining whether the plaintiffs' ancestors sufficiently and exclusively occupied the Claim Area as at 1846. Both TFN and Musqueam assert that the Claim Area is part of their traditional territory. I considered the Tsawwassen First Nation Final Agreement and I do not consider that it gives TFN's interests priority over the

Cowichan's established Aboriginal title and fishing right. Rather, it acknowledges the possibility that a court may make findings which conflict with the TFNFA.

[3548] TFN identified the Claim Area as part of its traditional territory in its Statement of Intent to the BC Treaty Commission, as shown in Appendix A to the TFNFA. TFN has treaty rights which overlap with the Claim Area, including fishing rights, and the TFNFA provides for certain consultative rights with respect to the broader "Tsawwassen Territory" as defined in that agreement and which includes the Claim Area. Under Appendix J-2 of the TFNFA, the Tsawwassen's fishing right for sockeye salmon is based on a percentage of the Canadian Total Allowable Catch for Fraser River sockeye salmon. It is limited by measures necessary for conservation, public health or public safety: TFNFA, chapter 9, clause 2. I accept that recognition of a Cowichan right to fish may impact the Tsawwassen's fishing right, just as the Tsawwassen's right to fish may impact the Cowichan's right to fish for food.

[3549] I do not accept TFN's position that the Court should adopt a rebuttable presumption against the recognition of Aboriginal rights and title that could result in the diminution of s. 35 rights of other Indigenous groups that are established through modern treaties. That approach does not accord with the law nor the burden that the plaintiffs have to meet in this case. In any event, there is insufficient evidence to conclude that the declarations I am prepared to make will disturb TFN's exercise of its substantive treaty rights. The fact is other Coast Salish groups have asserted and/or established claims, rights and interests around the lower Fraser River, as that area has been frequented by many Indigenous groups since time immemorial. The various claims and rights in that area, including the Cowichan's, reflect that reality. No doubt many nation-to-nation discussions and negotiations are to come with respect to land and resources in the south arm of the Fraser River.

[3550] My determination that ss. 23 and 25 of the *LTA* and the Torrens system do not extinguish nor bar an action for recovery of land for Aboriginal title holders is significant because it emphasizes the fact that there is a lot of unfinished business in this province. This was forecasted in 1878 by Commissioner Sproat and in 2000 by

Justice Southin in *Skeetchestn*. The situation we find ourselves in today is the product of the Crown's failure to address the Cowichan's claim, historically, and in modern times.

[3551] Richmond's submission that a declaration of Aboriginal title will destroy the land title system and the *LTA*, wreak economic havoc and harm every resident in British Columbia is not a reasoned analysis on the evidence. It inflames and incites rather than grapples with the evidence and scope of the claim in this case. After a hard fought trial that took over 500 days, the plaintiffs have established Aboriginal title to a small area on the Fraser River where they historically had a village and harvesting areas. Their Aboriginal title is limited to that area over which they have proven sufficient and exclusive occupation. Within that area there are lands now owned by Canada and Richmond and some privately-owned land. The Cowichan have not made a claim for return of land from non-parties and the property rights of the private landowners are not undermined. A precedent that will follow from this case is that provincial Crown grants of fee simple interest do not extinguish nor permanently displace Aboriginal title, and ss. 23 and 25 of the *LTA* do not apply to Aboriginal title.

[3552] I do not agree that the relief the plaintiffs seek should be declined because alternative remedies may be available. The plaintiffs are entitled to seek the return of their stl'ulnup, where the Cowichan people gathered and carried out their traditional practices, such as fishing, which are integral to their culture. That this land is unique and is of critical importance to the Cowichan Nation was established through the testimony of Cowichan elders, including Luschiim, Mrs. James, Sulipt'un and X'tli'li'ye.

[3553] Reconciliation does not mean that Indigenous peoples must always sacrifice their right to their established interest in land. Fee simple interests in this land are not superior to Aboriginal title. As Justice Vella said in *Chippewas of Saugeen* ONSC:

> [693] To achieve reconciliation means that the *status quo* must sometimes change. In the process of that change some will bear the brunt. Sometimes

> the hardship will be borne by Indigenous peoples and First Nations, and sometimes it will be borne by non-Indigenous Canadians. Change can be painful, much less, to echo the words of the Court of Appeal in *Chippewas of Sarnia*, "uncomfortable". However, in this case, change in the *status quo* is required to achieve justice and is the right step towards reconciliation.

[3554] I find that change to the *status quo* in the Cowichan Title Lands must occur in this case to achieve justice.

[3555] Below, I consider the specific declarations sought and whether to exercise my discretion in respect of each.

C. THE DECLARATIONS

1. Aboriginal Title

[3556] The plaintiffs seek a declaration that the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, have Aboriginal title, to: (i) the Lands of Tl'uqtinus; (ii) in the alternative, the Village Lands at Tl'uqtinus; or (iii) in the further alternative, any portion of the Lands of Tl'uqtinus within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[3557] The plaintiffs have established Aboriginal title to the Cowichan Title Lands, a portion of the Lands of Tl'uqtinus.

a) Positions of the Parties

i. Plaintiffs

[3558] The plaintiffs say a claim for declaratory relief is an appropriate means to ask the courts to determine Aboriginal rights: *Desautel* SCC at para. 89. It is for Indigenous people to define themselves and decide how they wish to proceed in vindicating their Aboriginal rights: *Desautel* SCC at paras. 86, 92. A declaration is the primary means by which Aboriginal title can be established: *Tsilhqot'in* SCC at paras. 89–90.

[3559] The plaintiffs object to BC's submission that the content of Aboriginal title should be defined by its limits. In *Tsilhqot'in* SCC, the Court issued a declaration of

title without defining any limitations despite the fact that there were forestry licenses on the land at the time. The plaintiffs say BC, Richmond and TFN advance *in terrorem* arguments which exaggerate the potential impacts of the declarations that they seek.

[3560] In response to the defendants' submission that I do not need to grant declaratory relief if I make findings of Aboriginal title, the Cowichan ask the Court to remember what has happened since 1878. The Cowichan's petitions to the Crown, ongoing complaints, and attempts to recover their land have all been ignored. The Cowichan raised their complaints to the Crown, historically and in modern times, and the Crown failed to act. The Cowichan come before this Court because the Crown has failed to protect their settlement lands and refused to recognize their fishing rights on a consistent or permanent basis.

ii. Canada

[3561] Canada submits that if the Court finds Aboriginal title, the area over which Aboriginal title is declared must be precisely defined and should not be the entirety of the Claim Area.

[3562] I made determinations regarding the extent of the Cowichan Title Lands and defined the parameters as precisely as possible based on the evidence.

iii. BC

[3563] BC says the plaintiffs seek a declaration of Aboriginal title that is not limited by existing legal interests in the land, in particular the fee simple interests held by non-parties. In seeking a declaration of Aboriginal title and unjustified infringement, the plaintiffs effectively assert a presently exercisable right of Aboriginal title as opposed to a declaration that their ancestors exclusively occupied the Claim Area in the past.

[3564] BC submits that the Court should decline to grant such a declaration over fee simple lands. Aboriginal title and fee simple title conflict and cannot coexist because both include the right to exclusive use and occupancy.

[3565] BC says a finding of Aboriginal title, without a declaration, is sufficient to provide a basis for modern negotiations with the Crown, aimed at reconciling the plaintiffs' rights and third party rights. In the alternative, any declaration of Aboriginal title must be limited to the lands owned by parties to this proceeding and must be subject to fee simple interests.

[3566] BC submits that a declaration of Aboriginal title would lack utility as it fails to account for the fact that for over a century third parties have held the right to exclusive use and occupation of the Claim Area. Far from resolving a dispute, the proposed declaration would create conflicting rights in the same land.

[3567] BC submits that a declaration of Aboriginal title would have a significant adverse effect on the private landowners who are not parties in this case, as well as all British Columbians. BC argues that the Court has no power to grant a declaration determining the rights of parties not present in the proceeding: *Uashaunnuat* (dissent) at para. 256, citing Sarna, *Declaratory Judgments* at 87. BC cautions against declarations with unknowable impacts, relying on the warning of the dissent in *Uashaunnuat* about ambiguous declarations that could damage the legitimacy of the justice system in the project of reconciliation: at para. 285.

iv. Richmond

[3568] Richmond submits that if the Court finds Aboriginal title and that the Crown grants of fee simple interest were unlawful, the Court should elect a remedy that vindicates the plaintiffs' rights while protecting the reliance interest of innocent third parties, like Richmond, who were not responsible for or aware of an historic injustice.

[3569] Richmond submits that no declaration of Aboriginal title should be made because the Richmond lands contain important municipal infrastructure that benefit its 230,000 residents. Jason Ho, municipal engineer for the City of Richmond, testified that the estimated value of public and private infrastructure assets within the City of Richmond is approximately $100 billion.

[3570] Richmond faces flooding risks as it has flat topography and is approximately one metre above mean sea level. Richmond has a flood management strategy, a flood protection plan and a dike upgrade program. With respect to Lots E and K, Richmond says it plans to spend up to $46 million to improve the dike to mitigate flood risk.

[3571] Richmond has drainage infrastructure consisting of drainage mains, culverts, watercourses and pump stations. In the Claim Area, there are approximately two or three catchments and three or four pump stations.

[3572] The Claim Area is serviced by two Metro Vancouver Regional District water mains. Richmond owns much of the drinking water infrastructure in this area as it is responsible for the transportation of water from these mains.

[3573] Richmond also has sanitary sewers in the Claim Area.

[3574] Richmond says that it owns everything within the road dedication, including paving, road base, streetlights, curbs and gutters.

[3575] Richmond submits that even if the plaintiffs have established Aboriginal title, the Court should not exercise its discretion to make a declaration. Doing so would likely remove land from Richmond's jurisdiction, which includes infrastructure that the citizens of Richmond rely on. A declaration would effectively expropriate Richmond without compensation.

[3576] The plaintiffs submit Richmond's assertion of $100 billion of infrastructure is misleading. This may be the value of the infrastructure for the entire City of Richmond. However, the best evidence Richmond led regarding municipal infrastructure on the Lands of Tl'uqtinus is that there are two or three drainage catchments and two pump stations, one of which is on land owned by the VFPA. There are five sanitary pump stations in the entire Claim Area. There are two Metro Vancouver Regional District water mains which are connected to a multijurisdictional system of pipes that supply water to multiple municipalities.

v. TFN

[3577] TFN says the boundaries in the Claim Area are a construct and a visual representation of the opinion of Dr. Brealey. The boundaries are not an attempt to delineate a space defined by physical characteristics of the land, but rather an attempt to calculate an extent of territory around a supposed village that would include enough land to sustain a community of about 2,000 people. The boundary is arbitrary, and in a case like this involving long-standing interests, the Court should not impose an arbitrary property line. This would not advance reconciliation.

[3578] TFN also says that the evidence does not establish that the plaintiff bands and Lyackson are a proper collective rights holder. TFN submits that there is no self-governing entity known today as the Cowichan Nation. Granting the declarations sought would create a jurisdictional vacuum because the asserted title holder does not exist. It would create significant ongoing conflicts between the plaintiffs themselves given the absence of a coherent entity through which valuable collective rights can be shared and distributed.

b) Analysis

[3579] I first address TFN's submission regarding the proper title holder. This is a representative action. The plaintiffs bring the action on their own behalf and on behalf of all the descendants of the Cowichan Nation. I am satisfied that includes members of the Lyackson.

[3580] I found that the members of the four plaintiff bands and Lyackson are the descendants of the Cowichan Nation as it existed in 1846, and are the modern-day successor groups and proper Aboriginal title holders of the Cowichan Title Lands. TFN points to evidence that membership in the Cowichan Nation Alliance varied at different points in time. I accept that membership in that alliance varied. This has no bearing on the question of the proper title holder, and does not impact my determination in Part 5 that the members of the Cowichan Tribes, Stz'uminus, Penelakut, Halalt and Lyackson bands are the descendants of the Cowichan Nation

and the proper present-day Aboriginal rights and title holders for the rights claimed in this case.

[3581] The plaintiffs have established Aboriginal title to the Cowichan Title Lands. How the Cowichan share and exercise the rights recognized in this proceeding is completely up to them, subject to the restrictions that the land may only be alienated to the Crown and uses must be consistent with the group nature of the interests and the enjoyment of the land by future generations: *Tsilhqot'in* SCC at para. 74.

[3582] With respect to utility, there is a live controversy regarding the Cowichan's rights with respect to its interest in the Cowichan Title Lands. This controversy has been live since the Cowichan's land was sold in the latter half of the 19th century and early 20th century. Contrary to BC's submission, the land title system in British Columbia and the indefeasibility provisions in the *LTA* do not resolve this controversy, nor the uncertainty that persists with respect to Aboriginal title claims in British Columbia.

[3583] I agree with the plaintiffs' submission that the cloud on title described in *Skeetchestn* was not caused by Indigenous peoples' prior occupation of what is now British Columbia, nor their Aboriginal title claims. The cloud over the Cowichan Title Lands arose from the inaction of colonial officials and provincial officials in the 19th century who failed to protect the Cowichan village as an Indian reserve and sold the land out from under the Cowichan to absentee settlers, with CCLW Moody purchasing some for himself. The Crown did not take steps in response to the Cowichan's complaint to Commissioner Sproat in the 1870s, at which time Sproat cautioned that failure to address such circumstances may necessitate the Province buying back the land from settlers. The honour of the Crown requires Aboriginal rights to be determined, recognized and respected: *Haida* SCC at para. 25. Negotiation is the preferred process to advance reconciliation and to clear the cloud on title in British Columbia. However, a court declaration is another means through which this may be resolved.

[3584] The plaintiffs have established Aboriginal title to land that includes lands owned by non-parties. A declaration of Aboriginal title that is geographically limited to lands the defendants own would be inconsistent with the principle that the relief should resolve, to the extent possible, all matters in controversy between the parties. Justice Power addressed this issue in a pre-trial ruling in which she declined to order formal notice to the private landowners: 2017 BCSC 1575 at paras. 23–24. She found that as the plaintiffs, at this stage, do not seek to invalidate or render defective the fee simple interests held by private landowners, there was no need to give them notice. Private landowners would have an opportunity to make submissions (including that they were not given formal notice) in the event subsequent proceedings are brought by or against them: at para. 24. This case proceeded on that basis.

[3585] A declaration of Aboriginal title has utility because it will clarify that the Cowichan have Aboriginal title to the Cowichan Title Lands and identify the location and extent of the land. The declaration will guide future negotiation and any future litigation. It will clarify the nature of the Crown's obligations to the Cowichan in respect of the Cowichan Title Lands going forward.

[3586] If subsequent proceedings are brought in respect of the other fee simple interests, the private landowners will have the opportunity to be heard and avail themselves of any defences.

[3587] Accordingly, I am satisfied that I have the jurisdiction to make this declaration in respect of the whole of the Cowichan Title Lands.

[3588] The fee simple interests do not displace Cowichan Aboriginal title. Aboriginal title is a senior, constitutionally-protected interest in land. However, the Cowichan have not challenged the validity of the private fee simple interests and those interests are valid until such a time as a court may determine otherwise or until the conflicting interests are otherwise resolved through negotiation. As a result, as I explained in Part 6.1, the Cowichan's exercise of their Aboriginal title is constrained by the existing fee simple interests to the extent it is incompatible with the fee simple

interests. This finding will provide some certainty for the Cowichan and the Crown with respect to the private landowners' continued fee simple interest rights. These interests may be resolved through negotiation, challenged in subsequent litigation, purchased, or remain on the Cowichan Title Lands. That is not a matter for this Court to address. BC and the Cowichan should be afforded space to reconcile these competing interests. It is an issue for the Crown and not the private landowners to resolve.

[3589] BC argued vigorously that any declaration of Aboriginal title must be made subject to the existing fee simple interests. While I agree with BC that the private landowners' fee simple interests are valid and remain so for the time being, I do not agree that recognition of the Cowichan's Aboriginal title is appropriately defined with reference to those interests. Nor would doing so be consistent with my determination that the Crown grants of fee simple interest are an unjustified infringement of the Cowichan's Aboriginal title. The question is not whether Aboriginal title can exist over fee simple lands, but whether fee simple interests can exist on Aboriginal title lands. In my view, the law has evolved and the answer to that question is "yes".

[3590] In *Wolastoqey*, Gregory J. wrote that the plaintiffs' asserted Aboriginal title and the fee simple interests of private property owners "must be *reconciled* by or through the Crown (whether by adversarial litigation between the Crown and the Aboriginal groups or by negotiation), not by or through litigation drawing in private parties who hold fee simple title to the claimed land": at para. 160 (emphasis in original). The approach in this case has followed a somewhat different track in that the plaintiffs seek specific relief with respect to land that Richmond owns in fee simple and that issue has been fully litigated. However, I agree with Gregory J. that a declaration of Aboriginal title, and any "problem" or "conflict" this presents with respect to the existing third party fee simple interests will first fall to the Crown to negotiate and reconcile in accordance with the approach endorsed in *Shot Both Sides* and *Restoule*: see *Wolastoqey* at para. 171.

[3591] Going forward, BC owes fiduciary obligations to the Cowichan in respect of their Aboriginal title, including in respect of those lands encumbered by private fee simple interests. As I set out later, BC has a duty to negotiate with the Cowichan to reconcile their Aboriginal title with the private fee simple interests in a manner that accords with the honour of the Crown. A declaration of Cowichan Aboriginal title is a foundation and a catalyst for these negotiations.

[3592] In addition to privately held lands, the Cowichan Title Lands are encumbered by Canada and Richmond's fee simple interests. Richmond owns Lots E and K, as well as the soil and freehold of highways on the Cowichan Title Lands. Portions of Sections 23, 26 and 27 are owned by Canada, managed by the VFPA and occupied by lessees who have entered into contracts with the VFPA.

[3593] Contrary to Richmond's submission, the fact that the Cowichan have been prevented from accessing their Aboriginal title lands for over a century because third parties held the right to exclusive use and occupation is not a reason to refuse to make a declaration of Aboriginal title. In my view, the absence of authority for the original Crown grants and the Cowichan's long-standing deprivation of their land are equitable factors which weigh in favour of making the declaration, although they are not determinative.

[3594] As I found that the plaintiffs established Aboriginal title to only a portion of the Claim Area, and of lands that Richmond owns, only Lots E and K, Richmond's impacted improvements are much less in number and value than Richmond asserts. The maps in evidence indicate that in Lots E and K, there was one pump station, one Metro Vancouver Regional District water main, sanitary sewers, and one sanitary pump station on the Cowichan Title Lands at the time of trial.

[3595] The Richmond lands at Lots E and K remain unoccupied and undeveloped except for the dike and some services. These lots are the most significant land to the Cowichan because they are the site of the historic Cowichan village and the shoreline that they traditionally occupied.

[3596] The significance of this land to the Cowichan far outweighs its significance to Richmond. The land is essentially undeveloped land that Richmond does not use. Richmond acquired this land largely as a windfall through municipal tax sales.

[3597] Richmond submits the land is essential for their diking project. However, the land elevation is not creating a risk of flooding at the present time. It is rated at the lowest priority for dike upgrading. It will remain open to the Crown and local governments to seek the consent of the Cowichan in the future with respect to proposed improvements. There are some services provided to this land in the form of sewer and water. The provision of those services can be addressed between the Cowichan and Richmond.

[3598] In response to TFN's concern about boundaries, as set out in Part 5, I determined the boundaries based on the whole of the evidence, relying heavily on the 1859 Trutch survey in determining the location of the village as at 1846 and the surrounding harvesting land based on the location of trails and berry patches. I also relied on the evidence of the number of canoes that accessed the village to determine a reasonable extent of shoreline. I relied on the uses of the lands in extending the Cowichan Title Lands to somewhat beyond the trails. Determining the extent and boundaries of the land is a difficult task given the passage of time and shifting geography in this case. It is simply not possible to determine with certainty the exact boundaries of the land that was sufficiently occupied by the Cowichan at 1846. However, based on the oral history, the substantial historical written record and expert evidence in this case, I have determined on a balance of probabilities that the Cowichan sufficiently and exclusively occupied the Cowichan Title Lands as at 1846.

[3599] I therefore make the following declaration: The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, have Aboriginal title to a portion of the Lands of Tl'uqtinus, the Cowichan Title Lands, within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[3600] The parameters of the Cowichan Title Lands are outlined in black on the attached map, which is a visual aid and Schedule “A” to this judgment.

2. Unjustified Infringement of Aboriginal Title

[3601] The plaintiffs seek a declaration that the Crown grants of fee simple interest and the Crown vesting of soil and freehold interest infringe Cowichan Nation Aboriginal title. The plaintiffs also seek a declaration that the Crown has not justified its infringement. I consider these issues together. I found the following Crown actions unjustifiably infringe the Cowichan Nation’s Aboriginal title:

a) BC’s issuance of the Crown grants of fee simple interest in the Cowichan Title Lands;

b) BC’s vesting of Richmond with fee simple interests in the Richmond Tl’uqtinus Land and the Federal Tl’uqtinus Lands (except the YVR Fuel Project lands) by operation of the legislated tax sale process in the *Municipal Act, 1911*, as amended, in the Cowichan Title Lands;

c) BC’s vesting of Richmond with the soil and freehold of the Richmond Tl’uqtinus Lands (Highways) in the Cowichan Title Lands;

d) Canada and the VFPA’s activities, as follows:

   i) Canada’s assignment of authority to the VFPA and its predecessors to undertake port activities including management, leasing and licensing of the Cowichan Title Lands;

   ii) Canada compelling the VFPA and its predecessors to develop land-use plans for the Cowichan Title Lands; and

   iii) As Canada’s agent, the VFPA and its predecessors undertaking leasing of the Cowichan Title Lands.

a) Positions of the Parties

[3602] The plaintiffs maintain that a declaration of unjustified infringement will address their longstanding disputes over what, if any, activities the Crown may undertake on the Cowichan Title Lands without the Cowichan's consent.

[3603] With respect to BC's concerns about potential effects on non-parties, the plaintiffs submit that hypothetical, unproven theories about the effect of a declaration on ill-defined third parties are not a bar to the declaration. If BC is correct that the rights associated with Aboriginal title cannot be exercised until a court declaration or agreement, that is not a bar to making the declaration of unjustified infringement now. The effect of the infringements is ongoing. The plaintiffs submit if the Court grants a declaration of Aboriginal title, then immediately upon pronouncement, the question of what effects the Crown grants and ensuing fee simple interests have on the Cowichan's ability to exercise that right is live. It would be prejudicial to make the Cowichan wait for BC to retry its case on justification.

[3604] BC submits that the Court should not make a declaration of infringement for many of the same reasons they opposed a finding of infringement. In brief, BC submits that the rights associated with Aboriginal title do not arise until Aboriginal title has been established by a court declaration or agreement: *Kwikwetlem First Nation v. British Columbia*, 2021 BCSC 458 at para. 25. The *Sparrow* infringement and justification framework does not apply to conduct that pre-dates a declaration of Aboriginal title.

[3605] As previously set out, I do not accept this argument. I found that the infringement analysis is sufficiently flexible to apply to historic conduct that continues and that it is an appropriate framework to address the Crown conduct which gave rise to the ongoing alienation of the Cowichan Title Lands. The obligation on the Crown to justify infringements is grounded in the *Constitution Act, 1982*, and the Crown has an obligation to justify infringements of Aboriginal rights and title once recognized by the Court or by agreement. The nature of the Crown's obligations

change when Aboriginal title is established, and may require it to re-evaluate historic conduct and justify continuing infringements.

[3606] Canada maintains the justification analysis should not be applied to Canada's authorization of port activities in the Claim Area which occurred before 1982. Any deficiencies in conduct after 1982 should be addressed pursuant to the duty to consult set out in *Haida* SCC. That was the duty owed at the time of the interference. I agree that the duty owed at the time is the relevant duty. However, I also found that the infringements are continuing and now that Aboriginal title is established, the Crown has additional duties to fulfill.

b) Analysis

[3607] For reasons already stated in Parts 7 and 8, I find a declaration of unjustified Crown infringement is necessary and useful at this stage. I do not agree that the Crown should be given more time to attempt to justify those infringements. This case was always set to deal with all the issues, including infringement and justification. No party sought to sever the issues.

[3608] As I found unjustified infringements of the Cowichan Aboriginal title, I find it is the proper role of this Court in this case to make declarations with respect to same. The courts are the guardians of the Constitution and the judiciary has a duty to ensure that the constitutional law prevails: *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at para. 48; *Manitoba Metis* at para. 140.

[3609] With respect to the activities of Canada and the VFPA, a declaration will assist in defining the scope of permissible activities the Crown may undertake or authorize on the Cowichan Title Lands, in the absence of consent from the Cowichan.

[3610] I therefore make the following declaration: The Crown grants of fee simple interest in the Cowichan Title Lands, and the Crown vesting of the soil and freehold interest in the Richmond Tl'uqtinus Lands (Highways) in the Cowichan Title Lands, unjustifiably infringe the Cowichan Nation Aboriginal title to these lands.

3. Validity of Canada and Richmond's Fee Simple Titles and Interests in the Cowichan Title Lands

[3611] Below, I address whether a declaration should issue that Canada and Richmond's fee simple titles and interests in the Cowichan Title Lands are defective and invalid.

a) Positions of the Parties

i. Plaintiffs

[3612] The plaintiffs submit that this declaration will clarify that the Cowichan are the landowners of Tl'uqtinus as opposed to Canada and Richmond. This will assist the Cowichan to recover and restore the Cowichan-owned settlement at the Lands of Tl'uqtinus. It will resolve a longstanding dispute between the parties as to whether the Crown could, by granting lands to absentee settlers and land speculators and/or vesting the lands to Richmond, unilaterally displace the Cowichan from their stl'ulnup.

[3613] The plaintiffs submit that *Shot Both Sides* affirms the importance of trial courts issuing declarations that provide authoritative statements of legal states of affairs, which may include denying the legal rights of parties: at para. 66. This is particularly so in the Aboriginal and treaty rights context where clarity on the legal rights of Indigenous parties and the Crown conduct in relation thereto can uphold the honour of the Crown and guide the parties to reconciliation.

[3614] The plaintiffs acknowledge that this declaration will affect lessees on the Cowichan Title Lands currently owned by Canada.

[3615] The Richmond lands that fall within the Cowichan Title Lands are generally unoccupied and undeveloped, and there are no set plans for their occupation or development other than possible dike redevelopment.

[3616] The declaration will operationalize the declaration of Cowichan Aboriginal title. It will disencumber the land of colonial instruments made without authority and it will be an on-the-ground change in the *status quo*.

[3617] In reply to BC and Richmond's submissions about uncertainty, the plaintiffs say uncertainty is the present state of affairs where fee simple interests are registered to those who have no beneficial interest. The declarations will clarify that the beneficial interest is with the Cowichan.

ii. Canada

[3618] Canada makes a brief submission that the Crown grants of fee simple title and interest in the Claim Area held by Canada and the VFPA are valid.

iii. BC

[3619] BC submits that there is no legal basis for this relief and the declaration would create significant uncertainty regarding the ownership of the land and invariably affect the rights of non-parties. BC relies on the provisions of the *LTA* and submits that, regardless of any defect in the Crown grants from which they derive, the fee simple interests are valid.

[3620] BC submits that a declaration of Aboriginal title cannot retroactively invalidate Crown conduct, including the creation of third party interests.

[3621] The jurisprudence establishes that the Crown has authority to manage land that is subject to asserted but unproven Aboriginal title, subject to any duties arising from the honour of the Crown. In *Tsilhqot'in* SCC, McLachlin C.J.C. found that, in the case of the *Forest Act*, the legislature intended the laws respecting the forestry regulation to apply to land under claims for Aboriginal title up to the time title is confirmed by agreement or court order: at para. 115. She stated:

> [115] ... 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.

[3622] I found that most of the Crown grants were made without statutory authority and all were made without constitutional authority by virtue of being issued under legislation that was constitutionally limited by Article 13 of the *BC Terms of Union*.

The Province did not have authority to unilaterally extinguish Crown protection for these lands. BC submits that even if the Crown grants were made without constitutional authority that does not mean that they should be invalidated. In any event, breach of a statutory duty is not an independent cause of action: *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 225–227, 1983 CanLII 21. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence.

[3623] While the plaintiffs submit that a declaration of invalidity would clarify that the Cowichan are the landowners, BC submits the proposed declaration does not purport to effect a transfer of ownership rights and the plaintiffs have not pled their claim as an action for ejectment. The declaration would leave Richmond and Canada as holders of invalid fee simple titles. This is far from clarifying ownership of those lands and would create significant uncertainty as to their status.

[3624] Finally, BC submits that the plaintiffs' contention that a declaration of invalidity would not impact private interests is of little comfort. The only comfort the plaintiffs offer non-party landowners is their assertion in this proceeding that they do not seek to invalidate those fee simple titles. The basis on which they seek a declaration of invalidity against Richmond and Canada/VFPA could be turned against the private landowners next.

iv. Richmond

[3625] Richmond submits that if the fee simple declaration is made, it would substantially harm it and other innocent third parties who own or lease properties in the Claim Area. The fee simple interests of neighbouring owners and their ability to grant leasehold interests to their tenants are derived from the same Crown grants as the Richmond lands. If Richmond's fee simple interests are defective and invalid because of an issue with the Crown grants, so too must these third parties' fee simple interests, given they derive from the same Crown grants. The only protection these non-parties would have is the plaintiffs' voluntary forbearance from seeking to eject them from their homes.

[3626] Richmond emphasizes the widespread reliance interest on the Torrens system in British Columbia. Richmond submits the Court should be guided by cases like *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 1985 CanLII 33, in which the SCC recognized and protected good faith reliance interests. Also, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, the SCC held that the government is immune from liability for good faith conduct in accordance with valid legislation even if the legislation is later shown to be unconstitutional. Richmond urges the Court to consider other remedies.

b) Analysis

[3627] Aboriginal title is a burden on the Crown's underlying title which arose upon the assertion of sovereignty. Prior to proof, Aboriginal title enjoys some protection through the honour of the Crown and the duty to consult and accommodate. In part, this duty is intended to protect the lands and resources of Indigenous people from being "changed and denuded" before the distant aim of proof is finally reached: *Haida* SCC at para. 33. In this case, the unfortunate reality is that the Province alienated the entirety of the Cowichan Title Lands through issuing Crown grants, and fee simple titles derived from those Crown grants encumber the land today.

[3628] The plaintiffs have obtained a declaration of Aboriginal title. The plaintiffs have also established that the Province lacked statutory authority to issue most of the Crown grants and lacked constitutional authority to issue all of them. Additionally, the plaintiffs have proven that the Crown grants of fee simple interest in the Cowichan Title Lands unjustifiably infringe their Aboriginal title. The decision to issue a declaration that Canada and Richmond's fee simple interests are defective and invalid is a discretionary one, but in my view, these findings bode in favour of changing the *status quo* in granting the declaration.

[3629] Additionally, having granted a declaration of Aboriginal title, there is greater uncertainty if I do not declare that Richmond and Canada's fee simple titles and interests are defective and invalid. Recognition that these fee simple titles are defective and invalid brings the parties closer to a resolution.

[3630] In *Tsilhqot'in* SCC, the Court was dealing with timber licenses that were ostensibly otherwise valid when they were granted and on which innocent third parties had relied. In this case, the Crown grants of fee simple interest were made without constitutional authority. The Crown did not act honourably when they were issued because it failed to fulfil its duty to consult with the Cowichan prior to disposing of their lands to third parties. However, the Province's historic breach of duty, lack of authority in issuing the Crown grants, and the unjustified infringement arising from the Crown grants of fee simple interest, do not render the fee simple interests defective and invalid. That determination is discretionary.

[3631] With respect to the lands owned by Canada, now that Aboriginal title has been declared, the ability of the Crown to manage these lands is significantly curtailed. Canada holds its land as federal real property, registered in fee simple as a matter of convenience. We know from *Tsilhqot'in* SCC that what remains of the Crown's radical or underlying title to lands held under Aboriginal title is a fiduciary duty owed by the Crown to Aboriginal people when dealing with the lands and the right to encroach on Aboriginal title if the government can justify this in the broader public interest: at para 71. The beneficial interest is with the Cowichan. In my view, these factors weigh in favour of a declaration that Canada's fee simple interests in the Cowichan Title Lands are defective and invalid. Going forward, the discussions should be focused on transitioning the land from Canada/VFPA to the Cowichan in a manner that accords with the Cowichan's rights and my findings with respect to unjustified infringement. The Cowichan's consent will be required with respect to any contemplated uses of the land unless the Crown has discharged its duty to consult and the use can be justified under s. 35 of the *Constitution Act, 1982*.

[3632] The situation on the Richmond lands is more complex because Richmond is a non-Crown entity and does not owe any fiduciary duty to the Cowichan. Richmond is not responsible for the Crown's conduct. Nonetheless, as above, Richmond's fee simple interests are derived from Crown grants that were issued without authority. Moreover, Richmond's interest in Lots E and K were acquired through municipal tax sales, essentially as windfalls, and BC infringed the plaintiffs' Aboriginal title in

vesting the land in Richmond. Richmond's fee simple interests in the Cowichan Title Lands are not protected by ss. 23 or 25 of the *LTA*. Richmond is a public body, a creature of statute, and not in the same position as private landowners. I also determined that Richmond is not a *bona fide* purchaser for value.

[3633] Even where the *bona fide* purchaser for value defence is made out, it is not absolute: *Chippewas of Saugeen* ONCA at paras. 237–238. The Court must weigh the equities when an Indigenous interest in land is competing against later acquired rights, and specifically consider the conscionability of upholding the legal rights of a *bona fide* purchaser for value in the circumstances: at para. 239.

[3634] In considering whether to exercise my discretion to grant the declaration, I have considered Richmond's evidence and submissions regarding existing land use and the importance of the land to Richmond, as well as the plaintiffs' evidence about the importance of the land to the Cowichan. Lots E and K are of utmost importance to the Cowichan as these lands are the site of their historic village. The Cowichan need this particular strip of land along the shore of the Fraser River in order to access the water and to engage in their traditional practices. As previously set out, I find that the lands are not of particular significance to Richmond, as they are largely unused, undeveloped and unoccupied, containing only a few services.

[3635] For these reasons, I exercise my discretion in favour of the Cowichan receiving the return of their stl'ulnup.

[3636] I make the declaration in the following terms: Canada's fee simple titles and interests in Lot 1 in Sections 27 and 22 (except those in the YVR Fuel Project lands), Lot 2 in Section 23, and Lot 9 in Sections 23 and 26, and Richmond's fee simple titles and interests in Lot E in Sections 23 and 26 and Lot K in Section 27, are defective and invalid.

[3637] The power to stay a declaration which gives effect to a constitutional right should only be used in exceptional circumstances where giving immediate effect to an order will undermine the purpose of that order or otherwise threaten the rule of

law: *R. v. Powley*, 2003 SCC 43 at para 51. This declaration will change a long-established *status quo* and have significant impacts for Richmond and third-party lessees on the lands that Canada owns. The declaration is aimed at giving effect to the Cowichan's Aboriginal title, reconciling the Cowichan's interests with the broader public interest and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples. A period to allow for an orderly transition of the lands is in keeping with the principle of reconciliation.

[3638] I suspend this declaration for 18 months. During this 18-month period, the Cowichan, Canada, and Richmond will have the opportunity to make the necessary arrangements. Additionally, although the declaration will not take effect for 18 months, upon declaration of Aboriginal title, I note that Canada has acknowledged in its submissions that its management of its fee simple title lands will be governed by the honour of the Crown, the fiduciary obligations that arise when the Crown assumes discretionary control over cognizable Indigenous interests, and the *Sparrow* framework going forward.

4. Constitutional Applicability of the Vesting of Soil and Freehold of Highways Under s. 35(1)(a) of the Community Charter

[3639] The plaintiffs seek a declaration that BC's vesting of Richmond with the soil and freehold of every highway in Richmond, as under s. 35(1)(a) of the *Community Charter*, is constitutionally inapplicable to the Richmond Tl'uqtinus Lands by virtue of Article 13 of the *BC Terms of Union*.

[3640] This declaration may be dealt with briefly. Although the plaintiffs challenged the BC's vesting of Richmond with soil and freehold of highways on this basis, I have declined to consider this issue, finding that it is more appropriate to deal with it under s. 35 of the *Constitution Act, 1982*, relying on the *Sparrow* framework.

[3641] This declaration is not granted.

5. Fiduciary Duty to Negotiate in Good Faith

[3642] Once Aboriginal title is recognized, and the Crown deals with those lands, the Crown's fiduciary duty is engaged: *Tsilhqot'in* SCC at para. 71. The plaintiffs say that embedded in that duty is a fiduciary duty to negotiate in good faith reconciliation of the existing Crown granted fee simple interests and vesting of soil and freehold with certain Cowichan Aboriginal title lands. The plaintiffs seek two declarations in this regard.

[3643] First, with respect to the land that Canada owns in the YVR Fuel Project lands, the plaintiffs seek a declaration that Canada has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation reconciliation of the Crown granted fee simple interests with the Cowichan Nation Aboriginal title.

[3644] The YVR Fuel Project is located in Section 34, B4N R5W, New Westminster District, and in approximately 12 acres of Lot 1 in Section 27. The plaintiffs seek this declaration in respect of this land in Lot 1, which is owned by Canada and is in the Cowichan Title Lands.

[3645] Second, the plaintiffs seek a declaration that, with respect to the Cowichan Title Lands, other than the Federal Tl'uqtinus Lands and the Richmond Tl'uqtinus Lands, BC has a fiduciary duty to negotiate in good faith with the descendants of the Cowichan Nation reconciliation of the Crown granted fee simple interests and the Crown vesting of the soil and freehold with the Cowichan Nation Aboriginal title therein.

a) Positions of the Parties

i. Plaintiffs

[3646] With respect to any fiduciary duty to negotiate on the part of BC, this declaration is aimed at the Crown granted fee simple interests held by third parties, as well as the Crown vesting of the soil and freehold of certain highways to Richmond.

[3647] The plaintiffs say this duty is grounded in the case law. The Crown has not only a moral duty, but a legal duty, to negotiate in good faith to resolve land claims: *Tsilhqot'in* SCC at para. 17.

[3648] The plaintiffs drew the Court's attention to various SCC decisions which discuss the scope and content of the Crown's fiduciary duty to Indigenous people in relation to interests in land, including *Sparrow* at 1108, *Guerin* at 385, *Tsilhqot'in* SCC at paras. 69–71, *Wewaykum* at para. 79, and *Alberta v. Elder Advocates*, 2011 SCC 24 at para. 49 [*Elder Advocates*].

[3649] The plaintiffs also submit that government commitments to Indigenous peoples, like the *Royal Proclamation, 1763* and the *Constitution Act, 1982* can ground a fiduciary duty and meet the test for an undertaking of responsibility to act in the best interests of Indigenous peoples: *Elder Advocates* at para. 48. Here, the plaintiffs say Crown acts and commitments dating back to 1853 satisfy that threshold and confirm the existence of a fiduciary duty between the Crown and the Cowichan (meeting both the test for an undertaking and/or evidence of Crown taking discretionary control over Cowichan interests).

[3650] In particular, the plaintiffs submit that the 1853 Crown promise is a clear government commitment to the Cowichan. Governor Douglas' appropriation of Indian settlement land is another. The Queen's Royal Instructions to Governors Seymour and Musgrave expressly included protection of Indigenous peoples. Additionally, Article 13 of the *BC Terms of Union* is a commitment which limits the exercise of federal and provincial power. Further, s. 35 of the *Constitution Act, 1982* constitutionally protects 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: *Sparrow* at 1113–1119; *Tsilhqot'in* SCC at para. 13. Finally, s. 2 of *BC DRIPA* and s. 4 of *UNDRIP* demonstrate clear government commitments to Indigenous people. Together or separately, these government commitments confirm a fiduciary duty that arose in 1846, or no later than 1853, that persists through to today. This fiduciary relationship includes a fiduciary duty to negotiate reconciliation of the fee

simple interests and Crown vesting of soil and freehold with Cowichan Aboriginal title.

[3651] As Sproat observed in 1878 in a letter to the Lieutenant Governor, one way to address the problem of land sold to private owners is for the Crown to buy back the land. That resolution was contemplated 147 years ago with respect to this particular piece of land. The plaintiffs say another option is for the Crown to address the issue through legislation.

[3652] The plaintiffs submit that this declaration will have practical utility, defining the legal relationship between the Cowichan and the provincial Crown going forward. So far, the Crown has denied the Cowichan any meaningful engagement on the exercise of the Cowichan Aboriginal title rights.

[3653] The plaintiffs submit that there is no evidence that any non-party interests would be implicated by this declaration; it imposes no obligations on fee simple holders to surrender their fee simple interests or otherwise participate in Cowichan-Crown reconciliation.

ii. Canada

[3654] Canada submits that a declaration that Canada has a fiduciary duty to negotiate reconciliation of its Crown granted fee simple interests in the YVR Fuel Project lands with the Cowichan's Aboriginal title is neither necessary nor appropriate.

[3655] Canada agrees that a *sui generis* fiduciary duty arises where the Crown assumes discretionary control over a specific or cognizable Indigenous interest, and that Aboriginal title is such an interest. Canada acknowledges that as the fee simple title holder, it has discretionary control over the federal YVR Fuel Project lands. If Aboriginal title is declared, Canada acknowledges that it would have a duty to negotiate with the plaintiffs with respect to the federal lands.

[3656] However, Canada does not agree that this translates into a fiduciary duty on the Crown to negotiate reconciliation of Canada's fee simple titles to those lands with the Cowichan's Aboriginal title. Even where a fiduciary relationship exists, "not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature": *Wewaykum* at para. 83, citing *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 597, 1989 CanLII 34.

[3657] In the alternative, if Canada has a fiduciary duty to negotiate with the Cowichan, Canada says it was met through consulting with each of the plaintiff bands in respect of the YVR Fuel Project; accommodating the interests of each of the plaintiff bands; and the written non-opposition of each of the plaintiff bands respecting the project.

iii. BC

[3658] BC submits that the declaration is unnecessary. The jurisprudence establishes that the Crown has a moral and legal duty to negotiate in good faith to resolve land claims: *Tsilhqot'in* SCC at para. 17, citing *Haida* SCC at para. 25; *Daniels v. Canada*, 2016 SCC 99 at para. 55. To the extent the plaintiffs ask the Court to declare the Province is obliged to negotiate, the plaintiffs seek a restatement of settled law. To the extent the plaintiffs ask the Court to find that the duty is fiduciary in nature, the declaration lacks a legal basis.

[3659] BC says it is committed to reconciliation, as evidenced by the Cowichan Nation – British Columbia Government-to-Government Agreement dated September 14, 2021. BC submits it is committed to negotiation with the plaintiffs and will be guided by findings made in this proceeding. The parties should not be constrained by a declaration as to the parameters of negotiations.

[3660] BC says the declaration should be denied in the absence of affected parties. The goal of this declaration is to assist in actualizing recognition of Cowichan Aboriginal title over private lands. The parties who stand to be most affected by the proposed declaration are not before the Court.

[3661] BC submits, to examine whether the Court can declare that the Crown has a fiduciary duty, the Court must begin with the two ways in which fiduciary duty may arise in the relationship between the Crown and Indigenous people: (i) an *ad hoc* fiduciary duty may arise where the Crown provides an undertaking if specific conditions are met; or (ii) the Crown may owe *sui generis* fiduciary obligations where it assumes discretionary control over specific Aboriginal interests: *Manitoba Metis* at paras. 49–50.

[3662] BC submits that, in this case, a fiduciary duty does not arise on the established tests. The Province made no undertaking of the kind necessary to ground an *ad hoc* fiduciary duty. None of the statements provides the requisite undertaking to act in the best interest of the Cowichan above the interests of all others. The Crown statements the plaintiffs rely on in the era of reserve creation cannot be construed as undertakings to "secure the paramountcy" of their interests. The plaintiffs rely on s. 35 of the *Constitution Act, 1982* and *UNDRIP* as sources of undertakings from the Crown but these provisions apply generally and do not constitute undertakings under fiduciary law.

[3663] BC similarly submits that no *sui generis* fiduciary duty was owed when it granted interests in the land at issue. At that time, Aboriginal title was not defined nor proven. Unproven Aboriginal rights are insufficiently specific for the honour of the Crown to mandate that the Crown act in the best interests of the Aboriginal group as a fiduciary: *Haida* SCC at para. 18.

[3664] I understand BC to mean that one cannot look back and impose a fiduciary duty retroactively on the grounds that Cowichan Aboriginal title has now been established. I agree.

[3665] BC submits that at present, it is currently not exercising discretionary control over the private lands such that a fiduciary duty could be engaged.

b) Law

[3666] Below, I briefly review the law respecting fiduciary duty in Aboriginal claims.

[3667] The law recognizes that the Crown may owe *ad hoc* and *sui generis* fiduciary duties to Indigenous groups in respect of certain interests: *Restoule* at para. 222. *Ad hoc* fiduciary duties arise as a matter of private law, and where owed, require utmost loyalty to the beneficiary: *Restoule* at para. 222, citing *Williams Lake* SCC at para. 44 and *Elder Advocates* at para. 43. By contrast, a *sui generis* fiduciary duty arises from the unique relationship between the Crown and Indigenous peoples. The Crown's *sui generis* fiduciary duty permits the Crown to balance competing interests: *Restoule* at para. 222, citing *Williams Lake* SCC at paras. 44, 165, and P. W. Hogg & L. Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016) 72 SCLR (2d) 291 at 307.

[3668] In *Guerin*, Dickson J. characterized the pre-existing right of Aboriginal people to land arising from their prior use and occupation as an "independent legal interest" from which a *sui generis* fiduciary duty arises. In *Sparrow*, the SCC expanded on the concept of a *sui generis* fiduciary duty to include protection of Aboriginal and treaty rights at 1108:

> ... The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.

[3669] In *Wewaykum*, Binnie J. clarified that the fiduciary duty imposed on the Crown with respect to the interests of Indigenous peoples does not exist at large but in relation to specific "Indian" interests: at para. 81. Not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature: at para. 83. It is necessary to focus on the particular interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation to the interest sufficient to ground a fiduciary obligation: at para. 83.

[3670] Justice Binnie described how the Crown must approach disputes between the interests of Indigenous persons and non-Indigenous persons when exercising ordinary government powers at para. 96:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in *Guerin*, *supra*, at p. 385:
>
> > It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.
>
> [Emphasis in original.]

[3671] In *Elder Advocates*, Chief Justice McLachlin addressed the question of when governments as opposed to individuals may be bound by a fiduciary duty, observing that governments will owe fiduciary duties in limited and special circumstances: at para. 49. This is because government must generally act for the benefit of all citizens and therefore situations where it owes a duty of loyalty to a particular group will be rare: at para. 44. She observed that with respect to Indigenous interests in land, "an exclusive duty in relation to Aboriginal lands is established by the special Crown responsibilities owed to this sector of the population and none other": at para. 49.

[3672] In *Manitoba Metis*, the SCC considered whether Canada owed the Métis a fiduciary duty to implement ss. 31 and 32 of the *Manitoba Act*. The Métis argued this duty was owed in light of their Aboriginal interests in land, or from the promises made in ss. 31 and 32. Justice Karakatsanis, writing for the majority, observed that the relationship between the Métis and the Crown is fiduciary in nature, but not all dealings between them are governed by fiduciary obligations. A fiduciary duty may arise where the Crown administers lands or property in which Aboriginal people

have an interest. However, while the Crown had undertaken discretionary control of the interest, the Métis as a collective did not have a communal Aboriginal interest in the land and so a *sui generis* fiduciary duty did not arise: at para. 59. The second way that a fiduciary duty may arise is from an undertaking, provided the following conditions are met: 1) an undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary; 2) a defined person or class of persons vulnerable to a fiduciary's control; and 3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control: *Manitoba Metis* at para. 50, citing *Elder Advocates* at para. 36. In that case, neither s. 31 nor s. 32 of the *Manitoba Act* amounted to an undertaking to act in their best interests.

[3673] In *Restoule* at para. 228, the SCC reiterated that an *ad hoc* fiduciary duty may arise between the Crown and Indigenous people where the three conditions outlined at para. 50 of *Manitoba Metis* and para. 36 of *Elder Advocates* are met. The SCC observed that unlike an *ad hoc* fiduciary duty, a *sui generis* fiduciary duty permits the Crown to balance competing interests, and is therefore a less stringent standard:

> [234] A *sui generis* fiduciary duty arises where there is: (1) a specific or cognizable Aboriginal interest; and (2) a Crown undertaking of discretionary control over that interest (*Manitoba Metis*, at para. 51; *Williams Lake*, at para. 44; *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18). Unlike an *ad hoc* fiduciary duty, a *sui generis* fiduciary duty permits the Crown to balance competing interests. As Brown J. explained in *Williams Lake*, at para. 165 (dissenting, but not on this point):
>
> > This form of fiduciary duty imposes a less stringent standard than the duty of utmost loyalty incident to an *ad hoc* fiduciary duty. It requires Canada to act — in relation to the specific Aboriginal interest — with loyalty and in good faith, making full disclosure appropriate to the subject matter and with ordinary diligence: *Wewaykum*, at paras. 81 and 97. It allows for the necessity of balancing conflicting interests: *Wewaykum*, at para. 96.
>
> [Emphasis added.]

[3674] In *Tsilhqot'in* SCC, the Court held that when Aboriginal title is legally recognized, the Crown's fiduciary duty to the title-holding group is engaged. The Crown's underlying title in land is held for the benefit of the Aboriginal group and the Crown is constrained by its fiduciary obligations: at paras. 71, 85, 92. The Crown

must act in a way that respects that Aboriginal title is a group interest held for present and future generations: at para. 86. Built in to the Crown's fiduciary duty is the requirement to show that any incursions on the land are proportionate, in that the action is rationally connected to the government's goal, goes no further than necessary, and the benefits that will flow from the goal are not outweighed by adverse impacts on the Aboriginal title holders. Put another way, the Crown's fiduciary duty allows for consideration of competing interests.

c) Analysis

[3675] The Cowichan have established Aboriginal title which is a cognizable Aboriginal interest in the Cowichan Title Lands. Historically, the Crown assumed discretionary control over that land, surveying it and selling it to high-ranking government officials and other settlers. I found that the Crown grants of fee simple interest in the Cowichan Title Lands are unjustifiably infringing. Now that Aboriginal title is declared, the Crown must re-evaluate its historical conduct and its ongoing impacts on the Cowichan in light of the Cowichan's established Aboriginal title and the fiduciary duty that the Crown owes going forward. I consider the ongoing presence of infringing fee simple interests as continued Crown dealing and discretionary control of the land. While the Crown has granted fee simple interests in the land, it holds the radical title and has various powers at its disposal, including expropriation and legislative powers.

[3676] The case law establishes that a *sui generis* fiduciary duty arises where the Crown assumes discretionary control over a specific or cognizable interest in land. Aboriginal title is a specific and cognizable interest in land.

[3677] Additionally, in accordance with the requirements of s. 35 of the *Constitution Act, 1982*, once Aboriginal title is established, the Crown may only interfere or deal with title land where justified by a compelling and substantial purpose, and where doing so is not inconsistent with the fiduciary duty owed to the Aboriginal title holders.

[3678] Canada acknowledges that as the fee simple title holder, it has discretionary control over the federal YVR Fuel Project lands, and that it will have an ongoing fiduciary duty to the Cowichan with respect to its dealings with these lands.

[3679] I rejected BC's submission that no fiduciary duty arises with respect to the Cowichan's Aboriginal title lands encumbered by private fee simple interests because there is no ongoing conduct, or because the "project" is complete for the purposes of considering interference with Aboriginal title. I found that approach is inconsistent with the Province's powers in respect of land and its duties under s. 35 of the *Constitution Act, 1982* and the constitutionally entrenched project of reconciliation. BC may only interfere with the Cowichan Title Lands in a manner consistent with its fiduciary duty to the Cowichan, and the Crown grants of fee simple interest are an ongoing, unjustified infringement. BC's fiduciary duty to the Cowichan is engaged, and going forward, it must be complied with. It is difficult to conceive of a more significant interference than the Crown grants of fee simple interest. The Province now owes a fiduciary obligation to the Cowichan in respect of their Aboriginal title lands that are currently held by private landowners in the form of fee simple estates. The same is true with respect to soil and freehold of highways that it vested in Richmond in the Cowichan Title Lands.

[3680] Having found that a fiduciary duty arises with respect to the Cowichan Title Lands, it is not necessary to consider whether an *ad hoc* fiduciary duty arose from the various statements, conduct and commitments that the plaintiffs rely on.

[3681] For the reasons set out below, I am nonetheless not prepared to find that the fiduciary duty the Crown owes the Cowichan in respect of the Cowichan Title Lands includes a fiduciary duty to negotiate reconciliation of the Crown granted fee simple interests with Cowichan Aboriginal title. I find that the honour of the Crown informs both Canada and BC's obligation to negotiate with the Cowichan moving forward.

[3682] I turn now to the law regarding the honour of the Crown, which I reviewed at Part 6 of these reasons.

[3683] The SCC explained the origin of the honour of the Crown in *Taku River* at para. 24:

> ... The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

[3684] The honour of the Crown is not a cause of action, but a doctrine which speaks to how obligations that it attracts must be fulfilled: *Manitoba Metis* at para. 73.

[3685] The honour of the Crown underpins the Crown's duty to determine, recognize and respect Aboriginal rights, which in turn may include a duty of honourable negotiation: *Haida* SCC at para. 25.

[3686] In *Manitoba Metis*, the majority found that "when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: 1) takes a broad purposive approach to the interpretation of the promise; and 2) acts diligently to fulfill it": at para. 75. The law assumes that the Crown intends to fulfill its solemn promises, and the honour of the Crown requires it to act diligently in doing so. As Burke J. observed in *Yahey* at para. 88, "[p]erfection is not required."

[3687] In *Delgamuukw* SCC, Lamer C.J.C. said that the Crown was under a moral, if not a legal, duty to enter into and conduct negotiations: at para. 186. This was clarified in *Haida* SCC at para. 25 where the Court found that the duty to negotiate flows from the honour of the Crown, which requires the Crown acting honourably to participate in the process of negotiation.

[3688] Chief Justice McLachlin explained in *Haida* SCC at para. 16 that the honour of the Crown is "always at stake in its dealings with Aboriginal people ... It is not a mere incantation, but rather a core precept that finds its application in concrete practices." She went on at paras. 20 and 25:

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. ... Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests.
>
> ...
>
> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate original interests.

[3689] As above, in *Haida* SCC, the Court explained at para. 20 that the Crown must act honourably both in defining the rights it guarantees, and in reconciling those rights with other rights and interests. I find that the SCC's statement is apt in the present circumstances, where the Crown, acting without authority, historically granted interests in the Cowichan Title Lands to private owners, and now must work with the Cowichan to resolve Cowichan Aboriginal title with existing third party interests. The Crown's obligations which flow from its promise of rights recognition in s. 35 of the *Constitution Act, 1982* do not cease with the Court's recognition of Aboriginal title.

[3690] BC and Canada do not deny that they have a duty to negotiate but take the position that a declaration is not necessary because it repeats stated law; BC and Canada both oppose a declaration of a fiduciary duty to negotiate.

[3691] I agree that the concept of a fiduciary duty to negotiate is contradictory because it implies that the Cowichan's interest will be put above all others. An internal inconsistency arises in requiring the Crown to negotiate with the Cowichan while also acting in their best interests — this is at odds with the nature of negotiation. I conclude that the duty to negotiate in good faith is grounded in the

honour of the Crown, which imports flexibility and flows from the Crown's constitutional commitment in s. 35 of the *Constitution Act, 1982* to respect Aboriginal title and act honourably in reconciling it with other interests.

[3692] I find that BC must act honourably in negotiating reconciliation of the Cowichan's Aboriginal title with the private fee simple interests and with BC's vesting of soil and freehold interests in Richmond. Such a declaration does not dictate a result but requires meaningful negotiations which seek to maintain the honour of the Crown and restore the Cowichan-Crown relationship.

[3693] There is utility in making such a declaration because it clarifies the Crown's responsibility. There remains uncertainty in the law regarding the impact of private fee simple interests on Aboriginal title lands. Clarifying BC's obligation to negotiate with the Cowichan in respect of those interests is a step toward clarifying the relationship between the Crown and the Cowichan vis-à-vis those lands, and a step towards reconciling these interests.

[3694] The practical utility of such a declaration is perhaps somewhat less apparent in the case of those YVR Fuel Project lands which Canada holds as federal real property registered in fee simple. The circumstances are different because these lands are owned by Canada, not private landowners, and Canada acknowledges an ongoing fiduciary duty to the Cowichan in respect of its dealings with these lands. There is more clarity in the law regarding the Crown's obligations in respect of Aboriginal title on what was Crown land (or here, federal real property owned by Canada and registered in fee simple) in contrast with the Crown's obligations to Aboriginal title holders whose lands are encumbered by private fee simple interests. However, these lands are encumbered by a third party lease and recognition of the Cowichan's interests will now require reconciliation of these interests. On balance I am satisfied that it is appropriate to exercise my discretion to declare that Canada owes the Cowichan a duty to negotiate, grounded in the honour of the Crown, reconciliation of the Cowichan's Aboriginal title with Canada's fee simple interests in the YVR Fuel Project lands. The parties agree that a duty to negotiate exists, and

this declaration will provide certainty with respect to its basis and serve as a foundation for negotiation moving forward.

[3695] Accordingly, I make the following declarations.

[3696] With respect to the Cowichan Title Lands, Canada owes a duty to the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, to negotiate in good faith reconciliation of Canada's fee simple interests in the YVR Fuel Project lands with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.

[3697] With respect to the Cowichan Title Lands, British Columbia owes a duty to the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, to negotiate in good faith reconciliation of the Crown granted fee simple interests held by third parties and the Crown vesting of the soil and freehold interest to Richmond with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.

6. Cowichan Entitlement as against BC to the Cowichan Title Lands

[3698] The plaintiffs ask the Court to grant a declaration that the descendants of the Cowichan Nation are entitled, as against BC, to the Cowichan Title Lands. For the reasons set out below, I do not grant this relief.

a) Positions of the Parties

i. Plaintiffs

[3699] The plaintiffs seek this declaration for two purposes.

[3700] First, they seek to clarify that Aboriginal title is superior to any provincially held fee simple title in the submerged lands. Second, they seek to establish that if BC comes into possession of any of the privately-held fee simple interests in the Cowichan Title Lands, the Cowichan's Aboriginal title is superior to any provincially held fee simple interests.

[3701] The plaintiffs submit that the Province retains no beneficial interest in the Cowichan Title Lands and accordingly should not be entitled to benefit if it comes into possession of any private Tl'uqtinus lands.

[3702] This declaration has practical utility because it operationalizes the declaration of Cowichan Aboriginal title and how the Cowichan's beneficial interest in the land must inform the Cowichan-Crown relationship going forward.

ii. BC

[3703] BC says that this declaration should be denied for five reasons.

[3704] First, it can only be granted if the Court also grants a declaration that the plaintiffs have a right of existing Aboriginal title which entitles them to exclusive use and occupation.

[3705] Second, the declaration should be declined on the basis that it is hypothetical. The Province does not presently hold any fee simple interests in the Claim Area, whether terrestrial or submerged.

[3706] Third, to the extent that the plaintiffs can only claim an interest in fee simple lands that the Province may subsequently acquire, the declaration is overbroad. This declaration might arguably be seen to apply to any interests the Province may have in the Claim Area, including its radical or underlying title.

[3707] Fourth, the declaration sought is contrary to ss. 23 and 25 of the *LTA*.

[3708] Fifth, a declaration that the plaintiffs are entitled to any fee simple interests the Province may subsequently acquire would intrude on its jurisdiction to deal with Aboriginal title lands, subject to the requirement that it justify any infringement. The infringement and justification framework furthers reconciliation by balancing the Crown's ability to exercise its regulatory jurisdiction in the interests of society as a whole with constitutionally-protected Aboriginal rights.

[3709] BC submits the plaintiffs' entitlement to any particular piece of land must not be fixed and determined in advance. A declaration should not be based on assumed or speculative facts. The Court should not address legal issues, especially constitutional issues, unless essential for the determination of the case.

b) Analysis

[3710] In my view, this declaration can be fairly characterized as aimed at clarifying the legal state of affairs and as a corollary to the declaration of Aboriginal title. *Tsilhqot'in* SCC says that the Crown does not retain a beneficial interest in Aboriginal title land: at para. 70. Upon a declaration of Aboriginal title, what is left of the Provincial Crown's underlying title is a fiduciary duty owed to the Cowichan when dealing with the land as well as the right to encroach on Aboriginal title where doing so can be justified: *Tsilhqot'in* SCC at para 71.

[3711] Given the obligations that the Province has at common law in respect of Aboriginal title, this declaration is largely a prospective statement of the new state of affairs, clarifying that the Cowichan, not BC, would be the beneficial owner of any provincially-owned fee simple land in the Cowichan Title Lands.

[3712] As a clarification or corollary to the declaration of Aboriginal title, I find this declaration lacks practical utility. Submerged lands are already included in the definition of the Cowichan Title Lands. If the Province does acquire fee simple title in the future within the Cowichan Title Lands, then it will take those lands subject to Aboriginal title, meaning the beneficial interest in land will be with the Cowichan. BC will not be permitted to deal with those lands without regard to the Cowichan's Aboriginal title, and its actions will be governed by the honour of the Crown, fiduciary obligations and the *Sparrow* framework. I also agree with BC that a declaration in the terms sought would be overbroad; Aboriginal title is not absolute, and it is possible that BC could be entitled to use the land provided these heavy obligations are met.

[3713] The declaration of Aboriginal title sufficiently clarifies the nature of the Province's interest in the Cowichan Title Lands. Accordingly, I do not grant this declaration.

7. Constructive Trust

[3714] The plaintiffs seek a declaration that Canada and/or its agent the VFPA holds the Federal Tl'uqtinus Lands, or any portion thereof, as a constructive trustee for the descendants of the Cowichan Nation. The plaintiffs sought this declaration as alternative relief in the event the Court recognized Aboriginal title but declined to declare Canada's fee simple interests invalid. Since I have declared that Canada's fee simple interests in the Cowichan Title Lands (except those in the YVR Fuel Project lands) are defective and invalid, which declaration will take effect in 18 months, it is unnecessary to grant this alternative relief.

8. Aboriginal Fishing Right

[3715] The plaintiffs seek a declaration that the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, have an Aboriginal right to fish the south (i.e., main) arm of the Fraser River for food purposes, within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[3716] I found that the Cowichan have established an Aboriginal right to fish the south arm of the Fraser River for food.

a) Positions of the Parties

[3717] The plaintiffs submit that a declaration of an Aboriginal right to fish for food purposes is an important step in advancing Cowichan-Crown reconciliation. It has practical utility of delineating and defining the plaintiffs' constitutionally protected s. 35 right. It will provide much-needed clarity between Canada (DFO) and the plaintiffs, and will inform the management of the Fraser River fisheries and the standard of Crown conduct that is required. It will restructure the Cowichan-Crown relationship so that the Cowichan are not systematically denied access to their traditional fishing territory. It will alter the *status quo* such that Canada (DFO) will not

continue to treat the Cowichan as an “extraterritorial” nation; the Cowichan will once again be local to the Fraser River territory.

[3718] Canada concedes that, if the Court finds the Cowichan did not need Musqueam’s or another Indigenous group’s permission to fish the south arm of the Fraser River, the plaintiffs have established a right to fish the south arm for food.

[3719] Canada was emphatic that the declaration sought would be useful and resolve a dispute, and would not offend the principle in *Cheslatta* that declaratory relief will not be entertained where the declaration serves little or no practical purpose: at para. 13. Canada emphasized that there is a dispute as to whether the plaintiffs’ ancestors fished with permission and as to whether the right is seasonal, and that the Court’s determination would provide a welcome resolution.

[3720] Musqueam and TFN objected to the utility of this declaration on the grounds that, as infringement is no longer in issue, there is no controversy to resolve. I decline to accede to that submission for the reasons set out in Part 10 of this judgment.

b) Analysis

[3721] This declaration has practical utility in defining the Cowichan-Crown relationship and altering the *status quo* so that the Cowichan are no longer treated as an extraterritorial nation by Canada (DFO). As previously set out, it is the proper role of the Court to recognize constitutional rights.

[3722] I found that the Cowichan have an Aboriginal right to fish the south arm of the Fraser River for food purposes. This right is not constrained by temporal limits, nor did the plaintiffs’ ancestors fish with permission. Accordingly, I grant the declaration in the terms sought.

[3723] The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz’uminus, Penelakut and Halalt, have an Aboriginal right to fish the south (i.e.,

main) arm of the Fraser River for food purposes within the meaning of s. 35(1) of the *Constitution Act, 1982*.

D. SUMMARY OF THE DECLARATIONS

[3724] In summary, I make the following declarations:

- The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, have Aboriginal title to a portion of the Lands of Tl'uqtinus, the Cowichan Title Lands, within the meaning of s. 35(1) of the *Constitution Act, 1982*.

- The Crown grants of fee simple interest in the Cowichan Title Lands, and the Crown vesting of the soil and freehold interest in the Richmond Tl'uqtinus Lands (Highways) in the Cowichan Title Lands, unjustifiably infringe the Cowichan Nation Aboriginal title to these lands.

- Canada's fee simple titles and interests in Lot 1 in Sections 27 and 22 (except those in the YVR Fuel Project lands), Lot 2 in Section 23, and Lot 9 in Sections 23 and 26, and Richmond's fee simple titles and interests in Lot E in Sections 23 and 26 and Lot K in Section 27, are defective and invalid.

- With respect to the Cowichan Title Lands, Canada owes a duty to the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, to negotiate in good faith reconciliation of Canada's fee simple interests in the YVR Fuel Project lands with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.

- With respect to the Cowichan Title Lands, British Columbia owes a duty to the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut, and Halalt, to negotiate in good faith reconciliation of the Crown granted fee simple interests held

by third parties and the Crown vesting of the soil and freehold interest to Richmond with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.

- The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, have an Aboriginal right to fish the south (i.e., main) arm of the Fraser River for food purposes within the meaning of s. 35(1) of the *Constitution Act, 1982*.

E. CONCLUSION

[3725] Most of the Cowichan's Aboriginal title lands at Tl'uqtinus were granted away over 150 years ago. Since that time, the Cowichan have pursued the return of their land, first through the JIRC process, causing Gilbert Sproat to write to the Lieutenant Governor in 1878: "The ancient fishing ground on the Lower Fraser of the Cowichan nation ... has been sold and now belongs to a white non-resident. What can be done in such a matter?" Although it has taken a very long time, the Cowichan have now established their Aboriginal title to that land. These declarations will assist in restoring the Cowichan to their stl'ulnup at Tl'uqtinus and facilitating the revitalization of their historical practice of fishing for food on the Fraser River and teaching their children their traditional ways. Nevertheless, much remains to be resolved through negotiation and reconciliation between the Crown and the Cowichan.

[3726] Additionally, the determinations in this case will impact the historic relationships between the Cowichan, Musqueam and TFN, and relations moving forward. The fact is all the parties have continued interests, rights and obligations around the south arm of the Fraser River and limited resources need to be shared and preserved.

[3727] Much has been written about reconciliation. The principles of reconciliation defined by the Truth and Reconciliation Commission of Canada include the process of healing relationships that required public truth sharing, apology and commemoration that acknowledges and redresses past harms. Litigation is the

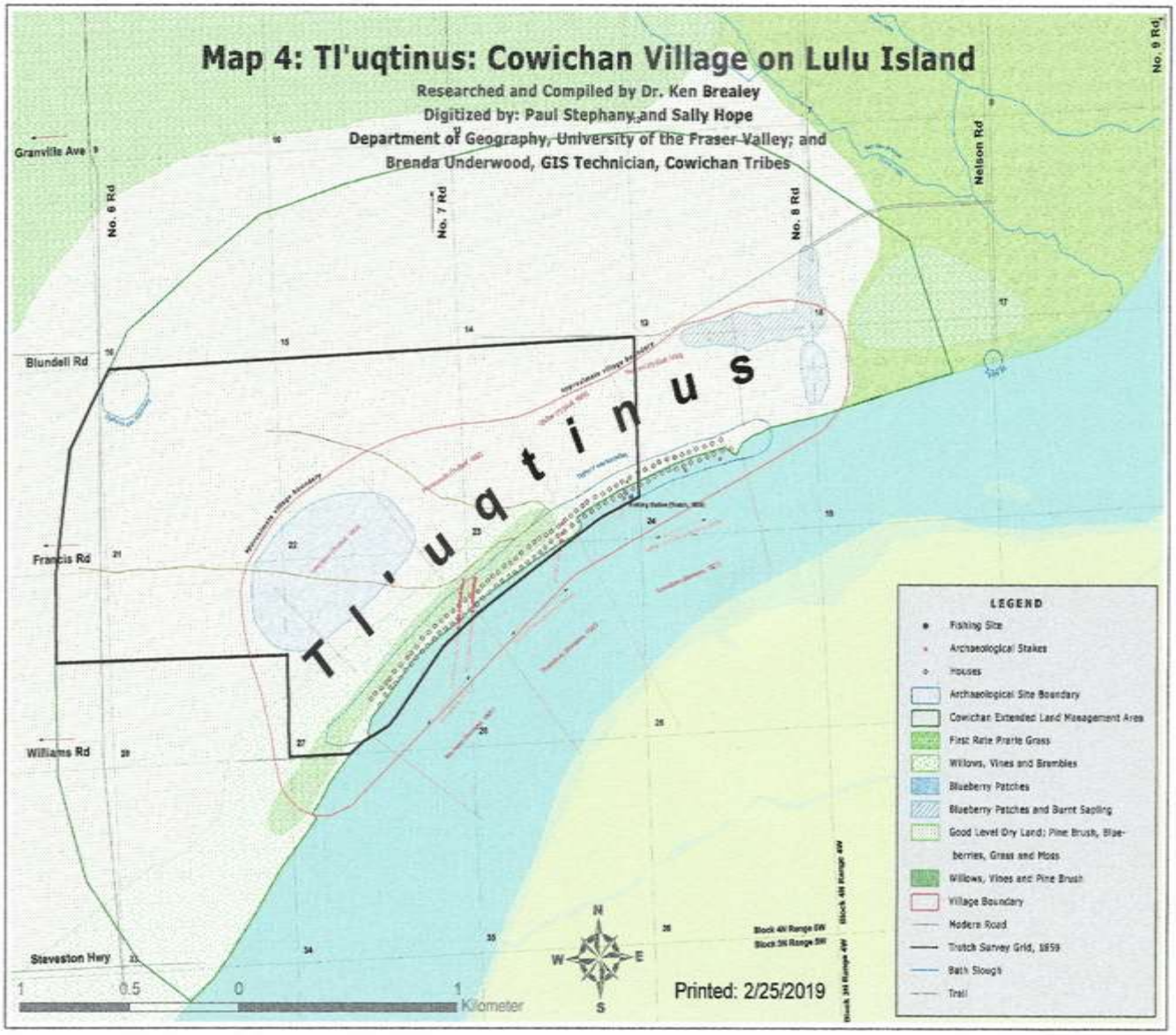
antithesis of a healing environment as the adversarial system pits parties, and sometimes kin, against one another. Yet at times it is necessary in order to resolve impasses such as those that arose here, halting negotiations. Now that this multi-year journey has concluded, it is my sincere hope that the parties have the answers they need to return to negotiations and reconcile the outstanding issues.

F. COSTS

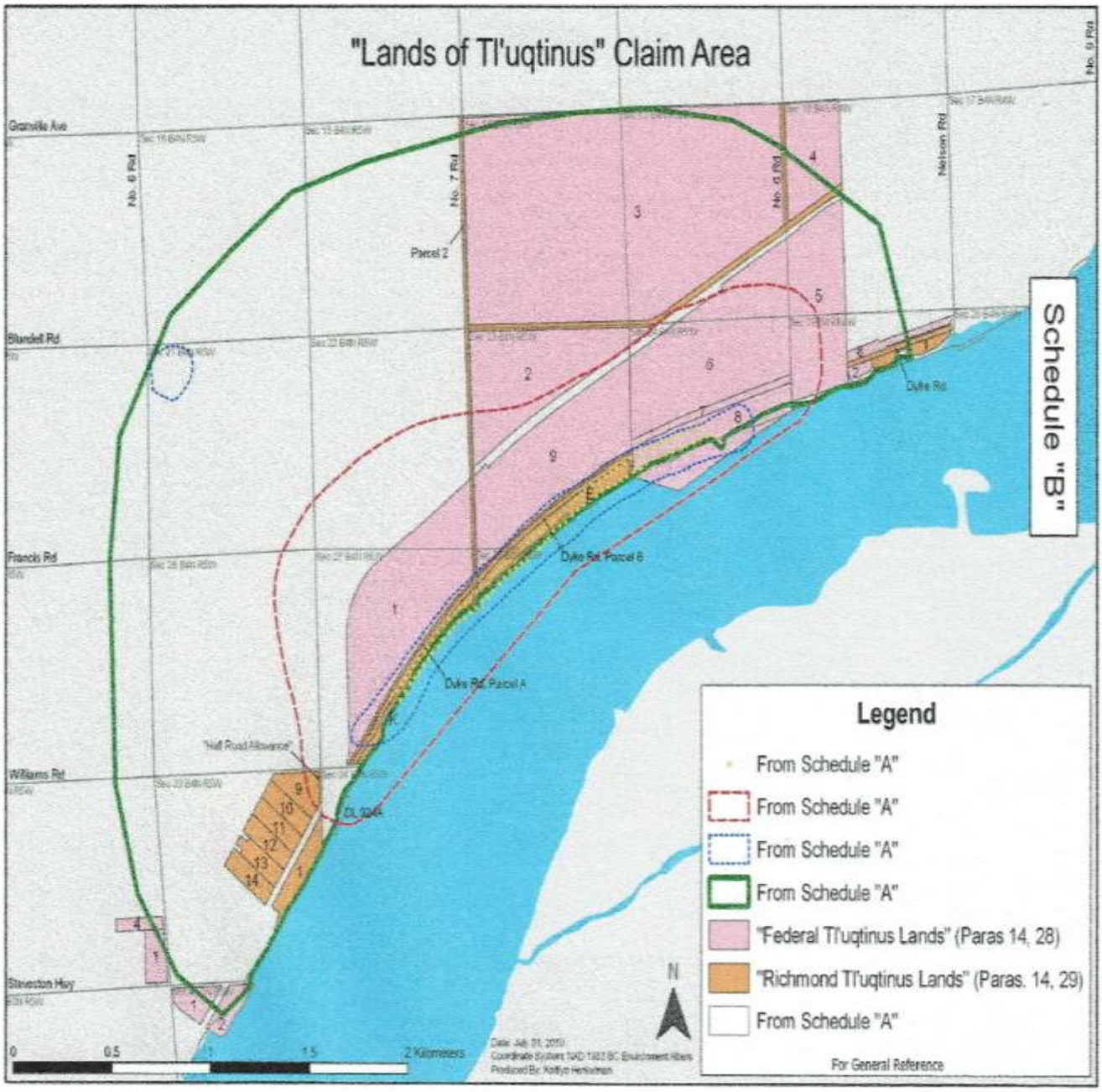
[3728] The plaintiffs have been successful in this trial and are entitled to their costs. If the parties cannot agree on the scale or apportionment of costs they may apply to the Court for a hearing on the matter.

"B. M. Young, J."
The Honourable Madam Justice Young

SCHEDULE "A"


Map 4: Tl'uqtinus: Cowichan Village on Lulu Island
Researched and Compiled by Dr. Ken Brealey
Digitized by: Paul Stephany and Sally Hope
Department of Geography, University of the Fraser Valley; and
Brenda Underwood, GIS Technician, Cowichan Tribes
Tl'uqtinus
Granville Ave
No. 6 Rd
No. 7 Rd
No. 8 Rd
No. 9 Rd
Nelson Rd
Blundell Rd
Francis Rd
Williams Rd
Steveston Hwy
LEGEND
Fishing Site
Archaeological Stakes
Houses
Archaeological Site Boundary
Cowichan Extended Land Management Area
First Rate Prairie Grass
Willows, Vines and Brambles
Blueberry Patches
Blueberry Patches and Burnt Sapling
Good Level Dry Land: Pine Brush, Blueberries, Grass and Moss
Willows, Vines and Pine Brush
Village Boundary
Modern Road
Thutch Survey Grid, 1859
Bath Slough
Trail
N
S
E
W
1 0.5 0 1 Kilometer
Printed: 2/25/2019

SCHEDULE "B"


"Lands of Tl'uqtinus" Claim Area
Schedule "B"
Granville Ave
Blundell Rd
Francis Rd
Williams Rd
Steveston Hwy
No. 6 Rd
No. 7 Rd
No. 8 Rd
Nelson Rd
No. 9 Rd
Dyke Rd
Parcel 2
Dyke Rd Parcel B
Dyke Rd Parcel A
"Half Road Allowance"
DL 3044
Legend
From Schedule "A"
From Schedule "A"
From Schedule "A"
From Schedule "A"
"Federal Tl'uqtinus Lands" (Paras 14, 28)
"Richmond Tl'uqtinus Lands" (Paras. 14, 29)
From Schedule "A"
For General Reference
N
0
0.5
1
1.5
2 Kilometers