File No. 34986

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the

XENI GWET'IN FIRST NATIONS GOVERNMENT

and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT

AND:

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

THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN, THE ATTORNEY GENERAL OF ALBERTA, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF MANITOBA,TE'MEXW TREATY ASSOCIATION, BUSINESS COUNCIL OF BRITISH COLUMBIA, COUNCIL OF FOREST INDUSTRIES, COAST FOREST PRODUCTS ASSOCIATION, MINING ASSOCIATION OF BRITISH COLUMBIA AND ASSOCIATION FOR MINERAL EXPLORATION BRITISH COLUMBIA, ASSEMBLY OF FIRST NATIONS, GITANYOW HEREDITARY CHIEFS OF GWASS HLAAM, GAMLAXYELTXW, MALII GWINUU, HAIZIMSQUE, WATAKHAYETSXW, LUUXHON AND WII'LITSWX, ON THEIR OWN BEHALF AND ON BEHALF ALL GITANYOW, HUL'QUMI'NUM TREATY GROUP, COUNCIL OF THE HAIDA NATION, OFFICE OF THE WET'SUWET'EN CHIEFS, INDIGENOUS BAR ASSOCIATION IN CANADA, FIRST NATIONS SUMMIT, TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION AND KWAKIUTL FIRST NATION, COALITION OF THE UNION OF B.C. INDIAN CHIEFS,OKANAGAN NATION ALLIANCE AND THE SHUSWAP NATION TRIBAL COUNCIL AND THEIR MEMBER COMMUNITIES, OKANAGAN, ADAMS LAKE, NESKONLITH AND SPLATSIN INDIAN BANDS, AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE, GITXAALA NATION, and CHILKO RESORTS AND COMMUNITY ASSOCIATION

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(Rule 42 of the *Supreme Court Rules*)

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PART 1 - OVERVIEW

1. The gravamen of this appeal is whether Aboriginal title is merely a small relic of history – a historical marker by the roadside, indicating that a First Nation once regularly and intensively used a particular patch of land – or whether it provides a viable springboard for a First Nation in the modern economy. At issue is whether ultimately s. 35 provides "cultural security" to First Nations only to live as they *once* did, or whether s. 35 also provides a foothold for First Nations seeking meaningful participation in contemporary Canada.

2. In arriving at the former of these choices, the Court of Appeal's reasoning was fundamentally inconsistent with the trajectory of this Court's jurisprudence and the case law and scholarship of which it has approved and on which it is based.

3. A central error in the Court below was in its application of the common law test for Aboriginal title. In *Delgamuukw*,[1] this Court accepted Professor McNeil's argument that "the fact of physical occupation is proof of possession at law, which in turn will ground title to the land", which he had set out in his seminal text, *Common Law Aboriginal Title*.[2] This basis for Aboriginal title is wholly grounded in the common law and in the fact of a First Nation's physical occupation of the land. This common law basis for Aboriginal title is disconnected from any consideration of the laws or customs the First Nation had in respect of that land.

4. This Court only generally defined the test for physical occupation in *Delgamuukw*, and later in *Marshall; Bernard*.[3] In *Delgamuukw*, Lamer C.J. gave examples of evidence of physical occupation that ranged from "the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources". He adopted Professor Slattery's admonition that "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".[4] In *Marshall; Bernard*, McLachlin C.J. stressed that "[t]he aboriginal perspective grounds the analysis and imbues its every step".[5]

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[1] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 149.
[2] Oxford: Clarendon Press, 1989 ["**McNeil, *Common Law***"].
[3] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 ["***Marshall; Bernard***"].
[4] *Delgamuukw*, para 149.
[5] *Marshall; Bernard*, para 50.

5. The Court below made fundamental errors in the application of this common law test for Aboriginal title, as the Appellant has correctly identified. For one thing, the Court interpreted the threshold test of physical occupation as requiring "an intensive presence at a particular site".[6] For another, the Court of Appeal largely ignored this Court's admonitions to view occupation through the lens of the First Nation's "manner of life".

6. The error in the Court of Appeal's judgment that will be focused on this factum, however, is the application of a test defined solely by the common law. The common law is but one basis for Aboriginal title. Another is the First Nation's customary laws in relation to land, which may ground and define title to that land in the First Nation. A third, *sui generis* approach – the one adopted by this Court in *Delgamuukw – combines* these two bases for Aboriginal title, such that physical occupation and customary law are *both* relevant to proof of title.

7. Professors Slattery and McNeil concur that these three approaches to Aboriginal title are the three leading theories and that the *sui generis* theory endorsed by this Court in *Delgamuukw* is preferable to the other two.[7] Both professors criticize this Court's decision in *Marshall; Bernard* for placing too much emphasis on physical occupation as the grounding for title claims,[8] and Professor McNeil is highly critical of the Court of Appeal's definition of Aboriginal title and the test for proof of it in the case at bar.[9]

8. In the balance of this factum, Gitxaala Nation set outs more fully the jurisprudential underpinnings of the customary law basis for Aboriginal title and the vital role it plays in the test for title that this Court laid down in *Delgamuukw*. Importantly to this appeal, the fact that Aboriginal title is rooted in part in Aboriginal law underscores that it is not just limited to particular sites, as the Court of Appeal found, but can be territorial in scope.

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[6] Appeal Judgment, para 220.

[7] Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006), 85 Can. Bar Rev. 255 ["**Slattery, *Metamorphosis***"] at p. 263; Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial", Law on the Edge Conference, Canadian Law and Society Association/Law and Society Association of Australia and New Zealand, UBC, Vancouver, July 1-4, 2013, found at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294552 ["**McNeil, *Territorial***"] **[Book of Authorities ["BOA"] Tab 11]**. See also McNeil's treatments of the Aboriginal law basis of Aboriginal title in chapter 6 of *Common Law Aboriginal Title* **[BOA Tab 12]** and of the common law basis in chapter 7, although he has since modified his views somewhat; see Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002), 47 McGill L.J. 473 **[BOA Tab 13]**, and McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (1996), 69 Sask. L. Rev. 281.

[8] Slattery, *Metamorphosis*, 279-281; McNeil, *Territorial*, 7-8.

PART 2 - POSITION ON THE QUESTIONS IN ISSUE

9. Gitxaala Nation supports the Appellant's appeal with respect to the nature of Aboriginal title and agrees with the Appellant that the Court of Appeal erred by restricting title claims to particular sites. Gitxaala Nation takes no position in this appeal on the other issues.

PART 3 - ARGUMENT

A. The "Doctrine of Continuity": the customary law basis for Aboriginal title

10. This Court long ago recognized the fact that, "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries".[10] Aboriginal peoples did not just occupy land randomly or opportunistically; rather, their occupation was structured and based upon their laws, traditions and customs, as is the case with any organized society. While Aboriginal peoples *physically* occupied the land and possessed it *in fact*, they also ordered that occupation of the land through normative systems by which their possession of the land was rooted in and legitimated by their customary laws.

11. While physical occupation in fact is one possible basis for Aboriginal title – the common law basis – another basis is that title "arises from the customary legal systems of particular Indigenous groups."[11] As Professor Walters has stated, "[t]he use and occupancy model of aboriginal rights focuses upon *use* of land and resources alone, but the aboriginal conception of aboriginal rights flows from their perceptions of not just their *use* of, but their *relationship* to, land and resources. This relationship is, in turn, defined by aboriginal 'law.'"[12] On this theory, a First Nation's Aboriginal title is a reflection of that First Nation's pre-sovereignty system of laws with respect to their lands, which ground and define its possession of its lands.

12. While on this theory Aboriginal rights and title have their source in *pre*-sovereignty Aboriginal systems of law, they continue to have force *post*-sovereignty because the common

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[9] McNeil, *Territorial*, 8-10.

[10] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 at 328 *per* Judson J. for the majority. See also Hall J.'s judgment, particularly at 375-394 and 401-6.

[11] Slattery, *Metamorphosis*, p. 263. Professor Slattery refers to this theory as the "customary" conception of Aboriginal title.

[12] Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's Law Journal* 350 ["**Walters, *Imperial***"] **[BOA Tab 16]** at 413.

law recognizes those systems of law by virtue of the "Doctrine of Continuity".[13] The doctrine is part of British "imperial" or "colonial" common law regulating the reception of British law in newly-acquired colonies. Under the doctrine, the establishment of the colony by the Crown does not automatically extinguish the former legal regime; to the contrary, laws and rights under that regime continue until specifically repealed or replaced by the new regime. The rationales for the doctrine have been said to be the separation of powers, the rule of law and fairness.[14]

13. The Doctrine of Continuity is well-established in the case law and commentary,[15] although it has been unevenly applied. At times it was said to apply only to colonies acquired by conquest or cession, as opposed to discovery or settlement; at other times it was held not to extend to peoples "so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society".[16] These limitations have at various times been thought to deny the continuation of the laws and rights of the Aboriginal peoples of North America and Australia, by way of the "fictions"[17] of *terra nullius*. But it is now clear that the doctrine applies to colonies acquired by settlement as well as conquest,[18] and that the common law recognizes the full range of Aboriginal interests, "even though those interests are of a kind unknown to English law".[19]

14. The Doctrine of Continuity has been applied by Canadian courts, as in *Connolly v. Woolrich*,[20] in which Cree marriage customs were held to be in force such that a settler's second

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[13] Also sometimes referred to as the "Principle of Continuity"; see Mark Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999), 44 *McGill Law Journal* 711 ["**Walters, *Aboriginal Customs***"] **[BOA Tab 17]**.

[14] Walters, *Aboriginal Customs*, p. 742.

[15] Recent academic commentary from Canada on this issue includes: Brian Slattery, *The Land Rights of Indigenous Canadian Peoples*, D. Phil Thesis, Oxford, 1979 at 50-62 **[BOA Tab 15]**; McNeil, *Common Law*, chapter 6 (161-192) **[BOA Tab 12]**; Walters, *Imperial* and *Aboriginal Customs*; and Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" 2000, 79 Can. Bar Rev. 196 **[BOA Tab 14]**. Classic early cases include: *Calvin's Case* (1608), 7 Co. Rep. 1a at 19b, 77 E.R. 377 (K.B.) **[BOA Tab 1]**; *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516 **[BOA Tab 9]**; *Witrong v. Blany* (1674),3 Keb. 401, 84 E.R. 789 **[BOA Tab 10]**; *Dawes v. Painter* (1674), 1 Freem. 175, 89 E.R. 126 **[BOA Tab 6]**; *Campbell v. Hall* (1774), 14 Geo. 3 (K.B.) **[BOA Tab 3]**.

[16] *Re Southern Rhodesia*, [1919] A.C. 211 **[BOA Tab 8]** *per* Lord Sumner at 233.

[17] See *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para 40, per Lamer C.J., quoting from *Mabo* at p. 58.

[18] See Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 738. See also Professor Walters' detailed treatments of the issue in *Imperial* and *Aboriginal Customs*.

[19] *Oyekan v. Adele*, [1957] 2 All E.R. 785 at 788 **[BOA Tab 7]**, per Lord Denning. See also *Amodu Tijani v. Southern Nigeria*, [1921] 2 A.C. 399 (P.C.).

[20] (1867), 17 R.J. R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.) **[BOA Tab 4]**, aff'd *sub nom Johnstone v. Connolly* (1869), 17 R.L.R.Q. 266, 1 C.N.L.C. 151 (Que. C.A.) **[BOA Tab 5]**.

marriage under Christian rites was a nullity because his first marriage under Cree custom had not been dissolved. More recently, Justice McLachlin (as she then was) accurately summarized and then relied upon the Doctrine of Continuity as the basis for Aboriginal rights in her dissent in *Van der Peet*.[21] Later, writing for the majority of this Court in *Mitchell v. M.N.R.*, Chief Justice McLachlin founded her judgment squarely upon the doctrine.[22]

15. The continuity of Aboriginal law has been explicitly found by courts to be the basis for Aboriginal title by some courts, most prominently by the High Court of Australia in *Mabo*. In that case, Justice Brennan stated for the majority: "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."[23] In *Van der Peet*, Chief Justice Lamer found Justice Brennan's analysis of the basis of aboriginal title to be "persuasive in the Canadian context".[24] After quoting the above statement from *Mabo*, the Chief Justice stated:[25]

> This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" – that which is "handed down [from ancestors] to posterity", *The Concise Oxford Dictionary* (9th ed. 1995), – implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

16. The advantage of the continuity of customary law approach to Aboriginal rights and title is that it properly respects the political and normative dimensions of pre-sovereignty Aboriginal societies. As Professor Slattery has stated, "Aboriginal title is nothing if not grounded ultimately in the actual use and occupation of lands by Indigenous peoples under their laws."[26] But the continuity approach also has limitations. As seen in *Mabo*, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the First Nation's pre-sovereignty]

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[21] Paras 263-275.
[22] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, paras 9-10; quoted in Appellant's Factum at para 97.
[23] *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 at 58.
[24] Para 38.
[25] *Ibid*. at para 40 (emphasis added).
[26] Slattery, *Metamorphosis*, 264 (emphasis added).

laws and customs." That basis of title could lead to insurmountable problems of proof for some First Nations, where clear evidence of their pre-sovereignty laws has not survived the intervening one and a half centuries. It would also lead to a heterogeneous patchwork of titles across British Columbia, with the title of each First Nation having different natures and incidents.[27]

B. *Delgamuukw*: the *sui generis* approach to Aboriginal title

17. The *sui generis* theory holds that Aboriginal title is not an ordinary proprietary interest under English common law, but neither is it entirely defined by a First Nation's pre-sovereignty laws relating to land. It is rather "a distinctive form of title ... that gives an Indigenous group the exclusive right to possess and use its traditional lands for such purposes as it sees fit, subject to the restriction that the lands cannot be transferred to outsiders but may only be ceded to or shared with the Crown, which holds an underlying title to the land."[28]

18. The *sui generis* theory has a long pedigree, dating back to the Marshall decisions from the United States Supreme Court in the nineteenth century,[29] in which Chief Justice Marshall held that the Indian peoples were "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial,"[30] subject to the limitation that they could only alienate their lands to the European power that "discovered" them. In *Van der Peet*, Chief Justice Lamer agreed that the Marshall decisions are "as relevant to Canada as they are to the United States".[31]

19. Chief Justice Lamer articulated the *sui generis* theory of Aboriginal title further in *Delgamuukw*. He observed that Aboriginal title "cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems", but rather must be understood by reference to *both* legal regimes.[32] While Aboriginal title has its source in the prior occupation of Canada by Aboriginal peoples, both legal regimes are relevant to occupation: the "physical fact of occupation" engages "the common

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[27] See these critiques in Slattery, *Metamorphosis*, 263-7, and McNeil, *Territorial*, 2-4.
[28] Slattery, *Metamorphosis*, 270.
[29] *Johnson v. M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823); *Cherokee Nation v. Georgia*, 5 Peters 1 (U.S.S.C. 1831); *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C. 1832). For commentary linking the *sui generis* theory of Aboriginal title to the Marshall decisions, see Slattery, *Metamorphosis*, 271-279, and McNeil, *Territorial*, 4-7.
[30] *Worcester v. Georgia*, 559.
[31] Para 35; see also paras 36-37 for further endorsement of the Marshall decisions.
[32] *Delgamuukw*, para 112.

law principle that occupation is proof of possession in law", and occupation is also informed by "the relationship between common law and pre-existing systems of aboriginal law"[33] (meaning the Doctrine of Continuity). These two jurisprudential sources for Aboriginal title in turn derive two bases for proof of it: since the sources of Aboriginal title are "grounded both in the common law and in the aboriginal perspective on land" – the latter of which "includes, but is not limited to, their systems of law" – "[i]t follows that both should be taken into account in establishing the proof of occupancy."[34] With respect to Aboriginal laws, Chief Justice Lamer further stated:[35]

> As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

20. Like the customary law theory of Aboriginal title, the *sui generis* approach has the important benefit of properly recognizing that, prior to the arrival of Europeans, First Nations were "distinct, independent political communities", with their own systems of laws that structured and legitimated their physical occupation of the land. The *sui generis* approach confronts that reality both by incorporating Aboriginal laws into the proof of title, and by allowing for different First Nations to govern the internal use of their title lands differently. The *sui generis* approach also has the advantage, however, of ascribing uniform *external* characteristics to Aboriginal title, such that the nature of the right *per se* does not differ from group to group: it is a communal title that cannot be alienated except through surrender to the Crown,[36] and it is a right to the land itself, which the First Nation may use in any manner that is not irreconcilable with its attachment to the land.[37] The *sui generis* approach to the Aboriginal title is therefore "a blend of the diversity envisaged by the custom-based conception and the uniformity contemplated by the English-based conception."[38]

21. The *sui generis* approach thereby advances the project of reconciliation by acknowledging that the colonization of Canada involved "the meeting of two vastly dissimilar

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[33] *Ibid*., para 114.
[34] *Ibid*., para 147.
[35] *Ibid*., para 148 (emphasis added).
[36] *Ibid*., paras 113 and 115.
[37] *Ibid*., para 117. See also *Campbell v. British Columbia*, [2000] 4 C.N.L.R. 1 (B.C.S.C.) **[BOA Tab 2]**.
[38] Slattery, *Metamorphosis*, 270.

legal cultures".[39] The goal is not to impose the categories of common law rights onto prior Aboriginal occupation of the land, but rather to construct "a form of intersocietal law"[40] informed by both the common law and Aboriginal perspectives. As Chief Justice Lamer stated in both *Van der Peet* and *Delgamuukw*, "[t]rue reconciliation will, equally, place weight on each."[41]

C. *Marshall; Bernard* and the Court of Appeal

22. Despite the strong language of *Van der Peet* and *Delgamuukw*, in *Marshall; Bernard* this Court strayed from the commitment to equal weight between the common law and Aboriginal perspectives. This departure appears unintentional; certainly the majority purported to follow *Delgamuukw* and eschewed "imposing a European template".[42] But whereas in *Delgamuukw* the present-day right of Aboriginal title is conceived as *sui generis* – a right that cannot be understood by reference to either the common law or Aboriginal legal systems alone, but only by reference to both – in *Marshall; Bernard* it is framed as a pre-sovereignty Aboriginal *practice* that is "translated" into a modern *common law* right. The act of translation engages "the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it."[43] As Professor Slattery notes, this translation approach constitutes a "sharp departure" from *Delgamuukw*; under the *sui generis* approach endorsed in that case, "aboriginal title is a distinctive inter-societal right that bridges the gap between Indigenous and European-based land systems and regulates their interaction. No translation is needed."[44] By conceiving of Aboriginal title as the product of translation, the Court re-cast Aboriginal title in a common law mold, no matter how sensitive the translation is to the First Nation's manner of life. Whereas Aboriginal legal perspectives are given equal weight to the common law in the *sui generis* approach, according to *Marshall; Bernard* Aboriginal perspectives are only relevant to the Aboriginal *practice*, while the common law solely defines the *right* to which the practice is translated.

23. In the case at bar, the Court of Appeal moved further away from the Aboriginal

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[39] *Van der Peet*, para 42, *per* Lamer C.J., quoting with approval from Walters, *Imperial*, at 412.
[40] *Van der Peet*, para 42, *per* Lamer C.J., quoting with approval from Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*.
[41] *Van der Peet*, paras 49 and 50; *Delgamuukw*, paras 81 and 148; referencing Walters, *Imperial*, 413.
[42] *Marshall; Bernard*, para 48.
[43] *Ibid*.
[44] Slattery, *Metamorphosis*, 281-2.

customary law basis of title, and conceived of it exclusively as the product of the common law test of physical occupation. While the Court of Appeal reviewed the Canadian law of Aboriginal title at paragraphs 174-204, nowhere in that discussion did it acknowledge Aboriginal legal perspectives as a source and basis of proof of the *sui generis* right of Aboriginal title; only at paragraph 233 did the Court acknowledge that, "[i]n considering Aboriginal title and Aboriginal rights, the Court must take into account Aboriginal perspective as well as that of the common law." Moreover, while in its overview of the facts the Court quoted from the trial judge's findings regarding the Tsilhqot'in's socio-political structure – including that they were "a rule ordered society" who "did consider the land to be their land" and "had a concept of territory and boundaries"[45] – the Court ultimately neglected any consideration of the Tsilhqot'in's customary land laws in determining whether their occupation was sufficient to prove title.

24. The Court of Appeal erred in law in not taking the Tsilhqot'in's laws into account. While Tsilhqot'in members were not present year-round in all parts of their territory, their laws were, as is underscored by the extensive evidence of the enforcement of their exclusive rights of occupation. As a general proposition, if Aboriginal title is properly seen as rooted in part in a First Nation's socio-political structure, then it is plain (as was recognized in *Delgamuukw*) that occupation of lands extends beyond physical presence; it must also encompass the normative rules by which the First Nation ordered use of the land. Indeed, as will be developed more fully under the next heading, the relevance of customary laws to proof of Aboriginal title demonstrates that title is *territorial* in scope, not just site specific.

25. On appeal, this Court should view the evidence of Tsilhqot'in occupation through the prism of Tsilhqot'in customary laws. This Court should also be conscious that there will be other cases – cases more like *Delgamuukw* – where the plaintiff First Nation had a land tenure system more specific and prescriptive than in the case at bar. The Court's judgment will be applied by lower courts in subsequent cases and will guide Crown-First Nation consultations. This Court should therefore make clear the continuing relevance of customary laws to Aboriginal title.

D. *Sui generis* Aboriginal title is territorial

26. At the heart of the Court of Appeal's judgment is a determination that Aboriginal title is

[45] See Appeal Judgment at paras 34-35, quoting from paras 356-363 and 429 of the Trial Judgment.

not "territorial" in extent, but rather applies only to particular sites. The Court of Appeal reached that conclusion by focusing exclusively on the *physical* occupation test from the common law, without considering the customary law dimension of Aboriginal title. That dimension makes very clear that the Court in *Delgamuukw* envisioned Aboriginal title to be territorial in scope.

27. Chief Justice Lamer cited, as examples, "a land tenure system or laws governing land use" as customary laws that would be relevant to "establishing the occupation of lands which are the subject of a claim for aboriginal title".[46] Later, in connection with the exclusivity requirement, he stated that relevant Aboriginal laws would include "trespass laws" and "laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land".[47] It is inconceivable that in citing a land tenure system and trespass laws the Chief Justice had in mind only a patchwork of village sites, cultivated fields and salt licks. To the contrary, the Chief Justice noted that the Gitksan had tendered their *adaawk* as "proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant", and that both the Gitksan and the Wet'suwet'en had tendered "territorial affidavits" detailing their respective houses' "territorial holdings";[48] in each case, the Chief Justice observed that they would be relevant to proof of title in a new trial.

28. As this Court confirmed two decades ago, section 35 calls for a "just settlement for aboriginal peoples".[49] To fulfil that promise this Court should return to the *sui generis* basis for Aboriginal title set out in *Delgamuukw*, re-affirm the customary law dimension of Aboriginal title, and reject the Court of Appeal's restriction of title only to particular sites of intensive use.

PART 4 - SUBMISSIONS CONCERNING COSTS

29. Gitxaala Nation does not seek costs and asks that none be ordered against it.

PART 5 - ORDER SOUGHT

30. Gitxaala Nation requests leave to present at least 10 minutes of oral argument.

All of which is respectfully submitted this 23rd day of September, 2013

Tim Dickson

[46] *Delgamuukw*, para 148.
[47] *Ibid*., para 157.
[48] *Ibid*., paras 94 and 102 (emphasis added).
[49] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1105-6.

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