

Roger William, on his own behalf and on behalf of all other members of the Xenigwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation (respondent/plaintiff) v. Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region (appellants/defendants) and The Attorney General of Canada (respondent/defendant) and B.C. Wildlife Federation and B.C. Seafood Alliance, Treaty 8 First Nations, Chief Wilson and Chief Jules, First Nations Summit and Te'mexw Treaty Association (intervenor)
(CA035617)

Roger William, on his own behalf and on behalf of all other members of the Xenigwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation (respondent/plaintiff) v. The Attorney General of Canada (appellant/defendant) and Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region (respondents/defendants) and B.C. Wildlife Federation and B.C. Seafood Alliance, Chief Wilson and Chief Jules, First Nations Summit and Te'mexw Treaty Association (intervenor)
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(CA035620; 2012 BCCA 285)

Indexed As: William v. British Columbia et al.

British Columbia Court of Appeal
Levine, Tysoe and Groberman, J.J.A.
June 27, 2012.

Summary:

The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff). This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory: Tachelach'ed (the "Brittany Triangle") and the "Trapline Territory". In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking (a) a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area; (b) a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area; (c) a declaration that British Columbia did not have jurisdiction to authorize forestry activities within the claim area; (d) declarations that British Columbia's authorization of forestry activities within the claim area unjustifiably infringed the aboriginal title of the Tsilhqot'in Nation and the aboriginal rights of the Xenigwet'in; (e) injunctive relief restraining British Columbia from authorizing forestry activities in the claim area in the future; (f) damages for unjustifiable infringement of the aboriginal title of the Tsilhqot'in Nation and Aboriginal rights of

the Xení Gwet'in; and (g) damages for breach of fiduciary duty.

The British Columbia Supreme Court, in a decision with neutral citation 2007 BCSC 1700, (a) dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area; (b) dismissed the plaintiff's claims for damages without prejudice to the Tsilhqot'in's right to make new damages claims in respect of aboriginal title land; (c) declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses; and (d) declared that forestry activities in the claim area unjustifiably infringed Tsilhqot'in aboriginal rights. The plaintiff and Canada appealed regarding aboriginal title. British Columbia appealed regarding a number of issues surrounding aboriginal rights claims.

The British Columbia Court of Appeal dismissed the appeals.

Editor's Note: There are a number of reported decisions related to this litigation which are accessible at www.mlb.nb.ca by searching under "William v. British Columbia et al."

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process (incl. abuse of process by relitigation) - [See third **Indians, Inuit and Métis - Topic 5563**].

Estoppel - Topic 251

Estoppel by record (res judicata) - General principles - Purpose of rule - [See third **Indians, Inuit and Métis - Topic 5563**].

Estoppel - Topic 379

Estoppel by record (res judicata) - Res judicata as a bar to subsequent proceedings - Cause of action - [See third **Indians, Inuit and Métis - Topic 5563**].

Indians, Inuit and Métis - Topic 5563

Lands - Land claims - Claim for ownership - Procedure - The Xení Gwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - At issue on appeal was the judge's determination that the claim for aboriginal title was an "all or nothing" claim - The British Columbia Court of Appeal did not agree with the trial judge's finding that the plaintiff's claim was an "all or nothing" claim - The claim was sufficiently pleaded to allow the court to find that aboriginal title had been proven in respect of only part of the claim area - Flexibility in the granting of a declaration was particularly important in a

case where aboriginal title was claimed - To require proof of aboriginal title precisely mirroring the claim would be too exacting - See paragraphs 104 to 119.

Indians, Inuit and Métis - Topic 5563

Lands - Land claims - Claim for ownership - Procedure - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - At issue on appeal was the judge's determination that the claim for aboriginal title was an "all or nothing" claim - The British Columbia Court of Appeal did not agree with the trial judge's finding that the plaintiff's claim was an "all or nothing" claim - The plaintiff's case was based on a "territorial theory" of aboriginal title - The defendants rejected that theory, instead taking the view that aboriginal title could be demonstrated over smaller tracts of land - As this was not the theory on which the plaintiff presented its case, it would have been unfair for the trial judge to attempt to identify particular areas within the claim area that qualified for aboriginal title on the defendant's theory - However, the judge was entitled to consider whether a lesser territorial entitlement than was claimed had been proven - See paragraphs 120 to 126.

Indians, Inuit and Métis - Topic 5563

Lands - Land claims - Claim for ownership - Procedure - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - On appeal, Canada asserted, inter alia, that the judge was wrong to dismiss the aboriginal title claim on a "without prejudice" basis as any claim to title within the claim area was res judicata based on the doctrine of cause of action estoppel - The British Columbia Court of Appeal dismissed the appeal - The claim before the court was a claim for aboriginal title based on a territorial theory - The case was one of the most complex ever adjudicated in this country - To suggest that the plaintiff ought to have been compelled to bring other, site-specific claims within the same litigation lacked reality - Res judicata was concerned with abuse of process - The plaintiff's decision to proceed with a territorial claim, rather than a narrower, site-specific claim, was not an abuse of process - See paragraphs 127 to 131.

Indians, Inuit and Métis - Topic 5564

Lands - Land claims - Claim for ownership - Requirements for - The Xenigwet'in First

Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - The British Columbia Court of Appeal dismissed the plaintiff's appeal - The claim to aboriginal title, as it was advanced, was not sustainable - A broad territorial claim did not fit within the purposes of s. 35 of the Constitution Act, 1982 or the rationale for the common law's recognition of aboriginal title - Broad territorial claims were antithetical to the goal of reconciliation, which demanded that, as far as possible, the traditional rights of First Nations had to be fully respected without placing unnecessary limitations on the sovereignty of the Crown or the aspirations of all Canadians - See paragraphs 205 to 226.

Indians, Inuit and Métis - Topic 5564

Lands - Land claims - Claim for ownership - Requirements for - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - The British Columbia Court of Appeal dismissed the plaintiff's appeal - While the trial judge did not articulate any clear test for the sufficiency of occupation, it was evident that he considered that occupation could be determined on a regional or territorial basis - However, the case law did not support the idea that title could be proven based on a limited presence in a broad territory - Aboriginal title had to be proven on a site-specific basis - The plaintiff's criticism of this approach as a "postage stamp" method did not account for the fact that title was not the only tool available to provide cultural security to the Tsilhqot'in - The cultural security and continuity of First Nations could be preserved by recognizing their title to particular "definite tracts of land" and by acknowledging that they held other aboriginal rights in much more extensive territories - Therefore, while the court did not agree with the trial judge's analysis of the aboriginal title issue, his order was upheld - The claim to aboriginal title, as it was advanced on a territorial, rather than a site-specific basis, was not sustainable - See paragraphs 227 to 241.

Indians, Inuit and Métis - Topic 5566

Lands - Land claims - Aboriginal title - Nature of - [See both **Indians, Inuit and Métis - Topic 5564**].

Indians, Inuit and Métis - Topic 5566

Lands - Land claims - Aboriginal title - Nature of - The British Columbia Court of

Appeal discussed the basis for aboriginal title and rights - While the basic concept of aboriginal rights was easily understood, the recognition of such rights in a common law system was a complex matter - Three major questions had to be answered: What types of rights were recognized? How was their existence to be determined? What protection was to be afforded those rights? - Compendiously, the answers to those questions had been described as representing a reconciliation of aboriginal rights with Crown (or national) sovereignty - One fundamental aspect of aboriginal rights was that they were intimately connected with traditional aboriginal culture and practices, adapted, as they might be, to modern conditions - Respect for aboriginal rights safeguarded the unique cultures of aboriginal groups and preserved their abilities to continue to live according to their traditions - Such respect was the proper focus of an aboriginal rights analysis - The law had to recognize and protect aboriginal title where exclusive occupation of the land was critical to the traditional culture and identity of an aboriginal group - This was usually the case where the traditional use of a tract of land was intensive and regular - Where traditional use and occupation of a tract of land was less intensive or regular, however, recognition of aboriginal rights other than title might be sufficient to fully preserve the ability of members of a First Nation to continue their traditional activities and lifestyles and might fully preserve aboriginal culture - In such cases, the recognition of those other rights might be more commensurate with the reconciliation of aboriginal rights with Crown sovereignty than would a broader recognition of aboriginal title - See paragraphs 158 to 173.

Indians, Inuit and Métis - Topic 5566

Lands - Land claims - Aboriginal title - Nature of - The British Columbia Court of Appeal discussed the Canadian law of aboriginal title - The rights of First Nations to lands that they traditionally occupied had been a concern of colonial and Canadian law from the earliest times - The history of protection of those rights had, however, been "embarrassingly weak" - Until relatively recently, aboriginal rights were often considered to be incidents of aboriginal title - This was in keeping with the idea that aboriginal title, itself, was a sort of usufructuary right - As the law recognized that usufructuary rights could be divorced from title, the rationale for describing aboriginal title as usufructuary in nature ceased to exist - It was no longer correct to describe aboriginal title that way - Now, in order to establish aboriginal title, the claimant had to demonstrate "possession similar to that associated with title at common law" - That level of possession depended on all of the circumstances, including "the nature of the land and the manner in which the land is commonly enjoyed" as well as the actual nature of the occupation - See paragraphs 174 to 204.

Indians, Inuit and Métis - Topic 5568

Lands - Land claims - Aboriginal title - Evidence and proof - [See first and second **Indians, Inuit and Métis - Topic 5563**, second **Indians, Inuit and Métis - Topic 5564** and third **Indians, Inuit and Métis - Topic 5566**].

Indians, Inuit and Métis - Topic 6005

Aboriginal rights - Nature and scope of - [See second **Indians, Inuit and Métis - Topic 5566** and second **Indians, Inuit and Métis - Topic 6015**].

Indians, Inuit and Métis - Topic 6005

Aboriginal rights - Nature and scope of - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - On appeal, British Columbia objected to the declaration as it pertained to horses - The British Columbia Court of Appeal dismissed the appeal - The court rejected the argument that the declaration ought not to have been granted because the judge had not specifically determined that any forestry activity had interfered, or would interfere, with the capture and use of wild horses - The trial judge had exercised his discretion in favour of granting the declaration - It had not been shown that he had erred in principle in doing so - See paragraphs 252 to 261.

Indians, Inuit and Métis - Topic 6005

Aboriginal rights - Nature and scope of - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - On appeal, British Columbia objected to the declaration as it pertained to horses - The British Columbia Court of Appeal dismissed the appeal - The Tsilhqot'in practice of capturing and using horses for work and transportation qualified as an aboriginal right, notwithstanding that horses were introduced (or, more precisely, reintroduced) to North America by Europeans - The trial judge made no palpable and overriding error in finding that the Tsilhqot'in tradition of horsemanship predated European contact - There was no basis on which to interfere with the judge's findings as to the aboriginal rights to capture and use horses - See paragraphs 262 to 268.

Indians, Inuit and Métis - Topic 6005

Aboriginal rights - Nature and scope of - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia,

Canada and others, seeking, inter alia, a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - On appeal, British Columbia objected to the declaration as it related to trading rights, asserting that the trial judge had erred by using the "moderate livelihood" standard, in concluding that Tsilhqot'in pre-contact trade was integral to their distinctive culture and in failing to confine the right to specific species of animals - The British Columbia Court of Appeal dismissed the appeal - The judge's finding of a general right to trade in skins and pelts taken from the claim area was supported by the evidence - There was no basis on which to interfere with the declaration - See paragraphs 269 to 288.

Indians, Inuit and Métis - Topic 6012

Aboriginal rights - Evidence and proof - [See second, third and fourth **Indians, Inuit and Métis - Topic 6005**].

Indians, Inuit and Métis - Topic 6015

Aboriginal rights - Claim for - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area and a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area and declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - At issue on appeal, was whether the trial judge had erred in finding that the proper rights holder was the Tsilhqot'in Nation - The British Columbia Court of Appeal held that the judge had not made any error in finding that the Tsilhqot'in Nation was the proper rights holder - The trial judge had tacitly allowed an informal amendment to the claim such that the claim to aboriginal rights was asserted on behalf of the Tshilqot'in Nation - This was within his discretion - British Columbia had suffered no prejudice due to the late change in the relief sought - See paragraphs 132 to 136.

Indians, Inuit and Métis - Topic 6015

Aboriginal rights - Claim for - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the

claim area and a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area and declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - At issue on appeal, was whether the trial judge had erred in finding that the proper rights holder was the Tsilhqot'in Nation - The British Columbia Court of Appeal held that the judge had not made any error in finding that the Tsilhqot'in Nation was the proper rights holder - Aboriginal rights were communal rights - The evidence clearly established that the holders of aboriginal rights within the claim area had traditionally defined themselves as being the collective of all Tsilhqot'in people - The Tsilhqot'in Nation was the proper rights holder - The Xenigwet'in, as modern "caretaker" or custodian of the Tsilhqot'in rights in the claim area, had a special role to play in asserting those rights and in engaging with governments in attempts to reconcile them with broader public interests - Though the rights were held on behalf of the entire Tsilhqot'in Nation, it was the Xenigwet'in that administered and protected those rights - See paragraphs 137 to 157.

Indians, Inuit and Métis - Topic 6017

Aboriginal rights - Infringement - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, declarations that British Columbia's authorization of forestry activities within the claim area unjustifiably infringed the aboriginal title of the Tsilhqot'in Nation and the aboriginal rights of the Xenigwet'in - The trial judge declared that forestry activities in the claim area unjustifiably infringed Tsilhqot'in aboriginal rights - British Columbia appealed - The British Columbia Court of Appeal dismissed the appeal - The judge understood and applied the Sparrow test for prima facie infringement of aboriginal rights - The test was satisfied when government action interfered with a proven aboriginal right in more than a trivial way - Here, government policy and high-level planning, combined with the specific forest tenures, permits and licences granted by British Columbia, led the trial judge to the conclusion that there would be an inevitable detrimental effect on habitat and wildlife populations in the claim area - He further found that this detrimental effect would interfere with proven Tsilhqot'in aboriginal rights to hunt and trap - These findings were open to the trial judge and the court could not interfere with them - Further, the declaration granted, while broad and of limited practical utility, was justifiable given the unique nature of the case - See paragraphs 289 to 322.

Indians, Inuit and Métis - Topic 6017

Aboriginal rights - Infringement - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British

Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, declarations that British Columbia's authorization of forestry activities within the claim area unjustifiably infringed the aboriginal title of the Tsilhqot'in Nation and the aboriginal rights of the Xenigwet'in - The trial judge declared that forestry activities in the claim area unjustifiably infringed Tsilhqot'in aboriginal rights - British Columbia appealed - The British Columbia Court of Appeal dismissed the appeal - Having found a prima facie infringement of aboriginal rights, the trial judge had not erred in determining that the infringement was not justified by British Columbia - Where the alleged infringement was governmental conduct other than legislation, the question was whether the governmental objective underlying the infringement was a justifiable one - The judge found that there was no valid governmental objective for logging in the claim area - There was no basis on which to interfere with that conclusion - See paragraphs 323 to 343.

Cases Noticed:

- William v. British Columbia et al., [2001] B.C.T.C. 1641; 2001 BCSC 1641, affd. (2002), 170 B.C.A.C. 257; 279 W.A.C. 257; 2002 BCCA 434 (C.A.), leave to appeal granted (2002), 303 N.R. 198; 188 B.C.A.C. 319; 308 W.A.C. 319 (S.C.C.), refd to. [para. 22].
- British Columbia (Minister of Forests) v. Okanagan Indian Band et al., [2003] 3 S.C.R. 371; 313 N.R. 84; 189 B.C.A.C. 161; 309 W.A.C. 161; 2003 SCC 71, refd to. [para. 22].
- William v. British Columbia et al., [2004] B.C.T.C. 610; 2004 BCSC 610, refd to. [para. 22].
- Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, refd to. [para. 32].
- Delgamuukw et al. v. British Columbia et al., [1997] 3 S.C.R. 1010; 220 N.R. 161; 99 B.C.A.C. 161; 162 W.A.C. 161, refd to. [para. 32].
- R. v. Marshall (S.F.) et al.; R. v. Bernard (J.), [2005] 2 S.C.R. 220; 336 N.R. 22; 287 N.B.R.(2d) 206; 750 A.P.R. 206; 2005 SCC 43, refd to. [para. 58].
- Biss v. Smallburgh Rural District Council, [1965] Ch. 335 (C.A.), refd to. [para. 108].
- Harrison-Broadley v. Smith, [1964] 1 All E.R. 867 (C.A.), refd to. [para. 112].
- Hong, Lau Wing & Others v. Hung, Wong Wor & Another, [2006] 4 H.K.L.R.D. 671 (H.C.), refd to. [para. 113].
- Native Women's Association of Canada et al. v. Canada et al., [1994] 3 S.C.R. 627; 173 N.R. 241, refd to. [para. 115].
- Lax Kw'alaams Indian Band et al. v. Canada (Attorney General) et al. (2011), 423 N.R. 3; 313 B.C.A.C. 3; 533 W.A.C. 3; 2011 SCC 56, refd to. [para. 124].
- Henderson v. Henderson (1843), 3 Hare 100, refd to. [para. 127].
- Arnold v. National Westminster Bank Plc., [1991] 2 A.C. 93 (H.L.), refd to. [para. 129].
- Nemaiah Valley Indian Band et al. v. Riverside Forest Products Ltd. et al. (1999), 24 B.C.T.C. 131; 37 C.P.C.(4th) 101 (S.C.), refd to. [para. 140].
- R. v. Sparrow, [1990] 1 S.C.R. 1075; 111 N.R. 241, refd to. [para. 142].
- Haida Nation v. British Columbia (Minister of Forests) et al., [2004] 3 S.C.R. 511; 327 N.R. 53; 206 B.C.A.C. 52; 338 W.A.C. 52; 2004 SCC 73, refd to. [para. 142].
- Chamberlin v. British Columbia (Minister of Agriculture and Lands) (2012), 319

B.C.A.C. 273; 542 W.A.C. 273; 2012 BCCA 193, refd to. [para. 148].
Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General) - see Chamberlin v. British Columbia (Minister of Agriculture and Lands).
R. v. Powley (S.) et al., [2003] 2 S.C.R. 207; 308 N.R. 201; 177 O.A.C. 201; 2003 SCC 43, refd to. [para. 157].
Guerin v. Canada, [1984] 2 S.C.R. 335; 55 N.R. 161, refd to. [para. 166].
R. v. Van der Peet (D.M.), [1996] 2 S.C.R. 507; 200 N.R. 1; 80 B.C.A.C. 81; 130 W.A.C. 81, refd to. [para. 168].
Delgamuukw v. British Columbia (1991), 79 D.L.R.(4th) 185 (B.C.S.C.), refd to. [para. 170].
R. v. Sappier (D.M.) et al., [2006] 2 S.C.R. 686; 355 N.R. 1; 309 N.B.R.(2d) 199; 799 A.P.R. 199; 2006 SCC 54, refd to. [para. 171].
St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (J.C.P.C.), refd to. [para. 177].
Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development), [1980] 1 F.C. 518, refd to. [para. 180].
R. v. Adams (J.R.), [1996] 3 S.C.R. 101; 202 N.R. 89, refd to. [para. 182].
R. v. Côté (F.) et al., [1996] 3 S.C.R. 139; 202 N.R. 161, refd to. [para. 182].
R. v. Marshall (S.F.) et al. (2001), 191 N.S.R.(2d) 323; 596 A.P.R. 323; 2001 NSPC 2, refd to. [para. 202].
Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [para. 229].
William v. British Columbia et al., [2006] B.C.T.C. Uned. 609; 2006 BCSC 399, refd to. [para. 256].
Cheslatta Carrier Nation v. British Columbia et al. (2000), 143 B.C.A.C. 248; 235 W.A.C. 248; 2000 BCCA 539, refd to. [para. 258].
Mitchell v. Minister of National Revenue, [2001] 1 S.C.R. 911; 269 N.R. 207; 2001 SCC 33, refd to. [para. 270].
R. v. Van Der Peet (D.M.) (1993), 29 B.C.A.C. 209; 48 W.A.C. 209; 80 B.C.L.R.(2d) 75 (C.A.), refd to. [para. 273].
Washington (State) v. Washington State Commercial, Passenger, and Fishing Vessel Association (1979), 443 U.S. 658, refd to. [para. 273].
R. v. Marshall (D.J.), Jr., [1999] 3 S.C.R. 456; 246 N.R. 83; 178 N.S.R.(2d) 201; 549 A.P.R. 201, refd to. [para. 276].
R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; 200 N.R. 321; 80 B.C.A.C. 269; 130 W.A.C. 269, refd to. [para. 280].
Ahousaht Indian Band et al. v. Canada (Attorney General) et al. (2011), 305 B.C.A.C. 191; 515 W.A.C. 191; 2011 BCCA 237, refd to. [para. 287].
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Authors and Works Noticed:

Slattery, Brian, Understanding Aboriginal Rights (1987), 66 Can. Bar Rev. 727, p. 745 [para. 149].

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R.J.M. Janes and K. Brooks, for Te'mexw Treaty Association.

These appeals were heard at Vancouver, B.C., on November 15-19 and 22, 2010, by Levine, Tysoe and Groberman, J.J.A., of the British Columbia Court of Appeal. On June 27, 2012, Groberman, J.A., delivered the following reasons for judgment for the court.

Appeals dismissed.

Editor: Sharon McCartney

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process (incl. abuse of process by relitigation) - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - On appeal, Canada asserted, inter alia, that the judge was wrong to dismiss the aboriginal title claim on a "without prejudice" basis as any claim to title within the claim area was res judicata based on the doctrine of cause of action estoppel - The British Columbia Court of Appeal dismissed the appeal - The claim before the court was a claim for aboriginal title based on a territorial theory - The case was one of the most complex ever adjudicated in this country - To suggest that the plaintiff ought to have been compelled to bring other, site-specific claims within the same litigation lacked reality - Res judicata was concerned with abuse of process - The plaintiff's decision to proceed with a territorial claim, rather than a narrower, site-specific claim, was not an abuse of process - See paragraphs 127 to 131.

Estoppel - Topic 251

Estoppel by record (res judicata) - General principles - Purpose of rule - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional

territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - On appeal, Canada asserted, inter alia, that the judge was wrong to dismiss the aboriginal title claim on a "without prejudice" basis as any claim to title within the claim area was res judicata based on the doctrine of cause of action estoppel - The British Columbia Court of Appeal dismissed the appeal - The claim before the court was a claim for aboriginal title based on a territorial theory - The case was one of the most complex ever adjudicated in this country - To suggest that the plaintiff ought to have been compelled to bring other, site-specific claims within the same litigation lacked reality - Res judicata was concerned with abuse of process - The plaintiff's decision to proceed with a territorial claim, rather than a narrower, site-specific claim, was not an abuse of process - See paragraphs 127 to 131.

Estoppel - Topic 379

Estoppel by record (res judicata) - Res judicata as a bar to subsequent proceedings - Cause of action - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - On appeal, Canada asserted, inter alia, that the judge was wrong to dismiss the aboriginal title claim on a "without prejudice" basis as any claim to title within the claim area was res judicata based on the doctrine of cause of action estoppel - The British Columbia Court of Appeal dismissed the appeal - The claim before the court was a claim for aboriginal title based on a territorial theory - The case was one of the most complex ever adjudicated in this country - To suggest that the plaintiff ought to have been compelled to bring other, site-specific claims within the same litigation lacked reality - Res judicata was concerned with abuse of process - The plaintiff's decision to proceed with a territorial claim, rather than a narrower, site-specific claim, was not an abuse of process - See paragraphs 127 to 131.

Indians, Inuit and Métis - Topic 5566

Lands - Land claims - Aboriginal title - Nature of - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new

claims to aboriginal title within the claim area - The British Columbia Court of Appeal dismissed the plaintiff's appeal - The claim to aboriginal title, as it was advanced, was not sustainable - A broad territorial claim did not fit within the purposes of s. 35 of the Constitution Act, 1982 or the rationale for the common law's recognition of aboriginal title - Broad territorial claims were antithetical to the goal of reconciliation, which demanded that, as far as possible, the traditional rights of First Nations had to be fully respected without placing unnecessary limitations on the sovereignty of the Crown or the aspirations of all Canadians - See paragraphs 205 to 226.

Indians, Inuit and Métis - Topic 5566

Lands - Land claims - Aboriginal title - Nature of - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - The British Columbia Court of Appeal dismissed the plaintiff's appeal - While the trial judge did not articulate any clear test for the sufficiency of occupation, it was evident that he considered that occupation could be determined on a regional or territorial basis - However, the case law did not support the idea that title could be proven based on a limited presence in a broad territory - Aboriginal title had to be proven on a site-specific basis - The plaintiff's criticism of this approach as a "postage stamp" method did not account for the fact that title was not the only tool available to provide cultural security to the Tsilhqot'in - The cultural security and continuity of First Nations could be preserved by recognizing their title to particular "definite tracts of land" and by acknowledging that they held other aboriginal rights in much more extensive territories - Therefore, while the court did not agree with the trial judge's analysis of the aboriginal title issue, his order was upheld - The claim to aboriginal title, as it was advanced on a territorial, rather than a site-specific basis, was not sustainable - See paragraphs 227 to 241.

Indians, Inuit and Métis - Topic 5568

Lands - Land claims - Aboriginal title - Evidence and proof - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - At issue on appeal was the judge's determination that the claim for aboriginal title was an "all or nothing" claim - The British Columbia Court of Appeal did not agree with the trial judge's finding that the plaintiff's claim was an "all or nothing" claim - The claim was sufficiently pleaded to

allow the court to find that aboriginal title had been proven in respect of only part of the claim area - Flexibility in the granting of a declaration was particularly important in a case where aboriginal title was claimed - To require proof of aboriginal title precisely mirroring the claim would be too exacting - See paragraphs 104 to 119.

Indians, Inuit and Métis - Topic 5568

Lands - Land claims - Aboriginal title - Evidence and proof - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - At issue on appeal was the judge's determination that the claim for aboriginal title was an "all or nothing" claim - The British Columbia Court of Appeal did not agree with the trial judge's finding that the plaintiff's claim was an "all or nothing" claim - The plaintiff's case was based on a "territorial theory" of aboriginal title - The defendants rejected that theory, instead taking the view that aboriginal title could be demonstrated over smaller tracts of land - As this was not the theory on which the plaintiff presented its case, it would have been unfair for the trial judge to attempt to identify particular areas within the claim area that qualified for aboriginal title on the defendant's theory - However, the judge was entitled to consider whether a lesser territorial entitlement than was claimed had been proven - See paragraphs 120 to 126.

Indians, Inuit and Métis - Topic 5568

Lands - Land claims - Aboriginal title - Evidence and proof - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area - The British Columbia Court of Appeal dismissed the plaintiff's appeal - While the trial judge did not articulate any clear test for the sufficiency of occupation, it was evident that he considered that occupation could be determined on a regional or territorial basis - However, the case law did not support the idea that title could be proven based on a limited presence in a broad territory - Aboriginal title had to be proven on a site-specific basis - The plaintiff's criticism of this approach as a "postage stamp" method did not account for the fact that title was not the only tool available to provide cultural security to the Tsilhqot'in - The cultural security and continuity of First Nations could be preserved by recognizing their title to particular "definite tracts of land" and by acknowledging that they held other aboriginal rights in much more extensive territories - Therefore, while the court did not agree with the trial

judge's analysis of the aboriginal title issue, his order was upheld - The claim to aboriginal title, as it was advanced on a territorial, rather than a site-specific basis, was not sustainable - See paragraphs 227 to 241.

Indians, Inuit and Métis - Topic 5568

Lands - Land claims - Aboriginal title - Evidence and proof - The British Columbia Court of Appeal discussed the Canadian law of aboriginal title - The rights of First Nations to lands that they traditionally occupied had been a concern of colonial and Canadian law from the earliest times - The history of protection of those rights had, however, been "embarrassingly weak" - Until relatively recently, aboriginal rights were often considered to be incidents of aboriginal title - This was in keeping with the idea that aboriginal title, itself, was a sort of usufructuary right - As the law recognized that usufructuary rights could be divorced from title, the rationale for describing aboriginal title as usufructuary in nature ceased to exist - It was no longer correct to describe aboriginal title that way - Now, in order to establish aboriginal title, the claimant had to demonstrate "possession similar to that associated with title at common law" - That level of possession depended on all of the circumstances, including "the nature of the land and the manner in which the land is commonly enjoyed" as well as the actual nature of the occupation - See paragraphs 174 to 204.

Indians, Inuit and Métis - Topic 6005

Aboriginal rights - Nature and scope of - The British Columbia Court of Appeal discussed the basis for aboriginal title and rights - While the basic concept of aboriginal rights was easily understood, the recognition of such rights in a common law system was a complex matter - Three major questions had to be answered: What types of rights were recognized? How was their existence to be determined? What protection was to be afforded those rights? - Compendiously, the answers to those questions had been described as representing a reconciliation of aboriginal rights with Crown (or national) sovereignty - One fundamental aspect of aboriginal rights was that they were intimately connected with traditional aboriginal culture and practices, adapted, as they might be, to modern conditions - Respect for aboriginal rights safeguarded the unique cultures of aboriginal groups and preserved their abilities to continue to live according to their traditions - Such respect was the proper focus of an aboriginal rights analysis - The law had to recognize and protect aboriginal title where exclusive occupation of the land was critical to the traditional culture and identity of an aboriginal group - This was usually the case where the traditional use of a tract of land was intensive and regular - Where traditional use and occupation of a tract of land was less intensive or regular, however, recognition of aboriginal rights other than title might be sufficient to fully preserve the ability of members of a First Nation to continue their traditional activities and lifestyles and might fully preserve aboriginal culture - In such cases, the recognition of those other rights might be more commensurate with the reconciliation of aboriginal rights with Crown sovereignty than would a broader recognition of aboriginal title - See paragraphs 158 to 173.

Indians, Inuit and Métis - Topic 6005

Aboriginal rights - Nature and scope of - The Xeni Gwet'in First Nation was part of the

Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Tsilhqot'in Nation had aboriginal title to the claim area and a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge dismissed the plaintiff's claims for declarations of aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to aboriginal title within the claim area and declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - At issue on appeal, was whether the trial judge had erred in finding that the proper rights holder was the Tsilhqot'in Nation - The British Columbia Court of Appeal held that the judge had not made any error in finding that the Tsilhqot'in Nation was the proper rights holder - Aboriginal rights were communal rights - The evidence clearly established that the holders of aboriginal rights within the claim area had traditionally defined themselves as being the collective of all Tsilhqot'in people - The Tsilhqot'in Nation was the proper rights holder - The Xenigwet'in, as modern "caretaker" or custodian of the Tsilhqot'in rights in the claim area, had a special role to play in asserting those rights and in engaging with governments in attempts to reconcile them with broader public interests - Though the rights were held on behalf of the entire Tsilhqot'in Nation, it was the Xenigwet'in that administered and protected those rights - See paragraphs 137 to 157.

Indians, Inuit and Métis - Topic 6012

Aboriginal rights - Evidence and proof - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Xenigwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - On appeal, British Columbia objected to the declaration as it pertained to horses - The British Columbia Court of Appeal dismissed the appeal - The court rejected the argument that the declaration ought not to have been granted because the judge had not specifically determined that any forestry activity had interfered, or would interfere, with the capture and use of wild horses - The trial judge had exercised his discretion in favour of granting the declaration - It had not been shown that he had erred in principle in doing so - See paragraphs 252 to 261.

Indians, Inuit and Métis - Topic 6012

Aboriginal rights - Evidence and proof - The Xenigwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal

rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Xeni Gwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - On appeal, British Columbia objected to the declaration as it pertained to horses - The British Columbia Court of Appeal dismissed the appeal - The Tsilhqot'in practice of capturing and using horses for work and transportation qualified as an aboriginal right, notwithstanding that horses were introduced (or, more precisely, reintroduced) to North America by Europeans - The trial judge made no palpable and overriding error in finding that the Tsilhqot'in tradition of horsemanship predated European contact - There was no basis on which to interfere with the judge's findings as to the aboriginal rights to capture and use horses - See paragraphs 262 to 268.

Indians, Inuit and Métis - Topic 6012

Aboriginal rights - Evidence and proof - The Xeni Gwet'in First Nation was part of the Tsilhqot'in Nation (the plaintiff) - This litigation involved aboriginal title and aboriginal rights in two areas (collectively, the claim area) in the west central interior of British Columbia that the plaintiff considered its traditional territory - In response to proposed logging in the claim area, the plaintiff brought an action against British Columbia, Canada and others, seeking, inter alia, a declaration that the Xeni Gwet'in had aboriginal rights to hunt and trap in the claim area - The trial judge declared that the Tsilhqot'in Nation had aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the claim area "as a means of securing a moderate livelihood", as well as to capture and use horses - On appeal, British Columbia objected to the declaration as it related to trading rights, asserting that the trial judge had erred by using the "moderate livelihood" standard, in concluding that Tsilhqot'in pre-contact trade was integral to their distinctive culture and in failing to confine the right to specific species of animals - The British Columbia Court of Appeal dismissed the appeal - The judge's finding of a general right to trade in skins and pelts taken from the claim area was supported by the evidence - There was no basis on which to interfere with the declaration - See paragraphs 269 to 288.