IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Nuchatlaht v. British Columbia,* 2023 BCSC 804

Date: 20230511
Docket: S170606
Registry: Vancouver

Between:

The Nuchatlaht

Plaintiff

And

His Majesty the King in Right of the Province of British Columbia
The Attorney General of Canada
Western Forest Products Inc.

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment

Counsel for the Plaintiff:	Jack Woodward, K.C. Kate Gower Ethan Krindle Owen Stewart
Counsel for the Attorney General Canada:	Ainslie Harvey Alexandra Hughes
Counsel for British Columbia	Jeffrey B. Echols Glen Thompson Shiko Mungai Leah DeForrest Hugh Gwillim Jordan Regehr
Counsel for Western Forest Products Inc.	Geoffrey Plant, K.C. Selina Gyawali

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Place and Date of Judgment:	Vancouver, B.C. May 11, 2023

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I. Introduction

[1] The Nuchatlaht claim Aboriginal title to a portion of Nootka Island located on the west coast of Vancouver Island. The Claim Area is approximately 201 square kilometers.

[2] The plaintiff framed its claim to avoid the usual years-long trial of an Aboriginal title case. The claim does not encompass any private lands, Indian reserves, as defined in the *Indian Act*, R.S.C. 1985, c. I-5, or potential competing claims from the two neighbouring First Nations, the Ehattesaht and the Mowachaht/Muchalaht. The plaintiff does not claim the seabed, nor does it claim Aboriginal rights.

[3] Virtually all the evidence in the trial was adduced through experts. No oral history evidence was relied on; the plaintiff said this evidence was not necessary because of the historic evidence showing its occupation of the Claim Area at the time of the assertion of sovereignty by the British Crown in 1846.

[4] Shortly after the trial started, the plaintiff discontinued the action against Western Forest Products. While Canada participated, they did not take a position and their submissions were brief. As the owner of the lands being claimed, the Province was the main defendant.

[5] Because of the limited scope of the claim, the lack of oral history evidence and the introduction of evidence exclusively through experts, this 54 day trial was likely the shortest one in Canada in which a declaration of Aboriginal title has been advanced, apart from the 1969 *Calder* case: *Calder v. British Columbia (Attorney General)*, 1969 CanLII 713, 8 D.L.R. (3d) 59 (BC SC). It was also far shorter than Aboriginal rights cases that have been advanced before this court.

[6] By comparison to the 54 days here, the trials in *Delgamuukw v. British Columbia*, 1991 CanLII 2372, 79 D.L.R. (4th) 185 (B.C.S.C.) [*Delgamuukw BCSC*] and *Tsilhqot'in v. British Columbia*, 2008 BCSC 600 [*Tsilhqot'in BCSC*] were each over 300 days in trial. The *Ahousaht* litigation, involving the Aboriginal right to fish

was done in 2 phases: *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494 [*Ahousaht Phase 1*]; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633 [*Ahousaht Phase 2*]. The first took 120 days and the second 150 days. *Cowichan Tribes v. Canada (Attorney General)*, which is currently underway, has had 458 days of evidence thus far.

[7] However, the shortness of this trial is not indicative of the density of the evidence, nor of the issues. The written arguments were well over a thousand pages combined. A condensed trial relying almost exclusively on experts and documents presents its own challenges, because of the bulk introduction of the evidence.

II. <u>Background & Overview</u>

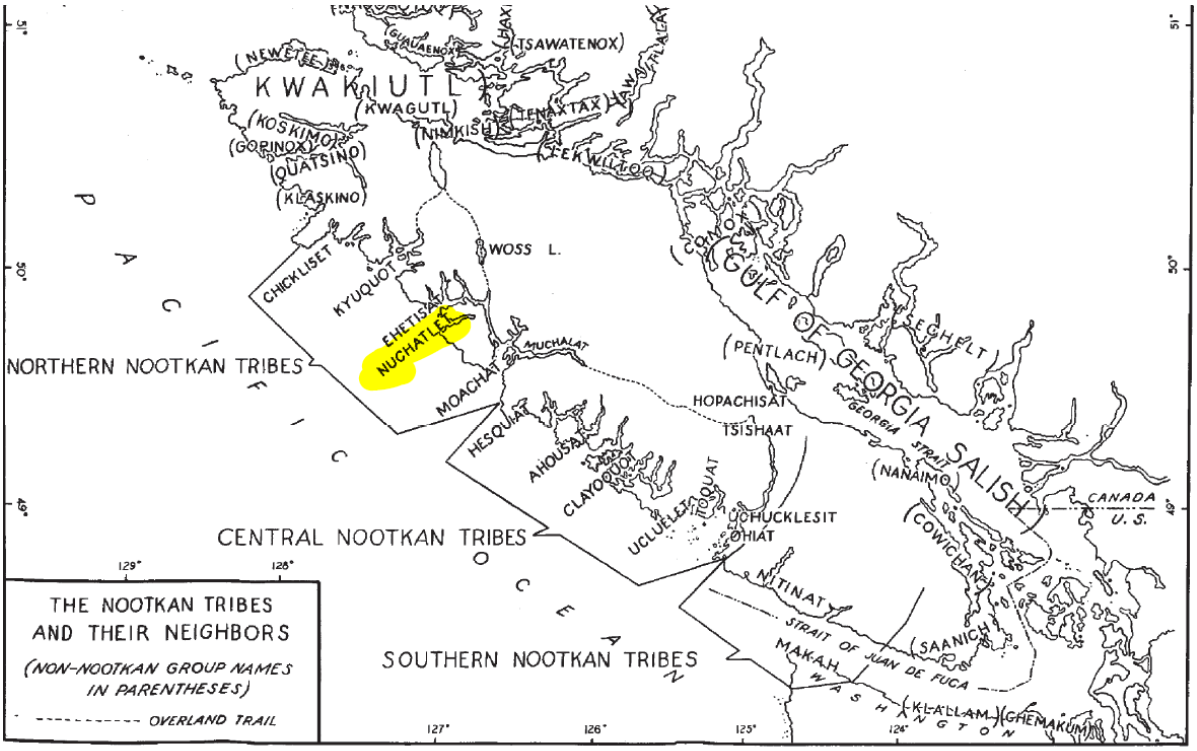
[8] In this section I provide a brief background to the case and some of the issues that will be dealt with. A more complete list of the issues may be gleaned from the table of contents.

[9] The Nuchatlaht are one of the Nuu-chah-nulth First Nations who occupy the west coast of Vancouver Island, from Cape Cook in the north to Point-no-Point (north of Sooke) in the south. The ethnographic literature and historic documents referred to the Nuu-chah-nulth as the “Nootkan” or “West Coast” people. They were also referred to as the “Aht”, which came from the suffix of many group names. “Aht” translates to “people of” or “dwelling at” and represents the places from which Nuu-chah-nulth Nations took their names.

[10] In 1978, the Nuu-chah-nulth name was adopted. Prior to that there was no single term that the Nuu-chah-nulth used to refer to themselves collectively.

[11] The Nuu-chah-nulth share a distinctive culture, however anthropologists recognized three broad groupings based mainly on geography, social organization and language: the northern, central and southern Nootkans. The Makah on the northwest coast of the Olympic Peninsula in Washington State are also Nuu-chah-nulth. Dr. Philip Drucker, in his 1951 book *The Northern and Central Nootkan Tribes* (Washington: United States Printing Office, 1951) [*Drucker 1951*], which featured

heavily in this case, included a map showing the distribution of the Nuu-chah-nulth along with their neighbouring Nations:



MAP 1.—The Nootkan tribes and their neighbors.

[12] The Nuchatlaht were formerly know as the Tacisath and lived at Tahsis. In the 1780's they moved from Tahsis to the village or area called nučaal, which is on the west coast of a peninsula on Nootka Island, between Esperanza and Nuchatlitz Inlets. (Nuu-chah-nulth people and outside observers have applied the term *nučaal* to both a place and a village.)

[13] The legal backdrop may be summarised in one paragraph from *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*] at para. 50, the most recent Supreme Court of Canada case dealing with a claim for Aboriginal title:

> [50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation <u>where present occupation is relied on</u>; and (3) exclusive historic occupation. In determining what constitutes

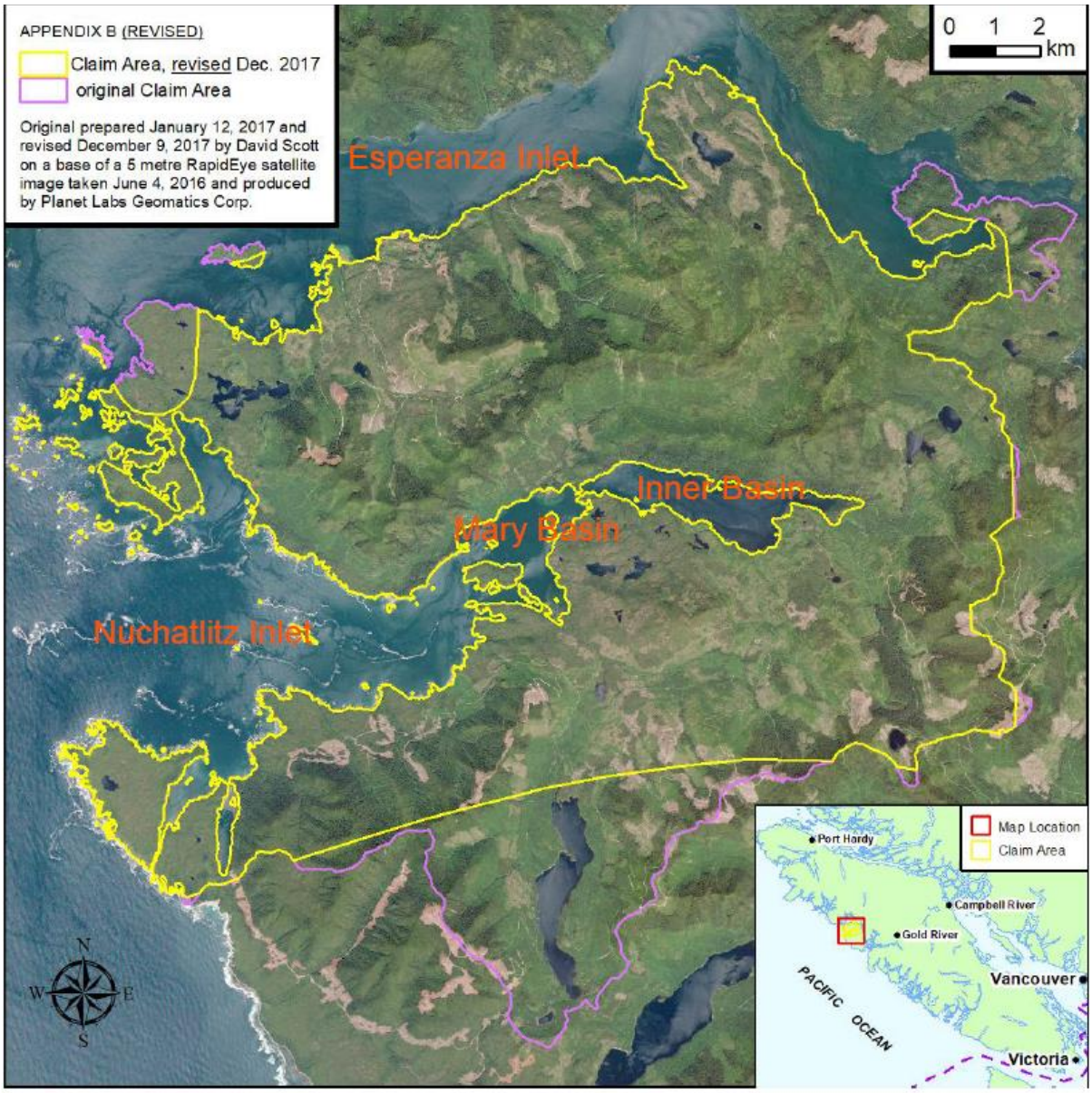
> sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty. [Emphasis added.]

[14] It will be noted from the underlined portion of the quote that continuity of occupation is only required where the plaintiff chooses to use present occupation as a proxy for historic evidence of occupation at the time of the assertion of sovereignty. In this case, as I explained above, the Nuchatlaht seek to prove their occupation at the time of assertion of sovereignty from the historical record, hence the lack of oral history evidence.

[15] The date for the assertion of sovereignty over British Columbia has generally been accepted as 1846. However, the Province challenged that for Nootka Island. I deal with that issue below at para. 73, but will say here that I have concluded the date is 1846.

[16] As I said above, the Nuchatlaht moved to the area in the 1780's and therefore archaeological evidence prior to then is not directly relevant. This contrasts with Aboriginal title claims based on occupation since time immemorial.

[17] The following satelite photo shows the Claim Area and (in the inset) its location on Vancouver Island. (A map of the Claim Area with settlement sites and other details is set out below, following para. 454).



[18] Being a marine-oriented and coastal People, Nuchatlaht villages and settlements were on the coast in parts of the Claim Area. Although the northern border of the Claim Area ends at the south shore of Espernaza Inlet, there were also Nuchatlaht villages north of the Inlet.

[19] The plaintiff's notice of civil claim is brief. Beyond describing the Claim Area, it contains only three factual allegations:

- The plaintiff is both an Aboriginal community and a band within the meaning of the *Indian Act*;

- The modern day Nuchatlaht is descended from a continuation of the Nuchatlaht Aboriginal community that existed in 1846; and

- The Nuchatlaht exclusively occupied the Claim Areas in 1846.

[20] In its response, the Province made the following admision and denial (amongst others):

> … the Plaintiff is a modern-day Indigenous collective which, through the lineage of the Michael family Chiefs, is descended from a historical Indigenous group which used and occupied a part of the claim area at the time at which the British Crown asserted sovereignty over Nootka Island and the surrounding area including the claim area (the "Date of Sovereignty") but the Province also says that the particulars of the modern-day and historical Nuchatlaht are pleaded by the Plaintiff without clarity and inaccurately and are denied.

[21] As the admission indicates, there is no dispute the current Nuchatlaht are descended from a historical group identified as Nuchatlaht who resided in the Claim Area at least as far back as 1846. However, the Province denies the Nuchatlaht occupied the totality of the area. In partial response to that denial, the plaintiff says that this is a territorial claim and relies, in part, on what it argues was a recognised boundary to its territory.

[22] By 1846, the Nuchatlaht was a confederation consisting of several local groups, each with their own villages. In the summer, these groups gathered at Lūpȧtcsis, about one kilometer south of nučaal, for sea hunting and fishing. The nature of the confederacy, and whether that is an accurate term, was in dispute and I use the word neutrally, without implying any specific characteristics.

[23] Land and resources were owned by the Chiefs of the local groups. The local groups have long since been absorbed into the larger collective. The Province says because of the local group ownership, the Nuchatlaht are not the the current or historic rights holder. Local group ownership is also related to the question of which

areas which were occupied. The Province says there is no evidence with respect to local group boundaries and that it cannot be assumed their territories constituted the whole of the Claim Area.

[24] A related issue is whether some of the local groups joined the Nuchatlaht before or after 1846 and, if the Nuchatlaht is the proper title holder, whether the claim can be based on the terriorial holdings of local groups which joined after 1846. One local group that the parties focused on was the Shuma'athat, who resided at the head of the Inner Basin of Nuchatlitz Inlet and at the narrows between the Inner Basin and Mary Basin.

[25] The evidence of occupation and use of the interior Claim Area was largely dependant on the evidence with respect to the coastal Claim Area. Coastal occupation was primarily demonstrated by historic documents showing settlement sites. The plaintiff sought to prove the use of the interior Claim Areas, in which there were no settlements, through evidence of culturally modified trees ("CMTs"). CMTs are trees which have been modified (for example, bark-stripped) for traditional purposes such as the building of canoes and dwellings, and the making of clothing and baskets, amongst other things.

[26] CMTs can be dated, but the groups that made the modifications cannot be identified from the trees themselves. For example, there is nothing to indicate whether a tree was modified by the Nuchatlaht or the Ehattesaht. The plaintiff says that because they have shown the Nuchatlaht occupied the coast, I should draw the inference that all CMTs were done by them.

[27] The plaintiff also relied on CMTs to a more limited extent to show occupation of the coastal area. Once again, the plaintiff asked me to draw the inference that they were created by the Nuchatlaht largely because of their proximity to Nuchatlaht village sites.

[28] A few comments on the form of these reasons. Because there is an overlap in the facts and law relating to the various issues, there is some repetition in these

reasons. If there was a choice to be made between repetition and potential lack of clarity, I have opted for the former.

[29] The spelling of local sites, local groups and other Nuu-Chah-Nulth terminology will be seen to be inconsistent. In large part this flows from the different spellings in the documents. Where I paraphrase from a document, I generally use the spelling from it.

[30] Where I quote a historical document which was footnoted by an expert, I have usually left the footnote in, in case a reader was interested in locating the source.

[31] Where it aids with historical context, or where I paraphrase a historical document, I use the word *Nootkan* as opposed to Nuu-chah-nulth. No disrespect is intended.

[32] I also use the terms Aboriginal, Indian, Indigenous and First Nation throughout these reasons, as they are used within legislation, the common law and commonly accepted modern terminology. Again, no disrespect is intended.

III. <u>Overview of Sources of Evidence</u>

A. Experts

[33] Aside from the subject of CMTs, most of the evidence came from historical documents introduced through experts who interpreted the documents and supplemented them with their own anthropological or archaeological opinions. Several cases have recognised the court needs the assistance of an expert to determine the context, admissibility, weight and interpretation of historic documents in Aboriginal title cases. See, for example: *William v. British Columbia*, 2004 BCSC 1237 at paras. 10-12 and *Cowichan Tribes v. Canada* 2019 BCSC 1986 at para. 47-48.

[34] The experts who addressed the ethnographic and historical record were:

a) John Dewhirst (on behalf of the Plaintiff): Mr. Dewhirst is an anthropologist and archaeologist who has an extensive background working with the

Nuu-chah-nulth. He was qualified to give opinion evidence with respect to northern and central Nuu-chah-nulth peoples, including their history, culture, lineage, and territories His initial report was titled: Nuchatlaht Culture and Ethnohistory. Although not apparent from the title of the report, it also addressed the historical documents. Mr. Dewhirst also prepared a response to the Province's experts.

b) Dr. Dorothy Kennedy (on behalf of the Province): Dr. Kennedy was recognized as an expert in socio-cultural anthropology, ethnohistory, ethnography, and genealogy with specialization in Aboriginal cultures and the history of western North America. She was qualified to express opinions with respect to land and resource use and the social organization of Nuu-chah-nulth groups. Her main report was titled: Genealogy and the Incorporation of Nuchatlaht Local Groups.

c) Dr. Joan Lovisek (on behalf of the Province): She was qualified as an anthropologist with expertise in cultural anthropology and a specialization in ethnohistory, with particular reference to Indigenous peoples' occupation and land use in Canada. Her initial report was titled: Nuchatlaht Land Use and Occupancy in the claim area prior to and at or around 1846. She also delivered several responsive reports.

[35] As I noted, to show the use and occupation of the Claim Area, particularly the non-coastal or inland area, the plaintiff relied on the existence of CMTs and, to a lesser extent, on archaeological sites. The experts who dealt with this were:

a) Jacob Earnshaw (on behalf of the Plaintiff)*:* Mr. Earnshaw was qualified as an archaeologist with specialised expertise regarding culturally modified trees on the northwest coast of North America. Mr. Earnshaw did, what he referred to as, a reconnaissance of parts of the Claim Area with respect to CMTs and archaeological sites. He also reviewed data in the province's Remote Access to Archaeological Data ("RAAD") database.

Mr. Earnshaw's reports were the subject of a pre-trial motion to exclude them. Indexed at *Nuchatlaht v. British Columbia* 2021 BCSC 370, I ruled the reports met the admissibility threshold.

b) Mr. Dewhirst also prepared a second report dealing with the question of who made the modifications.

c) Morley Eldridge (on behalf of the Province): Mr. Eldridge was qualified as an archaeologist with specialised expertise regarding CMTs in British Columbia.

d) Dr. Lovisek addressed the issue of CMTs in a response to Mr. Dewhirst's report. Mr. Dewhirst prepared an opinion and Dr. Lovisek responded to that report.

B. Historic documents

[36] The historical records introduced by the parties through their experts or notices to admit included:

- Explorer and trader records going back to 1774. This was the date of first contact between the Indigenous people of the west coast of Vancouver Island and Europeans and took place when the Spanish pilot Hernández anchored off Nootka Sound.

- Records dealing with the selection and allotment of reserves in 1889-1890, reserve surveys in 1893 and the 1913-1914 records of the McKenna-McBride Commission which dealt with complaints by Indian Bands regarding reserve allotments.

- Reports and diaries of Indian agents and Indian Commissioners.

- Canadian censuses going back to 1881

- 1791 deeds of purchase by Captain John Kendrick

[37] Many of the explorer records introduced in this case were referred to by Garson J. in *Ahousaht Phase 1* and, to a lesser extent, by Kent J. in *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15 [*Saik'uz*].

[38] The principles relating to the admissibility of explorer records were addressed by Garson J. in a separate decision in the Ahousaht litigation and by Young J. in the Cowichan Tribes litigation: *Ahousaht v. Canada* 2008 BCSC 768; *Cowichan Tribes v. Canada*, 2020 BCSC 1146. I will not repeat what was said in those judgments.

[39] Admissibility was generally not an issue in this case and both sides relied on the records. Any challenges to reliability were done on an individual document basis as opposed to a class of documents.

C. Dr. Philip Drucker's 1951 monograph and 1979 paper

[40] The experts relied on work done by earlier anthropologists and ethnologists. Most notable was the monograph by Dr. Drucker, *The Northern and Central Nootkan Tribes*, which I referred to in the introduction. While the publication date was 1951, it was based on his field observations in 1935-1936. The break between the field work and the publication was due to Dr. Drucker's service in World War II.

[41] Dr. Kennedy described Dr. Drucker's work as follows:

> Much of what is known about the social and political organization of the Nuu-chah-nulth comes from the 1935-1936 research of Philip Drucker who set for himself the goal of writing "an interpretation of social life and the functions of the social structure." Inasmuch as Drucker wanted "first-hand observations," he settled on the period from 1870 to about 1900 as his ethnographic horizon. To differentiate information that his Nuu-chah-nulth consultants had heard about, but not witnessed, Drucker writes that he tried to distinguish it by providing an estimated date or by stating that it reflected "early historic times."
>
> Drucker's discussion of the Nuu-chah-nulth social life includes consideration of a constellation of factors that led to changes in the composition and location of many named groups. While Drucker highlighted a few of these changes in his 1951 publication, the richness of his data varied, with members of the northern groups, especially Kyuquot, Ehattesaht, Mowachaht, and Muchalaht providing the majority.His data on the Nuchatlaht are sparse and limited by the single source of the information, Chief Felix

> Michael, a man raised at Kyuquot but who spent his adult life serving as the head chief of the Nuchatlaht. …

[42] In the 1970's, Dr. Kennedy located Dr. Drucker's field notes at the National Anthropological Archives of the Smithsonian Institution's National Museum. She photocopied and deposited them at the Royal B.C. Museum B.C. Archives ("B.C. Archives") and at the Canadian Museum of Civilization (then called the Museum of Man) in Ottawa. These notes were relied on by Dr. Kennedy.

[43] As Dr. Kennedy noted in the above quote, Dr. Drucker's goal was to describe Nuu-chah-nulth culture as at 1870 to 1900, his "ethnographic time horizon".

[44] Mr. Dewhirst placed particularly heavy, and largely uncritical, reliance on Dr. Drucker. The other experts were more circumspect, noting some of the limitations of his work.

[45] In his monograph, Dr. Drucker said the Nootkans were politically organised into a confederacy of tribes, which in turn comprised local groups. However, Dr. Drucker revisited this in a paper presented at the annual meeting of the American Ethnology Society in 1979, in which he agreed with the thesis that the "basic and only political unit in native Northwest Coast culture was the local group". The paper was published in 1983: Drucker, Philip (1983) Ecology and Political Organization on the Northwest Coast of America. PP. 86- 96 in, *The Development of Political Organization in Native North America. 1979 Proceedings of the American Ethnological Society.* Edited by Elizabeth Tooker ("Drucker 1983").

[46] The Nuchatlaht only occupied two pages of text in Drucker's book. Nevertheless, there was no debate there was a great cultural commonality amongst the Nuu-chah-nulth peoples.

D. Other sources

[47] Dr. Kennedy relied on recordings of ethnographic interviews with Nuchatlaht and Ehattesaht Elders conducted in the 1970s-1980s by staff members of the Royal B.C. Museum.

[48] Both Mr. Dewhirst and Dr. Kennedy relied on “the Chief’s Book”. This was obtained by Dr. Kennedy in 1978. The Chief’s Book provides a perspective on the composition of local groups and lineages seated at Nuchatlaht and Ehattesaht potlatches in 1944 and 1960. Dr. Kennedy opined that the book reflected the views of Chief Felix Michael and was added to over time. While Dr. Kennedy was not aware of who compiled the information, anthropologist Richard Inglis had noted in 1987: “Mrs. Matthew John – Felix Michael’s dau[ghter]; wrote book.”

[49] To put a time frame on the Chief’s Book, Felix Michael was born in about 1896 and became Chief of the Nuchatlaht in about 1914. Chief Michael was Dr. Drucker’s principal Nuchatlaht informant. Chief Michael was a descendant of individuals in the area who identified as Nuchatlaht in, and prior to, 1846.

[50] Dr. Lovisek questioned the reliability of the Chief’s Book, because its provenance is unknown, it has missing pages and there is a gap between the entries of names and seats between 1946 and 1964. She noted that Dr. Drucker referred to the book uncritically. I agree with those comments.

E. Evidence the Province says the plaintiff ought to have adduced

[51] There are a series of tape-recorded interviews with Nuchatlaht Elders that are held by B.C. Archives. Dr. Kennedy and another anthropologist, Randy Bouchard, listened to and translated some of them. In her evidence, Dr. Kennedy referred to some of the translations and suggested the remaining tapes could provide valuable information if they were translated.

[52] Several of the interviews were with Lillian Michael, conducted in 1979 and 1981. Ms. Michael was the widow of Chief Felix Michael and was an Elder of both the Nuchatlaht and Ehattesaht. Although Mr. Dewhirst did not refer to the interviews, he agreed Ms. Michael was a valuable source.

[53] The Province was critical of the plaintiff not having translated the tapes. It initially argued an adverse inference should be drawn from that. In oral argument the Province, I think correctly, backed off that argument. The tapes were not uniquely

available to the plaintiff; either side could have had them translated. A plaintiff may choose the evidence it wishes to prove its claim.

F. No oral history evidence

[54] As I mentioned earlier, the plaintiff did not call any oral history evidence – or oral evidence at all. This means that the only evidence I have of the Aboriginal/Nuchatlaht perspective is through anthropological evidence, primarily that of Dr. Drucker's work.

IV. Admissibility of Lovisek reports and approach to other expert reports

[55] Both sides initially took the position that most of the opposing reports were inadmissible, and, as I said, the Province brought an unsuccessful pre-trial motion to exclude Mr. Earnshaw's reports. At my suggestion, and with agreement of counsel, all the experts testified with respect to the reports on the basis that I would rule on the reports' admissibility as part of this judgment.

[56] The objections to admissibility were, for the most part, arguments that the reports were so flawed for one reason or another that they should not be admitted. In other words, the admissibility objections were often related to the content of the report and the quality of the opinions. Where objections were made to qualifications, it was with respect to parts of the reports, i.e. that in *some* parts of their opinions, the experts had exceeded the scope of their expertise.

[57] To canvass the issues raised in a *voir dire* would have taken the same amount of time and effort as leading the full evidence and cross-examining on it. It would have involved making findings that are better left to making after hearing all the trial evidence. An adverse ruling would not have saved the opposing party from obtaining a responding report, because all the responding reports had been prepared and exchanged.

[58] By the time of closing arguments it was acknowledged the reports met the admissibility threshold, except for those of Dr. Lovisek. However, it was argued by both sides that the other opposing reports should be given little or no weight.

[59] Turning to the admissibility of Dr. Lovisek's reports, the plaintiff mounted an attack not only with respect to the content of her reports in this trial, but with respect to reports she prepared for other cases. The plaintiff referred to remarks made on those reports by judges, and by an academic who said he had been misquoted in a report for another trial. That approach was properly objected to by the Province. Other criticisms of Dr. Lovisek's reports included "citational padding" and partial quoting.

[60] I disagree Dr. Lovisek's reports do not reach the threshold of admissibility, or that, in their entirety, they should be given no weight and disregarded. Rather, for the reasons that follow, I conclude the appropriate approach to all of the experts is for me to assess the weight of the experts' opinions with respect to each discrete issue that they have opined on, and which I consider to be relevant.

[61] It is important to understand the nature and scope of Dr. Lovisek's reports, as well as those of Mr. Dewhirst and Dr. Kennedy. While they are expert opinions, they provide the facts of this case. The plaintiff adduced no oral history evidence and sought to prove their claim by way of the historic record and ethnographic evidence. It was the experts who introduced and discussed that record.

[62] Because the reports provided the facts of the case, their scope was vast. I contrast the reports here with, for an example, an engineering report that opines on a product defect, and proffers a single opinion. Here, Mr. Dewhirst was tasked by the plaintiff with answering 74 questions in his initial report. In other words, he was asked to provide 74 opinions.

[63] Drs. Kennedy and Lovisek were asked fewer, but much broader questions. Dr. Lovisek was asked:

> 1. In the years prior to and at or around 1846, did an indigenous collective, known as the Nuchatlaht, own and have the intention and capacity to use and occupy, to the exclusion of all other indigenous collectives, any portion of the Claim Area in this litigation or contiguous areas in the vicinity ("an Exclusive Area")?
>
> If the answer to question 1 above is not "yes", explain why.

2. If the answer to question 1 above is "yes":

   i. what is known about the Nuchatlaht prior to and at or around 1846?

   ii. did the Nuchatlaht effectively retain control over an Exclusive Area and, if so, where, when and how.

[64] The questions posed to Dr. Kennedy were similar in scope. However, to reach their conclusions, Drs. Lovisek and Kennedy had to provide opinions on the interpretation of multiple documents and sub-issues. In fact, their conclusory opinions were so broad that they were not nearly as helpful as the discrete issues they elucidated.

[65] It is also worth noting the plaintiff itself, in many instances, relied on the evidence of Drs. Kennedy and Lovisek. Further, much of what they said was non-controversial. To ask that Dr. Lovisek's report be excluded in its entirety, and that little weight be given to Dr. Kennedy's opinions, is overly exuberant.

[66] Finally, I add that if I took the approach the plaintiff asks me to take with Dr. Lovisek, Mr. Dewhirst's report would be equally, if not more, vulnerable. For example, as I detail below, he inexplicably ignored Dr. Drucker's 1983 paper, although he presented himself, in effect, as an expert on Dr. Drucker's work. In addition, Mr. Dewhirst tended to make broad generalisations without any foundation.

[67] In summary, none of the reports, including those of Dr. Lovisek, can be treated as a unitary or single opinion. There has been no "knock-out punch" to justify giving no weight to an entire report. Similarly, none of the reports are flawless. As I have said, in my view, the appropriate approach is to assess the weight of each expert's opinion with respect to each discrete issue.

V. <u>Do the plaintiffs require a pleadIng amendment?</u>

[68] The parties agree the Nuchatlaht's most basic level of social and political organization were the local groups. Local groups formed tribes and the tribes formed into a larger level of organization, which Dr. Drucker in 1951 referred to as a confederacy. There was no Indigenous equivalent of the terms tribe and

confederacy. These were concepts used by Dr. Drucker and other anthropologists to describe the social structure he observed.

[69] As I mentioned earlier and will return to later, Dr. Drucker revisited the issue in his 1983 paper in which he questioned the appropriateness of the term confederacy and the political function he attributed to it in 1951. I will continue to use the term, but in a neutral sense so as not to imply any specific political function.

[70] The Province argues the plaintiffs have pleaded and advanced through to argument what the Province calls a “one territory, one collective” case. In other words, that the Nuchatlaht were one collective in which the Chief of the confederacy owned and controlled the entirety of the Claim Area. The Province argues the reality was that territory and resources were owned at the local group level, which the plaintiff has not pleaded, and therefore this cannot be the basis for plaintiff’s claim without an amendment.

[71] In response, the plaintiff says the Province has misconstrued its argument, which has always been that the ownership of territory and resources was vested primarily in the Head Chief at the local group level. It says what it does argue is that the Nuchatlaht occupied the Claim Area at sovereignty as a collective with a shared identity and the Nuchatlaht were an alliance of smaller tribes which were comprised of local groups. Whether the Nuchatlaht were a confederacy or a federation, or another term, does not matter because the Nuchatlaht were an identifiable community in 1846 which was the antecedent to the modern-day Nuchatlaht.

[72] I do not agree with the Province’s characterisation of the plaintiff’s notice of civil claim. For better or worse, it does not go into any detail as to the structure of ownership within the Nuchatlaht. Nor was the evidence based on ownership at the confederacy or higher political level. While the reports of Mr. Dewhirst and the plaintiff’s argument stressed the existence and significance of a confederacy, including the authority of its Chief, they did not claim ownership was at the confederacy level. In fact, Mr. Dewhirst said resources, including territory, were

owned at the local group level. The same applies to the plaintiff's arguments. I therefore do not see a pleading issue here which would require an amendment.

VI. Sovereignty date – 1790, 1846 or something in-between?

[73] A determination of a claim for Aboriginal title is based on occupation by the claimant group at the time of assertion of sovereignty by the British Crown over the territory in question. As I outline below, previous cases have taken British sovereignty over British Columbia to have been asserted by the 1846 Oregon Boundary Treaty. That treaty divided the United States and British territory west of the Rockies at the 49th parallel, except for the part of Vancouver Island south of the 49th parallel, which was left in British hands.

[74] In its further amended response, the Province pleads:

> The claim area was subject to relatively early European exploration and trade, in particular, by Britain and Spain. Both the British Crown and the Kingdom of Spain asserted sovereignty over the claim area as early as 1790, culminating in the 'Nootka Convention'.

[75] Throughout the trial, the Province's position was that the date of sovereignty "could be as early as 1790", without advocating for any specific date.

[76] In argument, the Province again avoided being specific and mooted several possible dates. It also said there were two possible outcomes to this decision where a determination as to the date might not be necessary.

[77] This is not a satisfactory approach for two reasons. First, for an important issue in a significant case, the Province ought to advance a clear and fully argued position, as I invited it to do multiple times before and during the trial. This is particularly so given the acceptance of 1846 as the appropriate date in other cases.

[78] Second, the Province's questions posed to Drs. Kennedy and Lovisek were all in relation to the facts on the ground "prior to, at, and around 1846". Their opinions were largely focussed on 1846. In other words, the temporal focus of the Province's evidence was 1846. It is unworkable and unfair to present the case in this

manner and then hold out in argument for another, undefined, possible date. (The plaintiff's experts were also all asked to address their opinions as at 1846.)

[79] As I mentioned, all prior decisions have accepted 1846 as the date of assertion of sovereignty for all British Columbia, although, of course, they each concerned different areas of the province. I will outline those cases.

[80] I start with the seminal case of *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313, 1973 CanLII 4, which involved the Nass Valley. The Supreme Court of Canada said (at pp. 325-326) that:

> The area in question in this action [the Nass Valley] never did come under British sovereignty until the Treaty of Oregon in 1846. This treaty extended the boundary along the 49th parallel from the point of termination, as previously laid down, to the channel separating the Continent from Vancouver Island, and thus through the Gulf Islands to Fuca's Straits. The Oregon Treaty was, in effect, a treaty of cession whereby American claims were ceded to Great Britain. There was no mention of Indian rights in any of these Conventions or the treaty.

[81] In *Delgamuukw BCSC,* at p. 402-406, McEachern C.J. did not find it necessary to make a specific finding as to the actual date of British sovereignty. He suggested it could be anywhere from 1803 to 1846, but acknowledged that "[t]he Oregon Boundary Treaty, 1846, has been judicially accepted as establishing, conclusively, British sovereignty over what is now British Columbia".

[82] On appeal, the date of sovereignty was not a contentious issue. In *Delgamuukw v. British Columbia*, 104 D.L.R. (4th) 470 (B.C.C.A.),1993 CanLII 4516 [*Delgamuukw BCCA*], the B.C. Court of Appeal said, at para. 708: "Throughout this appeal, all counsel seemed content to treat 1846 as the date of British Sovereignty in British Columbia. I propose to do so too". The court did note that "[a]s a settled colony, the common law in British Columbia automatically came into force in 1846 when the *Oregon Boundary Treaty* established Britain's exclusive sovereignty north of the 49th parallel" (at para. 372).

[83] The Supreme Court of Canada did not deal with the issue on appeal and simply noted that: "McEachern C.J. found, at pp. 233-34, and the parties did not

dispute on appeal, that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846." *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CanLII 302 [*Delgamuukw*] at para. 145.

[84] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, although the date of sovereignty was not in issue, the Supreme Court of Canada again made specific reference to 1846 as the date of sovereignty in British Columbia:

> [65] …The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

[85] In *Tsilhqot'in BCSC,* both the plaintiff and British Columbia treated 1846 as the date of sovereignty, but Canada disagreed. Canada argued that "assertion of sovereignty", "sovereignty" and the "conclusive establishment of sovereignty" (all of which had been referred to by Lamer C.J.C. in *Delgamuukw*) were distinct concepts. While Canada suggested 1846 was the date of "conclusive establishment of sovereignty", it argued the court must focus on the "assertion of sovereignty". Like the Province in the case at bar, Canada proposed a range of possible dates for the assertion of sovereignty, from 1579 to 1829, taking the position that the most compelling date was 1792, the date Captain George Vancouver made a formal assertion on behalf of King George III.

[86] Vickers J. concluded 1846 was the date to be used for the assertion of sovereignty, or its actual establishment, in British Columbia. He also concluded that this point was too well entrenched in the case law to allow him to reconsider it, saying:

> [601] I have no difficulty in concluding that The Treaty of Oregon, 1846 is a watershed date that the courts have relied upon up to now. I see no reason to move from that date. Indeed, as the Province has argued, the authorities would appear to be too well entrenched to admit any reconsideration at this level of court: see *Calder* (S.C.C.) at p. 325, per Judson J.; *Delgamuukw* (B.C.S.C.); *Delgamuukw* (B.C.C.A.); *Delgamuukw* (S.C.C.); *Haida First Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 65.

> [602] Apart from that, by 1846 there was a *de facto* British presence in the area. The Treaty of Oregon is a treaty with another nation settling a boundary dispute and providing international recognition of sovereignty to the land and territory north of the 49th parallel. The assertion of sovereignty, recognized by another nation, is clear at this point in our history.

This was not challenged on appeal.

[87] Recently, in *Saik'uz* at para. 256, Kent J., considered that *Tsilhqot'in* had established 1846 as the date of sovereignty, although the parties before him had agreed on that point.

[88] While these cases involved different areas of the province, the judgments were phrased as 1846 applying to the province as a whole.

[89] Even if I were not bound by the earlier decisions on the basis that they were limited to the area in question, I would be bound by the underlying legal rational that Vickers J. based his ruling on in *Tsilhqot'in BCSC*. I will turn to that now in greater detail.

[90] In *Tsilhqot'in BCSC*, Vickers J. drew the distinction between *assertion* of sovereignty and the *establishment* of sovereignty. Addressing Canada's argument that the most compelling date for assertion of sovereignty was Captain George Vancouver's formal assertion on behalf of King George III in 1792, Vickers J. said:

> [596] I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in my view, just words blowing in the wind. I agree entirely with Lambert J. A. when he said in *Delgamuukw* (B.C.C.A.) at para. 707:
>
> > Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control.

[91] Earlier, Vickers J. referred to international law:

> [593] In *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), Professor R.Y. Jennings states at p. 4:

> When we come to look more closely at the various modes which international law recognizes as creating a title to territorial sovereignty we shall find that all have one common feature: the importance, both in the creation of title and of its maintenance, of actual effective control. Every mode, like the Roman Law counterparts, requires the presence of *corpus* as well as *animus*. Not since the 16th century, for example, has it been possible to argue that a mere discovery, coupled with an intention eventually to occupy, is sufficient to create a title.

[92] The Supreme Court has used the terms "assertion of sovereignty" and "sovereignty" interchangeably. For example, in *Delgamuukw*, there are the following three examples:

> [83] … As I reiterate below, the requirement for continuity is one component of the definition of aboriginal rights (although, as I explain below, in the case of title, the issue is continuity from sovereignty, not contact). …
>
> …
>
> [144] In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. …
>
> …
>
> [145] On the other hand, in the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. …

[93] Lambert J.A. in *Delgamuukw BCCA* took care to state that mere assertion of sovereignty was not sufficient. Referring to *Pasco v. Canadian National Railway Co.,* (1989), 56 D.L.R. (4th) 404, 1989 CanLII 249, he said:

> [623] Then at p.412, after further reference to the reasons of Mr. Justice Mahoney in ***Baker Lake,*** Mr. Justice Macfarlane said this:
>
> In my opinion, the date at which it must be shown that there was an organized society occupying the specific territory over which the plaintiffs, as descendants of the members of that society, now assert aboriginal title is the date at which Sovereignty was asserted by the Europeans.
>
> [Emphasis in original.]
>
> [624] So long as one accepts that the vesting of radical title in the Crown and the successful assertion of Sovereignty occurred simultaneously, I agree with that conclusion. It was not argued otherwise in this case. Subject to that caution, the conclusion is amply supported by the authorities to which I have already referred, and as far as I am aware, there is no authority to the contrary. So I propose to accept that conclusion for the purposes of this case. But it may have to be re-examined in relation to a consideration of the nature

> of the aboriginal title, if any, of Métis people, and to similar questions about the acquisition of aboriginal rights after Sovereignty.
>
> [Emphasis added.]

[94] In a situation where several colonial powers are vying over the same territory – as was the case for Nootka Island and beyond – mere assertion of sovereignty hardly sets a satisfactory criterion for the acquisition of "radical title" by a power.

[95] It therefore appears to me that the jurisprudence, international law and logic all lead to the conclusion that despite the use of the phrase "assertion of sovereignty", actual establishment of sovereignty is required and not its mere assertion.

[96] Turning back to the present case, although, as I have said, the Province proposed several possible dates, it appeared to emphasize 1792. This was based on the Nootka Conventions and the assertion of sovereignty by Captain George Vancouver, alluded to by Vickers J. above.

[97] The declaration by Captain Vancouver was barely alluded to in this trial, and I therefore cannot elaborate on it. As seen above, Vickers J. explicitly rejected Captain Vancouver's declaration as a basis for the establishment of sovereignty.

[98] The three Nootka Conventions dealt with competing claims between Spain and England over areas of the Pacific. The historic context was described in a PhD thesis by William Manning, *The Nootka Sound Controversy*, published in 1905:

> Nootka Sound is a small inlet on the western shore of Vancouver Island. It was christened and made known to the world by Captain Cook in 1778. A few years afterwards a flourishing fur trade sprang up between the Northwest Coast and China. Nootka became the center of this trade, though it remained for several years without any settlement except an Indian village. On account of its sudden and growing importance, the Russians, English, and Spaniards all laid plans for occupying the port. It happened that all planned to carry out the project in the year 1789, a year that meant so much for the subsequent history of the world. Though the Nootka incident can make no claim to rank in importance with the great events of that year, yet it was destined to have an influence on the movements then started and to be influenced in turn by them.

[99] The “incident’ Manning referred to was the seizure of an English vessel in Nootka Sound by Spaniards.

[100] On the Province’s own argument, the treaty did not result in exclusive sovereignty for Britain. The Province said:

> While by the terms of the treaty, neither Spain nor Britain would “claim any right of sovereignty or territorial dominion there to the exclusion of the other”, both nations agreed to aid each other in protecting their own claims as against the rest of the world: “And Their said Majesties will mutually aid each other to maintain for their subjects free access to the port of Nootka against any other nation which may attempt to establish there any sovereignty or dominion.”

[101] In her testimony, Dr. Lovisek agreed the Nootka Convention left the issue of sovereignty unresolved. She suggested sovereignty was not established until 1846, saying:

> … I explained during my direct examination that sovereignty had not been established until after the War of 1812 and then the identification and determination of the boundaries from the Washington Treaty, that sovereignty was not established until 1846, but it was asserted this time.

[102] I take this as an opinion on history and not law, which Dr. Lovisek would not be able to provide.

[103] The texts of the Nootka Conventions support this view:

a) The Oct. 28, 1790 Convention restored seized properties and provided for compensation for the seizure. It provided for free access and navigation rights. Nothing in it deal with sovereignty.

b) The Convention signed at Whitehall on February 17, 1793 only dealt with the payment of reparations to be paid by Spain for the seized vessel.

c) The Convention signed in Madrid on January 11, 1794, as quoted in part above, stated:

> Further, Their said Majesties have agreed that the subjects of both nations shall have the liberty of frequenting the said port whenever they wish and of constructing there temporary buildings to

> accommodate them during their residence on such occasions. But neither of the said parties shall form any permanent establishment in the said port or claim any right of sovereignty or territorial dominion there to the exclusion of the other. And Their said Majesties will mutually aid each other to maintain for their subjects free access to the port of Nootka against any other nation which may attempt to establish there any sovereignty or dominion.
>
> [Emphasis added.]

[104] The 1794 Convention, therefore, did quite the opposite of declaring sovereignty, much less establish it.

[105] Consequently, I conclude from a factual and legal point of view, the date for the assertion of sovereignty coincides with the *establishment* of sovereignty and that occurred in 1846 with the Oregon Treaty.

[106] I do not rest my decision on this, and would reach the same conclusion without this comment, but note there are at least two benefits to 1846 being the date of assertion of sovereignty or establishment of sovereignty for the whole province. First, it is preferable not to litigate the matter in each Aboriginal title case. Proving history is not a simple or speedy matter. It requires experts on both sides. All Aboriginal title litigants would benefit from a unitary date for the province.

[107] Second, the *Heritage Conservation Act* R.S.B.C. 1996, c. 187 [*Heritage Conservation Act*], protects archaeological sites estimated to pre-date 1846. That date was presumably not pulled from the air. I do not say that it legislates the date of sovereignty, but it does establish a date for the protection of sites from which evidence of Aboriginal title is frequently garnered.

[108] Having concluded the date for the assertion of sovereignty or establishment of sovereignty is 1846, I will refer to that date in the balance of this judgment, rather than continuing to use the phrase “date of the assertion of sovereignty”.

VII. Organization of Nuu-chah-nulth society: local groups, tribes and confederacy

[109] Dr. Drucker defined the local group as the fundamental political unit of the Nuu-chah-nulth Peoples:

> The fundamental Nootkan political unit was a local group centering in a family of chiefs who owned territorial rights, houses, and various other privileges. Such a group bore a name, usually that of their "place" (a site at their fishing ground where they "belonged"), or sometimes that of a chief; and had a tradition, firmly believed, of descent from a common ancestor. I sometimes refer to these local groups as lineages, for the Indians themselves considered them to be based on kinship, although the precise relationships of their members is sometimes difficult or next to impossible to unravel.… [1]

[110] He went on to say the local groups formed tribes:

> … Among most Northern Nootkans these local groups were not autonomous. Each was formally united with several others by possession of a common winter village, fixed ranking for their assembled chiefs, and often a name. To such a formal union the term "tribe" is applied in the present paper. It was at the tribal winter quarters that the great houses, with their carved and named posts, were erected, and there that the important ceremonials were given.[2]

[111] In his 1951 monograph, Dr. Drucker said the tribes formed confederacies. The confederacy was based on the same ties that cemented local groups into a tribe: a fixed ranking of local group Chiefs, a collective name and a common village site. The First Chief of the Confederacy owned the summer village and granted house sites to Chiefs of local groups. As I said earlier, the issue of the confederacy and what it entailed is contentious, and I will return to it below.

[112] Each local group had an inherited position of Chief. A Chief's brother or son inherited subsidiary chief positions. Relying on Dr. Drucker, Mr. Dewhirst said that in tribes and confederacies the Chiefs of local groups were ranked largely in order of

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[1] *Drucker 1951* at p. 220

[2] *Drucker 1951* at p. 220

seniority in the order that they became part of the confederacy. The Chief owned and managed his territory and all its resources for the benefit of his group.

[113] Dr. Drucker and later anthropologists observed that the groups moved villages in a “seasonal round” so they could take advantage of seasonal marine resources. Mr. Dewhirst described the seasonal round as follows:

> In late spring or early summer, groups moved to “summer villages” on or near the unprotected outside coast that was abundant in many marine resources: fishing banks, shellfish, migrating sea mammals (whales, fur seals and sea lions), and salmon. In late summer and early fall, when the salmon entered the inlets, groups moved “inside” to their salmon fishing sites, usually local group villages at the mouths of salmon streams. There the groups caught and dried large quantities of salmon for winter provisions. After the runs of the various salmon species had finished and the winter provisions were prepared, groups moved to a sheltered winter village, where they passed the winter, a time for many ceremonial and social activities. In the spring, when winter provisions were low and the weather improved, groups moved from the winter village to another village site or camp to exploit the herring run, taking fresh herring and herring spawn that was dried for later consumption. In late spring or early summer, when seasonal weather improved, after taking the herring run, groups moved to the confederacy “summer village” to exploit the rich marine resources of the “outside” coast, thus beginning another seasonal round.

[114] However, according to ethnohistorian Dr. William Folan, not every group engaged in a seasonal round. Local groups considered local group sites “to be of greatest importance to the local group and to be their real homes.”

[115] The Nuu-chah-nulth were observed to have a highly sensitized concept of ownership. I will return to this below, at para. 261, when I deal with exclusivity of occupancy.

[116] While the Nuu-chah-nulth were a coastal society, they made use of the forest to support their existence. Dr. Drucker said:

> Products of red cedar bark and yellow cedar bark were used in almost all aspects of Nootkan life. One could almost describe the culture in terms of them. From the time the newborn infant's body was dried with wisps of shredded cedar bark, and he was laid in a cradle padded with the same material and his head was flattened by a roll of it, he used articles of these

> materials every day of his life, until he was finally rolled up in an old cedar-bark mat for burial.[3]

The Confederacy

[117] The nature of the Nuchatlaht confederacy was a major issue between the parties. While the plaintiff did not claim it owned the land or resources, the nature of the confederacy was central to its argument regarding the proper rights holder. The plaintiff argued the confederacy had political authority. The Province challenged that. In response, the plaintiff said it did not matter what type of authority the confederation had, because by 1846 there was an identifiable Nuchatlaht group who shared a common culture.

[118] The question of when the confederation was formed is not a significant one, as the experts agreed it was likely formed by 1846. Mr. Dewhirst said it was formed prior to 1785. Dr. Lovisek said it had formed after 1800, likely before 1846. Dr. Kennedy stated the Nuchatlaht were comprised of independent local groups, some of whom amalgamated or were absorbed in the first half of the 19th century, and others who joined in the late 1800s.

[119] I set out above (at para. 109) Dr. Drucker's conception of local groups and tribes. To re-cap, the local groups were the basic level of "polity", centred on a family of Chiefs. The local groups formed tribes through the possession of a common winter village. The village was owned by the First Chief. Tribes often took their name from the dominant local group or winter village.

[120] Tribes were, in turn, united into a confederacy and had a common summer village. Dr. Drucker said:

> Several such tribes might be bound together into a confederacy. The confederacy was cemented by ties of the same nature as those uniting a number of local groups into a tribe: a common village site in this case a summer one --to which all, or most, of the people repaired for sea fishing and hunting; seriation of their chiefs, expressed in the order of seating on ceremonial occasions; and a name. These largest groups corresponded fairly well to major geographical divisions. The Kyuquot confederacy included all

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[3] *Drucker 1951* at p. 93

> the tribes residing in Kyuquot Sound; the Nootka one, all those of Nootka Sound (except the Muchalat Arm groups). For a name, one of the local group (place) names was applied to the larger entity. There was a very real feeling of solidarity within these confederations. They were units for war as well as ceremonials. Intraconfederacy wars were very rare, almost unknown in fact except for one or two remote traditions.[4]

[121] Mr. Dewhirst points out that the First Chief of the confederacy owned the summer confederation village. He says the Nuchatlaht confederacy village was in the northwestern portion of the Claim Area, at the village of Lūpȧtcis. It later moved to the nearby site of nūtcȧL, for reasons which are not known. Both sites later became Nuchatlaht Indian Reserves. I do not think that is contentious.

[122] As stated previously, Dr. Drucker re-visited his prior view of the political organization of the Northern Nootkans (Nuu-chah-nulth) in a paper that was published in 1983. He stated:

> Older generations of Northwest Coast ethnographers, myself included, rather casually reported complex political structures for certain groups of the area: something we called the 'tribe' consisting of two or more local groups said to have been organized into a fairly stable entity. I even prosed the political designation "confederacy" as a label for certain seasonal population groupings of pre-contact origin among the Northern Nootkans …
>
> The effect of general acquiescence to use of the terms 'tribe' and 'confederacy' was to characterize the Northwest Coast as an area of complex political systems. This did not seem especially remarkable in an areal culture distinguished by elaborately developed technologies, intricate and varied.
>
> But when I looked for ecological factors affecting Northwest Coast polity for this American Ethnological Society symposium, it became clear how skimpily and unsystematically the political culture of the area has been treated. What discussion exists in the literature consists of attempts to define the authority-base of 'chiefs' in 'tribal' systems.[5]

[123] In the last page of the paper, Dr. Drucker said:

> In other words, there were various large aggregations of local groups among some Northwest Coast divisions. They existed. But they were not political organizations. No authority base resided in such a grouping. The chief of one local group might, if he could, persuade his fellow chiefs to join him in a military adventure. He could not order them to do so, no matter what his

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[4] *Drucker 1951* at p. 220

[5] Drucker 1983 at p. 86

> relative ceremonial status, just as the ranking chief of a winter village aggregate had socioceremonial status and authority in those domains but not in political ones.
>
> It seems worth stressing that functions other than the purely political could link small sociopolitical units into formal large structures. Political acts of these large units, especially acts of aggression or of defense, occasionally occurred through special arrangements of agreement, but were not normal functions. The distinction between true political units and the larger ceremonial organizations is highly significant to an understanding of Northwest Coast political organization.[6]

[124] A glaring omission in Mr. Dewhirst's first report was not mentioning Dr. Drucker's 1983 paper. Mr. Dewhirst carried the omission into his second report dealing with CMTs, where he continued to refer to the confederacy as a "sociopolitical organization" without reference to Drucker 1983.

[125] Mr. Dewhirst presented himself as an expert on Dr. Drucker. It is difficult to understand why he did not refer to Drucker 1983 in his initial report given the time Mr. Dewhirst spent on the confederacy and its importance to the issues as presented by the plaintiff. I find this negatively affects the weight of his evidence.

[126] Once Drucker 1983 was raised by the Province, Mr. Dewhirst took the position that Dr. Drucker was merely suggesting a change in terminology. In argument, using a turn of phrase, the plaintiff argued that: "what's in a name? That which we call a confederacy by any other make would be as sweet".

[127] Mr. Dewhirst testified:

> It's largely a semantic article, and it does clear up I think some misconceptions perhaps that people have. I mean, it's not -- it's not a worthless article or anything like that. I mean, what he's doing here is he's clearing up the notions that people have had studying coast cultures that these chiefs had a kind of absolute authority. And we know from his Nootkan studies, even in his own words, that there was a process of organization for tribes and confederacies whereby people basically gave over much of their authority to the Head Chief, but yet retained their own rights -- the local group Chiefs retained their own rights, particularly of their own territory, so that these groups, these aggregations could work together cooperatively in a federation.

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[6] Drucker 1983 at p.96

[128] He went on to say that Drs. Lovisek and Kennedy failed to appreciate the article was dealing with semantics only and took the article as ethnographic evidence.

[129] Drs. Lovisek and Kennedy disagreed. They cited, with approval, a 1983 article of another anthropologist, Leland Donald, published in the same volume as Drucker 1983 (and so presumably delivered at the same conference). Mr. Donald suggested a more appropriate word than *confederacy* would be *federation*. The main point here is that he echoes the substantive conclusions of Drucker 1983, who did not himself propose an alternate term:

> For most Nuu-chah-nulth-aht, in common with other Northwest Coast peoples, the polity was the local group focused on the winter village. But some local groups joined together to form larger political units. These are commonly termed confederations (following Drucker 1951), but I will call them federations. The connotations of the word confederacy do not fit the Nuu-chah-nulth-aht case very well. The Nuu-chah-nulth-aht federation bears little resemblance to such anthropologically better-known confederations as the League of the Iroquois. Nowhere on the Northwest Coast was there regular political unification above the local community level and even the Nuu-chah-nulth-aht federation was no exception to this. Federations were groups of winter village communities that resided together in the summer. Federations were, in effect, summer versions of the winter village community, whose building blocks were local groups rather than the descent groups of the winter village communities. The constituent groups of a federation shared a common village, their leaders were ranked in a common hierarchy, and so on. <u>Like the more common winter village-based local groups, federations were primarily ceremonial and war units</u> (these are probably the same thing on the Northwest Coast). Because of the lack of intrafederation fighting and the integration of the component descent and local groups through the hierarchy of ceremonial places, I feel that the label “federation” has more appropriate connotations than the looser organization implied by the term “confederacy.”: Donald, Leland (1983). Was Nuu-chah-nulth (Nootka) Society Based on Slave Labor? Pp. 108-119 in *The Development of Political Organization in Native North America. 1979 Proceedings of the American Ethnological Society.* AES: Washington, DC. Edited by Elizabeth Tooker. P. 109.
>
> [Emphasis added.]

[130] I do not accept that Drucker 1983 was a mere re-visiting of terminology. I think is apparent from the above quoted passages from it. It is also apparent from the balance of the paper. For example, at the outset of the paper, Dr. Drucker said:

> As I reviewed source materials, I recalled that, a quarter century or so ago, two elderly Kwakiutl friends, Mr. Nowell and Mr. Whonnock, explained to me that their "tribes" and the Fort Rupert "confederacy" were not political institutions at all (Drucker and Heizer 1967). The informants were not quibbling over the definitions in political anthropology. Rather, they were explaining their people's concepts of rights and duties of chiefs. They stressed that their chiefs claimed no interest in conflict resolution on the "tirbal" and "confederacy" level; there, chiefs' concern was not with political control but only with certain social affairs … and with ceremonials… Chiefs' only concern with non-socioceremonial affairs, that is, truly political matters, related to those of the local group… [7]
>
> [Emphasis added.]

[131] Dr. Drucker went on to discuss the design of a study to test the following hypotheses, which the paper appears to have concluded was affirmed:

> The basic and only political unit in native Northwest Coast culture was the local group.

[132] Dr. Drucker said the study had devised a set of criteria to be applied to the local groups. These were:

> 1. The local group was considered to be a kinship unit, descended from a mythical ancestor.
> 2. Ownership of economic resource sites was vested in the local group.
> 3. Ownership of house sites was vested in local group.
> 4. Ownership of socioceremonial "privileges was vested in local group …"
> 5. Each local group had a permanently ranked set of statuses…
> 6. Each local group was autonomous in decisions of war and peace. (This is a powerful indicator of political autonomy…) [8]

[133] Dr. Drucker concluded:

> A trait distribution list using the foregoing items and all Northwest Coast adequately described divisions shows that consistently the local group had all or most of the characteristics of the model.

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[7] Drucker 1983 at p. 87

[8] Drucker 1983 at p. 88

[134] He then went on to consider what he called the basic problem for his paper: what area-wide factors contributed to the local groups' functioning and stability.

[135] Turning back to Mr. Dewhirst, in his response report, he said:

> With respect to the terms "confederacy" and "tribe" applied to aggregations of local groups on the Northwest Coast, Philip Drucker in 1983 concluded that those terms were inappropriate because "no authority base resided in such a grouping." However, from his examples, Drucker considered the "authority base" as absolute authority—which is absent. On that sole criterion of absolute authority, Drucker concluded that the "various large aggregations of local groups among some Northwest Coast divisions" were not "political organizations." Drucker did not suggest a more appropriate term for the "large aggregations of local groups." However, in light of the actual Nuu-chah-nulth polity in Drucker's ethnography, Dr. Leland Donald proposed the more fitting term "federations" for Drucker's "confederacies."
>
> Apart from the semantic implications of terminology, the Northern Nuu-chah-nulth "tribes" and "confederacies" existed as formal political federations of "local groups." The absence of absolute authority, noted by Drucker and others, applied to all three levels of the polity, including the local group chief as well. Nonetheless, the chiefs at each political level had qualified authority and qualified ownership.

[136] That also is not apparent from the paper itself. The distinction between absolute power and something less was not mentioned in Drucker 1983. Had he meant to make that distinction it would have been easy enough for him to have done so.

[137] In support of his opinion, Mr. Dewhirst cited extensively from Dr. Drucker's 1951 monograph. The difficulty here is that Mr. Dewhirst used Dr. Drucker's earlier work to argue with Dr. Drucker's later work. Mr. Dewhirst added nothing of his own to further his analysis.

[138] The plaintiffs say that a purchase made by John Kendrick in 1791 demonstrates the confederation had political power. I deal with Kendrick's purchase later in the context of when the Shuma'athat joined the confederation. I will say here that I do not accept it detracts from Dr. Drucker's 1983 position.

[139] I therefore conclude that the confederation was not a political unit.

VIII. Occupation of the Coastal claim area

[140] As I have mentioned, the evidence dealing with the inland Claim Area largely depends on inferences to be drawn from the occupation of the coastal Claim Area, where all the Nuu-chah-nulth and hence Nuchatlaht settlements were located. I will deal first with the coastal Claim Area.

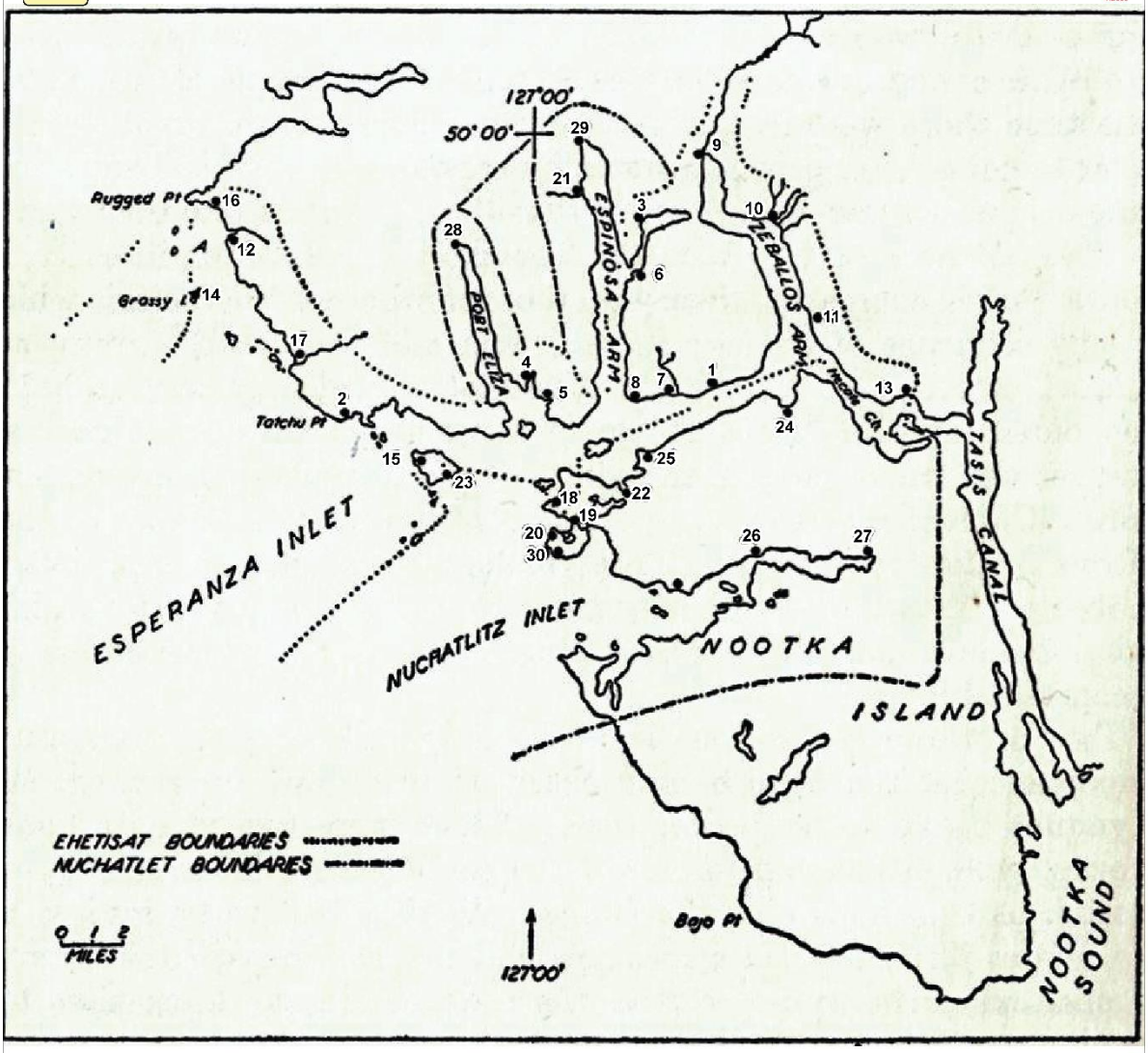
[141] The settlements in the Claim Area were occupied by different local groups. For some of them, there is a factual issue as to whether they were part of the Nuchatlaht in 1846 or merged with them at a later point. As some of the experts noted, interpreting historical documents is made more difficult by the fact the local groups took their names from the villages they occupied. It is therefore sometimes questionable whether the historic records refer to group names or site names.

[142] For local groups which joined later than 1846, there is a legal issue as to whether their area of occupation can be included in the claim by the Nuchatlaht.

[143] The evidence concerning the identity of local groups and their areas of occupation was often presented separately, which makes for another complicating factor. I will deal with them separately, but the two are tied together in the map following paragraph 454 and the accompanying analysis.

A. Sites of occupation in the coastal Claim Area in 1846

[144] The starting point for the plaintiff and Mr. Dewhirst on the occupation of the Claim Area in 1846 was a map in Dr. Drucker's book ("Map 3"). The following is an enhanced version of the map:



Drucker Map 3 (p226) - 1953

MAP 3.—Ehetisat and Nuchatlet sites. Ehetisat tribal (winter) villages: 1, hōhk (also modern confederacy site); 2, tatcū (also local group, later confederacy summer village). Local group sites: 3, LītcYa; 7, hūphōł; 9, ehetis; 10, icsa; 11, åtcin; 13, haqumts; 15, wɔxne'å'. Camp site: 18, ō'pnit. Queen's Cove villages: 4, tcīnɛxnit (also winter village); 5, maxteas. Nuchatlet tribal (winter) villages: 19, apåqtū; 21, tcatcatcinik; 28, dhkac. Local group sites: 22, ō'astea; 23, tcisyō'qwis; 24, aqī; 25, tca'łą; 26 yūtckhtōk; 27, cō'ōma; 29, ōLåktcī. Nuchatlet confederacy (summer) site: 30, LūpåtcsIs. Modern site: 20, nūtcåL.

Area A, cahqos, dentalia fishing grounds; 12, 14, 16, camp sites for dentalia fishery.

[145] As noted earlier, Dr. Drucker did his field work from 1935-1936 and he expressly limited the "time horizon" in his book to the period between 1870 to 1900. He noted:

> I do not believe that any modern informant can describe native customs, techniques, and the like of over 150 years ago (prior to 1778) with accuracy and in detail. [9]

[146] In spite of that, Mr. Dewhirst said the time horizon was not meant to apply to the map and that it is accurate at least as far back as 1846. However, that is not stated by Dr. Drucker, nor is there anything from which that can be implied. In my view, Map 3 must be given the same time horizon as the book's narrative.

[147] Dr. Drucker's Map 3 identifies a total of eight Nuchatlaht village sites within the Claim Area, including: two summer village sites (one older, one more recent); one winter village; and five local group villages. In 1889, many of these sites became Indian Reserves, which I set out below at para. 159.

[148] The former Nuchatlaht summer confederacy village was located at Lūpȧtcsis on the north side of the entrance to Nuchatlitz Inlet, which Dr. Drucker identified as site #30. Mr. Dewhirst noted that this site provided all Nuchatlaht groups with access to "outside" fish and sea mammal resources.

[149] The Nuchatlaht moved their summer village to the nearby site of nūtcȧL, which Dr. Drucker identified as site #20. Dr. Lovisek said nūtcȧl was likely the 'town' where the Nuchatlaht resided on or before 1789. Mr. Dewhirst said that in the late 19th century, nūtcȧL ("Nuchatlitz") replaced Lūpȧtcsis as the confederacy summer village. The reasons for the relocation are not clear.

[150] Map 3 shows the village of apȧqtū as site #19 in a sheltered location at the head of Port Langford. According to Dr. Drucker, apaqtū was an old winter village where the people from Nuchatlitz Inlet wintered.

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[9] *Drucker 1951* at p. 14

[151] Yūtckhtōk (site #26), located at the narrows of the Inner Basin on Nootka Island, was, according to Dr. Drucker, the local group village of the La'isȧth local group.

[152] Cō'ōma (site #27), located at the innermost point of Nuchatlitz Inlet, was the local group village of the Shuma'athat local group. I will return to this group later.

[153] Ō'astea (site #22) was a local group "inside" village located on the northern side of Nootka Island. This was set aside as Indian Reservation #6 in 1889.According to Chief Felix Michael (referred to above at para. 48), this village was included within the hahoulthle (the territory and all resources within it) of the tacīsȧth chief. Dr. Kennedy said:

> The Nuchatlaht first chief's exclusive property included the fishery known as *?u?aˑsCa* [Owossitsa IR 6] the name applied to Snug Cove on the south shore of Esperanza Inlet that was set aside as Owossitsa IR 6 When the chief wanted to hunt a whale, or pray for a whale to drift ashore, this was where he went to train for spiritual assistance. Lillian Michael said that her husband's uncle built a weir and house in Snug Cove, but the "Fisheries Officer" destroyed the weir. Felix Michael fished here with a net. In 1889, Indian Reserve Commission O'Reilly set aside land in Snug Cove as Owossitsa IR 6.

[154] Tca'ła (site #25) was a local group "inside" village on the north side of Nootka Island, located at the mouth of Broderick Creek, somewhat to the northeast of Ō'astea.

[155] Aqī (site #24) was identified by Dr. Drucker as a Nuchatlaht site, however, Dr. Kennedy concluded she could not be sure whether it was owned by a local group which was associated with the Nuchatlaht at 1846, or amalgamated with the Nuchatlaht after 1846, or amalgamated at all.

[156] Dr. Lovisek concluded that Aqī was not in existence prior to 1846, and noted there is no record of a request to make it into a reserve. Mr. Dewhirst simply adopted Map 3 and said Aqī was a Nuchatlaht site in 1846, although 1846 was outside of Dr. Drucker's time horizon. Mr. Dewhirst also relied on the Chief's Book (above

para. 48), but as I remarked above it its reliability for events going back to 1846 is doubtful.

[157] Dr. Drucker identified four other Nuchatlaht sites which are located outside the Claim Area. Three of these are north of Esperanza Inlet:

- tcatcatcinik, (site #21), a winter village on the west shore of Espinoza Inlet on the north side of Experanza Inlet, located near salmon fisheries;
- ohkac (site #28), a winter village located at the mouth of a stream at the head of Port Eliza, on the north side of Esperanza Inlet. (Drucker's Map 3 gives the name of this village as "dhkac", but Mr. Dewhirst notes this is "obviously a misprint")
- ōLȧktcī (site #29), an "inside" local group village at the head of Espinoza Inlet on the north side of Esperanza Inlet, located near salmon fisheries. The Nuchatlaht relocated their band office and most of their housing here from nūtcȧL in 1987.

[158] The fourth site which is outside the Claim Area, tcisyō'qwis (Drucker site #23), is on the east shore of Catala Island, to the northwest of Nootka Island. This village was important for access to deep sea marine resources of fish and sea mammals.

1. 1889 Reserve Creation

[159] As I said above, many of the above sites identified on Map 3 became Indian Reserves allotted to the Nuchatlaht. Although the plaintiff does not claim the reserves, evidence regarding their creation is relevant to show, in part, areas of occupation.

[160] On June 28, 1889, Indian Reserve Commissioner Peter O'Reilly met at Port Langford with Chief Tle-nen-o-ou-ick of the Nuchatlaht and Chief Maquinna of the Ehattesaht. At O'Reilly's urging, the Chiefs selected thirteen sites to be set aside as Indian Reserves – nine for Nuchatlaht, and four for Ehattesaht. O'Reilly described

these sites as “small fishing stations”. The sites selected by Nuchatlaht all correspond with traditional village sites identified by Dr. Drucker.

[161] The nine Indian Reserves allotted to the Nuchatlaht in 1889 were:

1) IR No. 1, Nuchat’l Island, corresponding to Site #20, nūtcȧL, the site of the more recent Nuchatlath confederacy summer village. O’Reilly noted that “[t]he soil is poor in the extreme, but it is valuable to the Indians, a large quantity of dogfish oil being obtained here, while salmon, halibut, and bass are plentiful in the vicinity.”

2) IR No. 2, Nuchat’l, corresponding to Site #30, Lūpȧtcsis, the older Nuchatlaht confederacy summer village. O’Reilly noted that “[t]his was once the site of a large village, but is now wholly abandoned as a place of residence, though some of the tribe continue to cultivate a few small garden patches. The timber upon it is valuable for fuel, and other purposes, there being none on the present village site.”

3) IR No. 3, Ah puk to, corresponds to Site #19, the winter village apȧqtū. O’Reilly noted, “[a] few small gardens are here under cultivation. A trail of about a hundred, and thirty yards in length runs through this reserve, and over this the Indians haul their canoes when travelling between their village [No. 1] and Port Langford.”

4) IR No. 4, Opemit corresponds to Site #18, ō’pnit. O’Reilly noted that “[h]ere the Indians have cultivated about a quarter of an acre. It is also the site of an ancient village.” Although made a Nuchatlaht reserve, Dr. Drucker noted it as an Ehattesaht settlement camp. I will return to Opemit at para.174.

5) IR No. 5, Shoo-mart, corresponds to Site #27, Cō’ōma. O’Reilly commented, “[it] is used by the Indians as a hunting, and fishing station. Deer, otter, and hair seal, are reported numerous in the neighbourhood, as also are salmon, and dogfish. The land is of little value, the mountain rising close to the rear of the houses. The timber is principally hemlock, spruce, and cedar of large size.”

6) IR No. 6, Owos sit sa, corresponds to Site #22, ō'astea. O'Reilly described it as "a small salmon fishery". According to Chief Felix Michael, the Nuchatlaht First Chief owned the sockeye creek here.

7) IR No. 7, O cluc je, corresponds to Site #29, ōLȧktcī. This is located outside the Claim Area, and is the modern location of the Nuchatlaht band office and village. O'Reilly commented, "[t]he principal portion of this reserve is low land, timbered with hemlock, and spruce of large size. A limited quantity of salmon is taken in the tidal waters of a small river that flows past this allotment."

8) IR No. 8, Oc-cosh, corresponds to Site #28 ohkac (misprinted as dhkac on Map 3). Ohkac is located outside the Claim Area. O'Reilly described it as a salmon and dogfish station and added, "[a]part from the fishery the land is of small value, being rocky, hilly and covered with small timber, spruce, hemlock, and cedar."

9) IR No. 9, Chis e ū quis, corresponds to Site #23, tcisyō'qwis, located outside the Claim Area on Catala Island. O'Reilly said it was the site of a village of ten houses, and that it was, "in close proximity to the halibut, and sealing grounds, and is consequently much frequented by the Indians during the fishing season. No water is found on this island, and they procure their supply from the mainland, about a mile distant."

2. McKenna-Bride Commission 1914

[162] The McKenna-McBride Commission was established in 1913 to address First Nation's dissatisfaction with reserve creation. Most of the evidence of this was introduced through Dr. Lovisek.

[163] The Commission conducted hearings in which Indigenous People gave evidence under oath and made submissions with respect to the original allotment, or non-allotment, of reserves and the reserve boundaries.

[164] In May 1914, the Commission met, what was described in the opening paragraph of the minutes as, “the Indians of the Nuchatlitz and Ehattesaht Bands of the Esperanza Inlet Tribe.” The meeting was held on Nuchat’l IR1.

[165] Harry Brown was sworn in on behalf of his nephew, Chief Felix Michael. He also acted as interpreter. Acting Chief Charles Benson made submissions on behalf of the Ehattesaht Band. Mr. Brown, speaking on his own behalf, said that the Nuchatlaht had nine reserves ‘but we go to other places at different times’.

[166] When asked about the population of the Nuchatlaht Band, Mr. Brown stated: “Not very many of them; they are all mixed up with the Ehat’is’ahts.” At this time the population of the Nuchatlaht was recorded as 38.

[167] The result of the Commission was four additional reserves created jointly for the Nuchatlaht and Ehattesaht bands:

1) IR No. 14, Sophe, located at the narrows of Nucahtlitz Inlet and very close to Site #26 on Map 3, Yutckhtok, which Dr. Drucker had noted as a Nuchatlaht local group site.

2) IR No. 15, Savey, located near the head of Espinoza Inlet (to the north of Esperanza Inlet, and therefore outside the Claim Area). It is at Site #21, tcatcatcinik, which Dr. Drucker noted as a Nuchatlaht tribal winter village.

3) IR No. 16, Klitsis, which is on Little Espinza Inlet, an inlet off Espinoza Inlet, and therefore outside the Claim Area. Dr. Drucker noted this as Site #6, but this is not in the legend for Map 3.

4) IR No. 17, Hecate, located on Zeballos Inlet, and therefore outside of the Claim Area. It is at the location of Site #11, atcin, which Dr. Drucker identified as an Ehattesaht local group site.

[168] In 1964, on the request of the Nuchatlaht and Ehattesaht, these four reserves were surrendered and then re-allocated. Klitsi and Hecate were set aside for the Ehattesaht, while Sophe and Savey were set aside for the Nuchatlaht.

3. 1922 Ditchburn-Clark Inquiry

[169] In 1922, the Ditchburn-Clark Inquiry was established to review the McKenna McBride Commission findings. Once again, this evidence was introduced through Dr. Lovisek.

[170] By this time the Nuchatlaht population had declined to a recorded number of 22.

[171] The document adduced by Dr. Lovisek was the minute from an August 14, 1922 meeting with “Nuchatlitz and Ehatisaht Bands, Chief David John, spokesman”. Chief David John requested additional reserve land, some by way of adjustment of current reserves and some by way of new ones, and clarification of the description of land requested before the Commission in 1914. It is not noted which of the two tribes Chief David made the request for. Nor is it in evidence which tribe or group he was the Chief of.

[172] Neither Dr. Lovisek, nor the parties, referred to any further allotments resulting from this inquiry.

[173] I further refer to the Ditchburn-Clark inquiry below, at para.473.

4. Opemit

[174] There was an issue as to who occupied Opemit in 1846. The plaintiff says that Opemit is not within the Claim Area and therefore of limited relevance. While it is not within the Claim Area, it is near the entrance to Esperanza Inlet and within the general area claimed to have been historically occupied by the Nuchatlaht. At minimum, it is relevant as to who may have created the CMTs in the area. It is therefore worth reviewing the relevant evidence.

[175] As noted, Indian Reserves 1, 2, 3, 5 and 6, which were created in 1889, correspond with sites that Dr. Drucker identified as the locations of traditional Nuchatlaht villages. Although it was created as a Nuchatlaht reserve in 1889, Opemit was noted by Dr. Drucker in Map 3 as being an Ehattesaht camp site.

Further, Dr. Drucker referred to the Ehattesaht's amalgamation with the Ha'w ehtakamlath, a coastal local group, and said:

> Before that, the Ehetesat had no "outside" place of their own for summer fishing except a camping site at Opnit.

[176] However, Drucker's draft map in his field notes showed Opemit as being in Nuchatlaht territory.

[177] Mr. Eldridge opined that the Ehattesaht occupied Opemit, relying in part on the gravestone of Frank Savey at Opemit, who was listed by Dr. Drucker as a Mowachaht informant, but identified by both Mrs. Dewhirst and Eldridge as also an Ehattesaht Chief.

[178] Dr. Lovisek reached a different conclusion than Mr. Eldridge. She said:

> Because there had been an old and ancient village of the Opemit site … based on observations made in 1889 and 1892, it is likely that this site had been occupied as a village by the Nuchatlaht years prior to 1889, and possibly prior to and at or around 1846. This site is not within the claim area probably because Drucker identified it as an Ehattesaht camp site.

[179] Mr. Dewhirst suggested Dr. Drucker's attribution of Opemit as an Ehattesaht campsite may mean that it was a Nuchatlaht-owned village where the Ehattesaht had rights to camp.

[180] Dr. Kennedy said that oral history tapes indicated the Ehattesaht and Nuchatlaht disputed the ownership of the area. In a 1981 interview between Joseph Smith, an Ehattesaht Elder, and Kevin Neary of the Royal B.C. Museum, Mr. Smith said: "This is our Reserve, Ehattesaht, that's not Nuchatlaht", and blamed a surveying error for it being allotted to the Nuchatlaht.

[181] Dr. Kennedy also noted what Lillian Michael said in 1987:

> Lillian Michael acknowledged the dispute in her interview with George Louie (and Richard Inglis) but maintained that the area belonged to Nuchatlaht. According to Mrs. Michael, a group from the *zaʔu* people [unknown] came by raft into nujal and were allowed to stay, for they needed protection from a mean chief. They floated down the inlet on a raft made of canoes. In talking about this situation with her grandmother, Mrs. Michael recalled that

> she said “nothing was really settled; there was no agreement.” But it is Lillian Michael’s view that the Nuchatlaht protected the Ehattesaht people from death by letting them live there. Now, she opined the Ehattesaht people think they own this land.

[182] It will be recalled that Dr. Drucker’s time horizon was 1870 to approximately 1900. His field work was done from 1935-1936. It is likely that the Ehattesaht were either observed by him at Opemit when he did his field work, or he was told it had been an Ehattesaht site. It may also be safely assumed there was a Nuchatlaht presence at the site in 1889 when the reserve was created and allocated to the Nuchatlaht. That obviously gets us closer to 1846.

[183] Dr. Lovisek concluded it was likely a Nuchatlaht site in 1846, and I would agree with that. On the other hand, the evidence also shows an Ehattesaht presence in the area, with an uncertain time frame.

[184] This is one example of how the intertribal relationships of the Northern Nuu-chah-nulth groups are difficult to disentangle in the historic record.

B. Nuchatlaht local groups in 1846

[185] I will now outline the evidence with respect to the existence of Nuchatlaht local groups in 1846.

[186] To put the significance of the local groups into perspective, it is worth quoting Dr. Kennedy:

> It is Drucker’s 1951 publication that provides foundational information on the structure of the Nuchatlaht, a people he first described as being comprised of three “tribes” with identified winter homes at apȧqtū, tcatcatcinik, and ohkac, who united into a “confederacy,” a group formed “of the left-overs of the Moachat and Ehetisat unions.” …
>
> … [I]t is evident that remnants of formerly independent local groups co-habited in the historic period and became recognized as the contemporary Nuchatlaht, remembering their separate origins as long as practicable. Some of these local groups, as Drucker noted, were formerly more closely aligned with the Mowachaht and Ehattesaht, and comprised Drucker’s “left-overs”.
>
> In Drucker’s view, Nuchatlaht territory was discontinuous, as shown on his map No. 3, with villages at the heads of Port Eliza and Espinosa Arm “cut off” from the Nuchatlaht territory on Nootka Island by the presence of Ehattesaht peoples occupying the north side of Esperanza Inlet and reaching north to

> beyond Tachu Point. Together with the account of ɛ'as people from the Bajo Point area travelling north and joining the Nuchatlaht at Lupatcsis, and another story relating to the move of the tacis chief and his people from Tahsis Inlet, Drucker concluded that there was "a ring of truth" about the disparate origins of the Nuchatlaht, resulting in his use of the term "confederation." Still, Drucker never considered how or when the groups amalgamated or became absorbed.

1. The tacīsȧth or Tahsis

[187] The tacīsȧth local group moved from Tahsis Inlet (outside the Claim Area) to Esperanza Inlet, likely to Nučaal. Mr. Dewhirst put the date of the move at around 1780. Dr. Kennedy says it was at least by 1789.

[188] In his 1951 monograph, Dr. Drucker relayed the legend that the tacīsȧth Chief who led the move had lost a son and bequeathed his Tahsis holdings to a sympathetic Nootkan, then moving to Esperanza Inlet. Dr. Lovisek pointed to another version, which is that the Tahsis holdings were lost in a war. In his field notes, Dr. Drucker recorded how the Nuchatlaht chief at Tahsis gave away his land after other Chiefs brought him sea otter robes.

[189] Mr. Dewhirst said that prior to the move, the tacīsȧth Chief already had the holding on Esperanza Inlet. Dr. Lovisek disagreed, saying there is no evidence of that. Dr. Kennedy opined it was likely the Tacīsȧth group joined a pre-existing group with whom they had a kinship relationship.

[190] The Tacīsȧth became the leading group of the Nuchatlaht. Again, whether that was before or after the move is a matter of debate. The Chief of the group was the First Chief, meaning first in rank. Chief Felix Michael told Dr. Drucker he held the property of the t'aSiˑ sʔatHt and that he acquired this property when the Nuchatlaht people recognized him as their Chief.

[191] Dr. Kennedy said Lillian Michael, in one of the taped interviews mentioned above (para. 52), identified the harbour of Port Langford as part of the Chief's property. This is the harbour that Kendrick purchased from Chief Tarassom in 1791, discussed below, beginning at para. 218.

[192] Dr. Kennedy analysed the genealogy of the Nuchatlaht Chieftainship in detail. She concluded that Chief Felix Michael, who was seated as the Nuchatlaht Chief in 1914 and whose lineage has maintained the Chieftainship to the present-day, was a descendant of identified individuals alive in 1846 and earlier, whose affiliation was with a people recognized as Nuchatlaht.

2. The Jala·tH or Cha tla ath

[193] In her initial report, Dr. Kennedy set out that Lillian Michael identified the Cha tla ath as the owners of Broderick Creek, situated immediately to the east of Snug Cove on Esperanza Inlet. This is identified as Site #25 on Dr. Drucker's Map 3. The Cha tla ath were closely related to the Tacīsȧth.

[194] Dr. Kennedy concluded the Jala'th were a local group that amalgamated with the tacisath/Nuchatlaht local group by 1846. The Province says that in her direct testimony, Dr. Kennedy revisited this and said the Jala'th (and possibly other groups) joined the Nuchatlaht local group in the late 1850s. I do not think that is a fair interpretation of her evidence. Rather, it appeared to me she was simply musing about how difficult it was to come up with exact dates.

[195] Dr. Kennedy testified that Lillian Michael said that when the amalgamation occurred, her father - the Jala'th Chief – transferred his name and songs, but not his "rivers and boundaries."

3. The Ei-was ath or ʔi.wasʔatH

[196] Dr. Kennedy said that Lillian Michael described the location of this local group as "either side of the Opemit IR 4 peninsula," according to notes made by Richard Inglis following an interview with George Louie. These people had a village at ki·nmatis. There were coho salmon and a trap set in the water here, which was owned by the Second Chief.

[197] Of the fishery, Joseph Smith said:

> That's Nuchatlats, Nuchatlats High Chief's property. That's the one they weren't allowed to take, not anybody. The Chief had to go and take what he

> needed, so he could go and at least give one meal to his people or go to Zeballos. Cause I seen this once.

[198] In Dr. Kennedy's opinion, the Ei-was ath were amalgamated with tacisath/Nuchatlaht by 1846.

[199] Mr. Dewhirst said that:

> Based on this history of the Mowachath confederacy, the ɛ'asȧth joined the Nuchatlaht before 1778, which indicates that the tacīsȧht chief, who took them in, was first chief of the Nuchatlaht confederacy and owned the confederacy summer village of Lūpȧtcsis (#30). Drucker notes that the ɛ'asȧth local group living at ɛ'as village at Bajo Point on the outer coast of Nootka Island19 had two factions. One faction, who became the yałūactakȧmłȧth in the Mowachaht confederacy, expelled another faction. Nuchatlaht first chief took in the expelled faction and gave them a place in the Nuchatlaht confederacy where they were called ɛ'asȧth.

4. The Yaminkamaath

[200] Dr. Kennedy said the yaminkamaath was a lineage, within the i.WasʔatH at 1846, with no territory of their own.

5. The Aqī or Ahkiath

[201] I dealt with this group in conjunction with the site of Aqī, (para. 155).

6. The Shuma'athat

[202] The Shuma'athat group resided in the Claim Area at *cō'ōma* (Site #27) at the western end of the Inner Basin of Nuchatlitz Inlet. Lillian Michael described it as a once-large community.

[203] There is also evidence, which the Province accepts, of the group residing at yūtckhtōk (Site #16) at the narrows between the Inner Basin.

[204] As I said above, a major issue is when the Shuma'athat joined the Nuchatlaht. I deal with that separately later.

7. The Shin Kwa ath or Shinkawaudeh or šinkwaʔatḥ

[205] Dr. Kennedy explained that Lillian Michael described this group as being located at ki'matis, which is in the Claim Area. This is also the name of the location described for the Ei-was ath, and is similar to the Tacisath location called kin'matis.

[206] In relation to this group, Dr. Kennedy refers to a band called hišusqučisʔatḥ at a location called hutinqis beach. The relationship of this group to Tacisath/Nuchatlaht is not in evidence, nor is the location of the area.

8. Groups outside the Claim Area

[207] There were several groups outside the Claim Area. I will not detail them here. I referred to their sites at para. 157.

C. When did the Shuma'athat join the Nuchatlaht?

[208] It is not disputed the Shuma'athat and the Nuchatlaht were originally separate groups. It is also not in dispute the Shuma'athat joined the Nuchatlaht. For example, Dr. Lovisek concluded:

> Based on my review of the relevant historical and ethnographic records, in 1846 the claim area was occupied by peoples known as Nuchatlaht and cō'ōma'ȧth. The Nuchatlaht occupied the village sites known as lūpȧtcsis [Appendix C Map 3 #30], nūtcȧl [Appendix C Map 3 #20] and the cō'ōma'ȧth occupied lūpȧtcsis and cō'ōma [Appendix C Map 3 #27 #30]. The occupation and use of these tracts of land in the claim area was significant and central to the distinctive culture of the two local groups in 1846.

[209] The issue is whether the merger – for lack of a better word – took place before or after 1846. Dr. Lovisek estimated the groups merged at some point after 1875. Dr. Kennedy opined that it was in 1898. Mr. Dewhirst's view was that the merger would have taken place early in the Nuchatlaht confederacy, which he says was formed by 1785.

[210] The parties relied on several historical references to support their positions, the debate with respect to some of them being whether they refer to a people or group vs. a place name. I will outline these here.

1. Historical records

a) 1788 – Ingraham, Haswell and Martinez

[211] As outlined by Dr. Lovisek, Captain John Kendrick, on the American vessel Columbia Rediviva, led a trading expedition to Nootka Sound in 1788. Joseph Ingraham was first mate and pilot on the Columbia, and Robert Haswell was second mate of the accompanying vessel Washington under Captain Gray. The two vessels were on the west coast between September 1788 and July 1789.

[212] Haswell's log lists "Shuma that" along with "Noocho lat", amongst other names, with an identifying bracket or heading "Names of the Towns which they visit and trade with to the Northwest of Nootka Sound.":

Weektock	*Hazy*
Shuma athat	*Names of the Towns which they visit and trade with to the Northward of Nootka Sound* [94]
Noocho tlat[1]	
Ahatesut[2]	
Che neckenet	
Otluckchaal	
Kyuquot	
Chee ah clee sutt[4]	
Cly ish hut	
Qushkeemoowhoat	

[213] Dr. Lovisek suggested the "they" referred to the people at Yuquot (in Nootka Sound) led by Chief Maquinna, whom Ingraham and Haswell were familiar with. Haswell and Ingraham had not visited Nuchatlitz Inlet at the time, so the list is obviously second-hand.

[214] The Columbia Rediviva had been joined in the spring of 1789 by the Spanish expedition led by Estevan José Martínez. In July 1789, before the Columbia had set sail from Nootka Sound, Martínez asked Ingraham to provide him with an account of the Indigenous Peoples in Nootka Sound. Ingraham prepared a list like Haswell's. Ingraham and Haswell's lists are the earliest documents to identify the Nuchatlaht by name.

[215] Dr. Kennedy's view was that Ingraham was the source of Haswell's and Martinez' lists.

[216] Also in 1789, Martinez wrote a descriptive account of Nootka Sound in his diary, which included a list of villages (which he called “rancherias”) that “natives of this entrance” (Nootka Sound) visit and traffic with to the north. Martinez’ list includes “Shumat”.

[217] I will not detail the further evidence of the experts on this narrow point. It appears to me that Haswell, Ingraham and Martinez were referring to village sites rather than Indigenous Peoples.

b) The 1791 Kendrick purchase

[218] As mentioned above at para. 211, John Kendrick first visited Nootka Sound in 1788. In 1791, Kendrick was asked to return to Nootka Sound by Boston merchant, Joseph Barrell, to trade for sea otter pelts and if possible, buy land. With respect to purchasing land, Barrell instructed Kendrick as follows:

> If you make any fort or improvement of land upon the coast, be sure you purchase the soil of the natives; and it would not be amiss if you purchased some advantageous tract of land in the name of the owners; if you should, let the instrument of conveyance bear every authentic mark the circumstances will admit of.

[219] It is also worth setting out here part of the instructions given to Kendrick for the 1788 voyage:

> You will be on the spot, and as circumstances turn up you must improve them; but we cannot forbear to impress upon your mind and expectation that the most inviolable harmony and friendship may be cultivated between you and the natives, and that no advantages may be taken of them in trading, but that you endeavor by honest conduct to impress upon their minds a friendship for Americans…

[220] Kendrick passed on similar orders to Captain Robert Gray, who accompanied Kendrick on the sloop *Washington*:

> I would have you treet the Natives with Respect whare Ever you go Cultivate frind Ship with them as much as possible and take Nothing from them But what you pay them for according to a fair agreement and not Suffer yur people to affrom them or treet them Ill and always Remember that there is no trade to Be made Butt for the Benifet of the owners…

[221] On August 5, 1791, Kendrick entered into a deed for the purchase of land from Chief Tarrasom, Chief Waklimmis (noted to be Chief Tarassom's first son), a female of unknown status named Quanteno and Chief Clakishuppa (noted as the second son of Chief Tarassom). The full text of the deed stated:

> To all people to whom these presents shall come: I, Tarassom, the Chief, with my other Chiefs, do send greeting: Know ye that I, Tarassom, of New Chatlick, on the Northwest coast of America, for and in consideration of two muskets, a boat's sail, and a quantity of powder, by the free consent of my other Chiefs concerned, do bargain, grant and sell unto John Kendrick, of Boston, Commonwealth of Massachusetts, in North America, *a certain harbour, in said New Chatlick, called by the natives Hoot-see-ess, but now called Port Montgomery*, in which the brig Lady Washington lay at anchor on the second day of August 1791, and is situated in Latitude 49 °46' North, Longitude 127 °02' West, on the South Side of the Sound of Ahasset, now called Massachusettes Sound, being a territorial distance of Eighteen Miles Square of which the Harbour of Hoot-see-ess alias Port Montgomery, is the center - with all the Lands, Mines, Minerals, Rivers, Bays, Sounds, Harbours Creeks and all Islands, with all the produce of both Sea and land, appertaining thereto: And by these Presents do grant and sell to the said John Kendrick, his Heirs, Executors, Administrators or Assigns, all the above-mentioned *Territory known by the names of New Chatlick and Hoot see-ess, now by the names of Massachusetts Sound and Port Montgomery*. And also do grant and sell to the said John Kendrick, his Heirs, Executors, Administrators or Assigns, a free pass through all the Rivers and Passages, with all the outlets which lead to and from said Territory, of which the signing these Presents, I have delivered unto the said John Kendrick, signed with my own name and *the names of my other Chiefs, to have and to hold the said Territories*, Premises etc. to him the said John Kendrick, his Heirs, Executors, Administrators or Assigns, from henceforth and Forever, as his property, absolutely, without any other emoluments or considerations whatever.
>
> In witness hereof, I have hereunto set my hand, and the hands of my other Chiefs this Fifth day of August, One Thousand Seven Hundred and Ninety One.
>
> Signed
>
> Tarassom, his mark, Wakalimmis, his mark, Signed by Tarassom for His First Son
>
> {Quanteno her x mark
>
> {Clakishuppa his x mark. Signed by Tarassom, For His Second Son.
>
> [Emphasis added.]

[222] The experts agreed the reference to New Chatlick is to be interpreted as Nuchatlaht. Dr. Drucker and Dr. Kennedy agree that Hoot-see-ess is what is now

known as Port Langford - a bay on the northwest of the entrance to Nuchatlitz Inlet. As I will explain, the term “eighteen miles square” is significant.

[223] Kendrick also obtained four similar deeds with neighbouring Chiefs.

[224] The plaintiff says that the Kendrick purchase included the village of Shumaat, noting the deed refers to “18 miles square” which means a square of 18 miles in each direction. It argues that Tarrasom, being a Nuchatlaht Chief, could not have sold Shumaat unless it was part of the Nuchatlaht confederation.

[225] In her initial report, Dr. Kennedy said:

> Kendrick’s purchase of these two identified harbours –Port Langford and Queen’s Cove (Chenerkintau) –included an 18-mile square territory surrounding each of the harbours. It is evident that Kendrick had not determined the extent of territory over which each chief had authority, for the descriptions reveal considerable overlap in the described lands and waters. Thus, it cannot be assumed that New Chatleck Chief Tarassom’s territory extended 18 miles in all directions from Port Langford, for this would overlap with the territory identified in the deed signed by Chief Nory Youk. It would also include Tahsis, yet, Kendrick purchased Tahsis from Caarshucornook and Hannopy, the latter a chief generally recognized as Ehattesaht, and the former the name of his 28-year old son.

[226] In direct examination, Dr. Kennedy revised her opinion, suggesting that Kendrick’s deed incorrectly read “miles square” when in fact it should have said “square miles”, meaning that Kendrick would have purchased an area roughly 4.25 miles on each side, and which would not include the Shuma’athat villages. Dr. Kennedy preferred this interpretation because it would mean that Kendrick’s purchases would no longer overlap.

[227] In her cross-examination, Dr. Kennedy acknowledged that another possibility is that the purchase was for 18 miles square, but Kendrick was not aware of the overlap. She also allowed for yet another possibility: that Kendrick was content to have an overlap as a margin of safety. After all, he was buying large tracts of land for virtually nothing. (He referred to all of Nootka Island as “Kendrick’s Island”, presumably, as Dr. Lovisek noted, because of the large tracts of land he purchased.)

[228] The term “miles square” was well known to surveyors in the U.S. at the time. In *Manitoba Metis Federation v. Canada,* 2007 MBQB 293, there is this reference to “square miles” and “miles square”:

> [159] Archibald was instructed to provide his opinion, which he did December 20, 1870, as to the regulations which should be made respecting subsection 32(5) of the Act for ascertaining, adjusting and commuting by land grants from the Crown the rights of common and of cutting hay enjoyed by the settlers.
>
> [160] His letter of December 20, 1870, related generally to landholdings as they existed within the province at July 15, 1870, and his expression of views to the Federal Government concerning that land on a go-forward basis. He took issue with Dennis's scheme for the surveys in the North-West. Archibald recommended the scheme of survey as it then existed in the United States, which he asserted was a system known all over the world to the emigrant classes. That system of survey he described was the <u>system of 6 miles square</u>, subdivided into 36 <u>square miles</u>, each of those again subdivided into 4 square lots of 160 acres each.
>
> [Emphasis added.]

[229] The purchases are shown on a map prepared by John Hoskins, who was a clerk on board the Columbia commanded by Kendrick. The map is titled *Map of the lands purchased by Capt. John Kendrick on the northwest coast, in 1791*. The maps had been included in an 1852 petition to Congress from Captain Robert Gray’s wife concerning the Kendrick purchases. It is not clear when they were drawn.

[230] Dr. Lovisek noted that there is no evidence Hoskins was present with Kendrick at the time he made the purchases, and the maps are likely inaccurate. As noted by Dr. Lovisek, although Nuchatlitz Inlet is not identified (it had not been surveyed at this time), it appears to have been included in the tract of land noted as having been purchased from Chief Tarrasom.

[231] One further point on the area purchased by Kendrick. The deed refers to the purchase of “all the Rivers, Passages, with all the outlets which lead to and from said Territory”. As the plaintiff points out, 4.25 miles in all directions from Port Langford (which would approximate to 18 square miles) would not include all the rivers and passages.

[232] Mr. Dewhirst said that Chief Tarrasom must have been the Tacisath Chief who made the move from Tahsis to Nuchatlatz (above para. 187). Dr. Lovisek disputed that and said he was likely a local Nuchatlaht Chief. I do not think it matters with respect to this issue, as the central point is whether a Nuchatlaht Chief was selling land which included cō'ōma. Either way, it is not in dispute that Chief Tarrasom was Nuchatlaht.

[233] I think the use of 18 miles square must have been deliberate on Kendrick's part. It was a term that was known to surveyors at the time, and it was not used in Kendrick's other deeds.

[234] However, I also think only a minimal amount of weight can be placed on the Kendrick purchase. If the parties are now debating 18 miles square vs. 18 square miles, it is no disrespect to doubt whether the Nuchatlaht would have known the measurement, and there is no reason why they should have. We have no idea what took place in the negotiations. While Kendrick was told to deal fairly with the Indigenous Peoples he encountered, the price he paid (two muskets, a boat's sail, and a quantity of powder) was likely derisory even for the 18th century. No doubt his interest was to acquire as much territory as he could for as cheap a price as possible. Whether Chief Tarrasom understood he was selling cō'ōma is an open question, especially since at 18 miles square the territory sold would have extended well into Mowachaht territory to the south.

c) John Jewitt 1803-1805

[235] John Jewitt was a blacksmith and armorer aboard the American fur trading ship Boston. The ship was captured by the Mowachaht in 1803. All the crew except Jewitt and John Thompson, a sail maker, were killed. Jewitt and Thompson were held as slaves of Chief Maquinna until 1805. Jewitt kept a journal of his captivity. In 1815, after Jewitt returned to Boston, he and ghostwriter Richard Alsop published a narrative account of his captivity. It is agreed the unpublished version is more reliable because of embellishments made for publication.

[236] In his journal, Jewett records visitors to the Mowachaht. Some of these refer to Nuchatlaht:

- October 31, 1803: “Arrived a canoe with six natives, from a small village called Newchadlate, ….”
- June 27, 1805: “Arrived two canoes from the New-chat-laits …..”
- July 10, 1805: “This day arrived at a canoe from the Newchadlates …”

[237] With respect to the Shuma’athat, there is one instance where he refers to people *from* “Shoemadeth”.

[238] There is an instance where Jewitt refers to a visit from “no less than 20 tribes to the North and South”, where he lists *the* “Schoomad-its”. Dr. Kennedy used this as support for her view that the Shuma’athat were, at that time, an independent group. The plaintiff argues that even if Jewitt was referring to “Schoomad-its” as the name of the local group, this does not mean they had not become affiliated with the Nuchatlaht by that point.

d) Other historical documents which do not mention the Shuma’athat as a separate tribe

[239] The plaintiff points to several historical sources which do not refer to the Shuma’athat, but where one would expect them to be mentioned if they were a separate group.

[240] Mr. Dewhirst referred to a census in James Douglas’ private papers in which the Nuchatlaht were mentioned, but the Shuma’athat were not. Mr. Dewhirst dated the census to 1852 but stated the information “was collected earlier from unidentified sources”.

[241] Dr. Lovisek said there is no support for that earlier date. Although Douglas may have started writing his papers, the earliest date for census information about the Nuchatlaht was July 17, 1855, when William Banfield and Peter Francis transmitted census information to Douglas. Although Banfield and Francis did not

provide population information for the Nuchatlaht at this time, they informed Douglas that Nuchatlaht was an island and that the Nuchatlaht were a “small tribe.”

[242] Dr. Lovisek added that the only reliable Douglas census is one he sent on October 20, 1856 to Henry Labouchere, Secretary of State for the Colonial Department. In his letter, Douglas stated he had “succeeded in completing a census of the Native Tribes [of Vancouver Island], and in ascertaining with something like accuracy their relative numbers and places of habitation…” The Nuchatlaht are mentioned, but not the Shuma’athat. (By this time, he was Sir James Douglas, having been knighted in 1864.)

[243] From 1859-1860, William Banfield compiled a census titled “Male Adult Population, Tribes Southwest Coast Vancouver Island”. This census primarily consisted of the Nuu-chah-nulth tribes, listed from south to north. The “Nootka Sound” tribes included the “Nieuchallet”, Banfield’s rendering of Nuchatlaht. Banfield did not list the Shuma’athat.

[244] In 1862, Commander R.C. Mayne, who had travelled extensively in the coastal regions of British Columbia and Vancouver Island, published a descriptive account that included a list of the names and approximate populations of tribes of Barkley Sound, Clayoquot Sound, and Nootka Sound. His list for Nootka Sound included four groups: the “Match-clats” [Muchalaht]; the “Moachet” [Mowachaht]; the Neuchallet [Nuchatlaht]; and, the Ehateset [Ehattesaht]. Mayne does not list the Shuma’athat as a distinct group.

[245] In the latter half of the 19th century, Captain R.W. Torrens spent several years conducting coastal explorations with a group of miners along Vancouver Island. While weather-bound at Friendly Cove, he said he amused himself by recording information “concerning the strength and disposition of the Indian Tribes of Nootka Sound, and compiled a Vocabulary of their words.” In 1865, he wrote a report of his “explorations and proceedings” at Clayoquot Sound, in which he listed the “Nootka Sound Indians”. On the left column he listed “Name of Tribe + Chiefs”, and on the right column he listed “Villages” corresponding to those tribes. Under

“Name of Tribe + Chiefs”, Torrens wrote “Neŭchātlăt” as his rendering of Nuchatlaht. The Shuma’athat are not listed as an independent tribe. However, next to the entry for the Nuchatlaht, in the “Villages” column, Torrens lists “Tsŭmā”, which both Mr. Dewhirst and Dr. Kennedy identified as “cō’ōma”, the local group village of the Shuma’athat. Dr. Kennedy thought that Torrens likely got his information from the Mowachaht.

[246] In 1889, Nuchatlaht Indian Reserve No. 5 “Shoomart” was set aside for the Nuchatlaht. This reserve is located at the site of cō’ōma, the local group village site of the Shuma’athat, at the head of Nuchatlitz Inlet. The Shuma’athat were not mentioned.

[247] In 1895, Indian Agent Harry Guillod, whom Mr. Dewhirst described as “perhaps the most knowledgeable source of his time”, created a list titled *Return shewing the names of the Chiefs of the Several Bands of Indians in this Agency* (the West Coast Indian Agency). The “Names of Bands” column lists the Nuchatlaht (“Noo-chaht-laht”) as a band. The Shuma’athat are not mentioned in the list.

[248] The Canada censuses of 1881, 1891 and 1901, all enumerate the Nuchatlaht as an existing group. None of them identify the Shuma’athat as a separate group.

2. Lillian Michael oral history

[249] One of Dr. Kennedy’s main rationales for concluding the Shuma’athat joined the confederation around 1898 was from her review and translation of a tape recording of the interview with Chief Felix Michael’s widow, Lilian Michael, conducted in 1981. The interview was done in the Nuu-chah-nulth language. The tape was partially translated by Randy Bouchard, a linguist and Dr. Kennedy’s husband. Mr. Bouchard’s note of the relevant part is:

> [talking in her language – LM says something about Chief and sumath?ath (=sumath people) and amalgamating in “98” (1898) – LM says “98” in English, twice, in this discussion]

[250] On listening to the tape during Dr. Kennedy’s cross-examination, it became apparent that Lillian Michael was not using the English word *ninety-eight*, as

suggested by Mr. Bouchard, rather she was saying *Nayi'ii* a Nuu-chah-nulth word for "echo". It was agreed this was a reference to an Oscar Dean, whose nickname was *Nayi'ii* and who was from Shuma'athat.

3. Conclusion re the Shuma'athat

[251] As Dr. Lovisek pointed out, because the local groups took their names from the villages or areas they occupied, it is often not clear whether the authors of the historic documents were referring to a location or a people, or both. For example, Dr. Lovisek said, with respect to Ingraham and Haswell:

> The names which Ingraham and Haswell identified as 'towns' would have included a local group and likely the name of the place of that local group. In my opinion the 1789 description of 'towns' by Ingraham and Haswell denotes a people as well as a place name. As determined by the ethnographic evidence cited by Drucker, the place name nūtcȧl [Appendix C Map 3 #20] was likely the 'town' where the Nuchatlaht resided on or before 1789. Similarly, the people listed by Ingraham and Haswell as Shuma athat likely resided at the site Drucker identified as cō'ōma [Appendix C Map 3 #27]. The peoples Ingraham and Haswell listed as Otluckchaal likely resided at the site Drucker identified as ōlȧktcī [Appendix C Map 3 #29]. The ethnographic evidence is based on a correlation of place name and the name of the group. Neither Ingraham nor Haswell identify the location of the three groups nor is there any evidence that they had encountered people from these 'towns' at Nootka Sound.

[252] The documents that begin in 1855, starting with Sir James Douglas' census, became more reliable because they were at least somewhat methodical. Of course, all of these documents post-date 1846, but 1855 is close to 1846.

[253] One thing appears clear – the 1898 date postulated by Dr. Kennedy must be rejected for the following reasons:

- It is based on a misinterpretation of the Lillian Michael transcript.
- in 1889 the Shoomart reserve was set aside for the Nuchatlaht, and not the Shuma'athat.
- The list prepared by Guillod in 1895 and the Canadian censuses of 1881 and 1891 do not refer to the Shuma'athat, but only the Nuchatlaht.

[254] In the opening paragraph to this section, I set out that it was Dr. Lovisek's opinion that in 1846 the Claim Area was occupied by peoples known as Nuchatlaht and cō'ōma'ȧth. She goes on in the same paragraph to say that the Nuchatlaht occupied lūpȧtcsis and nūtcȧll, and the cō'ōma'ȧth occupied lūpȧtcsis and cō'ōma. As I said earlier (at para. 148), lūpȧtcsis was the summer Nuchatlaht confederation site where the local Nuchatlaht groups gathered. There is no explanation for the cō'ōma'ȧth also occupying lūpȧtcsis if they were not part of the Nuchatlaht.

[255] Mr. Dewhirst observed that the village site of the Shuma'athat local group was in a geographical cul-de-sac at the head of Nuchatlitz Inlet, with no access to "outside" ocean fishing and hunting resources. The same can be said with respect to yūtckhtōk. While this does not in and of itself indicate when the Shuma'athat joined the Nuchatlaht, it does suggest they would have had an incentive to do so from an early date in order to gain access to the "outside" resources otherwise unavailable to them.

[256] On balance, I conclude it is more likely than not the Shuma'athat had merged with the Nuchatlaht, or were part of the Nuchatlaht confederation, by 1846.

[257] In the alternative, the plaintiff argued that it does not matter if the Shuma'athat became part of the Nuchatlaht after 1846. I will address that as part of the proper title holder later in section X. As will be seen, I agree with the plaintiff.

D. Evidence regarding exclusivity of occupation of the coastal Claim Area

[258] I set out the evidence regarding the location of villages and groups within the Claim Area above. Obviously that evidence is relevant to the issue of whether the occupation was exclusive. Here, I set out further evidence regarding the issue of whether the occupation was exclusive.

[259] I return later to the legal test for exclusivity, but to put the evidence I relay in this section into context, it is worth setting out here part of what the Supreme Court said about exclusivity in *Tsilhqot'in*:

> [48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

1. Concepts of ownership

[260] The Nuu-chah-nulth concept of ownership provides part of the Aboriginal perspective which is a key element of a title claim. It also elucidates what the practice "on the ground" was likely to have been and allows inferences to be drawn about exclusivity.

[261] I mentioned above that the Nuu-chah-nulth were observed to have a heightened concept of ownership. There is no oral evidence with respect to this, so I will quote at length from Mr. Dewhirst's report, which in turn relies on Dr. Drucker:

> The Nuu-chah-nulth regarded nearly all property as exclusively owned. As Drucker succinctly recognized:
>
> > Whatever authority a chief had derived in final analysis from the various rights he had inherited. The head chiefs, the "real chiefs," were those who held the most, the lower chiefs, those who owned less, and commoners were simply people who possessed none at all. The Nootkans [Nuu-chah-nulth] <u>carried the concept of ownership to an incredible extreme.</u> Not only rivers and fishing places close at hand, but the waters of the sea for miles offshore, the land, houses, carvings on a house post, the right to marry in a certain way or the right to omit part of an ordinary marriage ceremony, names, songs, dances, medicines, and rituals, all were privately owned property.
>
> Ownership rested in inherited privileges or rights held by chiefs, who represented their local groups. Ownership included both economic privileges and ceremonial or social privileges. Hereditary privileges or prerogatives were called *tōpatī*, which involved the ownership and utilization of practically anything of value, but especially rights connected with public displays.
>
> The economic privileges included the chief's territory or *hahauɬi* and all the resources therein. These economic privileges included an amazing range of

ownership: virtually all wealth, including house sites, houses, food, hunting and fishing territories, and salvage rights:

> Not only were houses themselves owned, but the entire village sites as well were the property of the chief of the local group or tribe residing there. If others built houses at the place, it was with the owner's express permission. Similarly, the sites of the tribal and confederacy villages were private property, as were the fishing places in the rivers and the sea, and hunting and gathering locales. In fact all the territory, <u>except for remote inland areas</u>, was regarded as the property of certain chiefs.[65]

Drucker concluded that all territory, "except for remote inland areas," was regarded as the property of certain chiefs. [Emphasis added.]

[262] Mr. Dewhirst described *hahoulthle*:

> "Hahoulthle" is an English rendering of the Nootkan term *hahauɬi*, which Drucker defines as the "major territorial claims" of a chief—in short the chief's territory, which included tracts of land and sea. *hahauɬi* involved exclusive ownership by the chief. The chief bestowed usufruct rights to resource locations in his territory, but still retained exclusive ownership. When people used the chief's territory they acknowledged his exclusive ownership publicly in a number of ways: the chief would open the season; users would pay the chief tribute (*o'ūmas*); when feasting with the tribute, the chief proclaimed his hereditary right to his territory and its tribute paid to him.

[263] Early explorers commented on the Nuu-Chah-nulth concept of ownership. For example, Captain Cook who visited Nootka Sound in 1778 noted:

> Here [Nootka Sound] I must observe that I have nowhere met with Indians who had such high notions of every thing the Country produced being their exclusive property as these; the very wood and water we took on board they at first wanted us to pay for, and we had certainly done it, had I been upon the spot when the demands were made; but as I never happened to be there the workmen took but little notice of their importunities and at last they ceased applying. but made a merit on necessity and frequently afterwards told us they had given us wood and water out of friendship.

[264] Captain Cook described an encounter with Mowachaht inhabitants:

> Having a few Goats and two or three sheep left I went in a boat accompanied by Captain Clerke in another, to the Village at the west point of the Sound to get some grass for them, having seen some at that place [Yuquot aka Friendly Cove]. The Inhabitants [Mowachaht] of this village received us in the same friendly manner they had d[o]ne before, and the Moment we landed I sent some to cut grass not thinking that the Natives could or would have the least objection, but it proved otherways for the Moment our people began to cut they stoped them and told them they must *Makook* for it, that is first buy it. As soon as I heard of this I went to the place and found about a dozen men

> who all laid claim to some part of the grass which I purchased of them and as I thought liberty to cut where ever I pleased, but here again I was misstaken, for the liberal manner I had paid the first pretended proprietors brought more upon me and there was not a blade of grass that had not a seperated owner, so that I very soon emptied my pockets with purchasing, and when they found I had nothing more to give they let us cut where ever we pleased.[10]

[265] James King, one of Cook's officers, noted:

> No people had higher Ideas of exclusive property; they made the Captain [Cook] pay for the grass which he cut at the Village [Yuquot], although useless to themselves, & made a merit, after being refused payment for the wood & water we got in the Cove, of giving it to us, & often told us that they had done it out of Friendship.[11]

[266] Fur trader Andrew Walker entered Nuchatlitz Inlet in 1786. He recorded that:

> As we were looking at some stones and shells which we found on the beach, they [the Mowachaht] snatched them hastily from us, and said in a savage manner, that we ought to purchase those things before we took them. They even appeared angry, that we should dare to touch any thing in their Country, unless we had procured a previous right to it by purchase. Their jealousy of the rights of Property was excessive and extended to every object.[12]

[267] Walker visited a village on the east side of Nootka Sound and noted:

> Notwithstanding that these people received us civilly, yet it was plain, that they had little hospitality. They seemed to have no idea of giving any thing without receiving an equivalent. I paid a string of beads for a drink of Water. We bestowed several little presents on them, which produced no other effect, than to make them clamorous for more. In bartering with us, they showed many circumstances of the most craving avidity. They expressed neither

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[10] James Cook 1978. Journal of Captain Cook, The Third Voyage. (April 1778). Page 306 in J. C. Beaglehole (editor) (1967) The Journals of Captain James Cook on His Voyages of Discovery. Volume 3, The Voyage of the Resolution and Discovery, 1776---1780, Part One. Woodbridge: Hakluyt Society, 1967.

[11] James King (1778). Appendix III: Extracts from Officers' Journals. King. Page 1407. J. C. Beaglehole (editor) (1967) *The Journals of Captain James Cook on His Voyages of Discovery*, *The Voyage of the Resolution and Discovery, 1776---1780, Volume III Part Two*. Woodbridge: Hakluyt Society, 1967.

12 Fisher and Bumsted 1982: Walker Journal entry for July 2, 1786, page 47.

> gratitude nor thanks for what they received. They seemed to think that we had much to give, and ought to give much.[13]

a) Ownership by Chiefs of local groups

[268] Mr. Dewhirst, again relying primarily on Dr. Drucker, said that ownership of the hahoulthle was vested primarily in the Head Chief at the local group level. The Chief had a responsibility to "feed the people", and he owned and managed his hahoulthle for the benefit of his group. Chiefs granted usufruct rights to resources within their hahoulthle to relatives and "tenants", but retained ownership of the territory and resources.

[269] The hahoulthle was the exclusive property of the Chief and included tracts of land and sea, as well as all resources and anything of economic value therein, including fishing banks, beaches, hunting territories, root and berry harvesting patches, other plant resources, salmon streams, herring spawn grounds, fishing sites, dentalia grounds, villages, house sites, houses and salvage.

[270] Although the hahoulthle was owned exclusively by the Chief, his territories were implicitly open to use by anyone from his local group, or even to anyone from the confederacy. However, such use was on the understanding that it was by virtue of the Chief's bounty and depended on public acknowledgment of the Chief's ownership.

[271] Nuu-chah-nulth culture had several ways by which those who used the Chief's territory would publicly acknowledge his exclusive ownership. One of these was to wait for the Chief to formally open the season. Another was for the users to pay tribute, or "o'ūmas", to the Chief. When feasting with that tribute, the Chief would proclaim his hereditary right to the territory and the tribute that was paid to him.

[272] Ceremonial or social privileges were also owned, and included intangible social and ceremonial items such as names, songs, rituals, tōpatī (hereditary

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[13] Fisher and Bumsted 1982: Walker Journal entry for July 2, 1786, page 45.

privileges or prerogatives that involved the ownership and utilization of practically anything of value, but especially rights connected with public displays), and ranked seats at feasts and potlatches. These ceremonial privileges were often connected to other forms of property and the history of ownership of that property.

[273] For example, an ancestral name might embody the ownership of a territory, resource rights and ceremonial privileges that were transferred to a Chief along with that name and recounted at the transfer. Ceremonial expression reconfirmed the Chief's ownership of the property and supported his prestige.

[274] House sites and houses were owned by Chiefs representing their local groups. At main villages, houses were typically large multi-family dwellings consisting of permanent house posts to which portable cedar plank coverings were attached. If the local group was large, there might be one or more neighbouring houses led by junior Chiefs. The physical house, with its ancestral display privileges (carved poles and painted designs), represented the Chief's corporate lineage group and was usually referred to by the name of that group. Local group villages were owned by the Head Chief of the local group, while tribal winter villages and confederacy summer villages were owned by the highest-ranking Chiefs of the tribe or confederacy, respectively.

[275] Dr. Lovisek noted that because of a local group's association by name to a place at which they lived year-round, there was little dispute over who owned or had rights at each village and salmon stream.

[276] Dr. Lovisek also noted that Dr. Drucker reported his informants did not know of any instances of trespass. He said that while in theory the Chief owned everything, the Nuu-chah-nulth used their judgement about small articles such as valuable dentalia shells.

[277] Dr. Lovisek said there is no evidence in either the historical or published ethnographic records that the Nuchatlaht "collectively and overtly engaged in the enforcement of trespass". I will return to this later.

b) Transfer and inheritance of property

[278] Mr. Dewhirst, again relying primarily on Dr. Drucker, said a Chief could transfer all or part of his hahauł̓i to others, although in practice it appears this was rare except in the case of the succession of a Chief's heir after his death. Property was transferred at potlatches following formal rules of inheritance based on male primogeniture. The common practice was for a Chief to transfer his rights to his heirs on an ongoing basis throughout his life, rather than waiting until he was close to death. When transferring property to an heir who was too young to take the position, the Chief managed the position until the heir was old enough, thereby allowing the heir to learn the complexities of managing his hahauł̓i.

[279] Property could be shared among family members in the line of descent from a founding ancestor. On this point, Dr. Drucker wrote:

> A given privilege could be inherited by the eldest son, or shared by several children (all having the right to use it); it could be given to a daughter until her marriage and then bestowed on her brother; it could be given to a son-in-law, who might, as the giver specified, have sole right to it or share it with his wife's brother.

[280] Property was also transferred in marriage. When taking the bride into his family, the husband would formally invest in her with everything he owned, including all of his Chiefly rights, privileges, lands, seats, names and songs, on condition she would bear his children to inherit them. In addition, the bride came with a dowry that transferred property from her family to the son-in-law. A condition of the dowry was that if the couple were childless or separated, the rights, but not the wealth, would revert to the woman's family.

[281] When a woman married into her husband's family and house, which was the usual practice, her family bestowed the groom with transportable rights such as names, songs and dances, but kept non-transportable rights within the bride's family. However, where a man married into a woman's family and affiliated himself with them through matrilocal residence (usually when there were no direct male heirs), her family would bestow non-portable properties, such as seats and fishing rights, on him. This ensured that the more valuable non-portable property remained

within the wife's family and would be inherited by male heirs of the couple who were themselves part of the wife's family.

[282] While still retaining ownership of the hahauł̓i, a Chief could transfer usufruct rights to resources, for example, the right to put fish traps at certain places in his salmon streams, or to the second picking of berries

2. Nuu-chah-nulth territorial boundaries and trespass

[283] The territories of local Chiefs were marked by mutually recognized boundaries in the form of natural landmarks, such as points of land, waterfalls, streams, islands, islets, the kelp line, reefs, rocks, bays, beaches, and other distinctive landforms. Man-made markers were not used. For inlets claimed by multiple groups, the mid-channel line, together with other markers, often delineated their respective territories. Offshore boundaries extending for many kilometers out to sea were projected from visible territorial boundary markers on land as well as the alignment of distinctive mountain peaks. Inland boundaries were more vaguely defined, but tended to follow watersheds divided by heights of land.

[284] Dr. Drucker said that the Nootkans had a "pilot's knowledge" of the coastal area and were unfamiliar with the interior:

> The people's "pilot knowledge" of their own land, that is, minute knowledge of the alongshore and foreshore, and unfamiliarity of the interior, may be noted first. To most of them, mountains were objects to be lined up in ranges to locate offshore points rather than localities to be traversed and known intimately. It is consistent that the woods and mountains were thought to be populated by vast numbers of dangerous and horrendous supernatural beings, where the sea contained fewer and less malignant spirits.

[285] The territorial boundaries of a Chief's hahauł̓i on both sea and land, and the Chief's ownership of all resources therein, including salvage, were mutually understood and widely acknowledged amongst Nuu-chah-nulth persons. Dr. Drucker said:

> Whatever was found derelict in a chief's ocean territory stranded on his beach, or lost on his land, was salvage (hōnī) and belonged to the chief owning the place. The finder of such property was obliged to bring it to the

> chief, or at least notify him, and was in return given payment. The right of salvage applied to anything from a whale, a canoe, a good log, or a runaway slave to a dentalia shell or a canoe bailer.[14]

[286] Dr. Drucker's informants could not recall an instance where someone refused to turn over salvage to the Chief:

> Informants cannot say just what would have been done if a man had refused to turn over such salvage to the chief. "That would be a bad name; it would really be stealing," they say. None knew any instances of such trespass of rights.[15]

[287] The Nuu-chah-nulth had a concept of trespass. Harvesting of resources within the boundaries of a hahauł̄ was restricted to the local Chief's group, and his express or implicit permission as recognition of his ownership was expected. Use of the hahauł̄ by persons not within the local Chief's group could be considered trespass. However, as emphasized by Dr. Lovisek, Dr. Drucker described that an outsider may have been temporarily allowed to use a group's resources without committing trespass if he came to reside with them. Dr. Drucker noted that in doing so, the "outsider" was considered to temporarily become a member of the Chief's local group:

> There was but a thin line separating trespass from legitimate use. An Ehetisat man, for instance, would not be allowed to fish halibut on the banks belonging to the Nootka chief, nor might he hunt sea otter in Nootka waters. But if he moved to Nootka, staying with some kinsman there, he became for the time being a member of the group, and was perfectly free to fish and hunt in the Nootka chief's territory.[16]

3. Ability to control the claimed territory

[288] As I set out above, the Supreme Court in *Tsilhqot'in*, at para. 48, said that "[e]xclusivity should be understood in the sense of intention and capacity to control

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[14] *Drucker 1951* at p. 254.

[15] Drucker 1951 at p. 254.

[16] *Drucker 1951* at p. 251, footnote 61.

the land…". I will return to how this has been treated by the courts later; at this point my focus is on the evidence.

[289] Both Drs. Kennedy and Lovisek noted the historical and ethnographic record do not provide evidence of the Nuchatlaht's ability to defend their territory. There is also no evidence to the opposite effect: namely of the Claim Area having been invaded or conquered. Dr. Lovisek noted that because of a local group's association by name to a place there was little dispute over who owned the or had rights at each village and salmon stream.

[290] Dr. Kennedy said that while the Nuchatlaht have been described as a small group with little capacity to exclude others, they allied themselves with neighbouring tribes where necessary, helping them attack or defend themselves against other tribes.

[291] The Nuu-Chah-nulth had defensive sites, although as with other archaeological sites, it is not possible to know which group created them. In one of his reports, Mr. Eldridge described a site he had noted within the Claim Area:

> Another large archaeological site is located at the southernmost point of the peninsula, about one and a half kilometres distant from DkSr-6. Here Haggarty and Inglis recorded DkSr-32 in the backshore and DkSr-33 on a high rock promontory. DkSr-32 is recorded as a shell midden, while DkSr-33 is recorded as a shell midden and defensive site. This site is within the provincial park. I stopped here a number of years ago recreationally, without knowing any of the archaeological background. I recognized the potential for this to be a defensive site (very similar to *Kiixin* village and adjacent Execution Rock nominated World Heritage Site defensive site near Bamfield, BC as well as others I have visited). I climbed the steep slope from the side facing the land. Traces of shell midden showed wherever there was exposure. The top had what I was sure were large house platforms. The view from the top was panoramic, with the entrance to Esperanza Inlet all around to Nuchatlitz Inlet as far as the entrance to Mary and Inner Basins. It would also be an excellent location to spot whales. With the addition of a palisade or projecting, cantilevered house floors overhanging the rocky bluffs above the ocean, the site would be effectively impregnable. I was gratified later to see that Haggarty and Inglis had similar views on its function. The defensive site is treeless and it is my opinion that its last use likely dates to the 19th century as an older site would likely have larger tree growth. There is no information regarding a local group resident here, so this may represent an additional group present in that century.

[292] Dr. Kennedy was unaware of this site when she wrote her report, but in her testimony, she acknowledged this was a well-situated defensive site with houses on it.

[293] Both Mr. Earnshaw and Mr. Dewhirst noted that there were several refuge or defensive sites in the Claim Area, although they could not be dated.

[294] Although Dr. Lovisek noted that Walker was not prevented from entering Nucahtlitz Inlet in 1786, he was greeted immediately by 20 canoes (above, para. 266). Mr. Dewhirst says this is evidence that they kept watch over who came into the area, most likely by posting sentinels.

[295] While there is no evidence of the Nuchatlaht using rifles in combat, there is evidence they had access to them. A paper co-authored by Dr. Dorothy Kennedy and Randy Bouchard - *Clayoquot Sound and Indian Land Use* - recounts the following incident which took place during the Ahousaht war, likely at some point during the early 19th century:

> The Ahousaht won the war, as they had more guns and ammunition which they obtained through their relatives, the Nuchatlet. They were reinforced on several occasions by the Nuchatlet relatives of haayuupinuulh, who gave them two hundred rifles, and the Makah relatives of 7illhchinak, who gave them ammunition.

[296] Dr. Kennedy did not mention this in her reports but was asked about it in cross-examination. She said she was astounded the Nuchatlaht were able to amass so much weaponry, but that it might reflect on their trading capabilities rather than their own defensive capabilities.

[297] Mr. Dewhirst opined that the Nuchatlaht confederacy, operating as a political alliance (a point which itself is contentious), would have supported its member groups in warfare, and that the existence of the confederacy would have operated as a deterrent to incursions by other groups:

> With respect to defensive capability, neither Dr. Lovisek nor Dr. Kennedy considered the role of the “confederacy” as a political alliance or federation to support its member groups in warfare. Drucker notes that warfare (and

> defence) was integral to the tribal and confederacy political organization. He describes a number of wars carried out by tribes and confederacies, especially the unsuccessful attempts of the Mowachaht Confederacy carried out for decades to capture the Muchalaht rich salmon fishery at Gold River. Based on these data, Drucker succinctly stated the important role of the confederacy for the mutual protection of its member local groups:
>
>> In one sense, it may be said that it [warfare] had a certain integrative function since it was conducted on the tribal and confederacy level, for it enforced the realization on united local groups that they had to stand together for mutual protection.

IX. <u>Occupation of The Inland Claim Area</u>

[298] Although the Nuchatlaht were primarily a marine-oriented culture, they could not have sustained that life without the use of forest resources. Dr. Drucker described how cedar was involved in nearly every aspect of life:

> Products of red cedar bark and yellow cedar bark were used in almost all aspects of Nootkan life. One could almost describe the culture in terms of them. From the time the newborn infant's body was dried with wisps of shredded cedar bark, and he was laid in a cradle padded with the same material and his head was flattened by a roll of it, he used articles of these materials every day of his life, until he was finally rolled up in an old cedar-bark mat for burial.[17]

[299] The uses which Nuu-chah-nulth Peoples made of their forest resources included canoes (western red cedar); paddles (red and yellow cedar); whaling harpoons (yew wood and cherry bark); clothing (spun yellow cedar bark); hats (cedar bark or spruce root); rope (twisted cedar withes); fish hooks (two kinds of wood); housing (cedar planks, posts and beams); cooking fires (wood); food storage boxes (kerfed wood); masks (wood); rattles (wood); drums (wood); large drums (hollow wooden logs); diapers (cedar bark); funerary boxes (wood); bows (yew); and arrows (cedar or ironwood). The Nuu-chah-nulth Peoples also had access to crabapple, hemlock and Douglas fir. Yellow cedar is found at higher elevations and is preferred for clothing and canoe paddles.

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[17] *Drucker 1951* at p. 93.

A. Culturally Modified Trees

[300] To show the use and occupation of the *inland* Claim Areas, the plaintiff relied on the existence of CMTs and, to a lesser extent, on archaeological sites. As I noted above, CMTs are trees which have been modified by indigenous people for a cultural purpose, such as those described in the previous paragraph.

[301] The plaintiff introduced this evidence through expert reports prepared by Mr. Earnshaw and Mr. Dewhirst. As stated previously, Mr. Earnshaw's reports were the subject of a pre-trial motion to exclude them. I ruled the reports met the admissibility threshold.

[302] The Province adduced two response reports by Morley Eldridge and one by Dr. Lovisek.

[303] Mr. Earnshaw noted the different types of CMTs, which include:

- Tapered Bark Strips ("TBS"): a common type of CMT resulting from the regular removal of bark from the tree. Such trees may show features such as "healing lobes" where the stripped area has healed over, scar crusts (large, smooth strips of dark hardwood running the length of the inner healing lobe) and sometimes preserved tool marks.

- Planked trees: living or dead trees with evidence of planks of wood having been removed from them.

- Stumps: "tall stumps" can be found, resulting from an ancestral felling method that avoided the large root flare at the base of the tree. They may show various "styles" including flat or step top, or "barberchair".

- Log sections: often found with missing sections from selective or partial log transportation.

- Tested trees: trees with deep holes cut in them to test wood quality.

- Canoe blanks: unfinished canoes.
- Trail marker (‘blazed’) trees.
- Trap-lines: trap-lines blazed on trees, or actual remains of trap structures.
- Kindling removal trees.
- De-limbed trees.
- Sap removal scars.
- Cambium removal scars: cambium was sometimes removed for food purposes.
- Arborglyphs: human faces carved into the sides of trees, theorized to delineate property.

[304] While the age of a tree modification can be determined through dendrochronology (counting tree rings), there is no way to identify which group altered a tree by analysing it. That determination depends in large measure on drawing inferences from the historic and ethnographic evidence regarding the coastal areas which I dealt with in the prior sections.

[305] Stated simply, the plaintiff says that because it was the Nuchatlaht who occupied the coastal region of the Claim Area, it must have been the Nuchatlaht who made the tree modifications. Thus, Mr. Dewhirst says:

> The Nuchatlaht are known from reliable historical and ethnographic sources to have exclusively occupied the Nuchatlaht claim area, as against any other Indigenous groups, from at least 1790 to today. Also, the Canada Census shows continuity of the long- standing resident population from before 1846. There are no past or present overlapping indigenous occupations or claims to the claim area. The known Nuchatlaht indigenous exclusive occupation of the claim area corresponds to the period in which most recorded culturally made trees (CMTs) were made in the claim area (Section 3.0), therefore, the Nuchatlaht were the long-standing resident group that made the CMTs recorded in the claim area (Section 4.0).

[306] Of course, exclusive occupation is the very issue in dispute. Mr. Dewhirst relies on his initial report which deals primarily with the coastal area, as authority for his proposition regarding exclusive occupancy.

[307] The Province did not present an affirmative position on who made the modifications. Rather it points to what it says are shortfalls in the plaintiff's evidence. It says the evidence is equivocal as to which Nuu-chah-nulth group made the modifications and that it is likely that non-Nuchatlaht people harvested cedar within the Claim Area.

1. The number, location and dating of CMTs

[308] The number, location and dates of the CMTs was primarily addressed by Mr. Earnshaw. Mr. Earnshaw was recognised as an archaeologist with specialised expertise regarding CMTs on the northwest coast.

[309] Mr. Earnshaw prepared two reports. The first reported on available information and on brief reconnaissance surveys he conducted in 2017 and 2018. The purpose of his surveys was to investigate the condition of previously discovered archaeological sites and discover new ones, with a goal of supplementing the existing record.

[310] His second report described the results of two further surveys conducted in 2021. Mr. Earnshaw noted he was asked to assist another archaeologist retained by the plaintiff, Dr. Chelsea Armstrong, to navigate the Claim Area as part of her ethnobotanical review. Although Dr. Armstrong prepared a report, it was not put into evidence.

[311] The existing information relied on by Mr. Earnshaw were primarily reports prepared by others in compliance with the *Heritage Conservation Act*, which, as I mentioned previously, protects all archaeological sites (including CMTs) estimated to pre-date 1846. Applications must be made to the province to alter any protected sites. The applications and accompanying reports are filed with the Archaeology

Branch of the Ministry of Forests and available in its Remote Access to Archaeological Data (RAAD) database.

[312] RAAD uses a grid system known as a Borden grid and assigns archaeological sites a unique identifying number based on the Borden location. Information in the RAAD database is mostly submitted by archaeologists. The information entered on a site form package is often detailed, including location, site type, age of artifact, route of survey and photographs. The information submitted to RAAD is based on field observations and notes. Both sides relied on this data and took no issue with respect to its admissibility or reliability.

[313] Apart from the survey work done by Mr. Earnshaw, and some shoreline surveys done in the 1980's, most of the archaeological surveys done in the Claim Area were forestry-driven. There were no prior systematic archaeological investigations.

[314] Mr. Earnshaw, and the plaintiff in its argument, stressed that the archaeological record in the Claim Area is far from complete and that much has likely been destroyed by logging. Also, old CMTs have likely died and tree scars can be completely enclosed by healing lobes in older trees. With respect to his own surveys, Mr. Earnshaw noted that in dense forest it is often difficult to find CMTs. Further, all of the Claim Area has not been surveyed to date. Therefore, not all CMT sites have been located or recorded, and only a portion of those have been dated.

[315] Mr. Earnshaw said the industry-driven nature of the surveys for the purposes of the *Heritage Conservation Act* skew the record:

- Archaeologists surveying a potential cutblock will rarely record any CMT sites beyond the boundaries of the proposed cutblock, meaning that recorded CMT sites tend to take the shape of cutblocks rather than showing the true extent of the original site.

- CMT "potential models" are used to assess the need for surveys. The model used fails to include areas more than 2 kilometers inland in "outside areas", or

3 kilometers inland from “inside areas”, thereby creating an area in the centre of the Claim Area that is likely not assessed for CMTs at all.

- Preliminary assessments showing high numbers of CMTs within a proposed cutblock may result in the removal of those areas from the cutblock, after which the CMT data sometimes is not submitted to the Archaeology Branch. Over time this can create the appearance of fewer CMT sites on the land.

[316] According to Mr. Earnshaw, there are 93 CMT sites within the Claim Area, containing a total of at least 8,386 individual CMTs. The two sites with the largest number of recorded CMTs are DlSr-99, with 2477 recorded CMTs, and DkSr-53, with 2358 recorded CMTs (The site numbers are the Borden numbers I referred to above). Mr. Earnshaw noted that these are the second and third largest known sites (again, in number of CMTs) within all of Nuu-chah-nulth territories.

[317] With respect to the age of the CMTs, Mr. Earnshaw said that:

- In total, dated CMT features within the Claim Area show cedar harvesting from 1541 to 1969 – a record of more than four hundred years of Indigenous forest harvesting within the Claim Area.

- Out of 21 sites with dated CMT features, 15 (71%) showed harvest dates prior to 1846. In Mr. Earnshaw’s opinion, this data reveals great antiquity of use over multiple generations.

[318] With the exception of DkSr-53, the CMT sites were in or near coastal areas, the average being 845 meters from the coast. The furthest site was 2.95 miles from the shoreline, all distances being in a straight line, or “as the crow flies”. However, Mr. Earnshaw said that CMTs would appear everywhere in the Claim Area “when searched for”, and that, “if these deep, inland areas were to be consistently surveyed, large cedar harvesting areas would continue to be identified.”

[319] He also said it is likely the CMT sites larger than surveyed:

> The development-driven nature of CRM [cultural resource management] survey means that usually only the area within a proposed cutblock boundary is surveyed for archaeological features. This suggests to me that a number of these large cedar harvesting areas (See Appendix II, Figure 47Figure 48) are much larger than currently recorded in RAAD (Remote Access to Archaological Data 2017). Rather, they should be considered interconnected with each other including both recorded and unrecorded CMTs.

[320] In essence, Mr. Earnshaw extrapolated from the available data to conclude that if all the Claim Area were surveyed, and if areas had not been destroyed by logging, it would show all of the area was used by the Nuchatlaht prior to 1846:

> The archaeological record, as it exists today, suggests to me that all accessible land within the Nuchatlaht claim area was likely used for generations (see answer to Question #9 for timeline) prior to contact. I come to this conclusion due to the fact that archaeological sites have been identified in every region of the territory that there has been adequate (or cursory) survey. These identified sites, would suggest that a similar distribution of sites likely exist elsewhere in the territory that has not yet been surveyed (outside of pre-1995 logged areas). After my surveys, it is far more logical to consider that the large unsurveyed areas within the claim area would have additional archaeological sites than not. The regular and continuous use of inland areas in this region is already proven as the second largest CMT site within the Nuchatlaht claim area (DkSr-53 centre point) is about 2.25 direct kilometres inland. As noted above, the presence of archaeological sites indicated larger catchment areas of use and occupation. For these reasons I would not be able to confidently indicate that there are any areas outside of regular and/or intense use within the claim area.

[321] Mr. Earnshaw also relied on a predictive model for CMT potential.

[322] The Province says no reliance can be put on Mr. Earnshaw's opinion. The issue is not whether Mr. Earnshaw accurately identified CMTs in his surveys. In fact, Mr. Eldridge acknowledged that Mr. Earnshaw did a much better job than most archaeologists of recognizing and recording CMTs. Rather, the Province says he presented skewed and misleading data.

[323] As stated above, Mr. Earnshaw opined that 71% of dated <u>sites</u> (not samples) were before 1846. The Province extensively cross-examined Mr. Earnshaw on the basis for that conclusion, taking him to the underlying studies that formed the basis of his report. The following is apparent from the cross-examination:

- Mr. Earnshaw did not include in his analysis a coastal site DlSr-60, near Dr. Drucker's Site #25: tca'la. The date ranges from this site are 1892-1894 and 1908-1916.

- DlSr-90 is shown as having a date range of 1703-1949, but of the 44 samples which were dated (out of a total of 2,744 total CMTs), only one was found to pre-date 1846.

- With respect to DkSr-53 (the only site that can be considered to be inland), Mr. Earnshaw failed to consider a filed report done by Baseline Archaeological Services Ltd. which indicated only 5 of the 65 dates samples pre-dated 1846. Mr. Earnshaw said the report was missing when he did his first report. However, he received it before doing his second report and did not make any correction, nor did he refer to it in his direct examination.

[324] In reaching his percentage figure, Mr. Earnshaw referred to the number of sites, whereas the Province referred to the number of samples. Each site and report, of course, deals with multiple samples. In my view, to present a true picture of Claim Area usage prior to 1846, it would be more illuminating to use sample numbers rather than site numbers. To use site numbers in a percentage calculation where there might be only one relevant CMT conveys an over weighted impression.

[325] The Province says when the correct data is tabulated, only 11.4% of the dated <u>samples</u> pre-date 1846. Taking both the added data and using samples rather than site numbers, I agree with the Province's that only 11.4% of the recorded samples pre-date 1846.

[326] Another issue which detracts from Mr. Earnshaw's conclusions is that he used "recorded" "estimated" and "observed" either inconsistently or interchangeably, particularly with respect to DkSr-53 and DlSr99.

[327] The Province also points out that the areas which Mr. Earnshaw himself chose to survey were not randomly chosen, and therefore subject to selection bias.

[328] Turning to the surveys conducted by Mr. Earnshaw, the Province notes that he did not have any permits to allow sampling or site disruption. These permits are available for research. In fact, Mr. Earnshaw had permits for his M.A. thesis. In response to this, Mr. Earnshaw said in cross-examination, he “was just walking lightly on the land and viewing what is visible”.

[329] Mr. Earnshaw did not note any CMTs in his furthest inland survey – Survey B. This was approximately 5-6 kilometers inland. Three people were involved in the survey, spread out along a survey path of 1,000 to 1,200 metres. Mr. Earnshaw’s report noted:

> This survey target was chosen due to its proximity to an inland lake and creek valley. It also has potential as an overland trail between Inner Basin and southern Tahsis Inlet… This zone contains a recent clear cut (in which we attempted to identify bark scars in cross-section… and a standing forest with a mix of cedar, spruce and hemlock that extends down to the creek valley… Despite our favourable assessment of archaeological potential, this survey did not result in the identification of any CMT features. Scarring was observed on several redcedar stems near the clearcut but these scars lacked cultural attributes.

[330] Survey D was 2 kilometers inland and involved three people. Only two possible bark strips were observed.

[331] The plaintiff argues that negative surveys were limited “spatially and temporally” and should not be considered conclusive, particularly considering Mr. Earnshaw’s favourable assessment of the archaeological potential. In answer to a leading question put to him in direct, Mr. Earnshaw said that after the surveys were done, he reviewed a potential model and it predicted there were likely CMTs “further up”. That, however, is not evidence.

[332] Mr. Earnshaw’s opinion that the Claim Area which has not been surveyed likely does, in fact, have further CMT activity, is based in part on Mr. Earnshaw’s extrapolation from identified CMTs (above para. 320). There is no scientific basis for this. Even if it was accepted that there would be further CMTs, there is the question as to whether they fall in the relevant date range of between the 1780’s (when the Nuchatlaht moved to the area) and 1846.

[333] Mr. Earnshaw's opinion is also based on use of a predictive model. No detail of the model was provided. Moreover, it is an industry tool to provide support for good forestry practices. It is not a means of estimating the presence of CMTs. It might provide guidance as to areas that ought to be surveyed, but it is not a survey in itself and cannot be taken as evidence of the existence of CMTs, much less their dating or their creators.

[334] I agree with the Province regarding Mr. Earnshaw's inferences of inland CMTs based on coastal CMTs. He has not provided evidence which allows for the inferences to be drawn, and his opinion is speculative. Nor do his own inland surveys provide evidence from which to infer the abundance of further CMTs that would be dated as having been done between 1780 and 1846.

[335] Mr. Dewhirst also addressed the age and distribution of CMTs in the Claim Area and prepared a table summarising his analysis. In my view, the table is not reliable because of errors and lack of inclusion of data. These include:

(a) With respect DkSr-43, Mr. Dewhirst said there were only 16 dated sites, when there were actually 24, only 10 of which pre-dated 1846.

(b) Mr. Dewhirst reported that DlSr-60 was undated. That is not correct. The relevant permit report notes two date ranges of 1892 to 1894 and 1908 to 1916.

(c) DlSr-59 is incorrectly described as undated. This was also incorrect. A site report put to Mr. Dewhirst in cross-examination showed 10 dated samples, only two of which pre-dated 1846. Confusingly, the site is listed twice, but both instances say the samples are un-dated.

(d) DkSr-54 is also noted by Mr. Dewhirst as having no dated samples. Again, that was incorrect. In fact, it had eight dated features, none of which pre-dated 1846.

(e) The date for DlSr-99 is noted as “Range (n=54): 1703 to 1949”. The report itself contained a detailed table showing 56 individual sample dates, only one of which pre-dated 1846.

[336] As I have said about Mr. Earnshaw, presenting the data as a date range for a site skews the data, as the prior example for DlSr-99 shows. Another example is DlSr99 which Mr. Dewhirst shows as a date range from 1703 to 1949. A date range that wide is unhelpful. It is also misleading because only one tree pre-dated 1846.

2. Who made the CMTs?

[337] This point was primarily addressed by Mr. Dewhirst, although Mr. Earnshaw also touched on it.

[338] As I mentioned above, and as acknowledged by the plaintiff, Mr. Dewhirst reached his conclusion that the CMTs were made by the Nuchatlaht by way of inference. The essence of Mr. Dewhirst’s opinion is that the CMT sites within the Claim Area show a pattern of use that would have required intimate knowledge of the local forest, such as could only have been possessed by a long-standing resident community. The CMT sites, in Mr. Dewhirst’s opinion, could not have been created by non-residents passing by and carrying out harvests “adventitiously” or “haphazardly”. As the Nuchatlaht are the only Aboriginal community known to have been resident in the Claim Area during the timeframe when the CMTs were made, the only reasonable conclusion is that nearly all CMTs in the Claim Area were made by the Nuchatlaht.

[339] Mr. Dewhirst points out:

- A number of sites show separate CMT harvesting events at the same site, separated over time;

- Different resources were harvested at the same CMT sites, which also indicates harvesting on different occasions. For example, while cedar bark stripping might be accomplished in a single visit, certain harvesting practices,

such as logging, plank removal, and canoe building, would have required multiple visits throughout the year to complete. Some would have required a number of strong men to carry heavy log beams and canoes down to the shore;

- The large numbers of CMTs recorded at individual sites show many separate harvests carried out over many years. Of particular note, undated site DkSr43 in the Broderick Creek watershed consists of an estimated 2,500 tapered bark strips, which would have required many separate cedar bark harvests over many years;

- Recorded CMT sites are often located near known Nuchatlaht village sites, while others are in associated watersheds and coastal areas that could be accessed from those village sites.

[340] Mr. Eldridge posited several alternate scenarios under which people other than the Nuchatlaht may have created some of the CMTs in the Claim Area:

- There are five known Ehattesaht village or camp sites on the north shore of Esperanza inlet that would have been 20-30 minutes by canoe from the Claim Area. Mr. Eldridge suggested during certain times of year there would likely have been no Nuchatlaht people watching the northern shoreline, and that under cover of darkness, rain or fog, the risk of being seen in transit was very low. He noted that canoes hard against the shore would have been nearly invisible and could have been covered to keep their presence a secret.

- Similarly, Mr. Eldridge noted Dr. Drucker's comments that Nuu-chah-nulth inland boundaries were "approximate" and that, in particular, the southern boundary line between the Mowachaht and the Nuchatlaht was "rather vaguely defined". Mr. Eldridge suggested it would have been very easy to miss the height of land, especially in broken or rolling terrain, and therefore inland harvesters might have inadvertently harvested on the wrong side of the boundary line.

- Mr. Eldridge also suggested that non-Nuchatlaht persons might have been granted permission to access and use bark harvesting sites within the Claim Area, either by special arrangement or after the owning Chief had opened a highly productive site to everyone following the first few harvests.

- Finally, Mr. Eldridge suggested that even if non-Nuchatlaht persons were "trespassing" in the Claim Area to gather bark, this might have resulted in "minimal" consequences for the harvester if caught, or the owning Chief might have elected to ignore the contravention.

[341] I agree with the plaintiff that most of these scenarios are speculative, and even a bit far-fetched. It begs the question as to why groups from the other side of the inlet would want to harvest forest resources further away from their village sites in the absence of evidence that they lacked similar resources. With respect to inadvertent straying by other groups into Nuchatlaht territory because of ill-defined boundaries, that would be minimal and at the margins. It should not in itself have a major effect on this claim.

[342] Nevertheless, Mr. Dewhirst's attribution of all the CMTs to the Nuchatlaht begs the underlying question of who occupied the coastal Claim Area, which parts were occupied and when.

B. Concept of Ownership of "remote" areas

[343] I have previously addressed the Nuu-chah-nulth perspective of ownership in the context of the coastal Claim Area. There is also an issue as to the concept of ownership over inland areas. This stems from a comment in Drucker 1951 at p. 48:

> Not only were houses themselves owned, but the entire village sites as well as the property of the chief of the local group or tribe residing there. If others built houses at the place, it was with the owner's express permission. Similarly, the sites of the tribal and confederacy villages were private property, as were the fishing place in the rivers and the sea, and hunting and gathering locales. In fact all the territory, <u>except for remote inland areas</u>, was regarded as the property of certain chiefs. [Emphasis added.]

[344] Dr. Drucker further noted at pp.60 and 9:

> The point is that normal Nootkan economic patterns (allowing those of the groups just mentioned to be exceptional) were so strongly oriented to the foreshore that they inhibited utilization of a valuable food source. In practical terms, the men never learned to be good woodsmen and land hunters.

and:

> It is scarcely to be wondered at, what with the ruggedness of the mountainous terrain and the dense tangle of vegetation, that the native population for the most part frequented the woods but little.

[345] As I set out above, Dr. Drucker also said the Nootkans had a "pilot's knowledge" of the coastal area and lack of knowledge of the interior:

> The people's "pilot knowledge" of their own land, that is, minute knowledge of the alongshore and foreshore, and unfamiliarity of the interior, may be noted first. To most of them, mountains were objects to be lined up in ranges to locate offshore points rather than localities to be traversed and known intimately. It is consistent that the woods and mountains were thought to be populated by vast numbers of dangerous and horrendous supernatural beings, where the sea contained fewer and less malignant spirits.

[346] Mr. Dewhirst countered this by saying Dr. Drucker was referring to the Nuu-chah-nulth in general and that there are no remote inland areas on Nootka Island "in the sense used by Drucker". This was so because the inland areas are easily accessed by foot via creek beds and stream valleys.

[347] As I will explain, I think this is another example of Mr. Dewhirst reaching a conclusion without a proper basis.

[348] I first note that Mr. Dewhirst's reasoning implies there are no creek beds or stream valleys in Nuu-Chah-Nulth areas other than Nootka Island, or that they are somehow different.

[349] Further, Mr. Dewhirst has been inconsistent. In a different context, he relied on the difficult topography of the terrain, particularly around Nuchatlitz inlet. Ironically this was to support his disagreement with Dr. Drucker on another point dealing with Dr. Drucker's references to the Nuchatlaht groups north of Esperanza Inlet being

“leftovers”. Mr. Dewhirst said Dr. Drucker ignored that the area was defined by “steep and difficult terrain”.

[350] I also note that Mr. Earnshaw referred to the difficulty of the inland terrain:

> The hike along logging roads was slow and difficult through overgrown blackberries, the hike downhill to the site was steep through clearcuts…

[351] Countering Mr. Dewhirst’ opinion of no “remote” inland areas, Mr. Eldridge said that in his personal experience creek beds are not easily walked up. He prepared an analysis which showed interior CMTs did not correlate with creeks or streams, as they would be expected to if Mr. Dewhirst was correct.

[352] In response, Mr. Dewhirst said he did not mean to say that people walked up the creek bed. Rather, he stated “the creek is an avenue to access, to get in and then to follow up the hillside or the mountainside”. As did Mr. Eldridge, I took Mr. Dewhirst to refer to walking up creek beds. That said, I am not sure Mr. Dewhirst’s revised description makes for easy access or makes the areas less remote than what Mr. Drucker meant.

[353] The plaintiff raises several issues with respect to Mr. Eldridge’s comment regarding the lack of correlation between CMT sites and creek beds.

[354] One criticism was that an underlying assumption of the analysis is that there is a uniformity of tree species in the forest, not the “jigsaw” of flora Mr. Eldridge describes elsewhere in his response. That is an opaque comment and not one put to Mr. Eldridge or commented on by Mr. Dewhirst.

[355] Another criticism is that the accuracy of geo-mapping data for stream beds can be poor. However, a similar criticism was made by Mr. Eldridge of mapping errors made by Mr. Earnshaw. Mr. Eldridge acknowledged that any inaccuracies would be minor to the point of being hard to notice. In the absence of more evidence about the margin of error and its significance to the study, I cannot conclude that errors would be of any significance here.

[356] The plaintiff also says Mr. Eldridge did not include all CMTs identified by Mr. Earnshaw. That might be true, but Mr. Eldridge's analysis was meant to be random.

[357] In the end, I do not accept Mr. Dewhirst's evidence that Dr. Drucker's comment regarding less knowledge and familiarity with the interior areas would not be applicable to Nootka Island, and the Nuchatlaht.

X. <u>Are the Nuchatlaht the proper title or rights holder?</u>

[358] Aboriginal title is held communally. In making a declaration of Aboriginal title, the court must be convinced that the claimant group is the proper rights or title holder. I think those terms can be used interchangeably here. While this is a title case, Aboriginal title is an Aboriginal right to exclusive use and occupation of the land (*Delgamuukw* at para. 117), held collectively by the Indigenous group for present and future generations (*Tsilhqot'in* at para. 73).

[359] As noted by Vickers J. at para 440 of *Tsilhoqot'in BCSC*, the Supreme Court in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 [*Marshall;Bernard*], related the identification of the proper claimant group to the continuity of identity requirement. (This is different than the second optional requirement for Aboriginal title, which concerned continuity of *occupation*.) McLachlin C.J.C. stated at para. 67:

> [67] The third sub-issue [raised by the parties] is continuity. The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. 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. Continuity may also be raised in this sense. 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.

[360] The task, then, is to determine the historic rights-holding community and then to determine the claimant's relationship to that group.

A. Rights holder in 1846

[361] I have already stated I accept 1846 as the date for the assertion of sovereignty in British Columbia. I now turn to address the question as to who the rights holder(s) were in 1846.

[362] To recap some key factual findings, there is no debate that resources and land were owned by the Chief at the local group level as part of his hahauł̓i. Although by 1846 the Nuchatlaht were organised into a confederacy, I accept Dr. Drucker's revised 1983 view that the confederacy was not a political institution, but largely ceremonial. I also accept his view that the fundamental political unit was the local group.

[363] The Province argues that the rights holders in 1846 were the local groups and not a larger Nuchatlaht community. The local groups are no longer in existence, having been absorbed into larger collectives such as the Nuchatlaht. From a procedural point of view, the Province agrees that "the Nuchatlaht, as a modern-day Indigenous collective, can advance an aggregate claim to historical territories, but the Nuchatlaht's ability to bring the claim does not mean that it is the proper rights holder."

[364] On the Province's argument, as the original rights holders were the multiple local groups, the current rights holders must trace their claim back to those groups. There has been no evidence to allow me to do that. Dr. Kennedy said, with a few exceptions, this would be an impossible task. The Court of Appeal noted the same issue in *Tsilhqot'in BCCA* at paragraph 146.

[365] For its part, the plaintiff argues that Aboriginal title is conceptually distinct from how an Indigenous group traditionally "divided up" land ownership amongst itself. Aboriginal title is a modern communal right that is vested in the Indigenous community. The rights-holding community is not necessarily the same entity that traditionally owned particular parcels of land according to internal customary law. Thus, Indigenous collectives can advance aggregate claims to their territories, even when direct ownership of lands within those territories was traditionally divided

amongst smaller subgroups. The plaintiff argues this is particularly so where, as here, community members enjoyed shared rights to access and use lands throughout the territory (a factual point which is in issue).

[366] As I previously mentioned, except for the Shuma'athat, the plaintiff has said it does not rely on ownership by local groups which later amalgamated into a confederacy bringing their territorial holdings with them. In fact, virtually all of the evidence regarding local groups was, at first instance, adduced by the Province through Dr. Kennedy.

[367] The Plaintiff relies on *Delgamuukw*, *Saik'uz* and *Tsilhqot'in,* which I will review now.

[368] The plaintiff says that in *Delgamuukw*, the Supreme Court of Canada implicitly accepted that a communal claim could be maintained by the two plaintiff Nations – the Wet'suwet'en and Gitksan – despite land being owned by smaller Houses of which the Nations were composed. I do not agree with this interpretation of *Delgamuukw*, although as will be seen I do not find that to be determinative of this issue.

[369] *Delgamuukw* began as a claim for 133 territories claimed by 71 Houses of the Wet'suwet'en and the Gitksan. The plaintiffs were 51 Hereditary Chiefs, some claiming on behalf of multiple Houses, or claiming multiple territories on behalf of one House. At trial, the action was dismissed by McEachern C.J.B.C. On appeal, the original claim was amalgamated into two communal claims brought by each Nation. No amendment to the pleadings had been made. The Supreme Court held (beginning at para. 73) that because there had been no amendment, the defendants had been prejudiced and ordered a new trial.

[370] The plaintiff says that McEachern C.J.B.C. found that the historic holdings were held by the Houses. From that, it argues that if the Supreme Court thought Aboriginal title could only be proved by individual Houses, it would not have ordered a new trial based on ownership by the larger collectives.

[371] However, McEachern C.J.B.C. did not make a finding of ownership at the House level. Rather, in para. 41, cited as authority for that proposition by the plaintiffs, he stated that was the *argument* of the plaintiffs. His reasons show he came to the opposite conclusion, namely, that the claimed territory was owned at the larger group level:

> If I have erred on the question of extinguishment, and the plaintiffs aboriginal interests or any of them are not extinguished, the evidence does not establish the validity of individual territories claimed by Gitksan and Wet'suwet'en Chiefs. Instead, therefore, the claim for aboriginal rights in such circumstances would be allowed not for chiefs or Houses or members of Houses, but rather for the communal benefit of all the Gitksan and Wet'suwet'en peoples except the Gitksan peoples of the Kitwankool Chiefs who did not join in this action.

[372] I also disagree with the submission that the Supreme Court impliedly agreed that the wider collective was the rights holder because otherwise it would not have sent it back for a new trial to be argued on that basis. Rather, the most that can be taken from the remit is that the Court did not dismiss that possibility out of hand.

[373] The end result is that we are left with a finding at the trial level in *Delgamuukw* the rights holders were the Houses. The factual finding was overturned but the Supreme Court did not weigh in on the legal issue. *Delgamuukw* therefore does not assist with the point in issue here.

[374] Turning to *Saik'uz*, the plaintiffs brought an action in nuisance for damage caused by the damming of the Nechako River. They sought a *finding* – not a declaration – of Aboriginal title to support their action for nuisance. Kent J. concluded he could not make the finding because of competing claims of other Nations who were not before the court. Nevertheless, he went on to say that if he were wrong in that conclusion, he would have made a finding of Aboriginal title. In analysing that issue, he had to determine the rights holder.

[375] Traditional Dakelh society was divided into sub-tribes which were in turn divided into extended family groups which were called sadekus. Traditional land ownership resided at the sadeku level. Each sadeku had an ancestral territory,

called a keyoh, with well-defined boundaries within which the family had exclusive rights to fishing, hunting, trapping and gathering. Others could use the keyoh with the permission of the leader of the sadeku. The plaintiffs were two sub-tribe members of the Dalkelh. The issue was whether the rights holders were the sadekus, as was argued by the Province, or the plaintiff sub-tribes.

[376] Kent J. accepted the sub-tribes - the Saik'uz and Stellat'en - as the rights holders, despite the fact that they did not traditionally own land and resources. His decision was largely based on the inability to trace the current Peoples back to the sadekus. He stated:

> [230] The plaintiffs correctly criticize Mr. Dewhirst's approach as wrongly assuming that the traditional land system that existed within the relevant Aboriginal groups at 1846 has survived intact notwithstanding the impacts of colonization; i.e. it assumes that *köyohodachum* and *keyohs* continue to persist and remain in place for the plaintiffs. They point to the evidence of Ms. Thomas, who is very knowledgeable about her own nation's traditions and territories, and who stated that people in Saik'uz today cannot say where the *keyohs* are located or which persons are properly associated with any specific *keyoh*. She says there are simply too many knowledge gaps and "sleeping names". "Parents that went to residential school . . . did not learn that, they did not teach the children that". I accept this evidence.

[377] It is also apparent that Kent J.'s decision was in part based on the fact that he was only asked to make a *finding* of aboriginal title for the limited purpose of supporting a nuisance claim:

> [235] The plaintiffs respond by pointing out that, whether title must be held at the keyoh/sadeku level or some broader collective of the Dakelh more generally, the members of their particular sub-tribe belong to both categories, and this should be sufficient standing to ground a claim in nuisance, particularly in the present circumstances where a formal declaration of title is not being sought. They expressly plead this point in their Reply filed in February 2017. I accept this aspect of their argument.

[378] Turning to *Tsilhqot'in BCSC*, Vickers J. held that the *Tsilhqot'in* Nation was the proper title holder, despite argument by the Province that the bands comprising the Nation were the proper title holders.

[379] Although Vickers J. (at para. 439) began with noting that a relevant factor is who, historically, made decisions about land use and occupation he noted (at

para. 451) that the Province placed too much emphasis on the notion of a single decision-making body at the time reserves were established. He went on to downplay the search for a central decision maker, finding it akin to a search for an "organized society", a criterion the Supreme Court in *Delgamuukw* did not refer to.

[380] The Court of Appeal was more explicit. While accepting the fact that decision-making and governance traditionally took place on a localized level, it rejected the Province's submission that the absence of a pan-Tsilhqot'in governance structure was fatal to the claim of the Tsilhqot'in nation:

> [146] If the law adopted such a position, it might well be devastating to claims by groups such as the Tsilhqot'in. The judge found that Tsilhqot'in decision-making and governance traditionally took place on a localized level, typically within family or encampment groupings, depending on the season. Because of the fluidity of the group structure and the limits of available evidence, however, it would be impossible to trace those localized collectives into modern counterparts. If Aboriginal rights devolve only upon collectives that can show that they are the modern successors of groups that had a clear decision-making structure, no one would be able to claim Aboriginal rights on behalf of the Tsilhqot'in.

[381] On appeal, the Supreme Court did not deal with the issue of the rights holder, presumably because the Province did not appeal that aspect of the decision.

[382] Vickers J. emphasized the common culture and language of the Tsilhqot'in, as the plaintiff does here with respect to the Nuchatlaht:

> [470] I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other subgroup within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

[383] A crucial factual finding (which the Court of Appeal referred to at para. 147) was made by Vickers J. with respect to all Tsilhqot'in having been able to make use of the Claim Area:

> [459] Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish

> anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.

[384] Both Vickers J. and the Court of Appeal stressed that the identification of he rights holder must take account of the Aboriginal perspective. The Court of Appeal, at para. 149, said that was the *primary* perspective, and stated:

> [150] In the case before us, the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the proper rights holder.

[385] The Supreme Court of Canada has provided little guidance on this issue. In *Marshall;Bernard*, there was the brief reference in para. 67, which is quoted above. In *R. v. Powley*, 2003 SCC 43, a case concerning Métis rights in the Sault Ste. Marie region, the court upheld the trial judge's finding of a historic Métis community:

> [23] In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. Here, we find no basis for overturning the trial judge's finding of a historic Métis community at Sault Ste. Marie. This finding is supported by the record and must be upheld.

[386] These cases illustrate that determining the historic rights holder is a nuanced task. They establish that central control is not necessary for a larger collective to be the rights holder, and that the Aboriginal perspective must be considered. Indeed, the Court of Appeal said it was it was the primary perspective.

[387] Turning back to the facts of this case, a major difference between it and *Tsilhqot'in* is the finding in the latter that all members of the Tsilhqot'in Nation had rights over all the territory. Here the evidence is that local group Chiefs carefully guarded their hahauɬi.

[388] The plaintiff has argued that "community members enjoyed shared rights to access and use lands throughout the territory". Elsewhere in its argument the plaintiff characterised that as an *implied* right. The plaintiff relies on Mr. Dewhirst's

opinion to support that proposition. In turn, Mr. Dewhirst relied on this passage in *Drucker 1951*:

> These domains might be utilized by anyone of the owner's group, or even confederacy, with the understanding that it was by virtue of the chief's bounty, and subject to certain conditions. The conditions under which a group member was permitted to exploit a chief's territory expressed public acknowledgment of the legitimacy of ownership.

[389] This does not go as far as to say there was an implied right of use; rather it indicates use required permission of the owner of the hahauł̓i. And, as I have said above, tribute often had to paid to the Chief for use of his hahauł̓i. Unlike the Tsilhqot'in, the Nuchatlaht *did* distinguish amongst themselves at the local group level as to the right to harvest resources.

[390] The plaintiff says a key criterion, and one relied on by Vickers J., is the common culture and language (above para. 382). That criterion is not helpful in this case because all the Nuu-chah-nulth, in particular the northern groups, share a common culture and language. The bulk of the ethnographic evidence in this case concerned the Nuu-chah-nulth as a whole. As I said, Dr. Drucker only devoted two pages to the Nuchatlaht his book. Further, there was inter-marriage and a moving back and forth between not only local groups, but also the neighbouring Nations.

[391] All that said, the Nuchatlaht local groups did identify themselves as Nuchatlaht. They did have a confederacy, even if it was ceremonial as described by Dr. Drucker. They shared a summer village, and there was some sharing of resources with permission of the hahoulthle owners.

[392] It seems to me that if it is wrong to over-emphasize central decision making in a larger collective, as indicated by the Court of Appeal, it must also be wrong to over-emphasize the ownership of the hahoulthle at the local level.

[393] In both *Tsilhqot'in* and *Saik'uz* the Province argued the appropriate rights holders were local groups. In both cases that argument was rejected. In *Tsilhqot'in*, Vickers J. remarked (at para. 445) that in all the cases he reviewed, the relevant historic community was the larger First Nation that existed at the time of first contact

or sovereignty. In *Delgamuukw*, as I described above, the trial judge found that the rights holders were the larger Nations, not the constituent Houses, and the Supreme Court did not weigh in on the point. The Province, therefore, has not cited a case concluding the rights holders were the equivalent of the Nuchatlaht local groups.

[394] I think it is significant to note there are no competing claims here. The plaintiff has framed its action to avoid overlaps. Notice of this action was given to the neighbouring Ehattesaht and Mowachaht/Muchalaht First Nations, because of early concerns raised by the Province about overlapping claims. Notice of the action has also been posted in Nuchatlaht communities as part of the effort to locate documents. The Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-o-qui-aht First Nations were all involved as respondents and appellants in a document production motion in this case brought by the Province. All of this has not brought forward any intervenors.

[395] The Supreme Court in *Delgamuukw* (at para. 158) allowed for the possibility of joint Aboriginal title based on shared exclusive possession. Implied in this is the idea that more than one group can be a historic rights holder. One may ask why that would not apply when the two potential rights holders are the broader group and the constituent local groups.

[396] The possibility of joint Aboriginal title demonstrates some flexibility in the common law of with respect to the determination of the historic rights holder. In *Marshall;Bernard*, the Court said at para. 48:

> [48] …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.

[397] I see no impediment to the Nuchatlaht being the proper title holder, given the claim must always remain tethered to actual areas of occupation that meet the criteria of Aboriginal title. To hold otherwise in the circumstances of this case would down-play the Aboriginal perspective.

[398] I conclude that the Nuchatlaht are the appropriate or proper historic rights holder.

Local groups which may have amalgamated with the Nuchatlaht after 1846 – the Shuma'athat.

[399] I addressed the issue of whether the Shuma'athat joined the Nuchatlaht before or after 1846 and concluded it was the former. However, the plaintiff argued in the alternative that it did not make a difference to the outcome. The Province argues otherwise. I will address this issue here.

[400] I pose the issue in the form of a question: if, as I have held, the appropriate claimant group can be the larger Nuchatlaht collective, what in principle prevents that claim from being based on the pre-1846 occupation of a local group which merged after 1846?

[401] The Province's answer, relying on *Delgamuukw*, is that Aboriginal title is inalienable. Elaborating on that in its written argument, it says:

> This does not mean that the Nuchatlaht local groups could not or did not politically amalgamate after the date of the assertion of sovereignty. Nor does it mean that the modern-day Nuchatlaht could not obtain a declaration of Aboriginal title as a representative of its collective membership if they satisfy the legal test. It does mean, however, that any Aboriginal title lands of the distinct groups who make up the modern-day Nuchatlaht are not merged into a single collective ownership, and they are separate or separable.

[402] I do not agree with the Province. I first note there is nothing in *Delgamuukw* to indicate the court was considering an Aboriginal group merging with another and bringing its land holdings – or Aboriginal title claim – with it. In fact, to my knowledge and that of counsel, this is the first case in which the issue has been raised. Moreover, the word "alienate" does not fit this scenario. The Shuma'athat did not alienate their land to the Nuchatlaht collective. Rather, they became part of that collective and merged their holdings into that of the larger collective which, on the plaintiff's argument, has the legal consequence of allowing the larger collective to be the proper title holder of the merged territory.

[403] It seems clear from the following excepts from *Delgamuukw* that the court was concerned with a sale or seizure of aboriginal lands and not the situation we are dealing with here:

> [125] The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands…
>
> …
>
> [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.
>
> …
>
> [129] It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements".
>
> [Emphasis added.]

[404] Allowing the Nuchatlaht claim to be based on one that may have been available to the Shuma'athat had it still been a separate group invokes none of these concerns. In fact, those concerns *would* be realised if I were to accept the Province's argument. There is no group that now identifies as the Shuma'athat. (Nor is there currently any other current local group.) This is not because their descendants have disappeared; rather it is because these groups have become part of the Nuchatlaht. To not allow the Nuchatlaht to make the broader claim would result in the disappearance of an Aboriginal title claim to what was formerly Aboriginal land in 1846 because of an amalgamation and shift in self-identity.

[405] One of the concerns expressed by the Province was that a descendent member of a local group which joined the Nuchatlaht after 1846 might come forward in the future and make a claim on behalf of the local group. That is an unlikely scenario, given the notice given to the Nuchatlaht and neighbouring communities of the claim, and that, on Dr. Kennedy's evidence, with a few exceptions it is now impossible to trace local lineages. Moreover, if there were to be a declaration of Aboriginal title in favour of the Nuchatlaht over land formerly occupied by the Shuma'athat, that would become a concern of the Nuchatlaht and not the Province.

[406] I conclude that territory which could have been claimed by groups which merged or became part of the Nuchatlaht after 1846 can be included in a claim brought by the Nuchatlaht on its own behalf.

B. Current title or rights holder and continuity

[407] I now turn to the issue of the current rights holder.

[408] The main legal debate between the parties is whether the plaintiff need show a continuing and present connection to the land being claimed.

[409] The Province points to the following underlined portion of Lamer C.J.C.'s judgment in *Delgamuukw* as support for the proposition that in *all* cases an Aboriginal title claimant must show a substantial connection to the land from pre-sovereignty through to the time of the claim:

> [150] In *Vanderpeet*, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's culture" (at para. 55). The latter stood apart because they "made the culture of that society distinctive ... it was one of the things which truly made the society what it was" (at para. 55). The same requirement operates in the determination of the proof of aboriginal title. 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 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. [emphasis added]

[410] However, immediately following this, Lamer C.J.C. embarked on a discussion of continuity under the heading “If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation.” In my view, the comment in para. 151 was meant to address the case where present occupancy was being used as proof of occupancy at sovereignty.

[411] This was also the view of Cromwell J.A., as he was, when writing for the Nova Scotia Court of Appeal in *R. v. Marshall*, 2003 NSCA 105, whose analysis I adopt. He noted the absurdity of the opposite interpretation:

> [164] find it difficult to reconcile this statement with the earlier one to the effect that, in title cases, the "integral to the distinctive culture test" is "... subsumed by the requirement of occupancy ..." (para. 142). In one case, occupancy at sovereignty is enough, whereas in the other, occupancy plus ongoing substantial connection is required. Moreover, any requirement for ongoing substantial connection with the land seems at odds with the purpose of s. 35(1) because insisting on post-sovereignty continuity would tend to "... perpetuat[e] the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land": para. 153.

[412] On the further appeal of *Marshall*, the Supreme Court of Canada overturned the Court of Appeal’s finding of Aboriginal title, but not on this issue. At the outset of this section, I quoted McLachlin C.J.C. I here emphasize the following from it:

> [67] The third sub-issue [raised by the parties] is continuity. The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. 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. Continuity may also be raised in this sense. 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.]

[413] As Vickers J. noted in *Tsilhoqot'in BCSC*, McLachlin C.J.C. was linking the issue of continuity to the issue of the appropriate claimant. In the latter part of the paragraph, she was referring to the situation where current occupation is being used as proof of past occupation.

[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 he 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?

[415] With that in mind, I do not think there can be any serious issue that the current Nuchatlaht are sufficiently connected with the historic Nuchatlaht who used and occupied the Claim Area in 1846. The Province has partially admitted this in its Response to Civil Claim that I set out above at para. 20.

[416] The local groups the Province has focussed on were part of the larger Nuchatlaht collective. There is no evidence of current local groups.

[417] When British Columbia joined Canada in 1871, the Nuchatlaht became a band under the *Indian Act*. The evidence is that the present Nuchatlaht do not draw any distinction between band membership and Nuchatlaht community membership. There is no evidence of any self-identification with former local groups.

[418] Put simply, the local groups have now been subsumed by the larger Nuchatlaht Nation which is the appropriate and proper present-day claimant. As I have said, to hold otherwise would be to ignore the Aboriginal perspective.

[419] Moreover, although not argued by the parties, this is in accord with art. 3 of *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which provides that Indigenous peoples have the right to self-determination, which incudes

the right to determine their political status. Under s. 2(a) of the *Declaration of the Rights of Indigenous Peoples Act* SBC 2019, UNDRIP is incorporated into the province's laws.

XI. <u>Has the plaintiff proven its claim to Aboriginal Title?</u>

A. The Claim Area

[420] In the Background and Overview section, I set out a map of the Claim Area. The Claim Area is based on Dr. Drucker's Map 3, which I dealt with above at para. 144, and in part, Dr. Drucker's equivalent map for the neighbouring Mowachaht to the south. The Claim Area was then reduced to eliminate any overlap of territorial claims by the Mowachaht and the Ehattesaht to the north. Most significantly, from the point of overall territory, this eliminated any claim to the area north of Esperanza Inlet, in which several traditional Nuchatlaht sites are located.

[421] It will be seen that the northwest corner of the claim boundary loops south-east to avoid including Opemit and nearby land on a peninsula. This was for two reasons. First, the plaintiff excluded Opemit from the claim along with all other Indian reserves. Second, Dr. Drucker's Map 3 shows the same boundary for Nuchatlaht territory because he noted that Opemit was an Ehattesaht village. I dealt with this earlier at para. 174.

B. Legal Test for Aboriginal Title

[422] In the introduction, I set out the requirements for a claim to Aboriginal title as stated by the Supreme Court in *Tsilhqot'in*. For convenience, I will repeat it here:

> [50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of

> settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

[423] As I also noted, the plaintiffs seek to prove their occupation at the time of assertion of sovereignty from the historical record, as opposed to relying on continuity of occupation. This leaves a two-part test for this case: sufficiency of occupation and exclusive occupation. Apart from that, a major issue is whether the Nuchatlaht is the proper claimant group or title holder, which I dealt with above.

1. Sufficiency of Occupation Requirement

[424] To ground a claim for Aboriginal title, there must be "sufficient occupation." The latter part of the above quoted paragraph from *Tsilhqot'in* makes it clear the analysis is a nuanced one. Certainly, only a temporary physical presence is not sufficient. The use or occupation must be more substantial than a claim for Aboriginal rights, as the Supreme Court said in *Marshall;Bernard*:

> [77] The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams, Côté*.

[425] While there must be physical occupation, it may be established in several ways. In *Delgamuukw*, the Supreme Court said:

> [149] However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title*, supra, at p. 73; also see Cheshire and Burn, *Modern Law of Real Property*, supra, at p. 28; and Megarry and Wade, *The Law of Real Property*, supra, at p. 1006. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, supra at pp. 201-202. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities,

> and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at pp. 758.

[426] In *Tsilhqot'in*, the Supreme Court elaborated on what constitutes 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.

2. Exclusivity of Occupation Requirement

[427] In *Tsilhqot'in*, McLachlin C.J.C. appeared to approve of the High Court of Australia's remark that the elements of the test for Aboriginal title cannot be analysed independently of one another:

> [31] Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In Western Australia v. Ward (2002), 213 C.L.R. 1 (Australia H.C.), the court stated as follows, at para 89:
>
> > The expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.
>
> [32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title.

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

[428] For what it is worth, I agree that a more holistic approach is preferable. For example, it is not apparent to me why exclusivity should not be considered as part of the sufficient occupation test. Nevertheless, in *Tsilhqot'in* (following *Delgamuukw*), exclusivity of occupation was articulated as a separate test:

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

[429] In the subsequent paragraphs, the Court in *Tsilhqot'in* elaborated on what amounts to exclusive possession:

> [48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

[430] The Court noted, at para. 49, that exclusivity "must be approached from both the common law and Aboriginal perspectives and must take into account the context and characteristics of the Aboriginal society."

[431] I think it almost goes without saying that the ability to exclude others refers to other Aboriginal groups, and not to Western colonisers or explorers. To interpret it

otherwise would be to indirectly incorporate the doctrine of *terra nullius* into the test for Aboriginal Title.

C. Discussion

1. Which parts of the Claim Area has the Plaintiff proved it sufficiently occupied?

[432] The plaintiff's approach to proving occupation and entitlement to the Claim Area changed in emphasis over the course of the trial.

[433] As discussed above, in its response to a demand for particulars, the plaintiff eschewed proving its claim through the identity or location of local groups comprising the Nuchatlaht in 1846, although it said "the evidence will make reference to the local groups referred to by Drucker." In response to a question posed by me, the plaintiff explained this further:

> What the Plaintiff was saying here is that it did not intend to prove the identities of the local groups that comprised the Nuchatlaht in 1846, nor to prove the internal boundaries of the territories (*hahoulthle*) of those local groups within the broader Claim Area. The reason is that it is unnecessary to do so (and may be impossible). As the foregoing discussion has shown, Aboriginal title vests at the community level, in this case the Nuchatlaht, even where ownership of particular parcels of land traditionally resided within smaller sub-groups. Thus, the identity and location of any specific *hahoulthle* within the Claim Area at 1846 are irrelevant to Nuchatlaht's proof of title. (Though in light of the Province's position that *Shuma'athat* was not a Nuchatlaht local group in 1846, it became necessary to discuss them.) …

[434] The plaintiff explained why, in light of that, it would nevertheless refer to the local groups described by Dr. Drucker:

> … although the Plaintiff did not intend to prove the territorial holdings of individual local groups, the Plaintiff's evidence would refer to the existence of those local groups as part of its discussion of Nuu-chah-nulth social structure. The Plaintiff's evidence described the existence of local groups, and the *hahoulthle* system, as part of its discussion of exclusivity – i.e., to provide evidence of the Indigenous perspective concerning exclusive ownership of defined territories. … However, while it was necessary to describe this system in a general sense, it was not necessary to prove the identity or location of any particular local group or *hahoulthle* within the Claim Area.

[435] The existence of local groups and their sites in the Claim Area did, therefore, take up a substantial amount of trial time, both because the plaintiff emphasized this evidence and because it was a major issue for the Province.

[436] However, the only direct evidence of specific area usage or occupation identifiable to the Nuchatlaht were the villages that the various local groups inhabited, and the confederacy village of Lūpȧtcsis. What little evidence there was indicated that the Nuchatlaht travelled between their villages by canoe. As I said earlier, the creators of CMTs and archaeological sites could only be inferred from occupation of the adjacent areas. Further, there was no evidence before me of fishing sites separate from the settlement sites or, for that matter, how the Nuchatlaht or Nuu-chah-nulth fished.

[437] After the trial, I asked for further submissions on, amongst other things, how occupation of the *whole* Claim Area could be inferred from the local village sites and the evidence of CMTs and archaeological sites. The parties provided written submissions and there were three further days of argument on the issue. I will refer to these as the supplementary argument and hearing.

[438] At the supplementary hearing, the plaintiff emphasized it was advancing a territorial claim. It argued, appropriately, that an Aboriginal title claimant was not limited to the areas of specific occupation or cultivation. In its supplemental written argument, the plaintiff said:

> However, an Aboriginal title claimant is not obligated to prove occupation through this sort of "ground up", site-specific approach. As the SCC explicitly noted in *Tsilhqot'in* [at para. 38], "[A] consistent presence on parts of the land may be sufficient, but [is] not essential to establish occupation." Rather, what is required to establish sufficient occupation is that "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."

[439] The plaintiff said that it's claim was proved in a "top down fashion":

> Accordingly, the Plaintiff has approached this case in a "top down" fashion – i.e., beginning with the "tract of land", the area that was mutually understood by Nuchatlaht and its neighbours to be Nuchatlaht-owned territory in 1846, and then turning to other evidence to fill in the picture of what was going on within that area at the time. The function of this evidence is not to map out

> the specific areas that the Nuchatlaht used, but to show that the Nuchatlaht's territorial assertions to the area in 1846 were not "purely subjective or internal"[8] – rather, the evidence supports the inference on a balance of probabilities that in 1846 the Claim Area taken as a whole was "regularly used" and was under the "effective control" of the Nuchatlaht.

[440] This reliance on recognized borders was a major shift in the plaintiff's prior emphasis. The starting point was the boundary drawn by Dr. Drucker in Map 3 and the neighbouring Mowachaht boundary, which was presented in another figure from Dr. Drucker. The plaintiff then noted subsequent maps showing the same boundary, including Mr. Dewhirst's opinion. All of those, however, relied on Dr. Drucker's boundary with no additional research of their own.

[441] The plaintiff also relied on a map showing the Mowachaht/Muchalaht traditional territory contained in a 2005 forestry agreement with British Columbia. This is of limited relevance. Its provenance is recent, there is no mention of the Nuchatlaht on the map, and the agreement provides that it is not an acknowledgment by British Columbia of a Mowachaht/Muchalaht territorial land claim.

[442] In the end, the evidence regarding the boundaries is limited to Drucker and his Map 3. Its repetition in subsequent citations does not make for further evidence.

[443] I do not think a territorial boundary – even if recognised by others - is enough to show sufficient occupation on its own. In emphasizing territorial boundaries, the plaintiff ignores what followed in the part of paragraph 38 from *Tsilhqot'in* which they quoted from in their argument set out above (para. 438). This emphasizes that there must have been a strong presence over the land:

> … 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. …

(The full paragraph is quoted above at para. 426.)

[444] Moreover, Dr. Drucker's evidence of the boundaries only goes so far. It does not assist in distinguishing between uses of the land which are amenable to

Aboriginal rights as opposed to title. In his narrative, his focus was on how the local group's boundaries were well-defined. On any analysis, I do not think Dr. Drucker's notation of the boundary can by itself establish sufficient use of or occupation of the total Claim Area as is required in the test for Aboriginal title.

[445] The question then becomes: over which parts of the Claim Area has the plaintiff proved use or occupation?

[446] I set out much of the evidence for this above, and will here draw my conclusions, where necessary elaborating on what I have said already and add a focus on geographic location.

[447] The use of the various Nuchatlaht local village settlements and camps in 1846 would be sufficient to establish a claim to title to those areas, and the Province does not argue otherwise. However, as I have said, they have mostly been made into Indian reserves and thus have been excluded from the claim. Nevertheless, their location is key evidence for the claim over the larger area.

[448] The approximate location of these sites was discussed by Dr. Kennedy in the context of her analysis of the local groups. To the extent that her evidence diverges from Mr. Dewhirst, I accept her evidence. I find Dr. Kennedy is better qualified to analyze the historic documents, and while I have not accepted her opinion on all issues, she has been more measured and provided backup for her opinions. Mr. Dewhirst tended to make broad conclusions without foundation. As I said above, his omission of Drucker 1983 affects the credibility of his all his opinions. For the same reason, I also prefer Dr. Lovisek's evidence regarding the history of the area and the people.

[449] The Province prepared the following table summarising Dr. Kennedy's evidence.

Location	**Local Group**
nucaal (nutcal / nuja·l / neŭchāt'l) / lupatcsis (klŏpātchăssīs)	Tasisath / Nuchatlaht
u'asis / Port Langford	Tasisath / Nuchatlaht
apaqtu (apa·qtū)	Tasisath / Nuchatlaht
kimahtis / Rosa Harbour	Tasisath / Nuchatlaht
o'astea (ʔuʔa·sCa / owossitsa /fishery at Snug Cove / Owossitsa Creek / Owossitsa Lake)	Tasisath / Nuchatlaht
Brodick Creek / Snug Cove	Jala'th / Cha tla ath
ki'nmatis at Rosa Harbour ("other side of the Opemit IR 4 Peninsula")	i.Wasʔath / Ei'was ath
ki'matis (similar / same as Ei'was ath location at ki'nmatis	Shin Kwa ath / Shinkawaudeh / šinkwaʔatḥ
šu·ma·tḥ / cō'ōma	Shuma'athat / co'oma'aht
long beach site in Mary Basin near yutckhtok	Shuma'athat / La'isath / Tla' is aht

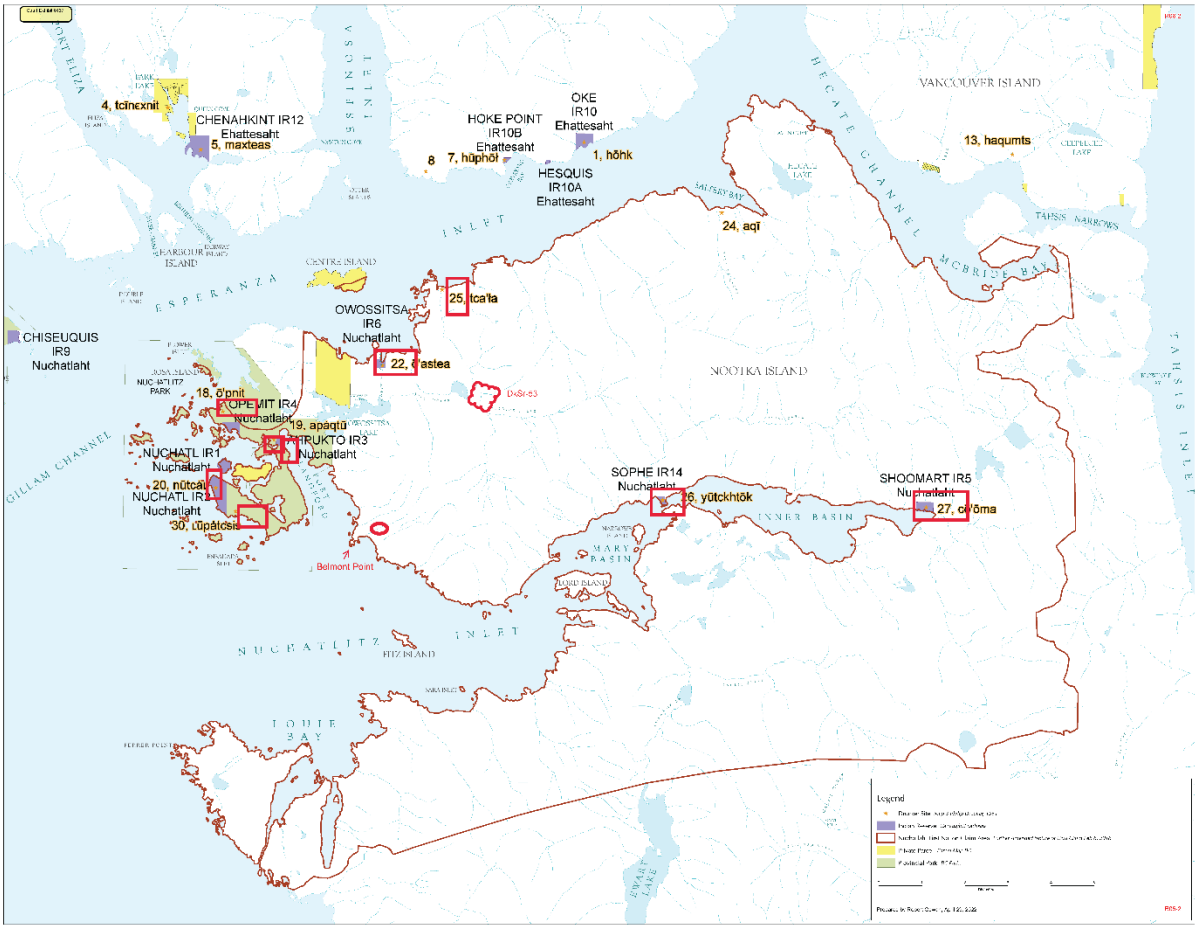
[450] With respect to the Jala'th, in her written opinion Dr. Kennedy said the group had amalgamated with the Nuchatlaht by 1846. The Province points out that in her direct evidence, she questioned this. However, in my view, this was more of an afterthought in the context of a question concerning a different matter. I will therefore be guided by her original opinion.

[451] With respect to the Shuma'athat, I dealt above with the debate as to whether they were part of the Nuchatlaht in 1846 or merged with them afterwards. I concluded it was likely the former. However, I also concluded that the result would be the same if they merged later because they brought their territories with them, and the plaintiff could base its claim on those holdings.

[452] Not included in the preceding table is Aqī. I dealt with Aqī above at para. 155. I do not think it has been demonstrated that the site was occupied in 1846.

[453] In summary, I find that all the sites in the preceding table were Nuchatlaht sites of occupation in 1846. In the alternative, as I have said above, if the Shuma'athat (or any other group for that matter) merged with the Nuchatlaht after 1846, the Nuchatlaht are the proper claimant group for that territory.

[454] In order to give a picture of the geographic spread of these sites, I have annotated the following map, drawing squares at their approximate locations. In addition to the village or settlement sites, I have indicated the location for the CMT site DkSr-53 which I have referred to and come back to later. I have drawn a circle at the location of another CMT site near Belmont Point which I refer to later. The map also shows the Drucker Map 3 site numbers and the borders of the Claim Area. I stress that the map is for illustrative purposes only. The locations are approximate, and the squares and circles are not to scale.



[455] Looking at the map, it will be noted these settlements are focussed on the west side of the peninsula between Esperanza and Nuchatlitz Inlets. With respect to the coast of Nuchatlitz Inlet, including Mary Basin and the Inner Basin, the only settlements noted by Dr. Drucker or the experts were Cō'ōma at the far end of the Inner Basin and Yūtckhtōk at the narrows.

[456] When I pointed this out at the supplemental hearing, the plaintiff argued that a document introduced by Dr. Kennedy for a different purpose showed the use of Nuchatlitz Inlet. The document was a list of place names transcribed from a recording of an interview that Dr. Andrea LaForet of the Royal B.C. Museum conducted of an Ehattesaht elder, Joseph Smith, in 1979. The document is primarily a list of place names following a notation or heading: "Chief Felix Michael had the rights to the shoreline from:".

[457] Dr. Kennedy's only purpose in referring to the document was to illustrate the interviews available at the B.C. Museum and as a partial glossary of place names. She did not refer to it as evidence of occupation by the Nuchatlaht pre-1846. Further, the plaintiff did not cross-examine Dr. Kennedy to see if she could elucidate the document.

[458] The plaintiff's reliance on the document was a change in their earlier position regarding the reliability of the B.C. Museum tapes, translations in general and this document in particular. With respect to the former, in its original closing argument (i.e., before the supplemental hearing was scheduled), the plaintiff stated:

> The Plaintiff submits that the tape recordings relied on by Dr. Kennedy are not reliable and should be given limited weight. Most of the recordings were done in English, which as Dr. Kennedy states, adds bias into the interview, affecting its reliability. Tapes are often unclear. Many of the tapes do not have true translations or transcriptions associated with them, or the manner of translation is unknown.

[459] With respect to this specific document, in their original argument the plaintiff highlighted the concerns that Dr. Kennedy herself noted with respect to its reliability. Dr. Kennedy said:

> Joseph Smith and Esther Smith were knowledgeable members of their community. Dr. LaForet conducted the interview in English, but only part of the interview was recorded, though she produced notes on the entire session using her limited understanding of linguistics. The existing tape-recordings contain additional information not captured in the brief notes, which focus on providing transcriptions of the place names. Moreover, the scale of the map on which named locations were marked is not of a sufficient ratio to now ascertain precise locations of these places.

[460] Another issue with this document is that Chief Felix Michael was born some 50 years after 1846. The reference to his holdings were presumably as Chief, which he became in 1914.

[461] In view of all these factors, I do not think this document proves occupation of this area in 1846.

[462] I turn now turn to the CMT evidence, which I set out at length above.

[463] There is only one identified location which can be classified as interior – DkSr-53. Only 6 of the 71 CMTs here pre-date 1846.

[464] Another site relied on by the plaintiff (identified as Site #6 in its supplemental submissions), not far from t'cala, refers to Borden number DlSr-99. This site had 54 dated samples. One was dated as 1703, which pre-dates when the Tacisath – the founding group of the Nuchatlaht – moved from Tahsis to the Claim Area. The balance post-dated 1846.

[465] The plaintiff identified several other CMT areas, which it grouped into sites it referred to as sites 1-4. These sites had been identified by archaeologists in preparing site alteration applications. As acknowledged by the Province, these do show pre-1846 cedar harvesting and use.

- One of the locations is near Aqī, which as I noted has not been shown to be an existing site in 1846.

- Site 2 includes 3 areas. Two of these are close to the Sophe Reserve/ Yutckhtok/Drucker site 26. The third is near Belmont Point, near the entrance to Port Langford. It is not near a former Nuchatlaht site.

- Site 3 is near the Owossitsa reserve/Drucker Site #22: o'astea.

- Site 4 comprises 2 locations, to the east and west of tca'la: Drucker Site #25

[466] Next, there are the CMT sites identified by Mr. Earnshaw in his surveys for this litigation. I concluded above that his evidence here is not helpful as he did not have permits to do sampling and on his own acknowledgement, he was "just walking lightly on the land and viewing what was visible". There is no reliable dating.

[467] Finally, with respect to CMTs, there are the inland areas identified by Mr. Earnshaw as having "CMT potential". I concluded above this evidence cannot be used to prove the existence of CMTs, much less their dates.

[468] The plaintiff also relies on the location of archaeological sites. Many of these are midden sites. I do not agree with the Province that the ones on the foreshore are not relevant because they are not in the Claim Area. Rather, they might be able to elucidate use of the immediately adjacent claim are, whether through further expert evidence (of which there is none) or through the possible drawing of inferences. However, I do agree with the Province that the 500 to 2000-year-old date range does not assist to show Nuchatlaht occupation without other evidence because, again, this pre-dates when the Tacisath moved to the Claim Area.

[469] Mr. Earnshaw noted burial sites mostly along the coast. However, these were not dated, nor are they directly attributable to any group or Nation. To the extent it can be inferred that they are Nuchatlaht - such as ones found near Lūpȧtcsis or Nutcal - they do not advance the territorial claim beyond the general area of those sites.

[470] The plaintiff also relies on a graveyard in Opemit, which is located outside the Claim Area. I dealt with Opemit earlier (para. 174). Given that I have held that

Opemit was likely a Nuchatlaht site in 1846 there is no point me going into the somewhat lengthy debate on whether the graveyard was Nuchatlaht or Ehattesaht.

[471] Lastly, the plaintiff relies on submissions made to the McKenna-McBride Commission in 1914 and the Ditchburn-Clark Commission in 1922, which I referred to beginning at para. 162.

[472] With respect to the McKenna-Bride commission, the plaintiff relies on four of the requests made for additional reserves. Three of these are either close to or adjacent to the Owossitsa, Shoomart and Sophe reserves. The fourth refers to "five acres…at the mouth of the Outer Basin". It is not possible to ascertain a location for this within the broader area of the Outer Basin of, presumably, Nuchatlitz Inlet.

[473] Turning to the Ditchburn-Clark inquiry, the plaintiff relies on five out of the ten requests made for further reserve allotment.

[474] Two of the five sites are near or adjacent to the Owossitsa, Nuchatl and Ahpakto reserves.

[475] The third site request noted was "…sixty acres at the place marked W…on Nootka Island and which in between Belmont Point and Benson Point and almost directly behind Bare Island, at the bay, on both sides of the creek…". This site is not adjacent to a reserve. Although noted by the plaintiff as being near Drucker Site #19 – Apaqtu – that cannot be the case because Belmont Point is to the northwest of Benson Point, and Apaqtu is in turn north of Belmont Point.

[476] The fourth site request relied on by the plaintiff was "all the good land on timber limit 6724 along its entire fore-shore…where there used to be an Indian village, they can have the timber we want the land (Esperanza Inlet and south of Centre Island.)" It is not noted who the "we" and "they" are; presumably one refers to the Nuchatlaht and the other the Ehattesaht. The plaintiff locates this as being at or close to Drucker Site #25 – tca'la.

[477] The fifth and final requested site the plaintiff relies on was:

> an error when the Commission decided to give us that place at the point, and … at the place where Mary Basin and Inner Basin meet, as that is nearly all rocks, only about an acre could be of any use,… what we wanted was land at this the mouth of the Creek that flows into Mary Basin (or Outer Basin) North of the Island at the head of Mary Basin, we want fourty acres West of that Creek as that is good land (on TL 6709).

This is adjacent to the Sophe reserve.

[478] In summary, the general areas which I accept as evidence of Nuchatlaht occupation or use in 1846 are:

a) Those in the table above, at para. 448

b) The CMT areas, which plaintiff grouped into sites it referred to as sites 1-4. These are all near the accepted Nuchatlaht settlement and reserve sites, except for the site in group 2, which is located around Belmont Point on the north shore of Nuchatlitz Inlet not far from the entrance to Port Langford.

c) The three McKenna-McBride requests which, as I said, are close to or adjacent to the Owossitsa, Shoomart and Sophe reserves.

[479] On the annotated map, I have marked the CMT site near Belmont Point. The other areas that I accept show Nuchatlaht use are close to the village sites I highlighted, so they are not shown separately.

[480] From the map, it will be seen that there are large areas of the coast where, in 1846, occupation has not been demonstrated. This would be the case even if Aqī were included.

[481] Can I infer use and sufficient occupation of the whole Claim Area from this evidence? I do not think so. I am cognisant that in *Tsilhqot'in*, the Supreme Court stated in para 50. (quoted in full above):

> … Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

[482] However, the problem here is that evidence of this type of use and control and concept of ownership is absent for most of the Claim Area:

a) With respect to the interior, there is almost no evidence of use by the Nuchatlaht. Further, Dr. Drucker said that the Nu-cha-nulth treated the interior and coastal areas differently in terms of ownership and had far less knowledge of the interior. As I concluded earlier, I do not accept Mr. Dewhirst's view that Dr. Drucker's observation regarding "remote inland areas" does not apply to Nootka Island.

b) Regarding the coastal area, there are too many gaps for me to conclude that the whole coastal area was sufficiently occupied or used in a manner to constitute occupation. Other than the villages and camps, I have no evidence of specific coastal use. Nor do I have any evidence of Nuchatlaht (or Nuu-chah-nulth) fishing practices, other than the coastal round which involved moving from one established settlement or camp to another: see Drucker quoted above at para. 113. Those settlements or camps are included in the Nuchatlaht-occupied sites that I have identified. The dentalia fishing grounds noted on Drucker's Map 3 as Area A, sites 12, 14 and 16, are outside the Claim Area.

[483] There is no evidence of the territory of any local chief's hahoulthle beyond the village sites which may be inferred as being in in the relevant local Chief's hahoulthle. While I have concluded that the Nuchatlaht is the rights holder to the territories of the former Nuchatlaht local groups, that cannot expand the title to include lands which were not sufficiently occupied to meet the current test of Aboriginal title.

[484] I am also cognizant that in *Tsilhqot'in* the Supreme Court said at para. 38 that "…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 evidence is also lacking with respect to the whole Claim Area. Moreover, as I

said above, in the latter part of the paragraph the court said that a strong presence over the land is required.

[485] Whether this be called a territorial claim or not, I do not think that Dr. Drucker's boundary can fill the evidentiary gap.

2. The Nuchatlaht perspective and exclusivity

[486] I turn to the issues of exclusivity and the Nuchatlaht's ownership perspective. When I refer to the Nuchatlaht territory here, I am referring to the more limited areas that I have defined above, which would have been encompassed in a local chief's hahoulthle.

[487] I do not think the Province contests that with respect to local Chiefs' hahoulthle, the Nuchatlaht had a concept of ownership that meets the requirement for an Aboriginal title claim. As I described this above, the sense of ownership over land and resources was so heightened as to draw remarks from western people who first encountered the Nuchatlaht. The Nuchatlaht's concept of ownership matched or exceeded that of the common law.

[488] Turning to the issue of exclusivity, the Nuu-chah-nulth concept of ownership of land and resources included an expectation of exclusivity. Boundaries of the local Chiefs' hahoulthle were well known (although not in evidence).

[489] The court in *Tsilhqot'in* at para. 48 – set out in full above - said that "[e]xclusivity should be understood in the sense of intention and capacity to control the land…" The Province interpreted capacity to control the land as ability to defend it militarily from trespassers or invaders. It argued that the Nuchatlaht had "little capacity" to exclude others from using the Claim Area due to their relatively small population, except – possibly – when they were all gathered at the summer village of Lūpȧtcsis.

[490] However, as para 48 *Tsilhqot'in* shows, the analysis is more nuanced. *Marshall;Bernard* reinforces that. The court in *Marshall;Bernard* stated:

> [64] …. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.
>
> [65] It follows that evidence of acts of exclusion is not required to establish aboriginal title. 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.

[491] The capacity to control, then, must be looked at in relation to the intention of the claimant group and the surrounding evidence, including the way in which the society was organised. On any analysis, 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. Dr. Drucker noted that "intraconfederacy wars were very rare, almost unknown in fact except for one or two remote traditions": *Drucker 1951* at p. 220. There is evidence of fortifications, albeit not specifically identified to the Nuchatlaht, and access by the Nuchatlaht to rifles. The fact is that whatever "system" was in place appeared to have worked because there is no evidence of attack against the Nuchatlaht.

[493] The Province also focussed on lack of evidence that, as per Dr. Lovisek, the Nuchatlaht "collectively and overtly engaged in the enforcement of trespass". However, there is no evidence of acts of trespass that might have required some sort of enforcement or defensive action. As I mentioned above, Dr. Drucker reported his informants did not know of any instances of trespass. He noted that Chiefs

allowed the use of their resources to members of other groups, but as was said in *Tsilhqot'in* at para. 48 (quoted in full above), "the fact that permission was requested and granted or refused, may show intention and capacity to control the land".

[494] In my view the plaintiff has demonstrated an intention and capacity to control the land I found it occupied in 1846.

XII. Conclusion

[495] I conclude the plaintiff has not proved its claim for Aboriginal title to the overall Claim Area.

[496] That said, when I outlined the areas of occupation, I frequently used the language "near or adjacent to" reserves or accepted settlements. There *may* be areas of sufficient occupation or use that are near the reserves or fee simple land over which the plaintiff *may* be able to establish its claim to Aboriginal title. For example, if there are CMT sites that are adjacent to a reserve, the plaintiff may have a claim to them and the area between them and the reserve.

[497] However, the claim was not presented in that manner. I do not think it is open to me make more piecemeal declarations without hearing from the parties. And even if that were open to me, I would not have the capability to do so without more detailed maps showing precise locations along with further submissions.

[498] It may be that this case demonstrates the peculiar difficulties of a coastal Aboriginal group meeting the current test for Aboriginal title, given the marine orientation of the culture. For example, there will probably not be trails between one coastal location and another, given that the means of transport was primarily by canoe. This may be indicative of the need for a reconsideration of the test for Aboriginal title as it relates to coastal First Nations. That would be for a higher court to determine.

[499] If the plaintiff wishes to seek a declaration for smaller areas, it should set a further hearing to canvass the procedure to be followed. I stress that I am not pre-

judging any of the issues or whether a pleading amendment would be necessary. I am merely leaving it open to the plaintiff to come back before me to canvass these issues should it wish to do so. I ask that the plaintiff advise me of it's position on this within 14 days, or alternatively advise how much additional time it requires.

[500] If the plaintiff does not wish to advance this argument, the order will be that the action is dismissed.

[501] If costs need to be spoken to, a date should be arranged as soon as possible.

"E.M. Myers J."