



# Tools for Self-Governance and Self-Determination in the Aboriginal Law Realm

Assembly of First Nations  
Climate Change Gathering  
Whitehorse, March 3 and 4, 2020  
Drew Mildon

**WOODWARD & COMPANY**

“Once people have money, they don’t need respect.”

Tsilhqot’in Elder

“I believe. I believe the sun will rise tomorrow, and I believe I can make money doing this.”

Gord Downie

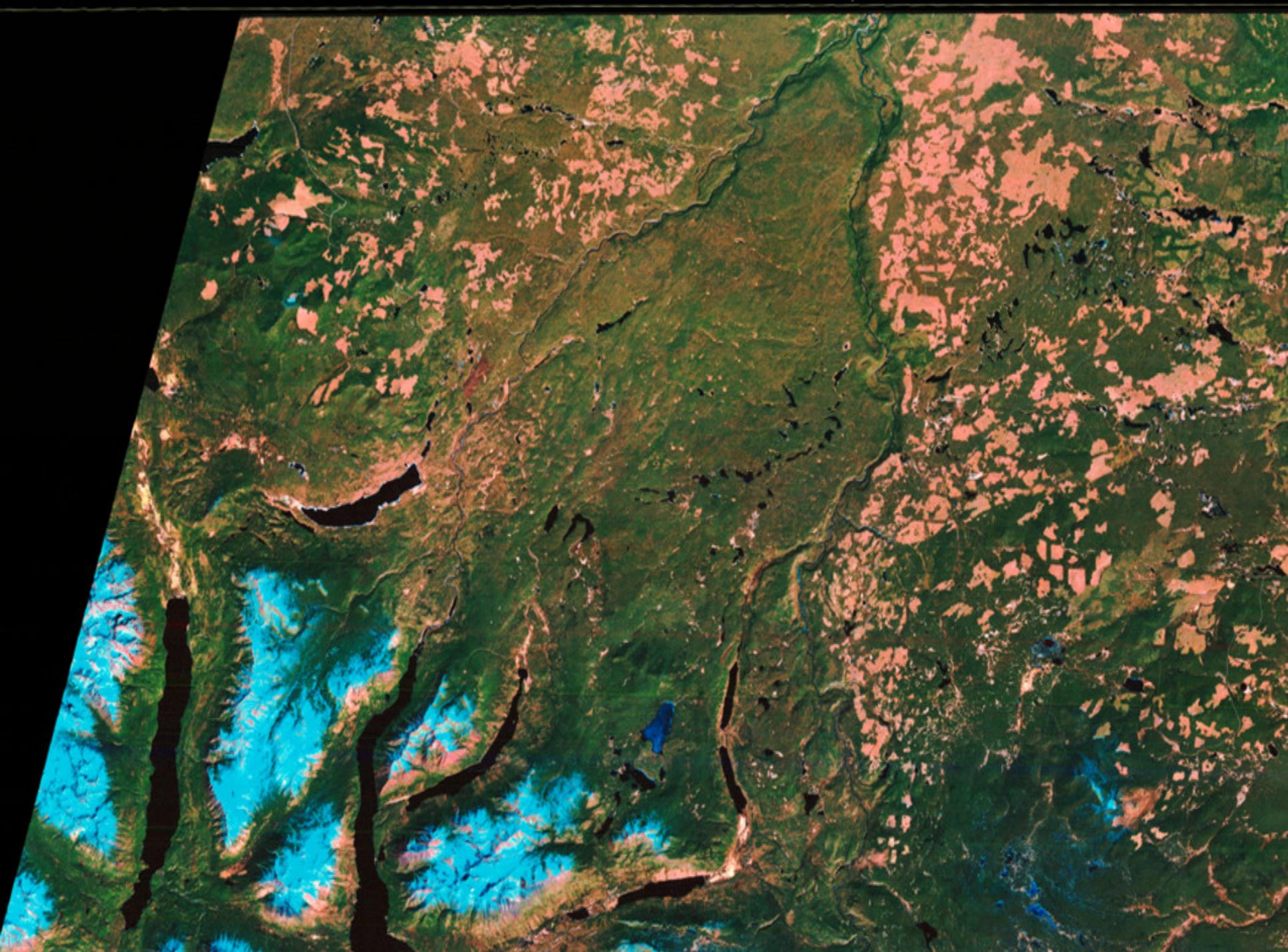
## ***Section 35 Rights***

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

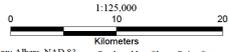
How do we put the decision-making power over lands, forests, and waters back in the hands of the rightful decision-makers?

A misty forest of tall evergreen trees, likely spruce or fir, with a dense canopy and a hazy atmosphere. The trees are silhouetted against a light, overcast sky. The overall tone is dark and atmospheric.

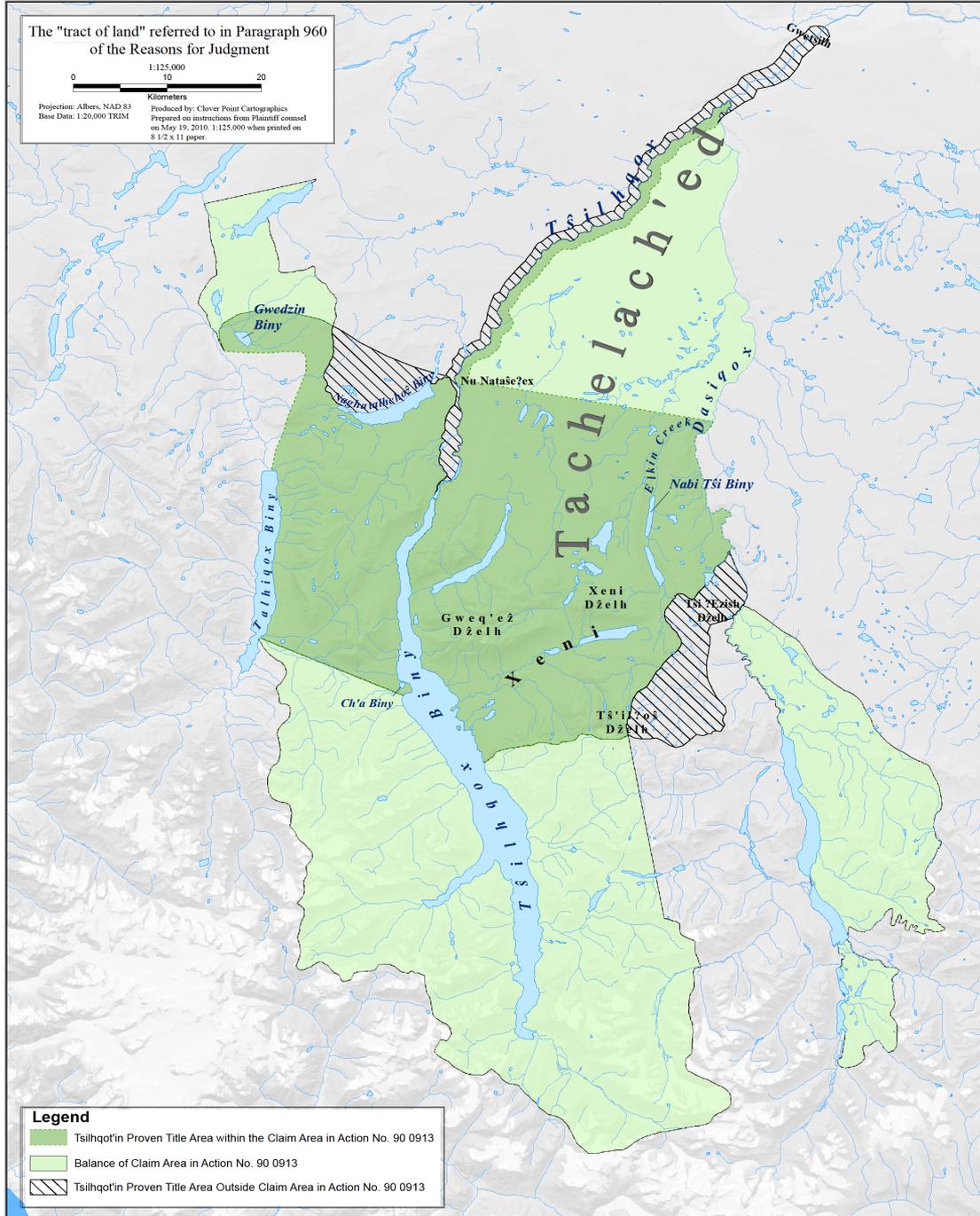
# Rights and Title



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



Projection: Albers, NAD 83  
Base Data: 1:20,000 TRIM  
Produced by: Clover Point Cartographics  
Prepared on instructions from Plaintiff counsel  
on May 19, 2010. 1:125,000 when printed on  
8 1/2 x 11 paper.



**Legend**

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



**Title**

# *Infringement of Title*

“the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public.” – at para. 71.

“

“...to constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation...” - at para 82.

“The Crown’s underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown’s fiduciary or trust obligation to the group.” – at para. 85.

“... incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.” – at para. 86.

“As such, the Crown does not retain a beneficial interest in Aboriginal title land.” – at para. 70.

“After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land.” – at para. 90.

# ***Public Interest***

“We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”

*Sparrow* at 331.



**Rights**

## ***Consultation Bar is Significantly Raised***

“At present, British Columbia **does not have a database** that provides **information on the individual species or wildlife or their numbers** in the Claim Area. The Province **has not conducted a needs analysis** which would inform decision makers on the needs of the Tsilhqot’in people related to their hunting, trapping and trading rights. Such an analysis would ensure those needs are addressed when planning and conducting forestry activities. The absence of a database or a needs analysis indicates that Tsilhqot’in Aboriginal rights in the Claim Area are not a priority with respect to timber harvesting and other forestry activities”.

- *Tsilhqot’in Nation* 2007 BCSC 1700, para 1293

## ***Justification Requires “Sufficient Credible Information”***

**“Tsilhqot’in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot’in Aboriginal rights, To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot’in Aboriginal rights in the Claim Area.”**

- *Tsilhqot’in Nation* 2007 BCSC 1700, para 1294

# ***Sustainable Management Obligation***

“My assessment of the evidence leads me to conclude that provincial foresters do practice sustainable management, within a narrow definition of sustainability. The main focus is on timber management and sustainability of the forest resource. Other government Ministries and agencies focus on their sustainability issues such as environment, land, wildlife and water. **There is no single government agency that views sustainability through a broad lens,** taking into account the values of the people affected by government decisions. Any model of sustainability that is driven solely by an economic engine is deficient if it is incapable of taking into account social values. This is particularly true where the model of sustainability affects Aboriginal people whose social values are so intricately connected to the land”.

- *Tsilhqot'in Nation* 2007 BCSC 1700, para 1301

A photograph of a dense forest of tall evergreen trees, likely pines or firs, shrouded in a thick mist or fog. The trees are silhouetted against a lighter, hazy background, creating a sense of depth and atmosphere. The overall color palette is muted, with various shades of blue, grey, and white.

# Impacts on Later Decisions

# *Nacho Nyak Dun v. Yukon*

- After a 7 year process, land use planning commission released a “Final Recommended Land Use Plan” protecting 80% of the Peel.
- Yukon responded by imposing a set of “core principles” that effectively would have turned the figures around (70% exploitable lands).
- Court agreed and found that Yukon failed to uphold the honour of the Crown -- quashed the Plan Yukon had approved, ordered the parties to return to the land use planning process.

“As a matter of interpretation of a constitutionally-entrenched treaty provision, s.11.6.3.2 cannot be given a plain reading interpretation divorced from the general framework of the Final Agreements. **The First Nations have given up their claim to undefined rights, title and interests in their Traditional Territories in exchange for, among other things, a comprehensive land use planning process on that territory.** The Government of Yukon agreed to pursue a planning process for the Peel Watershed.”

at para. 184



**Thank you!**