RECONCILIATION: GITXSAN PROPERTY AND CROWN SOVEREIGNTY

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Abstract

Using the Acts of Reconciliation, September 14, 1998, as a model, I argue that Canada, British Columbia and the Gitxsan can establish a respectful relationship acknowledging Gitxsan land tenure and their governance institutions. It is contended that the principal role the Federal Crown occupies toward the Gitxsan is protection of their rights and lax‘wiiyip from unnecessary Provincial infringements. In exchange for this protection, the Gitxsan can easily extend to Canada amnigwootxw rights (privileged rights of access for good deeds). Similarly, the relationship between the Gitxsan and the Provincial Crown could simply be based in xkyeehl (payment to the wilp).

It is suggested that until 1997 Gitxsan aboriginal title and associated rights have been limited to Reserve lands or site-specific subsistence activities. Although the Gitxsan have the option of pursuing proof of their title in Court, they continue to press for a negotiated settlement that recognizes their ayooks (laws) and governance procedures. The Gitxsan believe that the essence of their relationship with the Crown in right of Canada and British Columbia is situated in the construction of protocols for consultation when either Canada or the Province desires to enact legislation to access resources or settle foreign populations within the boundaries of their lax‘wiiyip. In the event that such acts limit Gitxsan access to their s. 35 rights or title, it is maintained by the Gitxsan that they have the right to compensation. As such, it is recommended that the second aspect of Gitxsan and Crown relations is situated in the development of indices for compensation. This case study uses the Proceedings at Trial for the Delgam‘Uukw (Muldoe) et al. v. R. in right of British Columbia and Attorney General of Canada [1991] 3 W.W.R. 97 trial heard from May 11, 1987 until June 30, 1990, the advice of various Sam‘ogits and Seem‘oogits in the Hazelton, Kispiox, Kitwancool and Kitwanga areas, and the literature on the history of the Land Question in British Columbia.
Acknowledgements

This dissertation is dedicated to the Gitxsan people and their struggle for parity in the land question, especially Maas Gaak (Don Ryan). Further, I wish to acknowledge the Gitxsan and Wet'suwet'en Seem'ogit and Seem'ogit who gave testimony at the Trial, the Judiciary, the Crown (Federal and Provincial) Lawyers, the Plaintiffs Lawyers, the support researchers for the Crown (Federal and Provincial) and the Gitxsan.

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Preface

When the Gitxsan Hereditary Chief’s office was located in Vancouver from 1987 until 1998, I went often and systematically read through the arguments taken to Court in 1984, the transcripts of the Proceedings from the Trial (1987 to 1991), and the evidence that was given in support of the Testimony for the trial in the British Columbia Supreme Court (1987 to 1991), as well as the Proceedings and arguments of the subsequent appeal to the British Columbia Court of Appeal (1992 to 1993). My familiarity with Colonial, Dominion and the recent Canadian Constitutional history of British Columbia First Nation concerns (including the fact that the oral tradition encompassed both the community's legal code and their rationale of how they held territory or rights) indicated that neither the Government of Canada nor British Columbia was aware of the significance of such knowledge, nor how they could use this information for both reconciliation or the future relationship.

Yet at the same time, after reading everything, contrary to the opinion of most Gitxsan (and other First Nation peoples in British Columbia) even though the Chief Justice limited his ruling to a very narrow aspect of law, I determined that his ruling in 1991 did yield a monumental victory for British Columbia First Nation Communities. The judgment in 1991 spurred the Provincial and Federal governments to design a process to settle the title question, however flawed it currently is. However, between the First Nation Summit, and Provincial and Federal representatives, the model for Treaty in late 1991 is the proposed 1978 solution, with a small textual modification in 1993 which did not require the community to “cede and surrender” its territory as a prerequisite to negotiations. The current model adopted, and endorsed by the Royal Commission on Aboriginal Peoples (1996), is still a cede and surrender land claim agreement that aims for certainty and finality, following the common law practice of purchasing title as stated by the Royal Proclamation of 1763. The existing Treaty Model does nothing to either address past grievances or to create progressive trust relationships.

In general, First Nation Communities have had very few opportunities in either the historic treaties or contemporary Land Claims Agreements to integrate their laws and administration into either Provincial or Federal law, such agreements as do exist have allowed the community to influence the livelihood of their members in a changing regional economy. Contrary to this, the Gitxsan, during their testimony, discussed their governance system, their social and political institutions, their allocation laws and how they desired Crown protection for their aboriginal rights and title interests throughout their traditional territories. More importantly, their testimony brought to light their desire to integrate their governance and laws with those of British Columbia in the area of resource management (trees, oil and gas and the delivery of education, social services and health care), and with Canada with respect to fish, migratory birds and environmental protection, in light of Provincial legislative objectives. The Gitxsan desire to enter into a formal alliance with Canada, in exchange for continued protection of their s. 35 rights throughout their lax ‘wiiyip, in order to reconcile their past occupation, both settlement and livelihood concerns, with that of the Newcomers, and to enter into a working relationship with the Province of British Columbia with respect to the management of resources in their traditional territories.

Given the legal-social environment in Canada with respect to both the content and protection of aboriginal rights and title, especially the Province of British Columbia, and after much discussion with the Maas Gak and a review of the current academic literature, it was apparent that the overall concerns of the Gitxsan were not being heard. Similarly, what was being written was limited to the trial, and analysis of this subject spoke only to the more general, that of reconciling aboriginal rights within the context of litigation, and not negotiation, nor was the Gitxsan’ negotiated platform was being discussed that looked to their law as its basis.
Chapter One

Be gentle on the lixs giigyet', for they are like children in the territories

In 1984, the Gitxsan² filed a statement of claim³ against the province of British Columbia seeking a declaration that they had the right of ownership of, and jurisdiction over, their house territories (wilp lax 'wiiyip). At this time the Gitxsan felt that they had exhausted all means available to them to negotiate an agreement with both the Federal and Provincial governments to settle the land question according to their traditions. The plaintiffs, 35 Gitxsan and 13 Wet'suwet'en⁴ hereditary chiefs (Seem 'ogits and Seem 'oogits⁵) alleged that since time immemorial, they and their ancestors had occupied and held jurisdiction over approximately 58,000 square kilometres in northwest British Columbia (lax 'wiiyip). They sought a judgment against the province of British Columbia that they had existing and continuing rights to ownership of, and jurisdiction over, 133 separate territories (98 Gitxsan and 35 Wet'suwet'en).

This dissertation contends that reconciliation of jurisdictional authority amongst Canada,

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¹ In a conversation with Wui Eelast (January 1998), I was asked to be respectful to the lixs giigyet (Newcomers) in the work, as until recently the Gitxsan regularly rescued them from the bush and came to the conclusion that it was important to make sure that it was known who was on the lax 'wiiyip in order that they may be safe.
² I use the contemporary spelling of Gitxsan, but recognize other spelling, such as Gitksan, as well as the difference between Gitxsen and Gitxsan. Also, as far as possible, the spellings of other Gitxsan words used in this dissertation are reflected in the British Columbia Supreme Court’s Proceedings at Trial, May 11, 1987 to June 30, 1990.
³ The Gitxsan and Wet’suwet’en Statement of Claim was filed at the Smithers Registry October 22, 1984 in the name of Delgam ‘Uukw, held at that time by Albert Tait.
⁴ The Wet’suwet’en, after the British Columbia Court of Appeal decision in 1992, were separately represented at the Supreme Court Hearings in 1997.
⁵ Seem ‘ogits refers to male hereditary chiefs, and Seem ‘oogits is the feminine form, and unless otherwise specified this dissertation uses the feminine term.
the Province of British Columbia and the Gitxsan can be based on Gitxsan ayouks of naa hlimoot\(^6\) (laws of sharing). More specifically, Canada could achieve jurisdictional certainty throughout the lax 'wiiyip from the Gitxsan through the extension of privileged access (amnigwootxw\(^7\)). British Columbia and the Gitxsan could attain a viable relationship by working out of consultation protocols, infringement guidelines, and indexes for compensation (situated in Gitxsan principles of xkyeeht\(^8\)) throughout the Gitxsan statement of claim area. It is suggested that the current perspective on the content of aboriginal title, as laid out by the Supreme Court, is sufficiently broad to negotiate an agreement based on Gitxsan lax 'wiiyip ownership and governance principles, as set out in the Acts of Reconciliation\(^9\). Lastly, drawing on the underlying principle of reconciliation, as articulated by Lamer C.J. in R. v. Van der Peet\(^10\), British Columbia, Canada and the Gitxsan people can build administrative relationships and develop the resources in the territories for the benefit of the Gitxsan and the Newcomers (Lixs giigyet) alike. Thus it is concluded that the principal aboriginal right of Gitxsan people is to be able to act within their legal and governance structures when engaging with either the Provincial or Federal governments.

When the Gitxsan went to Court in 1988, it is generally accepted in Canada that aboriginal title\(^11\) referred to the interest, unsurrendered by treaty or unextinguished by legislation,

\(^6\) A. Mathews Proceedings at Trial (1988) vol. 75 March 16 at 4672 [Mathews].
\(^7\) Amnigwootxw privileges are discussed in Chapter 3. A. Mathews, Proceedings at Trial (1988) vol. 73 March 14 at 4558 [Mathews].
\(^8\) Xkyeeht privileges are extended to individuals for access to resource locations after they have offered items of equal value to the wilp in question. M. McKenzie, Proceedings at Trial (1987) vol. 7 May 20 at 383, 418 to 419 [McKenzie] and A. Mathews, Proceedings at Trial, (1988) vol. 76 March 17 at 4721 to 4722 [Mathews].
\(^9\) Gitxsan and British Columbia, A Reconciliation Agreement between Her Majesty the Queen in Right of British Columbia and The Hereditary Chiefs of the Gitxsan, September 14, 1998.
\(^11\) "Aboriginal title" is considered to be sui generis in nature, as this title does not originate in English, French or First Nation property law. As such it appears that what determines the quality of "aboriginal title," is the nature of the surrender, not the content of the title before Crown declarations of sovereignty. This position suggests that only First Nation communities who have
of aboriginal peoples to lands which they traditionally used and occupied\textsuperscript{12}. At minimum, the Crown presently recognizes the rights of First Nation peoples to hunt, fish, trap and gather foodstuffs in areas of their traditional use and occupancy. However, although the Courts have accepted that aboriginal interest is a proprietary interest in the land, they have also held that these rights (to hunt, trap, fish, and gather) may in some situations be modified or abridged by federal and provincial fisheries and wildlife legislation. The Courts have accepted in theory that aboriginal title (whether based on use, occupancy or “Indianness”), like aboriginal rights (especially the right to hunt, trap, fish or gather) exists until surrendered, is modified by treaty, legislation or Land Claim Agreements. For communities who have yet to enter into Agreements, their rights to land and its use are still subject to a case-by-case evaluation.

Although the Supreme Court of Canada in \textit{Delgam'Uukw}\textsuperscript{13} has enlarged the quality of aboriginal title to encompass forestry and mining ventures, at the same time the Gitxsan (or other First Nation people) have not been able to obtain the legal redress necessary to sustain these rights following the destruction or degradation of the habitat by third parties who have obtained competing resource or land rights from the Crown. The Gitxsan, despite their dependency on fish and wildlife resources, have acquired no special power to allocate, regulate or manage these resources under provincial or federal resources management programs that will ensure their

\textsuperscript{12} P. Cumming and N. Mickenberg, \textit{Native Rights in Canada}, 2\textsuperscript{nd} ed., (Toronto, Ont.: Indian-Eskimo Association of Canada, 1972).

\textsuperscript{13} \textit{Delgam'Uukw (Muldoe) et al. v. R. in Right of British Columbia and Attorney General of Canada} [1997] 3 S.C.R. 1010. [\textit{Delgam'Uukw} [1997]].
continued access. Similarly, administrative policy and practice has for many years been based on the assumption that aboriginal rights and title have only effectively conferred upon their holders no more than a licence to enter into an area, and even this right is not held to be exclusive. In addition to maintaining the status quo with respect to the interpretation of aboriginal title and rights, the goal of the current Federal and Provincial Treaty making process still expects the First Nation community to further identify lands to be set aside for their exclusive use and to surrender their rights and title to their traditional territories in exchange for access to specific aboriginal right activity sites, subject to Crown jurisdiction. The Gitxsan have felt that this situation has been problematic.

Before 1997 it was generally assumed that the presence of the Crown had replaced First Nations' land interests on Crown lands through categorical denial of title to First Nations peoples and annexing what was considered to be “waste lands.” The Gitxsan, though they do not “farm”, have clear boundaries that mark the division of their wilp territories. These boundary markers vary from stone columns, blazed trees, the middle of running creeks, and named locations. Besides known boundaries and named locations, the Gitxsan cultivated berry patches through controlled burnings, used specific fishing sites, hunted animals in passes, knew the locations of all the bear dens, and practised selective harvesting of beaver and ground squirrels. In essence, the Gitxsan, as a group or individually, know the sum total of their land, (including the internal boundaries) through occupation and use. Those who could not demonstrate knowledge of its history through the recitation of the adawaak (oral histories) and through knowledge of the ayuk(s) (symbols of title) could not claim rights to it, thus with respect to Gitxsan title and tenure their lax 'wiiyip is an integral part of their social structure and the legitimate use of it is determined by birth, affinity, common residence, social status or some combination of these. Besides land use and tenure, the Gitxsan have a body of law that regulates access, use and, above all, the distribution of resources to the broader community.
Gitxsan law allows the individual the right to use the land, and to this end the Gitxsan have a viable system to determine who is a member of wilp or house. They also have laws and regulations that govern how secondary and tertiary rights are allocated to individuals outside of the wilp. Furthermore, the Gitxsan have mechanisms within their law that permit them to alienate or encumber their territory. These rights are limited, and in the long term do not diminish or abrogate the original owner’s right to claim the territory in question as their own. Finally, the Gitxsan have the means to control and ensure that individuals use the land and resources in accordance with the availability of the resource in question, and in a manner that does not endanger the security of the group, insofar as the consequence of a particular action is foreseen. In general, the Gitxsan, like other First Nation communities across North America

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14 For example, other Canadian First Nations peoples, such as the M’kmaq, Deneza and Inuit, claims to tenure are closely related to the subsistence resource and their political and social organization. The individuals in each of these societies are required to self-regulate their activities, and if any one person steps too far outside of the normal expected behaviours, they run the risk of being ostracized. Every person knows and observes sets of rules about how, where and when to hunt, fish or trap, and especially when not to hunt. At first glance, their property rights could be construed to be usufruct, in that the individual’s rights lie in the products, not in the territory itself. However, a usufruct perspective does not take into account the sense of belonging to the particular locations, or the relationship between the human and the animal. For the M’kmaq, Deneza and Inuit, these feelings of belonging to a location are born out of the distinct history they have with the particular territory in question, where the territory itself is infused with specific anthropomorphic characteristics as well as being layered with personal events of their ancestors. The animal-human relationship stems from the fact that when people appeared in the regions, they found the animals already there and considered themselves moving into an existing society, that of the animals. The relationship between man and the animals is interwoven, as man derives his status, according to Richard Preston (R. Preston, Cree Narrative (Montreal, Que.: McGill-Queens Press, 2nd Edition, 2002) at 212), not by seeking dominance over animals but according to competence and particular needs as the “other persons have,” and these “persons” are animals, fish and plant life and the land itself: Frank Speck has suggested the M’kmaq feel that animal life is “tribal,” and similar to the humans, only animals do not have man’s “technical gifts and powers” (F.G. Speck, “Penobscot Tales and Religious Beliefs” (1935) 48 Jour. of Am. Folk. 1 at 13). For the Deneza the land has been transformed, according to Scott Rushford, by their ancestors into a place that is able to support their life (S. Rushford, Bear Lake Athapaskan Kinship and Task Formation (Ottawa, Ont.: National Museum of Man, Mercury Series, 1984) at 38). They have been taught that the animals have instructed them on how they are to be captured for food, and what must be done to secure their continued presence (P. R. Coutu and L. Hoffman-Mercredi, Ikonze: The Stones of Traditional Knowledge, a History of Northeastern Alberta (Edmonton, Alta.: Thunderwoman Ethnographies, 1999). Similarly, the
not only have occupied distinct territories according to systematic hunting, fishing, trapping and gathering patterns over long periods, but also have stable systems of political authority, land tenure, and resource harvesting schemes.

This dissertation, as an interdisciplinary thesis encompassing law, history and anthropology, uses existing literature on aboriginal title and rights, the trial transcripts of the British Columbia Supreme Court in *Delgam’Uukw (Muldoe) et al. v. R. in Right of British Columbia and Attorney General of Canada*¹⁵ (heard from May 11, 1987 to June 30, 1990), the Commissioned Evidence, and advice from selected *S’eem’ogits* and *S’eem’oogits* to illuminate the property regime of the Gitxsan as a means to advance the Gitxsan reconciliation model proposed on September 14, 1998.

The history of the Gitxsan and Newcomer relationship is examined in Chapter Two, from the perspective of how the Gitxsan political authority has been compromised since the assertion of sovereignty by the Newcomers in 1846, and how they have been displaced as the original owners and managers of their *huwilp lax’wiiyip*. It is suggested that although during the contact (1802 to 1840) period the Newcomers readily acknowledged Gitxsan social and political institutions, after assertion of Crown sovereignty, until the judgement of the Supreme Court of Canada in *Calder*¹⁶ in 1973, Gitxsan title (like that of other First Nation peoples) was strictly denied. Outlined first are the early trade relations that suggest that Gitxsan property and associated laws were recognizable to the Newcomers. Examined second are the colonial Reserve Only Policy as initiated by James Douglas (1850 to 1854), the Colonial and Provincial

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revisionism (1858 to 1871) and the subsequent national Indian policies after Confederation in 1871 that limited the ability of the Gitxsan to act within their traditional obligations, to seek a livelihood throughout their traditional territory, and to negotiate a Treaty agreement with Canada based on their law. Also discussed is how the Gitxsan, since 1884, have attempted to resolve the Land Question by the submission of petitions and by presentations to the various Inquiries and Commissions, including examination of the attempts to seek a judicial resolution in the first decade of the twentieth century. Lastly, the period from 1969 until 1978 is summarized, concluding that the then, and the now current, Comprehensive Claims process, which the Gitxsan have willingly participated in, is only a more contemporary version of the “Reserve Only” option forwarded by the Colonial authorities as a solution to the Land Question in British Columbia.

Set out in Chapter Three is the Gitxsan land tenure system as it relates to their governance regime. It is suggested that Gitxsan society operates from their ayooks of naa hlimoot’ (sharing) requiring the Sæm’oogits and Sæm’ogits to manage the lax’wiiyip in a manner that optimizes the returns from resources (fish, wildlife, and so on), while sustaining the integrity of the ecosystems for all creatures, as spoken in the adawaak (oral histories). It is maintained that the Gitxsan li’ligit system (feast complex) is a central institution, and that any one yukw (feast), whether it is one that is sponsored to give thanks to the animals or salmon for their submission, or one that is related to funerary rites, memorials, marriages, adoptions, rites of passage, or for restorative purposes, constitutes an opportunity for each Gitxsan wilp to account to the community for whatever resources arise from the wilp’s lax’wiiyip, and to circulate prestige objects (cash or commodities that signify wealth) throughout the community. In addition, it is illustrated that the yukw, besides being a means to account for wilp property, acts as a public forum validating the authority of the Sæm’oogit, and maintains the alliances with other huwilp (plural of wilp or house) through the telling (either as recitations or through song, dance or by the performance of plays) of the adawaak (oral histories).
The property rights' concepts of amnigwootxw (privileged rights) and xkyeehl (payment to the huwilp through the li'ligit) are analyzed in terms of the access rights of wilp members, and the obligations and duties of the Seem'ogits. It is concluded that Gitxsan "Indianness" is not defined as a subsistence pattern practice, or by genealogy, but instead is situated in the relationships that base the individual in firstly, their obligations of respect for the lax 'wiiyip, secondly, the maintenance of social relations, and thirdly, the distribution of resources according to the ayooks as outlined by the adawaaks.

Chapter Four examines how the Gitxsan, over the last thirty years, have tried to put forward as a negotiation platform their laws for a treaty through the litigation of Delgam 'Uukw (et al) v. the Attorney General of British Columbia and Canada17 [1991, 1993 & 1997]. This litigation is critiqued as part of the contemporary struggle of the Gitxsan people to achieve parity with respect to the Land Question. It is suggested that enough evidence was submitted to the British Columbia Supreme Court by the Gitxsan to conclude that Gitxsan affiliations (both through kinship real and fictive), governance and laws, constitute a form of land ownership, including its regulation, cognizable by British-Canadian law. Further, it appears that the Supreme Court of British Columbia ignored the Seem'ogits and Seem'ogits description of their ayooks regarding the principles of amnigwootxw and xkyeehl, and saw no contemporary role for their obligations to the lax 'wiiyip the Gitxsan claim as theirs. Furthermore, though it was argued that Gitxsan aboriginal rights encompassed more than subsistence rights and occupation, the Court of Appeal, in 1993, continued to characterize "aboriginal rights" in terms of historic subsistence activities, instead of First Nations' legal, governance and political structures. Also, it is contended that the majority decision of the British Columbia Court of Appeal (1993) again disregarded the Gitxsan claim of ownership, based on the Trial Judge's interpretation of

evidence. It is argued that the minority decision of the Court of Appeal laid the foundation for a negotiated settlement; however, the political climate from 1993 to 1995 prevented meaningful discussion with respect to incorporation of Gitxsan ayooks into British Columbia management practices in the area of sustainable development. Additionally, the Supreme Court judgment of 1997 is analyzed in terms of how oral histories, First Nation property rights and a land tenure system can be advanced as ways to reach reconciliation agreements that will protect any First Nation's existence in their traditional territory, while at the same time providing Canada with certainty and finality regarding the land question, allowing for legitimate Provincial legislative infringements. It is suggested that between the Supreme Court of Canada's test for "cultural distinctiveness" in Van der Peet (1996) and the test for proof of title in Delgam 'Uukw (1997) lies the foundation which will support reconciliation.

Presented in Chapter Five is the Gitxsan model for reconciliation as set out in the evidence given by the Sáem'óogits and Sáem'ógits during the trial from 1987 until 1991. It is asserted that the long held position of the Crown of framing aboriginal rights and title in terms of "use and occupation" that lead to "certainty and finality" in Treaty agreements, through the offering of additional Reserve lands, persists, thus placing an undue burden on First Nation communities. The Gitxsan model for reconciliation suggests that their aboriginal rights lie in their land tenure and governance, which encompass how wilp lax 'wiip is held, resources are allocated, and accounted for, and how reciprocity is undertaken. As, according to Gitxsan tradition, the lax 'wiip is held in trust by the current Sáem'ógits for the next generations, the territory cannot be reallocated. This situation does not preclude establishing alliances with the Federal Crown for protection of the inherent limit on Gitxsan rights and title that extends to the boundaries of each wilp's lax 'wiip, the standards necessary for determining whether Provincial legislative imperatives and resulting infringements are justified, and the subsequent consultation protocols and compensation indexes are adhered to. It is recommended that the Gitxsan
allocation rights of *amnigwootxw* (privileged rights) and *xkyeehl* (payment to the *huwilp* through the *li'ligii*) can be employed as guiding principles to assist with the reconciliation of Gitxsan title and ownership with that of the Federal Crown title, as well as the Provincial Crown's legislative imperatives. The Gitxsan land sharing and governance model is discussed in relation to the current Comprehensive Claims policy that has supported the Nisga’a Treaty.

As the Gitxsan proposed during their litigation a justification for Canada and British Columbia to negotiate with them as property owners and to view their title in terms of their laws and obligations, they desire to have recognized their proprietary and management interest in the salmon fishery, in their trap lines, in the berries they gather, and the animals they hunt. They are eager to influence Federal and Provincial policy decisions, permitting their law to effect these interests throughout their *lax’wiiyip*, and, in the event of infringement, as a result of Crown appropriation and third party damage, trespass or nuisance, they believe that it is necessary for them to be involved in setting the conditions for appropriation, infringement and the determination of the standards for compensation.
Chapter Two

Since the Coming of the Lixs giigyet

For the most part, over the last two hundred years of either indirect or direct contact, Gitxsan people have accepted the presence of Lixs giigyet (Newcomers). Early Hudson Bay traders in the area, William Brown and Simon McGillivray acknowledged the law and authorities in Gitxsan society. By contrast, after 1862, the Lixs giigyet largely ignored Gitxsan laws of sharing and trespass, and its associated authorities. In the early contact period, from 1747 until 1862, Gitxsan economic and political life was relatively unaffected by the presence of the Lixs giigyet1. It is generally accepted that their presence enhanced the livelihood of all community members. After 1862, tensions with respect to trespass, as well as conflicts regarding competing jurisdictions and application of British-Canadian justice, emerged. The Colonial Crown, and subsequently the Provincial and Dominion Crowns, failed to understand Gitxsan law, to respect the community’s right to allocate resources according to their laws in their lax ’wiiyip, and to enter into joint processes to resolve property disputes between British Columbia and Canada.

In this Chapter, I review Gitxsan and Crown interaction from 1790 until 1927, and from 1927 until 1977, illustrating how the Crown ignored the existing laws and jurisdiction of the

1 It must be pointed out, however, that the Gitxsan, like other First Nation peoples were particularly vulnerable to European diseases like smallpox, measles, and the flu. Their losses from these illnesses took an enormous toll on their communities. See: J.F. Decker, “Tracing Historical Diffusion Patterns: The Case of the 17980-1782 Smallpox Epidemic among the Indians of Western Canada,” (1988) 4 (1&2) Nat. St. Rev. 1; R. Boyd, “Commentary on Early Contact-Era Smallpox in the Pacific Northwest,” (1996) 43 (2) Ethnohistory 307 and C. Harris, “Voices of Smallpox around the Strait of Georgia,” in Resettlement of British Columbia: Essays on Colonialism and Geographic Change ( Vancouver, B.C.: University of British Columbia Press, 1997) 3 [Harris].
Gitxsan. I also examine the “Reserve Only” policy of the British Columbian Colonial officials (1858 to 1875), and the Dominion’s (1867 to 1916) perspectives on the content of First Nation title, concluding that the Federal/Provincial contemporary land selection model is a continuation of Governor Douglas’ Reserve Only policy that neither addresses the placement of the Gitxsan’s law and jurisdiction in the fabric of Canada, nor promotes First Nations’ ability to act on their right to a livelihood in their traditional territories. I also review the efforts the Gitxsan made to address their concerns relative to their concepts of restorative justice and to the land questions by means of Petitions and Memoranda, until legislation made it almost impossible to put forward land title concerns. I then examine the background to the Delgam’uukw litigation from 1969 until 1978 following which, as a last resort, the Gitxsan filed a civil suit against the Province of British Columbia and Canada seeking a declaration of ownership of their collective lax wiiyip, based on the adawaaks, ayuks and ayooks in 1984.

The Arrival of the Lixs giigyeyt: Regional Economy 1795 to 1910

The Lixs giigyeyt were eagerly trading metal tools, copper sheeting, guns, cloth and other luxury items for sea otter pelts on the coast from the 1780’s until around about 1800. By 1805, the North West Company had established inland fur trading posts at Fort MacLeod and, by 1807, had established Fort George and Fort St. James. For the Gitxsan, this meant that European goods were filtering in to their region from both the coast maritime trade through Nisga’a and

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Tsimshian relations⁴, and by established trading networks with their easterly neighbours, the Sekani⁵.

In an effort to trade directly with the Gitxsan, in 1822 the Hudson’s Bay Company (after its merger with the Northwest Company in 1821) established Fort Kilmaurs at the head of Babine Lake⁶. It was not until 1826 that Hudson’s Bay trader William Brown met the Gitxsan when he visited three villages, and was told of at least five other villages. It was reported that the Atanah (Gitxsan) Sæm’ogits were "much attached" to the Coastal Indian traders, and, as Brown observes, the "Atanah" were better dressed, and their fishing techniques were more sophisticated than those of the Carriers (communities to the east of the Gitxsan, known now as the Wet’suwet’en). Brown also comments that the Gitxsan, like the Carriers, cremated their dead and put feasts on for "the deposit of the bones"⁷. More importantly, Brown observes that the Gitxsan were "men of property"⁸, in that they held specific tracts of land that were exclusively reserved for personal wilp use. Access to these territories was by permission from specific individuals, known by other community members. In addition, Brown also observes that hunting or trapping was strictly regulated by their chiefs⁹, and contingent on the salmon returns.

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⁷ Ray supra note 6 at 13358.
⁹ Ray supra note 8 at 304.
That is, in years when the salmon were plentiful, the Gitxsan did not hunt early in the fall and postponed their trapping activities until mid-winter instead of immediately dispersing throughout their territories after the "pinks" had returned. Similarly, when Simon McGillivray, a Chief Trader with the Hudson's Bay Company in 1833, travelled to the Forks (the confluence of the Skeena and Bulkley Rivers) in 1833, he reported that he met Atanah from the "first" and "second" villages, and noted that many of the villagers had never seen Europeans before.

More often than not, the Hudson Bay traders at the Forks were told that other traders from the Coast had recently been to the villages and, as a consequence, the Hudson's Bay did not do much trading, as there were not many or high quality furs left. During this early period between 1821 and 1840 the Hudson's Bay Company was desirous of acquiring more trade in the region. In order to achieve this, the Company tried to position forts in the area surrounding Gitxsan villages. The Hudson's Bay Company quickly found that they were unable to make direct contact with Gitxsan people, as the First Nation guides would not trespass, nor could the Hudson's Bay Company induce the Gitxsan, Wet'suwet'en or Sekani to trap more beaver than was permitted by their Säm'ogits. Geographical historian Robert Galois and Gitxsan historian Susan Marsden assert that part of the failure of the Hudson's Bay Company was that they were unable to reorient the Gitxsan's exchange networks. According to Ray, it appears that until Brown found high quality "moose hides" that were greatly prized by the Gitxsan, the Hudson's Bay Company could not compete with the traditional practices or the trading allies of the

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12 Ray *supra* note 8 at 304.
13 Ray *supra* note 6 at 13382.
Regardless of either the quality or quantity of these hides, the trade in beaver remained sporadic and contingent on surpluses as regulated by the *Saem'ogits.*

During this time, the *Lixs giigyet* had a minor presence in the interior and only a few stayed for any length of time, even after the British purportedly consolidated their interests in the northwest as a result of the Oregon Boundary Treaty in 1846 and the merging of the Mainland and the Vancouver Island colony in 1862. The *Gitxsan* and *Lixs giigyet* shared similar and complementary business interests. The *Gitxsan* were interested in trading opportunities with the *Lixs giigyet,* and gladly shared other diverse business possibilities, such as bringing to the attention of Mr. McNeill (Fort Simpson’s Commander) the presence of gold up the Skeena. Mr. McNeill noted on April 8, 1852, that:

> [T]his day one of the Chiefs from Skeena River that arrived here yesterday, brought a few SMALL pieces of Gold ore to the fort, two large pieces of Quartz Rock with a few particles of Gold ore... He tells that the gold is to be seen in many places on the surface of the Rock for some distance, say two miles. This is a most important discovery, at least I think so.

Several years later, during the tenure of Governor James Douglas, this discovery prompted the commission of Mr. W. Downie to explore the Skeena River, taking particular note of potential mineral prospects. During his excursion up the Skeena, Mr. Downie found gold and coal seams, and he met *Gitxsan* from the villages of Gitsegukla (Kitsegukla), Gitanmaax.

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15 The Hudson's Bay Company obtained moose hides from trading districts located east of the Rocky Mountains, particularly the Athabasca-Mackenzie area. These hides were highly valued by the *Gitxsan* for use in their funeral feasts. According to Brown, they chopped up the leather and distributed it at the time of the burning of the body. Only the highest quality was good enough and if the leather was given away when the bones were disposed of, whole skins were distributed. Large white skins were preferred, for which the *Gitxsan* would pay any price. A. Ray, Proceedings at Trial, (1989) vol. 203 March 21 at 13466 to 13467.


17 Harris *supra* note 1 at 68 to 102.

(Kittamarks), Kispiox (Kispyattes), Glen Vowell (Anlagasimdx), Naas Glee and Kithathatts.

Downie writes:

We experienced some dangers from Indians here, but by a small present of tobacco, and by a determined and unconcerned aspect, I succeeded in avoiding the danger of collision with them\textsuperscript{19}.

Galois suggests that when Downie “gave presents” he understood that he was “paying for safe passage” through Gitxsan territories\textsuperscript{20}.

When the Collins Overland Telegraph was constructed in the Kispiox–Hagwilget area the company negotiated safe passage by “paying tolls” and for the “rights to cross the rivers,” accommodating the expenses as part of doing business\textsuperscript{21}. Besides accommodating Gitxsan trespass laws, during the construction of the Collins Overland Telegraph line (built along the Simpson River to the Forks, then along across the Skeena to Kispiox River in 1866), Gitxsan men enjoyed steady employment as labourers and packers\textsuperscript{22}. The area did not flourish as anticipated, as the Collins Overland Telegraph route was shelved in favour of the laying of the Trans-Atlantic Cable in 1867. A small Hudson’s Bay Company trading house opened at Hagwilget in 1866, but closed in 1868. The trader, Thomas Hankin, stayed on, and was commissioned by the new Provincial government to improve the trails in the area, again

\textsuperscript{19} Major W. Downie, “1859 gold explorations, report by Mr. W. Downie of his journey to Queen Charlotte’s Island, and thence by Fort Simpson to the interior of British Columbia,” in: British Columbia, \textit{Further Papers relative to the Affairs of British Columbia, Part III - Copies of Dispatches from the Governor of British Columbia to the Secretary of State for the Colonies, and from the Secretary of State to the Governor, Relative to the Government of the Colony} (London, Eng.: Printers to the Queen, 1860) 71 at 73.


\textsuperscript{21} T. Elwyn [to Colonial Secretary] September 4, 1866] British Columbia (Colonial) to the Colonial Office 60/25 British Columbia Archives.

\textsuperscript{22} C. Mackay, “Collins Overland Telegraph” (1947) 10 (3) B.C. Hist. Quart. 187 at 208 to 210.
employing Gitxsan men. The economy of the region picked up after gold was discovered in the Omineca area, to the northeast of Gitxsan territory, in 187123.

These early relations could be considered principally to be business ventures where profit motivated all parties. It could be concluded that the regional economy was enhanced by the presence of the Lixs giigyet, though they were few in number and limited to fort areas. While the Lixs giigyet organized the enhancement of existing trails and road construction, First Nation community members were the bulk of the contracted labour. Employment opportunities ranged from packing, guiding, and trail construction to maintenance. However, Gitxsan regulated this employment within their own communities, making sure that huwilp trespass laws were strictly enforced24.

The introduction of employment and cash payments for seasonal work and the fur trade only augmented the effective use of traditional resources, and were similarly regulated by the Sæm'ogit(s). Besides the introduction of European and Asian goods, and other trade and employment opportunities, Gitxsan use of alternative employment gave them a reputation for being industrious. In addition, their participation in the emerging commercial and salmon canneries after 1875 on the coast also attests to Gitxsan organizational abilities. Most of the fishing and canning work at this time was done on contract, and employers relied heavily on First Nations' labour, both on the water and on the cannery floor25. Like other First Nation communities throughout the Province, the Gitxsan engaged in logging pursuits, and established competitive sawmills both for on reserve lumber use and for sale. These ventures flourished

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until after the turn of the century when the Provincial government encouraged the development of remote areas through what has been described as “resources giveaways” by entering into leasing arrangements, at minimum cost, of vast tracts of timber lands to only a few corporations that organized both logging and milling. Though there were alternatives to how Gitxsan earned a livelihood, resources taken from the territories and their allocation were still governed through their traditional ayooks.

**Tensions between the Lixs giigyet and the Gitxsan, 1871 to 1884**

While it could be said that the Gitxsan were embedded in the regional economy at the time of Confederation, more important concerns began to emerge. Between 1871 and 1884, the Gitxsan were feeling the effects of the region being opened up to the Lixs giigyet for alternative uses, in particular mining and transportation, and there were clashes with respect to whose laws were valid in the region. The Gitxsan, believing that they were sovereign, felt that the Lixs giigyet were ignoring their laws, resulting in a series of blockades and molestations. Further, the Lixs giigyet remained unaware of circumstances under Gitxsan law which permitted justifiable homicide: for instance, habitual trespass onto another territory after warnings had been given, blatant trespass not followed up with compensation, the use of witchcraft causing another’s death, or unexplainable death while on another’s territory.

**A Conflict of Laws**

A few Lixs giigyet came into the region and, by 1872, had established businesses in Hazelton. Relations were generally good. The fire at Gitsegukla (Kitsegukla), the Cassiar Trail

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26 Knight supra note 25 at 113 to 130.
Molestations and a series of justifiable homicides, created tensions. These issues brought to the surface the pressure points caused by the strain of the continued presence of the *Lixs giigyet*, without formal relationships having been established.

A fire at Gitsegukla, in mid-June of 1872, destroyed 11 houses and 13 poles with an estimated loss of several thousands of dollars in property. The Gitxsan stated in their petition to the government:

Two canoes passing up the river with white men in them stopped and built a fire immediately above our village. The weather being very dry for some time would have caused a fire to spread very quickly unless care was taken when leaving camp to see that it was safe. This fire was neglected by those camped there and the consequence was, the total destruction of the village, 11 houses and 13 poles, also ten canoes. The poles are of great value to us. Our loss is very heavy, and thousands of dollars worth of property and years of time having been expended in the building of the houses and the erection of the poles, all of which was entirely destroyed in one hour by the fire.  

The cause of the fire was initially attributed to a Tsimshian named Kibl-ootsay; however the *Lixs giigyet* (miners) in the area were blamed. Immediately, the Gitxsan blockaded the Skeena, vowing "no white man should pass" and pressed demands for restitution for the trespass and destruction. By July 1, 1872, Thomas Hankin of Hazelton had compiled an inventory of what was lost in the fire and set out certain promises that the Government would fulfill. The river was re-opened to freight and passenger traffic pending the arrival of a magistrate to settle the matter. Later that summer, Joseph Trutch, then Lieutenant-Governor of British Columbia, travelled up the coast in the gunboat *H.M.S. Scout*, as far as Skeenamouth—

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27 T. Hankin [to Lieutenant Governor J. Trutch], “Petition of Indians at Kitesgoually to Lieutenant Governor” National Archives Canada, National Archives of Canada, RG 10 volume 1159 n.p.
28 J. Trutch, [Speeches at Metlakatla] in: Duncan to Church Missionary Society, (1873) February 3, Duncan Papers 8882/146ff University of British Columbia Archives [Trutch].
Metlakatla, for a meeting with the Gitxsan. In an elaborate show of arms and ceremony, and with William Duncan as interpreter, the Province gave six hundred dollars to the Saem'ogits as an "act of grace," (not as compensation) and a warning to the Saem'ogits to “speak” within the law, that is the “Queen’s Law.” For the Gitxsan the issue was concluded satisfactorily. The Saem'ogits interpreted the public presentation of the “gift of money,” the show of arms and ceremony as the Lixs giigyet accepting responsibility for the fire at Gitsegukla. According to Galois, the events aboard H.M.S. Scout at Skeenamouth–Metlakatla were compatible with Gitxsan procedures for resolving conflicts; that is, first, there was a meeting between both sides in which they spoke to their concerns; second, a settlement was reached; and, third, both sides displayed their power. Furthermore, the settlement that was reached met with Gitxsan standards, in that they received a cash payment, which was viewed by the Gitxsan as compensation for their losses; an agreement that the Gitsegukla Saem'ogits would not threaten the Lixs giigyet; and entertainment that had elements of hospitality and spectacle.

Over the next few years, issues continued to arise around pack employment and issues of trespass. William Humphrey, the man in charge of the construction of a cattle trail north of Kispiox, reported in June of 1874 that the Kuldoe Indians would not allow his Indian packers any further up the trail towards the settlement, nor would the Kuldoe "pack" without doubling the fees. Other reports, later that year, stated that Kispiox Gitxsan regularly molested the Lixs giigyet. Although there were several meetings with Saem'ogits to resolve these tensions, little

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resulted. However, a community member was eventually “arrested” for assault and, after appearing before William Duncan at Port Essington, was imprisoned for a month.\(^{33}\)

In 1875, Rev. Robert Tomlinson was asked to find out the reasons for escalating tensions between the Lixs giigyet and the Gitxsan in the Hazelton area communities. Tomlinson observed that since the slow down in the Peace River Mines most Gitxsan men were out of pack work. During the "gold excitement," community members were making hundreds of dollars as packers and providing related services, such as guiding. By 1875, they were hardly making "tens." It appears that this sudden drop in income resulted in Gitxsan men regularly stealing from, and browbeating, the few Lixs giigyet who ventured into the area.\(^{34}\) Though at the time the issues were reportedly attributed to the slackening of the regional economy, the underlying causes were situated in trespass. According to the Gitxsan, the Lixs giigyet were infringing on their trespass laws, by not first securing permission before they entered into the territories, and not offering payment to pass through or ford rivers.

The accidental death of Billy Owen at Hazelton while in the employ of A.C. Youmans, a merchant of ten years in the area, brought to the surface the hostilities between the Lixs giigyet and the Gitxsan. Youmans was killed, according to the Gitxsan law, after the accidental drowning of a young man by the name of Billy Owen. Billy’s father Haatq stabbed Youmans in public, and Youmans died a short while later.\(^{35}\) Henry Roycraft, Superintendent of the B.C. Provincial Police, the assigned magistrate, demanded that the person who “murdered Youmans,” surrender. Haatq did so, against the wishes of the community. Haatq admitted to stabbing

\(^{33}\) E. Pettingell [Statement] September 18, 1874 in: Church Missionary Society, Duncan Papers 16055 University of British Columbia Archives.

\(^{34}\) Rev. Robert Tomlinson Journal 1874, Church Missionary Society, vol. 106 #143.

Youmans and in his defence spoke that it was his understanding that Youmans had a hand in the death of his son, as he had kept his death secret for three days. Haatq was remanded for trial and sent to Victoria.

The Sæm’ogits of the area wrote to Victoria arguing for clemency and urging the Government to pardon Haatq, as he was only following First Nations’ law. The Sæm’ogits explained the "laws of the Kitiskseans," and outlined the possibility that Youmans could have had a hand in the death of Billy. The Sæm’ogits said:

If one Kitisksean A, asks another, B, either to work for him or to go hunting or fishing and that B should die from any cause while so employed, then A, when he arrives back at his village at once tells the relations of B and also gives the relations a present to show that he, A, had no bad feelings against B and that he does not want any bad feelings between B's relations and himself. If A does not tell about the death of B shortly after his return and is then supposed to have had a hand in the death of B then the relations will [sic] kill him for as [sic] they suppose he has killed their relations.

The resulting conviction and subsequent gaoling of Haatq brought a further lobby by Sæm’ogit Geddun-cal-doe. Sæm’ogit Geddun-cal-doe restated what other Gitxsan Sæm’ogits had said earlier, at Haatq’s preliminary hearing, that Youmans’ actions indicated guilt, and that Haatq was justified to take his life. The response by Attorney General John Robson only stated that though it may have been more prudent of Youmans to follow "Indian custom," he made it clear that Gitxsan law "was not binding on him," and it was the Queen's law by which all people, "Indians and Whites alike, are now governed." Robson may have been correct in suggesting that Gitxsan law was not binding on the Lixs giigyet, but to suggest that Gitxsan law held little merit, without debate, seemed to exacerbate an already tense situation.

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Similarly, another justifiable homicide in the eyes of the Gitxsan created such tensions in the area that the Gitxsan almost declared war on the Lixs giigyet. A dispute started with a shaman called Neatsqu from Gitsegukla (Kitsegukla) who had claimed the right to the name of Hanamuq at an earlier Yukw and ended with his death at the hands of Hanamuq's husband Kamalmuk (Kitwancool Jim) in February of 1888. Kamalmuk killed Neatsqu after the death of his two sons from measles, as Kamalmuk refused to give Neatsqu some blankets, required by Gitxsan ayooks, which would have provided Neatsqu the necessary payment to prevent his sons from falling ill. Kamalmuk went home to Kitwancool believing that issue was over. Neatsqu's family, however, wanted revenge for his death and the Rev. William Pierce was able to convince them to put the entire "issue in the hands of the law." The Kitwancool community felt that Kamalmuk was justified in killing Neatsqu. The subsequent death of Kamalmuk at the hands of the Constable escalated tensions in the region.

Though the Gitxsan responded first by deferring to their own law, they eventually placed this matter before Magistrate Fitzstubbs (only after the Gitxsan had been threatened with an open armed confrontation) hearkening to the promise made after the 1872 fire at Kitsegukla. In restoring order, Fitzstubbs invited the Sæm’ogit(s) of Gitanmaax, Kitwangak, Kitsegukla, Kispiox and Hagwilget to a meeting where he summarized the Queen’s Law. It was important to Fitzstubbs to outline the "terms in which they were to live in the future." This included a clear statement about how disputes were to be resolved, an outline of what the law prohibits, that it would be the Sæm’ogits who would bring forward the disputes to the Judges, and every person

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high or low was “bound by and protected by the law.” Furthermore, the Seem’ogits were presented with the choice to continue to operate under Gitxsan law, or be faced with war. The Crown did not acknowledge the importance of Gitxsan law when it came to concerns over unknown deaths. The knowledge of the resolution of these matters, though understandably different from the common law, would have afforded the Crown additional understanding of Gitxsan customary law and remedies. Such an investigation at this time would have revealed the root cause of the tensions in the region – the waning independence of the community, their disappearing land and resource base, coupled with issues of forced inclusion into Canada, without definable rights. According to Rev. Tomlinson, the Gitxsan claimed that the:

exclusive right we (the Gitxsan) claim to hunt, fish and gather fruit in any particular place is an hereditary right enjoyed by us before the white man came among us. It is a right most vigorously upheld by all our tribes, without exception.

The only solution sought to resolve these conflicts by Canada was the establishment of the Babine Indian Agency in 1889, mainly to keep the peace.

The Land Question

Besides the inability of the Provincial and Dominion governments to acknowledge Gitxsan law, the Gitxsan were nervous that the Government was sending more Lixs giigyet to steal their land. Until the early 1880’s Lixs giigyet rarely stayed around the forks of the Skeena, Bulkley and Kispiox Rivers, and appeared to be just passing through. However, the improvements to the district, the telegraph line and upgraded trails, spurred by discovery of gold

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43 Department of Indian Affairs Annual Report, 1889.
at Lorne Creek and in the Omineca district, brought steady Newcomer traffic into the area. As a result of these opportunities, the Lixs giigyet became permanent residents and they were staking out homesteads and competing for “country foods and furs” alongside the Gitxsan. This competition for resources, as well as inroads by the Lixs giigyet into Gitxsan lax 'wiiyip, was occurring without the Government sitting in council with the community.

B.C. Colonial – Provincial Indian Land Policy 1850 to 1875

The Oregon Boundary Treaty in 1846 between the United States and Great Britain consolidated British interests on the Northwest Coast and provided what historian Richard Mackie has suggested was, “the legitimate opportunity for the non-Native person to settle in British territory west of the Rockies”⁴⁴. A charter was granted to the Hudson’s Bay Company on 13 January 1849⁴⁵ for the advancement of colonization and the encouragement of trade and commerce, and to clear indigenous title⁴⁶. However, when the colonies of Vancouver Island and British Columbia merged in 1866, not only did the First Nation title question still exist, serious flaws were apparent in the Colonial Indian land and title policy.

Following the British colonial policy as reflected in the Royal Proclamation, the Hudson’s Bay Company had secured fourteen “cede and surrenders” around Fort Victoria and Port Rupert by 1854. These treaties purchased the title of the community, and laid out the rights

⁴⁶ A. Barclay, 17 December, 1849 at A.6/28 folio: 90d – 92 Hudson’s Bay Archives.
of the First Nation community members. For the purpose of determining the extent of the communities’ title and property rights, James Douglas viewed First Nations tenure in terms of their agricultural pursuits (as defined by the colonialists), their fishing stations, village sites, cemeteries or sacred sites. Although the prevailing treaties were silent on community member’s rights, Douglas’ First Nation policy in general assumed that community members were to be granted the same rights as the settlers in such matters as the additional acquisition of lands adjacent to their communities. As Robert Cail, Robin Fisher and Paul Tennant observed, the land settlement policy in 1850, as set out by Governor Douglas, ought to have accommodated the clearing of First Nation title according to prevailing British and North American standards, that is, through purchase.

Although it had been well known since 1760 in Eastern North America and in British Canada, that the British Crown compensated First Nations for not only their title to their settlements and gardens, but also for their hunting grounds, the Colonial Crown appeared to

47 The provisions in these Treaties around Fort Victoria were straightforward: the communities ceded their territories, expected that they could continue with their fisheries as before, their livelihood could continue in areas that the Colony considered “uninhabitable” or “waste,” and community members were to have the same rights as the Lixs giigyet. See: “Conveyances of Land to the Hudson’s Bay Company by Indian Tribes,” in: British Columbia, Papers Connected to the Indian Land Question, 1850 to 1875 (Victoria, B.C.: Queens Printer, 1875) at 5 to 11 [Papers Connected to the Indian Land Question].

48 There is some debate regarding this point, as Cole Harris has pointed out even though First Nation people or their communities had the right to purchase off-reserve lands they may not have been able to meet the required conditions of the pre-emption. See: C. Harris, Making Native Space: Colonialism, Resistance, and Reserves in British Columbia (Vancouver, B.C.: University of British Columbia Press, 2002) at 36.


50 W.P.M. Kennedy, Statutes, Treaties and Documents of the Canadian Constitution (Toronto, Ont.: Oxford University Press, 1930) at 29 & 37.

remain ambivalent about the legal nature of First Nation title. The government convinced itself that the lands and resources for the settlement of foreign population or by third party interests did not displace First Nation peoples from their natural livelihood. West Coast First Nation peoples were seen to derive their livelihood as fishers, hunters or labourers and these occupations were not seen as conflicting, as the Newcomers preferred employment as farmers, miners, foresters or industrialists. West Coast First Nation people’s livelihood activities did not require, in the eyes of the Crown, vast reserves, and other than lands to be set aside for their settlements, gardens, cemeteries, or locations that held significance, were deemed to be of little value or waste. Also, in some areas the Colonial government relied on arguments that denied First Nations' title to their territory, as well as their ability to manage the lands in a beneficial manner. As the Indian agent from the Kamloops Agency, William McKay, when reporting to Indian Affairs on the status of reserve lands of the Kamloops Indian Band, said in 1885:

Some of the old Indians still maintain that the lands over which they formerly roamed and hunted are theirs by right. I have met this claim by stating that as they have not fulfilled the divine command, “to subdue the earth,” their pretensions to ownership, in this respect, are untenable.

These arguments justifying the annexation of First Nation lands were based on the idea that First Nation peoples did not use the land and resources effectively and hence, could not own them. Again, the Colonial Crown relied on the supposition that the historic or pre-contact livelihood of First Nation peoples could continue undisturbed as they held property only in the products of their labour from hunting, fishing, and trapping, and not in the territories that they habitually used. Furthermore, since the British Crown insisted that the Vancouver Island Colony

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54 United Canada, The Report of the Commissioners Appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada (Toronto, Canada: Queen’s Printer, 1858).
be self-sufficient, Douglas was unable to convince the House of Assembly to purchase First Nation title on either Vancouver Island after 1858 or on the Mainland after 1862\textsuperscript{55} or to allocate existing funds to purchase additional titles\textsuperscript{56}. The issue of “funds for surrenders” continued to be debated in the Assembly, and Mr. Foster (member from Cowichan District to the House of Assembly) raised the point that there was the widespread belief by the Colonists who were purchasing or were granted land that “the money that they paid for it was partly appropriated to secure their (First Nations’) title\textsuperscript{57}.” However, the House felt it was the responsibility of the Home Government to quiet the Indians with respect to the title question. Instead of realizing that this was in fact a “pressing issue,” the House concluded that the “quieting of those claims at this time would be a serious drawback to the improvements of the colony, taxing the resources of the Colony, making it unattractive to settlers\textsuperscript{58}.” Due to the lack of political will the purchase of Indian lands ceased. This set up a series of logical inconsistencies. First, the Colony blatantly disregarded in general British constitutional principles of securing “a good title” by purchase to the territory from the indigenous inhabitants, before reselling the lands leaving it open to future conflicts. Second, the Colony shirked its responsibility to the settlers by permitting them to believe that a portion of the monies they were paying for the land was going towards such purchases, and the land itself was free from all covenants.

As a compromise, the colony continued to act solely on its modified Reserve Only Policy. All future Reserves set aside in British Columbia (on the Island and on the Mainland) were to include the First Nations’ cultivated fields and village sites, as well as all lands that First Nations “invariably conceive a strong attachment to, and prize more.” Drawing on Douglas’ goal to establish “[s]ettlements of Natives” in order that they would become civilized, Christian,

\textsuperscript{56} House of Assembly, January 28, 1860 in: [British] \textit{Colonist} (29 January 1861) [[British] \textit{Colonist}].
\textsuperscript{57} [British] \textit{Colonist supra} note 52 at House of Assembly n.p.
\textsuperscript{58} \textit{Ibid.} n.p.
and industrious. Douglas felt that by establishing independent settlements, he was first being fair to the State, and second, was looking "out for the regard to the well-being of the Indians." He hoped that his plan of allowing each First Nation community to choose its lands would create Native settlements that were "entirely self-supporting." Douglas predicted that the First Nations peoples of British Columbia would easily be "assimilated" into the surrounding communities, provided that they were first "placed under the proper moral and religious training, and left, under the protection of laws that would initially provide for their own maintenance and support." 

Furthermore as there was a surprising lack of information about the content of First Nation governance and the substance of their title, little was done to define either the reserves or lands outside the areas identified as "special lands, cemeteries or village sites" as having any significance to community members or even under their jurisdiction. As Wilson Duff, anthropologist, points out, writing about the Douglas Treaties, part of the problem was that the Lixs giigyet had little understanding of the nature of the West Coast land tenure or governance structures. Duff suggests that though James Douglas understood that the Songhees groups with whom he elected to "treat" were "corporate groups" owning lands "exclusively" with "definable boundaries," he neglected to investigate the nature of inter-family relationships, the use of "shared spaces" with respect to resources exploitation, and the widely dispersed seasonal sites to which the group moved around on an annual basis. Furthermore, though Douglas affirmed the "natural employment" of the Songhees is to be left undisturbed, he failed to integrate protection of these rights into the emerging body of law, as well as to acknowledge the community's "new rights" as subjects of the Crown.

59 J. Douglas, March 14, 1859, in: Papers Connected with the Indian Land Question supra note 47 at 16 to 17 [Douglas].
60 Douglas supra note 59 at 16
62 Duff supra note 61 at 16.
Douglas' "Reserve Only Policy" was problematic. Douglas' Reserve Only Policy goals were to provide the community with "homelands," and that, over time, community members would "pre-empt lands" adjacent to these villages according to the Colonial land policy. Surplus reserve lands, not used by the community, would be "leased or sold," with the monies invested for the benefit of the community\(^{63}\), that is, used to provide the necessary "tutelage" and cultural instruction to community members in order that they would become indistinguishable from the colonists. It was anticipated that the community would choose their village sites, lands that they had under cultivation, cemeteries, locations that held special significance and fishing sites. The policy anticipated that the average community would be allotted on average ten acres of land per family of five. However, although the colony had expected to allocate this acreage it appears that in practice less than five acres per family were set aside. According to the surveyors' accounts they would arrive, ask an arbitrary set of members which lands were to be set aside (gardens, fishing stations, village sites, cemeteries and ceremonial grounds) and complete a cursory survey, and then leave all in a matter of days\(^{64}\). Though the process of identification of Reserves was initially and faithfully carried out, formal consultation with First Nation community members - the surveys, the Gazetting, and public notification, lagged behind\(^{65}\).

Amidst the sketchy reserve allocation processes, by 1865 some reserves that had been at least surveyed, but not Gazetted, were being, as Robin Fisher (historian) describes, "whittled down\(^{66}\)." Joseph Trutch, then Chief Commissioner of Lands and Works, was asked by various settlers to make available to them lands that had been set aside for First Nation communities along the Thompson River. The Colonial government relied on arguments that denied First

\(^{63}\) Ibid. at 17.

\(^{64}\) I.W. Powell [to the Provincial Secretary, Department of Indian Affairs] August 15, 1874 in: Papers Connected with the Indian Land Question supra note 47 at 139 to 140.


\(^{66}\) Fisher supra note 49 at 9.
Nation people their title to their territory, as well as their ability to manage the lands in a beneficial manner. In response to a request for a pre-emption of part of a First Nation reserve along the Thompson River, Joseph Trutch wrote:

The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them; and I cannot see why they should either retain these lands to the prejudice of the general interests of the colony, or be allowed to make a market of them either to the Government or to individuals.

Also, the Reserve Allocation Commission, when adjudicating a dispute over the re-allocation of reserve lands in the Kootenay region of British Columbia in 1887, stated:

You know that the white men come to this country and take up the land, according to its laws. There is a good deal of land the Indians do not use and do not require. It is the same in the Kootenay as in other places where there are Indians.

These arguments that justified the annexation of First Nation hunting lands were based on the notion that they did not use the land and resources effectively and hence, could not own them. It appears that the context of Trutch’s revisionism lay in his observation that First Nation peoples did not “use” the lands that were allotted to them “properly” or “efficiently” according to European agricultural standards, and that their “assumption” of “ownership” operated “very materially to prevent settlement.” This perspective initiated two series of events. First, the size of existing Reserves was questioned, especially Reserves that had been surveyed, but not Gazetted. Second, questions arose over the use of funds from either lease revenue or sales of

Reserve Lands. The conclusion came in a report to Governor Seymour, which advocated the reduction of Reserves, without compensation.

This revisionism was contrary to the Douglas vision of the Reserves, and the use of funds, either from leases or sales. In that vision, the lands could easily become a “homeland” for the First Nation community, and monies garnered from sales or leases could be used to support education and pensions for community members. However, the Indian land and reserve policy under Trutch developed quite quickly into denial of aboriginal title, and the arbitrary allocation of relatively small parcels of lands which could be rescinded without compensation. Douglas’ compromise, inaugurated by 1856, that of the setting aside of Reserves according to the wishes of the particular First Nation community, met the satisfaction of most. However, as Fisher points out, it was when the subsequent governors, Kennedy and Seymour, permitted the erosion of the Reserves after 1862, that the Land Question became the “Land Issue.”

The revisionist position of Joseph Trutch that of reducing reserve, as well as selling unused portions of reserves, was particularly disturbing to First Nations. Their concerns centred around first the “title question,” mainly compensation for the loss of access to their territories in which they elicited a traditional livelihood from, and second the process being allocated a “reserve” then having the reserve either rescinded or a portion thereof sold, without formal relations or consultation created considerable tension throughout the colony. Trutch’s main argument for first reducing the reserves was that the size of the reserves were for the most

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71 Fisher supra note 66 at 157.
72 See: Ibid: at 163 to 165 & Papers Connected to the Indian Land Question supra note 47 at 30 to 34; 36 to 40; 41 to 46; 48 to 60 & 86 to 91.
73 The Songhees Reserve was sold, and monies earned went to pay for the removal of their homes to an alternate location. It is unclear if the Community members agreed to the sale, the terms, or the use of the funds. See: Papers Connected to the Indian Land Question supra note 47 at 64 to 68, 121 to 122 & 127 and S. Hume, “Legislature is on our land, B.C. Natives: Governments are ‘trespassing,’ Band claims,” [Vancouver] Sun (25 August 2001) A1 & A8.
74 Fisher supra note 49 at 180.
part “disproportionate to the numbers and requirements of Indians residing in those Districts,” and, when faced with the justification of the reduction, as well as the cost, Trutch, instead of heading the advise of his colleagues to purchase the surplus lands, elected to question the legality of the allocation policy in general, as there was “no written document on the matter in the land office.”

Reserve allocation and the soundness of British Columbia’s title were raised by Canada in talks with British Columbia before and after Confederation. In a letter written by Joseph Trutch on the eve of Confederation to Prime Minister J.A. MacDonald, he made it quite clear that the “Indians,” as special wards of the Crown, had lands set aside that were both proportionate and sufficient for their needs, and the:

> title of the Indians in fee of the public lands, or any portion of, therefore, has never been acknowledged by Government, but on the contrary, is strictly denied. In no case has any special agreement been made with any of the tribes of the Mainland for the extinction of their claims of possession; but these claims have been held to have been fully satisfied by securing for each tribe, as the progress of the settlement of the country seemed to require, the use of sufficient tracts of land for their wants for agriculture and pastoral purposes.

However, during the Confederation debates, there was some discussion of the Indian Question. One motion proposed “protection of Indians during the change of government,” (defeated 20 to 1) and another motion that would have extended “Canadian Indian Policy to the Province,” was withdrawn. Clause 13 of the final Terms of Union was added in Ottawa, and

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75 J.W. Trutch [to w. Moberly] October 10, 1865, GR 1372 (Reel: B-1351).
76 J.W. Trutch, Report of the Lower Fraser Indian Reserve, August 28, 1867 in: Papers Connected to the Indian Land Question supra note 47 at 41 to 43.
78 British Columbia Legislative Council, Debate on the Subject of Confederation with Canada, Reprinted from the Government Gazette Extraordinary of March, 1870 (Victoria, B.C.: Queen’s Printer, 1870) at 146 to 147.
the drafting attributed to Trutch\textsuperscript{79}. Though Clause 13 transfers the "charge of Indians to the Dominion," it states "that a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union\textsuperscript{80}." Canada was unaware that "liberal" treatment meant that it had been the practice of the local government to allocate only 10 acres per family of five. Canada’s policy had been equally clear, in that its practice had been to allocate at minimum 80 acres per family of five, that the Dominion receive a formal surrender of all traditional lands, that continued access to hunting, fishing, and trapping lands be maintained, an annuity be assessed and given, and that "Indians and lands reserved for Indians" were to be administrated under the auspices of the \textit{Indian Act}. After Confederation it became apparent to David Laird, Canadian Minister for the Interior, that the framers of this clause "could hardly have been aware of the marked contrast between the Indian policies which had, up to that time, prevailed in Canada and British Columbia, respectively\textsuperscript{81}." The response to these enquiries prompted Joseph Trutch to state emphatically that:

\begin{quote}
The Canadian system, as I understand it, will hardly work here. We have never bought out any Indian Claims to land, nor do they expect we should, but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivation or grazing. If you now commence to buy Indian title to the lands of B.C. you would go back on all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the districts now settled or farmed by white people equally with those in the more remote and uncultivated portions\textsuperscript{82}.
\end{quote}

It was all too apparent to the Dominion that the Indian land question was not going to be resolved easily. There were concerns and discussions going on about the state of Indian affairs

\textsuperscript{79} Cail \textit{supra} note 49 at 187.
\textsuperscript{80} Report of the Government of British Columbia on the subject of Indian Reserves, August 17, 1875 in: \textit{Papers Connected with the Land Question supra} note 47 Appendix at 1.
\textsuperscript{81} D. Laird, Memorandum November 2, 1874 in: \textit{Ibid.} at 152.
in British Columbia, especially the failure to extinguish Indian title, and the report of the Justice
Minister as to whether Land Laws enacted in British Columbia should be allowed or disallowed
by the Dominion Government. Though there is a strong argument put forward in the report to
disallow or to amend the *Land Act*, which affected Crown Lands in British Columbia, as
Telesphore Fournier, the Justice Minister, noted, the British Columbia Legislature had by
“statute admitted Indian sovereignty to all lands of the Province”, and since there were no formal
surrenders, “the Indians” could claim title to the entire Province. Fournier substantiated his
statement by pointing out that “from the earliest times, England has always felt it imperative to
meet the Indians in council, and to obtain surrender of tracts of Canada.”

The compromise was to organize a Reserve Allocation Commission to settle the Indian
Land Question and the Minister of Justice concluded with these words:

Upon this assurance of the Government of British Columbia the
undersigned recommends that the Act be left to its operation. Although the
undersigned cannot concur in the view that the objections taken are
entirely removed by the action referred to; and, though he is of opinion
that, according to the determination of council upon the previous *Crown
Lands Act*, there remains serious question as to whether the Act now under
consideration is within the competence of the provincial legislature, yet
since, according to the information of the undersigned, the statute under
consideration has been acted upon, and is being acted upon largely in
British Columbia, and great inconvenience and confusion might result
from its disallowance; and, considering that the condition of the question
at issue between the two governments is very much improved since the
date of his report, the undersigned is of opinion that it would be the better
course to leave the Act to its operation\(^3\).

A three-man Indian Reserve commission was set up by joint agreement of the two
governments, the Government of Canada and the Government of British Columbia. More

\(^3\) T. Fournier, “Report of the Honourable Minister of Justice, approved by His Excellency the
Governor General in Council, 23 January, 1875” in: W.E. Hodgins, comp. Correspondence,
reports of the Ministers of Justice and Order in Council upon the Subject of Dominion and
Provincial Legislation, 1867 – 1920 (Ottawa, Ont: Government Printing Bureau, 1896-1922) at
1:1024 to 1:1025 [Fournier].

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specifically, they directed their attention to the allocation of reserves – Indian reserves in British Columbia based on the formula of 20 acres per family of five, and great care was to be taken not to disturb the “enjoyment of their customary fishing grounds,” which were to be reserved for them. Fournier sensed that British Columbia was attempting to legislate with respect to public lands, as though those lands were its absolute property. As Fournier observed, Article 109 of the British North America Act, 1867 conveyed public lands “subject to any trust existing thereof, and to any interest other than that of the province in the same” and this had been understood by the Dominion to be “some First Nations interest” in the public lands of the province. The significance of Fournier’s argument to the B.C. Land Question, as far as First Nations were concerned, was that it was obvious that, until aboriginal title was cleared, they held this interest.

In an attempt to bring the significance of the resolution of the Indian Land Question to the attention of not only Provincial officials, but to the general population of British Columbia, Lord Dufferin in his address in Victoria, 1876 in part stated:

In Canada this has always been done: no Government, whether Provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and communities that hunted or wandered over them. Before we touch an acre we make a treaty with the chiefs representing the bands we are dealing with, and having agreed upon and paid the stipulated price, often times arrived at after a great deal of haggling and difficulty, we enter into possession, but not until then do we consider that we are entitled to deal with an acre. The result has been that in Canada our Indians are contented, well affected to the white man, and amenable to the laws and Government. At this very moment the Lieutenant Governor of Manitoba has gone on a distant expedition in order to make a treaty with the tribes to the northward of the Saskatchewan. Last year he made two treaties with the Crees and Chippeways, next year it has been arranged that he should make a treaty with the Blackfeet, and when this is done the British Crown will have acquired a title to every acre that lies between Lake Superior and the top of the Rocky Mountains. But in British Columbia, except in a few places where, under the jurisdiction of the Hudson Bay Company or under the auspices of Sir James Douglas, a similar practice has been adopted, the Provincial Government has always assumed that the fee simple in, as well

84 Fournier supra note 83 at 1:1024 to 1:1025.
as the sovereignty over the land, resided in the Queen. Acting upon this principle they have granted extensive grazing leases, and otherwise so dealt with various sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen's Indian subjects. As a consequence, there has come to exist an unsatisfactory feeling amongst the Indian population. Intimations of this reached me at Ottawa two or three years ago, and since I have come into the Province my misgivings on the subject have been confirmed. Now, I consider that our Indian fellow-subjects are entitled to exactly the same civil rights under the law as are possessed by the white population, and that if an Indian can prove a prescriptive right of way to a fishing station, or a right of any other kind, that that right should no more be ignored than if it was the case of a white man. I am well aware that among the coast Indians the land question does not present the same characteristics as in other parts of Canada, nor as it does in the grass countries of the Interior of this Province, but I have also been able to understand that in these latter districts it may be even more necessary to deal justly and liberally with the Indian in regard to his land rights than on the prairies of the North-West. I am very happy that the British Columbian Government should have recognized the necessity of assisting the Dominion Government in ameliorating the present condition of affairs in this respect, and that it has agreed to the creation of the joint commission for the purpose of putting the interests of the Indian population on a more satisfactory footing.

According to Paul Tennant (political scientist), although Canada initially tried to manoeuvre British Columbia (after Confederation in 1871) into a more favourable First Nation policy, it became apparent by 1875 that the only compromise that could be reached would be with respect to Reserve size, omitting the important question of aboriginal title throughout the traditional territory of the any one of the First Nations. Thus, by the turn of the century, the myth of unencumbered Crown title prevailed in the minds of the Lixs giigyet. This was maintained, as Fisher points out, through explicit Provincial legislation that excluded the political voice of First

85 Lord Dufferin made a tour of British Columbia and spoke with numerous First Nation leaders in Prince Rupert, throughout the interior and in the Lower Mainland before visiting Victoria where he delivered a speech laying out his sentiments regarding the treatment of the First Nations’ land question. Speech of Ld. Dufferin, September 20, 1876 in: G. Stewart, Canada Under the Administration of the Earl of Dufferin (Toronto, Ont.” Rose-Belford Pub. Co., 1878) at 492 to 493.
86 Tennant supra note 49 at 41.
Nations\textsuperscript{87}, and by the administration of Federal Indian policy without clear “rights” set out for the communities\textsuperscript{88}.

**The Establishment of the Reserve Commission in 1876**

In the aftermath of what Cail\textsuperscript{89} describes as “duel-by-letter,” the Indian Reserve Commission was created in 1875; its mandate was:

> to visit with all convenient speed, in such order as may be found desirable, each Indian nation... in British Columbia and after a full inquiry on the spot... to fix and determine for each... the number and extent, and locality of the Reserve or reserves to be allowed to it\textsuperscript{90}.

Initially the Commission was composed of three men, Archibald McKinley (for the Province), Alexander Anderson (for the Dominion) and Gilbert Sproat (a joint appointment of both governments) with a mandate to fix reserves according to the wishes of the community, with the allocated reserves being held in trust by the Dominion\textsuperscript{91}. By 1877 the Provincial government was complaining about the expense, and in 1880 Peter O’Reilly\textsuperscript{92} was appointed the sole Commissioner. In general, the Reserve Commission in allocating lands was to:

> have special regard to the habits, wants and pursuits of [Indians,] to assist [them] to raise themselves in the social and moral scale ... encourage them in any branch of industry [and to ensure] an ample provision of water\textsuperscript{93}.

\textsuperscript{87} Chief J. Mathias and G. Yabsley, “Conspiracy of Legislation: The Suppression of Indian Rights in Canada” (1991) 89 B.C. St. 34 at 38.

\textsuperscript{88} Canada, *The Historical Development of the Indian Act* (Ottawa, Ont.: Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs, 1978) at 71 to 121.

\textsuperscript{89} Cail *supra* note 49 at 192 to 206.

\textsuperscript{90} R.W. Scott, Memorandum from Minister of the Interior, November 5, 1875 in: *Papers Connected with the Indian Land Question supra* note 47 at 161 to 16 [Scott].

\textsuperscript{91} Breasley *supra* note 65 at 186.

\textsuperscript{92} P. O’Reilly held the post of Reserve Commissioner from 1880 to 1898, and during his tenure he allocated 694 reserves, with a total 654 of these reserves surviving to the present. Breasley *supra* note 65 at 222.

\textsuperscript{93} Scott *supra* note 90 at 163.
The first attempt to settle the land question by the Reserve Commission on the north coast started earnestly in 1882. O'Reilly, however, was only instructed to survey Reserves according to the prevailing standards that of the setting aside of lands that community members felt strongly about, their village sites, gardens and cemeteries. He ran into some antagonism from the Nisga’a and Tsimshian people, Gitxsan neighbours. While the controversy with the Nisga’a and Tsimshian had more to do with fishing issues and an ecclesiastical dispute at Metlakatla, the result was that O'Reilly was expelled from the area in 1881. This expulsion led to the Northwest Coast Royal Commission in 1886. In their presentation to the Commission the Nisga’a and Tsimshian lobbied that “a treaty be made with them with reference to the land,” “a sum paid down, or annual subsidies” or in “lieu of payment” community members be allowed to choose land outside of the reserves at “160 acres for each individual.” The resulting Northwest Coast Commission revealed that the Tsimshian and Nisga’a were concerned with more than just the “loss of lands.” They feared a loss of freedom, were concerned about Federal Indian Administration, and they wanted a “treaty.” Their demands were determined to be unrealistic, and were only addressed in the form of the Reserve Commission re-visiting the region at a later time. The North West Commission only reported these findings to the Provincial and Federal governments; no action was taken other than continuing to allocate reserves.

The Reserve Commission did not reach Gitxsan territories until the 1890’s. By this time it was generally known that the setting aside of reserves begged the question of “title.” When O'Reilly came to the Skeena there was widespread opposition by the Gitxsan to any reserve

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98 Brealey supra note 65 at 212.
allocation. The Gitxsan knew that the Nisga’a, fearing that their lands might be taken from them, and their removal from fishing stations assigned to Tsimshian people, had expelled the surveyors in 1882. Similarly, the Gitxsan were aware that the Tsimshian had been told about how the Songhees People had been treated in Victoria and were fearful that their reserve would also be given and then taken.

**Early Land Claims: 1884 to 1888**

The Royal Commission conducted at Lorne Creek in late 1884 revealed that the concerns of the Gitxsan were not really about incidental “trespasses” or the *Lixs giigyet*’ inability to work with Gitxsan law. It was about land, resources and authority in their *lax ’wiiyip*. The Gitxsan petition requested Government assistance to sort out the Land Question as they saw it. To the Gitxsan the district was theirs, the resources in it - theirs and authority over the “persons” in it - theirs, and the presence of the *Lixs giigyet* without clear relations were unsettling and incomprehensible to them. The *Seem’ogits* argued:

From time immemorial the limits of the district in which our hunting grounds are found have been well defined. This district extends from a rocky point called “Andemane” some two and a half or three miles from a village on the Skeena River to a creek called “She-quin-khatt,” which empties into the Skeena below Lorne Creek. We claim the ground on both sides of the river, as well as the river within these limits, and as all our hunting territories, fruit gathering and fishing operations are carried out in this district, we truly say we are occupying it.

The district is not held unitedly by all the members of the tribe but is portioned out among the several families, and no family has a right to trespass on another’s grounds: so that if any family is hindered from hunting on their own ground, there is nowhere else for them to go - they lose all the benefits they derived from their hunting, as they cannot follow the animals across the bounds into their neighbour’s grounds. We would liken this district to an animal, and our village, which is situated in it, to its

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99 Patterson *supra* note 97 at 49 to 52.
heart. Lorne Creek, which may be likened to one of the animals [sic] feet, we feel that the white men, by occupying this creek, are, as it were, cutting off a foot. We know that an animal may live without one foot, or even both feet; but we also know that every such loss renders him more helpless, and we have no wish to remain inactive until we are almost or quite helpless. We have carefully abstained from molesting the white men during the past summer. We felt that though we were being wronged and robbed, but as we had not given you the time or opportunity to help us, it would not be right for us to take the matter into our own hands. Now we bring the matter before you, and respectfully call upon you to prevent the inroads of any white men upon the land within the fore-mentioned district. In making this claim we would appeal to your sense of justice and right.

For the Saem'ogits, the most significant parts of the petition suggested that the district was “not held unitedly by all members of the tribe,” but was “portioned out among the several families” and if, “any one family is hindered on their own ground,” they have no “right to trespass on another’s land” losing the “benefits they derive from their hunting” if the animals cross over to another Saem'ogit’s territory. The Saem'ogits asserted:

... We hold these lands by the best of all titles. We have received them as gifts from the God of Heaven to our forefathers, and we believe that we cannot be deprived of them by anything short of direct injustice. In conclusion, we would ask you, would it be right for our chiefs to give licence to members of the tribe to go to the district of Victoria to measure out, occupy and build upon lands in that district now held by white men, as grazing or pasture land? Would the white men now in possession permit it, even if we told them that, as we were going to make a more profitable use of the land, they had no right to interfere? Would the government permit it? If it would not be right for us so to act, how can it be right for the white men to act so to us?

This claim of the Saem'ogits was based on Gitxsan law and governance structure. The Gitxsan continued to press for recognition of their title, and were desirous of reaching agreements with the Dominion that included the integration of their laws and governance in their lax 'wiiyip. They argued that their rights were exclusive rights claiming that they could hunt, fish

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101 Rush supra note 100 at 70.
or gather fruit in any particular place, and these rights were:

hereditary rights enjoyed by us before the white man came among us. It is
a right most rigorously upheld by all our tribes without exception. Our
hunting and fruit gathering are the principal sources of our livelihood. Do
away with them and we are at the mercy of the white man. We are
prepared to maintain them in our own way or we are willing for the
government to maintain them for us by law but we will not permit them to
be interfered with.

Reserve Allocations: 1891 to 1898

Regrettably neither the Federal government, nor Provincial authorities, grasped Gitxsan
concerns. A clear response to this petition in 1884 might have sent future “Land Question”
debates on a distinctly different trajectory. There was no negotiated response. The only
response came in the form of the appointment of the Reserve Commissioner, Peter O'Reilly.
In theory, the allocation of reserves was insufficient to address Gitxsan concerns without a
defined relationship and clearly articulated rights of access throughout their territories. The
Reserve Only Policy forwarded initially by first the Colony (and after Confederation by the
Province) and endorsed by the Dominion of Canada, fell short of the expected adherence to
British North American constitutional norms, where the Crown met the First Nation community
in Council to discuss terms of surrender, annuities, Reserves, rights of access to traditional
territories and the subsequent relationship.

Reserve allocations, though slowed down in Nisga’a territories, went ahead as scheduled
around Gitxsan communities. In August of 1891 O'Reilly made a hasty survey trip and allotted
reserves at Gitanamaax, Hagwilget, Moricetown, Babine Lake, Kispiox, Gitsegukla and

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102 R. Tomlinson [to the Provincial Secretary] October 20, 1884 in: Galois supra note 35 at
16459.
103 Brealey supra note 65 at 187.
Gitwankga and he encountered opposition at Kispiox and Gitwankga. At Kispiox, community members wanted their entire traditional territories put aside. O’Reilly could not do this, and pointed out to them that they would have continued access to their berry-picking places, hunting grounds and fishing stations. It was only when O’Reilly convinced community members they would not be confined to the “reserve,” that he was able to go ahead with the survey and most issues regarding the question of title quieted. During a second visit in 1893, opposition was voiced at Gitwankga. The resident Indian Agent, R.E. Loring, mediated the disputes, and the surveyors continued with their work. For the most part, Reserve allocation continued steadily from 1888 until 1900.

Gitxsan concerns, however, were not limited to the recognition of title. Rather, issues of trespass, the imposition of Indian Act strictures with respect to movement off Reserve, the Anti-Potlatch Laws, and sales or leasing of Reserve lands, were the main considerations of the Sæm’ogit’(s). In 1889, shortly after the Babine Indian Agency was opened, Loring reported that the “Kits-pioux Sæm’ogit’(s)” opposed any new law that the Government was going to bring into the territory, especially the banning of the Potlatch, emphatically reiterating what was stated to him:

My Uncle is the head Chief of the Kits-pioux, the same told me, to oppose any new law that should come to this country. That they had their own laws and they wanted no other. I know that the law is against stealing etc.

105 Resistance to the “Potlatch” had been mounting in the years prior to the amendment of the Indian Act in 1884 (An Act to Amend “The Indian Act, 1880” S.C. 1884, c.27 (47 Vict.) by various Newcomers throughout the Province. The clergy had a list of reasons to “ban” the Potlatch. Their list ranged from the “wanton destruction of property,” the “giving away of excessive amounts of property,” the “eating of dogs”, to the “fact that it promoted laziness” and “indebtedness.” However there was also a similar lobby by other clergy to quiet this protest, arguing that the “potlatch” was similar to many Christian festivals. Even though there were few arrests and even fewer convictions, the legislation was quite threatening as it stipulated that, if convicted, hosts or participants in feast activities would face “imprisonment for a term [of] not more than six nor less than two months in any gaol or place of confinement.” See: C. Bracken, The Potlatch Papers: A Colonial Case History (Chicago, Ill.: University of Chicago Press, 1997).
I am an officer of the law myself. We do not want anyone to come to Kits-piox with any new laws for the Govt. How would the Gov’ent like to have their laws locked up, as they do ours.\textsuperscript{106}

More importantly, the Gitxsan realized that the \textit{Lixs giigyet} were not only passing through to mine, they were fencing off sections of Gitxsan \textit{lax ‘wiyiip} for agricultural pursuits, staying and, by 1896, were the majority in the area.

Loring, like his predecessor Captain N. Fitzstubbs\textsuperscript{107}, was unable to find reasonable arguments for why “potlatch” participants should be arrested. Loring agreed with Fitzstubbs that over time the \textit{Yukw} would cease, and arresting Gitxsan people for either holding the “feast, or “attending” it, only courted resistance. Furthermore, the law was proving to be ambiguous, as the “Potlatch” could arguably be just a funeral feast, similar to a Christmas or Easter celebration, or just a community social\textsuperscript{108}. In fact, as Loring observed, the Gitxsan within several years had already refrained from the offensive aspects of the feast. It appeared that the Gitxsan had curtailed the eating of dogs, and the wanton distribution of property, or its destruction. As far as Loring was concerned, the \textit{Yukw} by 1901 had disappeared, or more accurately, had been modified. However, the Gitxsan, as Loring observed by 1897, still recognized the role of the \textit{Yukw} in the significance of “becoming a man of consequence,” in that by “attending the ceremony in adopting a departed’s place and name” Gitxsan still retained their intimate relationship to their \textit{lax ‘wiyiip}. It appeared as long as the community kept the peace and acted


\textsuperscript{107} Enforcement of the Potlatch laws put the plan of indirect rule of Capt. N. Fitzstubbs into jeopardy, however the Kitwangak \textit{Sæm’ogits} accepted the office of constables after Capt. N. Fitzstubbs agreed to let the Potlatch law “sleep for the winter.” N. Fitzstubbs [to C.W.D. Clifford] in: RG10 vol. 3628 file 6244-1 National Archives of Canada & N. Fitzstubbs [to Attorney General] 5 January 1889 in: Babine Agency Letter-book RG 10 vol. 1585 National Archives of Canada.

with discretion, Loring was satisfied to ignore “Gitxsan ritual life.” Loring was kept busy settling fishing disputes, and ensuring that all community members had enough wood and food for the winters. Besides this routine business, his reports are filled with the continued allocation of Reserves and the dispensing of relief\textsuperscript{109}.

**Stewart – Vowell\textsuperscript{110} Commission**

In the years just prior to the 1910 Petitions, the *Lixs giigyet* were migrating into the Upper Skeena. The construction of the Grand Trunk Pacific Railway created new markets, as well as access to outside markets, stimulating the agricultural, mining and forestry industries. Though preferring the Bulkley Valley in Wet’suwet’en territory, the *Lixs giigyet* made their way into the Kispiox and Kitwanga Valley. These moves immediately alarmed the Kispiox and Kitwancool communities, raised again in earnest the land title question. From contacts at the coast, Gitxsan were able to join up with the larger Provincial Land Claims movement that sought, firstly by lobbying Ottawa, and additional legal means, to get an acknowledgement of aboriginal title. In general, First Nation Communities sought compensation for their territories that had been alienated, explicit rights for hunting, fishing and trapping, citizenship rights, and recognition of their right to self-government\textsuperscript{111}. Issues around the Hazelton – Kispiox area came to a head in 1908 when a series of conflicts arose in Gitxsan, Gitanyow and Wet’suwet’en

\textsuperscript{110} A.W. Vowell for many years was the Superintendent of Indian Affairs in Victoria became the Indian Agent at the Babine Agency in 1909 after R.E. Loring retired. Mr. Vowell also had been a surveyor under the auspice of Peter O’Reilly. See: R.M. Galois, “Indian Rights Association, Native Protest Activity and the ‘Land Question’ in British Columbia, 1903 – 1916” (1992) 8 (2) Nat. St. Rev. 1.
communities over continued Newcomer inroads in the area. The Department of Indian Affairs promised an enquiry into the grievance of the communities.

During the meeting in Hazelton, July 18 and 19, 1909\textsuperscript{112}, Special Commissioners Stewart and Vowell (appointed by the Department of Indian Affairs) listened to Gitxsan grievances. Though nothing concrete materialized from these meetings, the Gitxsan did crystallize their sentiments about the land question. The Gitxsan claimed the right to occupy and to administer this territory according to their laws and customs, asserting that Sæm'ogits were the owners of the lands - "the lands of their forefathers," thus for the Gitxsan there was "no vacant or un-owned land" in their lax'wiiyip, for "the sum of the territories owned by each Sæm'ogits equaled Gitxsan territory\textsuperscript{113}." They contended that the current reserve system was against their traditional ways, and, as the land had neither been taken from them by conquest, nor been purchased, thus they laid claim to the entire region. It is evident that the Gitxsan wanted to re-assert their authority in their lax'wiiyip. They said, through a gentleman from the area:

Why should we give up our land to the white people? We have lived in this valley for generations. My father was killed here in a fight to drive our enemies away; my grandfather was killed further up the river in a fight for the same purpose. What reason is there for us to give up our land to the first white man that comes along?\textsuperscript{114}

The only real response the government could muster was to continue the survey of additional reserves, as well as sending Rev. J. McDougall to the Skeena River to consult with the communities to determine their grievances, and ensure that the Lixs giigyet had not, and would not encroach on the community lands. However, the grievances were similar throughout the

\textsuperscript{112} R. Galois, Proceedings at Trial, (1989) vol. 227 May 19 at 16556 to 16558.
\textsuperscript{113} "Indian Unrest," [Vancouver] Province (16 July 1909).
territories. The Gitxsan claim against the government was still straightforward. They professed:

The Government has never done anything for us. The land belongs to us. We are living in hope day by day that the Government will do us right.

Take the reserves and the Indian Act and let us die in peace. Give us back the right which was ours. Deer, fish, fruit and liberty. The strong man has done us wrong. We ask the Government to do for us what is fair and right.\textsuperscript{115}

Once again the community members wanted their historic title acknowledged. Besides affirmation of title, they desired to be given the franchise. The Gitxsan now realized that “being disenfranchised,” meant that they did not have a voice in regional matters. Furthermore, they desired that separate “legal and administrative” structures be abolished\textsuperscript{116}. McDougall recommended that the Federal and Provincial government secure the “extinguishment of the Indian title to the lands in British Columbia\textsuperscript{117}.”

In 1907, the Province of British Columbia, through a Minute-in-Council, gave official notice to the Federal Government regarding two areas of disagreement over the allocation of reserves. The Province argued that some Reserves were too large, and that the reversionary interest in the Reserve lands was vested in the Province\textsuperscript{118}. Adding to this turmoil, the Province launched legal proceedings in the B.C. Supreme Court laying claim to lands that First Nations had abandoned, as well as seeking the disposition of the resources on the reserves in general\textsuperscript{119}. Though the case was dropped in British Columbia to be taken to the Supreme Court of Canada


\textsuperscript{117} \textit{Ibid.} at 151 & J. McDougall [to Oliver] 11 March, 1911 in: RG10 vol. 4020, file 280 at 470 to 472 National Archives of Canada.

\textsuperscript{118} Editorial, [Victoria Daily] \textit{Times} (2 January 1908) n.p. & British Columbia Gazette December 27, 1907 at 8695.

\textsuperscript{119} A. O’Mera, The Indian Land Situation in British Columbia: A Lecture, delivered in Aberdeen School, Vancouver, 22 April, 1910.
then dropped altogether in favour of negotiations, by this time it was apparent that the Province laid claim to the Reserve lands, and the Federal government, in order to protect the interests of the First Nation communities, sought, with First Nations’ support, a judicial inquiry into the Province’s claim of undisputed title. To this end, representatives of Canada and British Columbia drew up a list of ten questions, the first three having to do with Aboriginal title, and the remaining seven being concerned with the size of reserves, reserve resources such as minerals and timber and the claim of the Province to abandoned reserve lands.¹²⁰

This judicial action was brought to a halt when Richard McBride, then Premier of British Columbia, categorically refused to endorse the first three questions.¹²¹ British Columbia claimed that the title held by First Nations was limited to “use and occupancy,” and, under Clause 13 of the Terms of Union, the Dominion held no “beneficial interest in such lands” as guardian of First Nations. Moreover, British Columbia argued, whenever the First Nation right to any reserve lands became extinguished by surrender, cessation of use, or occupancy, the lands reverted to the Province.¹²² The Province sought to formalize the revisionism policy of Trutch.

**McKenna – McBride Commission: 1912 to 1916**

The Dominion was nervous about the unfinished nature of the allocation of reserves, and the Provincial claim to the ceded reserve lands. Though the Indian Act had been amended to reflect the Dominion’s position,¹²³ the Dominion Government negotiated with the Province the

¹²⁰ Ibid. at 234.
¹²¹ Canada, Houses of Parliament, Senate - Special Joint Committee of the Senate and House of Commons Appointed to Inquire in the Claims of the Allied Tribes of British Columbia, as set forth by their Petition submitted to Parliament in 1927, Report and Evidence, Appendix to the Journal of the Senate of the Canada, First Session of the Sixteenth Parliament, 1926 – 1927. (Ottawa, Ont.: King’s Printer, 1927) at 11 [Special Joint Committee].
¹²² Special Joint Committee *supra* note 121 at 53.
¹²³ Cail *supra* note 49 at 233.
McKenna-McBride Agreement\textsuperscript{124} which laid out the terms of reference for the McKenna-McBride Commission. This was established to resolve reserve acreage, underlying title to reserves; and reversionary interests. Initially the size and location of the reserves were to be set. If the reserves were found to be too large, unused portions were to be sold, and the proceeds were to be split between the Province and the Department of Indian Affairs. Should new reserves or additional lands be required, the Province was to take all necessary steps to “locally reserve additional lands.” After the reserves were determined, to the satisfaction of all five Commissioners, the reserve lands were to be conveyed by the Province to the Dominion. The Commission, over the next three years, recommended 482 new reserves, and “cut-off” a total of 47,058 acres from existing reserves\textsuperscript{125}.

The formation of the Commission brought forward a prompted and well-organized response from all British Columbia First Nation people\textsuperscript{126}. By this time, First Nation politics were organized around the Indian Rights’ Association, and in a circular letter sent in December of 1912, the Association critiqued the mandate of the McKenna-McBride Agreement and the future Commission. They pointed out that the main question - that of “title,” was not included\textsuperscript{127}.

The Gitxsan, as members of the Indian Rights Association, were prepared to use the platform of the Commission to bring forth their concerns over title. When the Commission arrived to determine whether the reserves were adequate, Gitxsan representatives reiterated their position that they had forwarded earlier in the Petition they sent to the Rt. Hon. Sir W. Laurier in 1910. In this Petition, they asked that their lands be reinstated, their system of administration

\textsuperscript{124} Canada and British Columbia, \textit{McKenna – McBride Agreement} of 24 September, 1912 established the Royal Commission on Indian Affairs in British Columbia.

\textsuperscript{125} Cail \textit{supra} note 49 at 236 to 237.

\textsuperscript{126} Tennant \textit{supra} note 86 at 96 to 124.

returned, to be taken out from under the Indian Act, and to be free under the “British flag”\(^{128}\).”

However, the Chairman’s response was that they were there to “fix reserves”\(^{129}\), and the question of title was not going to be dismissed.

In 1915, Walter Wright, in his submission to the McKenna-McBride Commission, summarized the Gitxsan land struggle. He stated:

> I was born here, and all the land that we lived on practically belonged to us. It is over 20 years since our people started talking about their lands, and it is going on to 30 years – I was only a young kid when they started in to talk about their lands, and the Government sent in a party of surveyors up and some of the Timshian [sic] people refused to have these surveyors. We heard at the time that the land that they were going to survey for us was not going to be ours; it was only going to be turned into reserves. We did not want to have these surveyors until Mr. O’Reilly came and we got a good understanding from Mr. O’Reilly that we needed a certain amount of the stream and that no one would disturb us at all, and a few years after that the white people came into this place here and they have come on to this land where we need to take our berries and also on our hunting ground, and then the people look back at the promises that were made by Mr. O’Reilly when we saw the white people coming into our land. The white people started trouble with the Indians, and ever since we have had no peace. We know very well that this land belonged to our forefathers and it is ours still and we want to go back to the places where we used to pick berries and our hunting grounds, but the white people have taken up all the land. I have seen all the little reserves on the map and they are important reserves to us – that is where we make our living. The land which we thought was ours started at the Chsourakta, and it runs down as far as Klespan\(^{130}\).

Similarly, Mr. Holland told the Commissioners:

> We don’t want no reserve at all we want to get our own land back. You want to ask us questions, which are not in our petition at all. We did not sign our petitions for a reserve at all – we signed for our own land. The reservation is not so good for us all – it is no use for us. There are fences

\(^{128}\) Tennant \textit{supra} note 86 at 51 to 67.

\(^{129}\) \textit{Proceedings of the Royal Commission on Indian Affairs for the Province of British Columbia}, Meeting with the Kuldoe Band or Tribe of Indians at Hazelton on Tuesday July 13, 1915 at 1.

\(^{130}\) W. Wright, in: \textit{Proceedings of the Royal Commission on Indian Affairs for the Province of British Columbia}, “Meeting with the Kitselas Band or Tribe of Indians at Newtown on Thursday April 15, 1915 at 11 to 12.
all around so we can’t do any business outside the reserves. We are just tied up in the Reservation, and that is the reason we signed our petition that we don’t want any more reserves for the whole Skeena Nation\textsuperscript{131}.

Charles Wesley from Kispiox told the Commission:

This country originally belonged to our ancestors, we were placed here by God, and it is only quite recently that the Government sent men out here to measure this land immediately around us, and we were not notified of it when they did it; then the Province came in and sold the remaining land immediately around us. All the old camps up the Kispaiox [sic] river, where we used to gather our salmon, and our hunting camps, and where we used to pick berries, and what we most strenuously object to is that you insist upon us having this reserve. You have measured all these reserves and you say that is yours. I was one that signed the petition in 1908 which we sent down to Ottawa, and we asked that the land which the Provincial Government had sold be returned to or given back to us – we want the reserve that is held in trust by the Dominion Government; we want to own that ourselves, because it was originally planned so\textsuperscript{132}.

The mandate of the McKenna-McBride Commission was clear: it solely was responsible to set the acreage of Reserves, settle the question whether the Province or Canada held “title to the Reserve lands,” and to determine whether it was the Province or the First Nation community (through the Federal government) that administered the trusts set up from the sale, lease of lands and resources (timber or mineral). In the end it was determined that Canada was who held “title to the reserves” and would provide the community with benefits from the sale or lease of reserve lands or resources. The Gitxsan, like other British Columbian First Nation communities, rejected the findings of the McKenna-McBride Commission that either enlarged or reduced the Reserves, and sought to support initiatives of the Allied Tribes of British Columbia. As far as the Gitxsan

\textsuperscript{131} Mr. Holland in: \textit{Proceedings of the Royal Commission on Indian Affairs for the Province of British Columbia}, Meeting with the Getanmax Band or Tribe of Indians at Newtown on Thursday April 21, 1915 at 3.

\textsuperscript{132} Charles Wesley in: \textit{Proceedings of the Royal Commission on Indian Affairs for the Province of British Columbia}, Meeting with the Kispiox Band or Tribe of Indians at Newtown on Thursday April 22, 1915 at 1.
were concerned the issues of underlying title, control over trusts, as well as their personal legal
status, were still questions that needed to be addressed.

After the McKenna-McBride Commission in 1919, the northern First Nations (the
Tsimshian, Nisga’a and Gitxsan) issued a statement that outlined their concerns. They stated:

That from time immemorial these tribes of Indians have been in the in
disputed possession of the land of the northern part of the Province. We
have lived and hunted upon it, fished in the streams that run on it,
harvested the berries and fruits, built our houses and made our wood fire
from its timber, and our forefathers are buried underneath its soil. It has
been handed down to us from uncle to nephew from time immemorial to
this present time.

We do not understand how it is that the White men, men of intelligence
who understand the laws of property, spend their time, labor (sic) and
money in trying to deny our claims and trying to make us believe that we
have no right to the land. Practically throughout the rest of Canada tribal
ownership has been fully acknowledged, and all dealings with the various
tribes have been based upon the Indian Title so acknowledged

The Tsimshian, Nisga’a and Gitxsan, under the umbrella of the United Tribes, continued
and outlined their conditions for a settlement. They wanted to sit in Council with the Dominion,
as outlined by the Royal Proclamation of 1763, and they required a voice in setting the
conditions of the said surrender, as well as monies transferred from the sale be given to them in
order that they might make the improvements. Additionally, they wanted to stipulate that the
communities in question be consulted prior to any reduction or cutoff to their reserves. Also,
they sought to have all foreshore, whether tidal or inland, be included in the reserves to which
they were connected, so that the various First Nations could have full and permanent benefit.

The United Tribes desired that their Indian title and rights be fully recognized by both the
Provincial and Dominion governments by either concession or through a judicial ruling,
supported by an act of Parliament.

United Tribes, “Statement of the United Tribes of Northern British Columbia for the
Government of Canada,” February 27, 1919.
Although various First Nation communities continued to press for equality, (including the Nisga’a who attempted and had failed to present a claim against Canada through the Privy Council on their aboriginal title\textsuperscript{134}) an effort was made to present these title concerns on the Indian Land Question to the Joint Parliamentary and Senate Committee on Aboriginal Issues in 1927. However, the Joint Committee concluded all the “aboriginal title” issues were closed, as First Nation Communities had accepted additional reserve lands in 1916, and as the Dominion had faithfully spent money, would continue to act on improvements to Reserve communities (medical care, education, and relief) and all First Nation members retained the right to hunt, gather or fish in unoccupied Provincial Crown lands\textsuperscript{135}, the Federal government concluded that it had satisfied its obligations. The only real action that the Special Senate Parliamentary Committee took was to recommend amendments to the \textit{Indian Act}, which initially prevented non-aboriginal persons from “raising funds to forward claims”, later disallowing First Nation peoples to put forward claims against the Dominion, without first obtaining the permission of the Superintendent\textsuperscript{136}.

\textbf{After 1927: Background to the 1987 Trial}

The amendments to the \textit{Indian Act}, though they effectively silenced First Nations across the country with respect to land title claims, did not result in the cause of the grievances disappearing. By 1927 it was apparent to both British Columbia First Nation communities and Canada that an impasse with respect to the B.C. Land Question conclusion had been reached.

\textsuperscript{134} Friends of the Indians, \textit{The Nishga Petition to His Majesty’s Privy Council, A Record of Interviews with the Government of Canada together with related Documents} (Victoria, B.C.: Friends of the Indians, 1919) [Friends of the Indians].

\textsuperscript{135} Special Joint Committee \textit{supra} note 121 at 50 to 51.

\textsuperscript{136} \textit{An Act to Amend the Indian Act}, S.C. (1926 – 1927) c. 32 (17 Geo. V) at pt. 149.
Furthermore, by 1921 it was generally accepted, with the conclusion of Treaty 11\textsuperscript{137}, covering most of northern Alberta and part of the Northwest Territories that treaty making in Canada had come to an end. However, by the end of the 1920's there remained vast regions of Canada where no treaties had been signed. The lands in northern Quebec, Labrador, and parts of the Northwest Territories, the Yukon, and most of British Columbia fell into this category. The Federal government, at this time, argued that they fulfilled their obligations to the communities without treaty by showing consideration to these First Nation communities, in question, in the same manner as their counterparts, First Nation communities that held treaties. Canada argued that First Nations land rights in British Columbia were met and fulfilled during the McKenna-McBride Commission from 1913 to 1916. In northern Quebec, Labrador, the Yukon, and areas of the Northwest Territories, the required reserves could theoretically be set aside for the communities, if required, at a later date, as there appeared to be little need, as neither settlement nor industry had ventured into this area. It was not until after World War II that these concerns needed to be addressed. Though the 1951 \textit{Indian Act}\textsuperscript{138} revisions quietly swept away the more offensive aspects of the legislation (potlatch prohibitions and ability to enter in a claims process that questioned both the validity of surrenders or title concerns), the concerns of First Nation people across the country, such as control over membership, culture, trusts, and revenues from leases did not appear in this legislation. Likewise, First Nation leaders across the country were under the impression that these concerns would be addressed after the release of the Hawthorne Report\textsuperscript{139} in 1966 and in the reorganization of Indian Affairs in 1969.

\textsuperscript{137} Canada, \textit{Treaty 11 (June 27, 1921) and Adhesion (July 17, 1922) with Reports, Etc.} (Ottawa, Ont.: Department of Indian Affairs and Northern Development, 1926).
\textsuperscript{138} \textit{An Act respecting Indians}, S.C. 1951 c. 29 (15 Geo. VI).
Instead of fulfilling the post-war concerns of First Nation people, complying with treaty obligations and addressing the land title question, in 1969 the Federal government responded with a *White Paper*[^1] that unabashedly stated that Treaties should be abolished - “an anomaly which should be reviewed to see how they could be equitably ended.” Also the *White Paper* recommended that jurisdiction over “Indians” should be transferred to the Provinces, and that reserve lands be granted to Band Members in fee simple. Simultaneously, the Federal government made a commitment to settle past grievances, based on the Treaty relationship[^2]. Although the federal government wanted to divest itself of “Indians and Indian lands,” it was willing to act on its lawful obligations when it came to past grievances regarding the sale or lease of reserve lands, the issue of cut-off lands specific to British Columbia as a result of the findings of the McKenna-McBride Commission[^3], and fraud with respect to the acquisition or dispossession of reserve lands by employees or agents of the Federal government[^4]. Regarding Aboriginal title claims, the Government determined these concerns were “too vague” to be capable of a specific remedy. First Nation communities, in general, were faced with the prospect of having their “reserve lands” divided up, and the “Indian Act dissolved.” In the Treatied areas, it appeared that the “cede and surrender agreements” that the communities had entered into, in exchange for “lands set aside for their use and benefit” and “protection,” were now being


[^4]: Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa, Ont.: Ministry of Supply and Services, 1982).
disregarded\textsuperscript{144}. For communities who had yet to cede their territories formally to the Crown, it appeared these grievances were to continue to be ignored. However, the \textit{White Paper} galvanized many frustrated First Nation organizations, including the National Indian Brotherhood, into rallying around for the recognition of aboriginal rights. Needless to say, the \textit{White Paper} was shelved, and little was accomplished, until the Nisga’a took their claim to the Supreme Court in 1973. More importantly, First Nations voices entered into the national political arena\textsuperscript{145}.

In an attempt to resurrect their assertion of aboriginal title in the Nass Valley, the Nisga’a, in 1967, argued before the B.C. Courts that aboriginal title was recognized at common law and that the Nisga’a could satisfy the requirements of establishing title. The Nisga’a’s goal was to obtain a declaration of their rights within traditional territory, in order to negotiate a Treaty. They did not claim that they were able to sell or alienate their right to possession, except to the Crown. They did, however, challenge the authority of British Columbia to make grants in derogation of their rights. Hall J. in the Supreme Court of Canada set out the contours of the Nisga’a argument:

The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa\textsuperscript{146}.

\textsuperscript{146} \textit{Calder supra} note 147 at 402.
The Supreme Court decision was split; three judges held that the Nisga’a retained an unextinguished title; three held that whatever title the Nisga’a held was extinguished; and the seventh judge dismissed the claim as the Nisga’a had failed to obtain a fiat from British Columbia to proceed with the litigation, and, as the case was dismissed on a technicality, the Court did not address the content of aboriginal title. Six judges agreed that aboriginal title could arise at common law without legislative recognition based on colonial constitutional principles that the sovereign ought to recognize the property rights of the inhabitants upon acquisition of a new territory.

While the Supreme Court’s ruling was inconclusive as to the Nisga’a claim, the *Calder* decision made it clear that aboriginal title was alive as a legal concept, despite the Government’s denial of it. Besides the *Calder* action, in 1973 in the *Re: Paulette*\(^{147}\) case, sixteen chiefs were successful in registering a caveat on the title to approximately 700,000 square kilometres of land in the North West Territories, based on the claim that they had never ceded their aboriginal rights to the Crown. Also, in 1973, the James Bay Cree obtained an injunction to halt the construction of a hydro-electric dam at James Bay\(^{148}\). Though the James Bay Cree injunction was nullified by the Court of Appeal, this action heralded the first contemporary treaty two years later in 1975\(^{149}\).

The year of 1973 was a year of change in law, policy and attitude towards First Nation grievances, especially for communities who had not formally ceded their territories to the Crown. After the *Calder* case, the Federal government conceded that its earlier 1969 position

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147 *Re: Paulette et al and Registrar of Titles* (No. 2) [1973] 6 W.W.R. 97.


149 Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association and Canada, Agreement between the Government of Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association and the Government of Canada (Ottawa, Ont.: Department of Indian and Northern Affairs, 1975).
was deficient and responded with a comprehensive claims policy in August of 1973. Cabinet agreed that there were two types of claims, “Specific” and “Comprehensive,” and Comprehensive Claims were based on traditional use and occupancy of land in areas where First Nation interests had yet to be extinguished by treaty or superseded by law. These claims were to be settled not only in cash, but also with additional lands.

The Federal government’s subsequent policy of 1977 (affirmed in 1981) stipulated that the community’s aboriginal title was to be ceded, in exchange for a modified title (reserve lands), user rights within the traditional territory and compensation. It is generally accepted that since August of 1973, with respect to First Nations’ land and associated rights that have not formally been ceded to the Crown, the Federal government seeks to “signify the Government’s recognition and acceptance of its continuing responsibility under the British North America Act for “Indians and Lands Reserved for Indians,” which it regards “as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people’s interests in land in this country.” This change in policy also expressed the government’s willingness to negotiate claims of aboriginal title, especially in British Columbia, Northern Quebec, and in the North West Territories on the basis “that where their traditional interest can be established, an agreed-upon form of compensation or benefit will be provided to native people in return for their interest.”


Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy, Comprehensive Claims (Ottawa, Ont.: Ministry of Supply and Services, 1981).

Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, August 8, 1973 at 2 [Chrétien]. Chretien supra note 153 at 4 to 5.
In November of 1977, there was renewed hope that the Provincial and Federal Governments would sit down with the Gitxsan to negotiate a treaty. The Gitxsan were anxious to delineate separate, as well as shared, jurisdictions. In a 1977 Declaration, the Gitxsan stated:

Since time immemorial, we, the Gitksan and Carrier People of the Kitwanga, Gitannmaax, Shikadoak, Kispiox, Hagwilget and Moricetown, have exercised Sovereignty over our land. We have used and conserved the resources of our land, with care and respect. We have governed ourselves. We have governed the land, the waters, the fish and the animals. This is written on our totem poles. It is recounted in our songs and dances. It is present in our language and in our spiritual beliefs. Our Sovereignty is our Culture.

Canada’s Position

In 1978, the Federal comprehensive land claims position was to be a joint process that included Provincial governments. Though the particulars were underdeveloped at this time, the Federal government had made a commitment to negotiate comprehensive claims based on an inherent rights perspective: in other words, continuing use and occupancy of traditional lands where First Nations had aboriginal interests that were not relinquished by treaty or special legislation. The Federal comprehensive claims position was uncomplicated. The Federal government was willing to negotiate with the First Nation communities on a variety of protection issues, such as hunting, fishing and trapping, land title, compensation and other rights and benefits, in exchange for a release of their general and undefined native title, according to “past usage of the Crown.” Thus, the First Nation community was expected to cede their rights to their traditional territories, in exchange for a set of user rights, demarcated reserved boundaries, and a set of conditions in which government could infringe on the “reserve lands.” Regarding self-government, though the Federal Crown was unwilling to entertain a model that reflected

sovereignty, it would consider an expanded role for Band Councils, transferring additional responsibilities for the management of services to community members. The Federal government, while recognizing traditions and culture, expected a greater accountability from the community. Self-government powers were limited to village concerns, and the management of renewable resources (except oil and gas). The Federal Crown, however, understood the underlying difficulties the Gitxsan faced from Provincial opposition regarding any "governance model" that was based on the hereditary and traditional life office of the Saem'oo'gits and Saem'ogits, and integrating their ayooks regarding resource management and access with Provincial Ministerial authority. It was also apparent that the Federal Crown, though interested in the "inherent rights" model for solving the land question, and governance, elected to shy away from any direct intervention on behalf of the Gitxsan, regarding the Province's position on title and rights.

**British Columbia's Position**

Although British Columbia was willing to sit at the negotiating table as observers in 1977, they were unwilling to:

recognize the existence of an unextinguished [sic] aboriginal title to land in the Province, nor does it recognize claims relating to aboriginal title which give rise to other interest in lands based on traditional use and occupation of land.

The Province was prepared to engage in discussions in the areas related to the harvesting of game or fur-bearing animals, joint management protocols with respect to future resource development, environmental protection, economic development, delivery of services, and First

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Nation culture. Moreover, if additional “Reserve lands” were necessary, then the Province would entertain “selling the land to the Federal government,” only if it was determined that such “sales” would not be detrimental to Provincial management, or that the loss of control over lands and resources for the benefit of all residents of British Columbia would not be affected. The Province, at this time, would not discuss matters that First Nations peoples maintained endowed them with additional benefits associated with their historic or current status as indigenous people, or, as what the *Hawthorne Report* defined as “Citizens Plus”\(^{157}\). British Columbia’s negotiation position was straightforward: the communities would have to relinquish their tax-free status and adopt a municipal-style form of self-government, if “Citizen Plus” issues were broached.

**Gitxsan’s Position**

Initially, in response to both the Federal and Provincial positions the Gitxsan sought to negotiate first a “blanket trap-line licence” from the Provincial government, and second, the opportunity to re-claim their inland salmon fishery. The Gitxsan felt that as they had co-existed with the animals and salmon for thousands of years, they had not only the right to manage these resources but they also believed that it was in the best interests of the animals and the environment that they take on this responsibility. They proposed, besides desiring to control what species were trapped and the numbers thereof, that each *wilp* ought to be responsible for the areas within their *lax wiiyip*, contrary to the current Provincial trap line registration requirements, that neither respected *wilp lax wiiyip* boundaries, nor their rules of inheritance.

\(^{157}\) *Hawthorne Report supra* note 139 at 1: 211 to 234. Generally “Citizens Plus rights” are associated with First Nations’ inherent right of access to unsettled lands for hunting, fishing, and trapping for subsistence, ceremonial and social purposes and to some form of self-government limited to Reserve Lands.
In the management of the fishery, the Gitxsan have made efforts to resolve the conflict between the Department of Fisheries and Oceans and that of traditional authority of the Saem'ooq'its and Saem'ooq'its over allocations and the scheduling of openings. The Gitxsan believe that they ought be able to fish and process their catch where they live. Ax Gwin Desxw, in his evidence, described these efforts at reconciliation:

We wanted to develop an inland fishery that resembled our traditional one, so we wanted our people to be able to use, buy, sell, trade or barter fish caught on the Skeena in accordance to our traditional laws and customs.

We wanted to reclaim the fishery that belongs to the hereditary chiefs. There are houses that own specific fishing stations or holes, sites, and the plan was that each household would use their own site or station. We wanted the chiefs to be the ones that would be in authority over the inland commercial fishery, so that house members would get some economic benefit from the inland fishery. We planned to use traps and fish weirs, because with a fish trap you can be very selective. If all we wanted, for instance, was say sockeye, we would only take the sockeye even though all the salmon would go through the trap. They would not be damaged, as opposed to being caught in a net. Furthermore, you can grade the salmon as they come through. If we did not want the steelhead, we could just take them out of the traps and let them go, without being damaged. The same is with a fish weir; fish weirs are just a fence. You are in a boat or a canoe on the other side of the fish weir. As the salmon jump into the boat, you can throw the ones you do not want, like steelhead, you can just let them go again.

We want to work with other user groups, other native groups up and down the Skeena. We also want to meet with the commercial fishermen on the coast, and also the sport fishermen. We want to try and work out an arrangement of how we could all work together on the fishery on the Skeena River.

The salmon are a real part of our lives. The Gitksan and Wet'suwet'en peoples are not going to leave where they live to fish, and we want to ensure that the resource is protected, we want to sustain the resource, we want to protect it for the future. We want to make sure that sawmills and logging companies do not have a negative impact on the habitat around the river or spawning beds.\(^{158}\)

\(^{158}\) G. Williams, Proceedings at Trial, (1988) vol. 107 June 1 at 6761 to 6769.
Besides the desire to control in part their trap lines, to regulate the harvest of animals and to allocate and to use traditional gear for the salmon fishery, the Gitxsan wanted a say in the environmental standards when it came to forestry management. The Sae'm'ogits and Sae'm'oogits believed that the Newcomer forest practices were making their ability to use the lax'wiiip for subsistence impossible. As Tenimgyet testified:

You will not see moose standing in the middle of a clear-cut because they would not find anything to eat there. The same goes for the ground hogs, the martens, and even the mushrooms or our berries will never grow in a clear-cut.  

Clear-cut logging scares off animals. And I have indicated that we have a bear den at one of these in the general area of below Win luu gan, and one of our berry patches is there. Our berries would never grow sweet and would not be edible. They would grow, but they would be a different kind of berries we call in our language 'mii gan, and this means that they are wood berries, they are bush berries. They have no texture. They would be too sour and seedy, and if you try to preserve these berries, you would put tons and tons of sugar, and it would never sweeten up very much. If the logging was done according to selective logging practice, you just would just take out certain species and, therefore, you would not disturb the habitats of the animals that are there. 

These negotiations to this treaty, however, concluded as soon as they started. The Gitxsan had very little choice but to consider litigation, as they were unwilling to accept a treaty that required them to first “cede and surrender” their territories, and second acquire a “list of rights” subject to Crown regulation. They believed if they were party to this treaty model, they would be powerless to effect their aboriginal rights. In other words, they still would be required to compromise their traditional governance and limit their livelihood ventures to only a proportion of their lax'wiiip, and modify their ayooks with respect to the hunting, fishery and berry picking locations in light of Crown legislative initiatives and third party use, without adequate consultation or compensation.

When the *Lixs giigyet* arrived in the territories *circa* 1825 to trade, the Gitxsan remained independent, maintaining their own laws. Gitxsan people knew as early as 1884 that the loss of use of *lax'wiyiip* meant that their means of livelihood was undermined. They also knew that retaining authority in their territories was important for respectful relationships among themselves and the animals. Adherence to the laws of trespass, and the ability to shoulder responsibility for respectful relations, were obligations placed on all who came to the territories, according to Gitxsan *ayooks*. The *Lixs giigyet* initially respected the laws of the Gitxsan, however, after 1872, the situation changed. Restitution waned. Issues regarding trespasses and the inability of the *Lixs giigyet* to respect the laws that governed a person’s conduct in light of trespass or accidental death, while under the employ of another, created tensions between the Gitxsan communities and the local authorities.

The unwillingness of the Government to carefully analyze the situation regarding the trespass and homicide issues in the early 1880’s created a sea of distrust that persists. Similarly early Provincial insistence on allocating Reserves without addressing the interrelationship between aboriginal title, self-government and continued livelihood, as well as the harmonization of laws and jurisdiction has not favoured respectful relations.

In 1910, the Gitxsan crystallized their position regarding the Land Question. They believed that the *Lixs giigyet* were trespassing onto their territories, as well as ignoring that their laws regarding the right to allocate resources (fish, fur, and berries as well become engaged in related business ventures such as mining and forestry). The Gitxsan, like other British Columbian First Nation people, knew they had land and social rights that rested in Imperial Colonial law and practice. Moreover, James Douglas, at the time of declared sovereignty, knew that First Nations held “distinct ideas of property in land” and recognized their exclusive
possessory rights\textsuperscript{161}. However, after the failed attempt at litigation by the Allied Tribes of British Columbia in 1910, the Nisga'a Petition of 1916 and the United Tribes statement in 1919, when the Special Joint Senate Parliamentary Committee met to discuss the state of affairs in 1927, British Columbian First Nation delegates stated that the issues of title, annuities, and citizenship concerns were considered by them to be unfinished business.

\textsuperscript{161} J. Douglas [to the Duke of Newcastle] 25 March 1861 in: \textit{Papers Connected with the Indian Land Question supra} note 47 at 19.
Chapter Three

Gitxsan Property, Ownership and Governance

The Gitxsan have lived in the Skeena, Bulkley and Kispiox watersheds since time immemorial. According to the Gitxsan, when everyone lived at *T'am Lax amit*¹, the Animals, Fish, Plants and Humans had clear understandings among themselves, and were able to talk with one another. As time wore on, the Humans over-hunted², and according to the Gitxsan adawaaks (oral histories) the Mountain Goats, in defence, invited the people to a great feast, but the Humans continued to disrespect the Goats and killed them without shame. The Mountain Goats brought the mountain of *Stekyooden* down around the Gitxsan peoples in retaliation³. Later, at the lake at the foot of *Stekyooden* the young ladies, after salmon fishing season was over, played with the bones of some of the trout they had just finished catching. This disrespect

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¹ *T'am Lax amit* was a great village located along the Skeena River that extended from present day Gisegyukla to Kispiox. M. Johnson, Proceedings at Trial, (1987) vol. 11 May 27 at 670 [Johnson].

² Txä’mse kills little Pitch; Txä’mse kills Grizzly Bear; Txä’mse kills Deer; Txä’mse imitates Chief Seal; Txä’mse imitates Chief Kingfisher; Txä’mse imitates the Thrush; Txä’mse and the Cormorant; Txä’mse and Chief Grouse; Txä’mse returns to the Wolves. F. Boas, *Tsimshian Mythology* (Washington, D.C.: Smithsonian Institution, 31 Annual Report for the Bureau of American Ethnology for the Years 1909 - 1916) at 86 to 100 [Boas].

³ As discussed in greater detail later in this chapter, the adawaaks generally speaking record wilp origins, migrations, and the boundaries of the lax wiixip of each wilp. The source for, together with the text of, the *adawaak* referred to can be found in Appendix One. See: The First *Adawaak of Antgulilbix* in Appendix One at 233. Chronicled in this *adawaak* is the story of how the boy who wantonly killed animals, especially Mountain Goats, and after a change in heart heeded the advice of the elders and saving a young goat, was able to be the sole survivor of landslide at the Mountain Goat’s village. Afterwards, the boy takes for his crest the image of the one-horned Mountain Goat as a memorial for those who died and to remember not to overkill the animals.
for the remains of the trout aroused the wrath of Mediik\(^4\), and in his rage he brought a great flood clearing the land of people\(^5\). Even after this the people at T'am Lax amit continued to ignore the warnings of the Sun God and allowed a young boy to poke fun at the sky when it continued to snow late in the spring. The Sky did not like the taunts, and brought more snows, creating the glaciers\(^6\).

It was at this time that the larger animals - Bear, Mountain Goat, Wolf, Deer and Mountain Lion - wanted to rid the world of the humans and prevent them from returning. However, the smaller animals, - Skunk, Ground Squirrel, Raccoon and Mouse - felt that this was a bit too harsh and lobbied for a negotiated agreement, as they were rarely taken by the Humans and relied on them for their existence. The compromise that the animals worked out was that the people of T'am Lax amit were to be banished from the territories, and when they had learned not to over-hunt or disrespect the animals, and they were able to follow the ayooks (laws), they could return\(^7\). Winter lasted a long time. When they got out of the ice and snow their land was changed and it was like new. Each group followed those they could understand, so some went in different directions\(^8\).

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\(^4\) Johnson supra note 1 at 668.
\(^5\) The Adawaak of Tsibasaa and Antgulibix (Appendix One at 235) relates how after the fall of the Mountain Goat’s village, those from the Wilps of Tsibasaa and Antgulibix had finished smoking fish for the winter and the young ladies were playing and laughing, fooling around with the remains of the fish. Then came the great Mediik gaining strength along the streams and river into the lake, crashing into the village and in its wake drowning all.
\(^6\) The Adawaak of Haat’ixslaxnox in Appendix One at 236. It was spring time, and the Spring Salmon had been handed out, however, a little boy started to poke fun at the falling snow and the mountains. The snow fell harder and eventually covered the land and the villages.
\(^7\) Boas supra note 2 at 106 to 108.
\(^8\) There used to be one language at T'am Laxa mit before they used tsimxsan language. They called this sim algyax and now the Gitxsan use what is known as gynimx. Johnson supra note 1 at 668.
Gitxsan society rests on the foundation of the wilp. One is born into, socialized and inherits from one’s mother’s family. The wilp is the basic social and political unit in Gitxsan society and collectively the wilp owns its history (adwaaks) which are associated with its crests or symbols of title (ayuks) to its territory (lax wiiyip), which are displayed on various ceremonial regalia (Gwiis gan ‘malaat – robes or blankets, ‘Am halitx, – headaddresses and Am bilan –aprons) and poles (T’saan) at different feasts (li’ligit). There are sixty-four wilps associated with the Gitxsan lax wiiyip and Gitxsan society, and like that of other Northwest Coast peoples, is divided into four groups called pteex. The pteex existed before the Deluge when all lived at T’am Lax amit, and when the people scattered after the deluge, the people carried with them their pteex affiliation. According to Gitxsan historian, Susan Marsden, after the people dug themselves out from under the snows, the people of the Genada - Laxset pteex (Frog/Raven Clan) returned first to the Lax wiiyip, the great plateau to the northwest. The Laxgibuu (Wolf Clan)

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9 The wilp membership may include anywhere form 25 to upwards to 200 people at any one given time. Currently, there are about ten thousand Gitxsan people and approximately 80% live in or around their historic villages in north central British Columbia.

10 Even though either man or woman can hold the title of Seem’ogit or Seem’oogit, the preferred head of the wilp is one’s mother’s uncle, brother or nephew. In conversation with J. Angus, April 16, 2000.

11 Pteex membership is inherited through the mother, and as such, marriage partners are sought outside of that pteex (S. Marsden, Proceedings at Trial, (1989) vol. 233 June 6 at 17087). To marry inside that pteex is to commit g’aats or incest (M. McKenzie, Proceedings at Trial, (1987) vol. 6 May 19 at 379 [McKenzie]). Persons who consider themselves related by a common origin or migration refer to each other as the wil’na t’ahl group of huwilp (The Adawaak of Gyoluugyat in Appendix One at 248 & The Second Adawaak of Antgulilbix in Appendix One at 242. In these two adawaaks the relationship is laid between the Wilp of Gyoluugya and Antgulilbix, and at a Yukw they would be recited one after the other.)

12 (S. Marsden, Proceedings at Trial (1989) vol. 234 June 7 at 17108 to 17114, 17119 to 17120 [Marsden]).


14 The Adawaak of Hax bagoottxw in Appendix One at 237. In this adawaak, the sisters become heads of the Wilp Antgulilbix claiming the crest of the One-Horned Mountain Goat and the dirge song for their brother.

15 See: The Second Adawaak of Antgulilbix in Appendix One at 238. In this adawaak the young people learn from Wiitax max meexw hunting, trapping and fishing skills after the floods recede.
followed, then the *Laxskiik* (Eagle Clan), and lastly the *Giskaast pteexs* (Fireweed Clan) migrated into the area. After the dispersal, some members of the *Genada - Laxsel pteex* (Frog/Raven Clan) stayed on Haida Gwaii (Queen Charlotte Islands) while others travelled to Alaska. The *Laxgibuu* (Wolf Clan) lived on the north coast for a while and were forced back up the Nass River by the Tlingit, and lastly some *Laxskiik* (Eagle Clan) from the Nass River region moved down into Upper Skeena and finally to Kitwanga (Gitwankga). Lastly, the *Giskaast pteexs* (Fireweed Clan) moved in from the north. The return to the *lax 'wiiyip* occurred family by family (*wilp* by *wilp*), and according to the *adawaak* (oral history) those of common *pteex* assisted each other and settled in paired *pteex* groups at village sites along the banks of major rivers near canyons or by productive fishing sites. *Pteex* affiliation, like inheritance of *wilp* property rights and political status, is determined by matrilineal inheritance. Those who are of the same *pteex* consider themselves at one time related or from the same village before the flood and are thought of as family, and refer to each other as *wil'na t'ahl*. The *wil'na t'ahl* are called on by a *wilp* on when one of their members passes on to assist with the funeral, as support workers for the necessary *li'ligit* that affirms the succession of a *Sæm'ogit* or

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16 See: The *Adawaak of Biis hoont Adawaak* in Appendix One at 251. In this *adawaak* the *Wilp* of *Tenimyget* tells of their migration into the *Lax 'wiiyip* of the Gitxsan.
17 See: The *Adawaak of 'Neekt* in Appendix One at 246. This *adawaak* chronicles the route that the *Laxskiik* took from the Nass Valley to Haida Gwaii, back to the Nass River then on to Kitwanga.
18 See: the *Adawaak of Sindihl* in Appendix One at 239. Outlined in this *adawaak* is how the *Wilp* of *Sindihl* claimed their territories when they all lived in the village of Gitangasx, until their move to *Gitan 'yaaw*.
20 See: The *Adawaak of Hanamuxw* in Appendix One at 240. The *Wilp* of *Hanamuxw* has chronicled in this *adawaak* their origins, *ayuks* and their purpose as peace keepers among the Gitxsan.
21 The term "*wilp*" literally means dwelling place of a family and is the resource owning group and *wilp* membership is restricted to the *Sæm'ogit* (woman) or *Sæm'ogit* (man) (McKenzie, *supra* note 19 at 484), her or his brothers, sisters, sisters' children, and sisters' daughters' children (H. Harris, Proceedings at Trial (1989) vol. 168 January 16 at 10697 [Harris]).
22 Marsden *supra* note 11 at 17126 to 17127.
23 *Ibid.* at 17104 to 17105.
Saem’oogit, and in situations where additional help or labour is required by any one of the affiliated wilps.

In historic times, each family had a dwelling located in the village of origin\(^{24}\), and although male wilp members usually did not leave this village (patrilocal), in most cases women when they marry move to their husband’s uncle’s village\(^ {25}\). The woman’s sons (or daughters) at puberty would return to their mother’s village to be trained by their mother’s brother\(^ {26}\). Early training in the laws (ayooks) and history of the Gitxsan is the responsibility of one’s father’s wilp (or wilksiwitxw). This body of people, besides being responsible for the early education and training, maintains special relationships throughout the lives of any children. The wilksiwitxw provides the first and last bed of any child, and assists with the ceremonial obligations of these children (from sponsoring ones naming li’ligits to pay for special events at one’s funeral)\(^ {27}\).

More importantly, while one’s father is alive, one has access to particular fishing sites, hunting grounds, or berry grounds, as well as trapping privileges in ones father wilp’s lax ‘wiiyip. Thus, ones wilksiwithxw, assists the wilp in establishing the next generation, and knits the society together\(^ {28}\).

Besides these alliances, which cements Gitxsan society, their affiliation with other wilps, wilksiwitxw, or wilksiwithxw members who reside the other villages\(^ {29}\) Gitxsan wilps establish

\(^{24}\) S. Mardsen Proceedings at Trial, (1988) vol. 93 May 6 at 5896 [Marsden].
\(^ {26}\) A. Mathews, Proceedings at Trial, (1988) vol. 73 March 14 at 4539 & 4543 to 4544 [Mathews].
\(^{27}\) In conversation with J. Angus, April 16, 2001.
\(^ {28}\) In conversation with M. McKenzie, April 18, 2001.
\(^ {29}\) Although Gitxsan villages in themselves do not form political and social units, wilp members that live in the villages are usually more or less central; or at least close to the wilp’s lax ‘wiiyip. Also, in times of crisis, villages will align themselves against a common enemy, or as in contemporary times have banned together as unit under the banner of the Gitxsan Hereditary Chief Society (or the Gitxsan Treaty Society) to forward their court action and now their treaty
close relationships with other communities throughout the region. Thus, Gitxsan society, although the property of the *wilp* is maintained through the adherence to a matrilineal inheritance system, social relations throughout the region (including with neighbouring communities) are maintained through marriage, knowing the *wilp*'s place of origin as remembered in the *adawaak*, and by acknowledging the importance of their *pteex* affiliation\(^{30}\). Political and social aggregation among the Gitxsan rests on the foundation established by *wilp* membership, and is interwoven with claims of exclusivity to specific territories (*lax'wiiyip*), various titles (*ayuks*) and histories (*adwaaks*) by the *wilp* that is tempered by the desire to maintain access to additional territories and economic endeavours\(^{31}\). These relations are cemented by marriage, historical ties and shared histories. The *wilp* is the property holding group, in which it members have rights and obligations, and as such it is only the members of the *wilp*, directed by the *Seem'ogit* or *Saem'oogit*, that may transact business associated with the *wilp*'s *lax'wiiyip*, *ayuks* or names (*wams*)\(^{32}\).

As part of the Gitxsan’s renewed contract with the Animals, the Gitxsan were to remember the events that banished them from the *lax'wiiyip*, and as part of the renewed relationship the *Saem'oogits* were entrusted to manage the resources in the *wilp* *lax'wiiyip*, as well as to maintain respectful relations between the *huwilp* and *wilp* members. Besides the respect that they were to show to each other and their *wil'na t'ahl* (related *wilps* of the same *pteex*) the Gitxsan were to acknowledge the contributions of their *wilksiwitxw* (one's father's relatives). This is remembered in their *adawaaks*. Thus the purpose of the *adawaak* is to bring the past into the present, and to show that the *ayooks* of *naa hlimoot* (their laws of sharing)\(^{33}\)

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\(^{30}\) In conversation with J. Angus.
\(^{31}\) In conversation with V. Smith, April 23, 2001.
\(^{32}\) In conversation with A. Mathews, April 22, 2001.
\(^{33}\) In conversation with D. Ryan, April 18, 2000.

\(^{33}\) A. Mathews, Proceedings at Trial, (1988) vol. 74 March 15 at 4587 to 4589 [Mathews].
given to the Gitxsan promote respectful relations. Respectful relations must exist not only between the huwilp, but also between the Gitxsan and the animals. Historically, Gitxsan traditional political and legal life, like other First Nation peoples in North America, has been considered to have been replaced with Indian Act Administration and compliance with Federal and Provincial laws. However, the Gitxsan can illustrate that several groups or individuals may hold different kinds of rights in the same resource or piece of land. It could be said that individual rights (in resources or land) as Gordon Wilson contends, are “dependent” upon “social relationships,” and even then the individual can only have “definite rights” to participate in the use and/or to share the produce from particular locations, governed by specific rules. Rights to resources for members of a community, like Max Gluckman has suggested, are determined by status inside it, and by meeting obligations inherent in that status. Thus the Gitxsan Säm'ogit or Säm'oogit must carry the responsibility to manage their lax 'wiiyip in such a manner that will enable the wilp members to have enough to eat, and similarly wilp members and those affiliated with the wilp, regardless of political status, must respect the ayooks, and heed the word of the Säm'ogit or Säm'oogit. Yet, at the same time, Gitxsan society, like most societies, is organized and governed according to principles that first maintain that the lax 'wiiyip of the wilps is “owned as a whole” in alliance with each other, and then individual wilp members are “delegated rights” according to specific relationships and in particular territories.

Fundamentally, the Gitxsan are corporate group owners of their Lax 'wiiyip, and this includes,

34 G. Wilson, The Land Rights of Individuals Among the Nyakyusa (Rhodes-Livingstone Papers, 1938) at 39.
35 M. Gluckman, Ideas in Barotse Jurisprudence (New Haven, Con.: Yale University Press, 1965) at 79.
36 Such a statement suggests that all land can be considered to be “communal in nature,” whether one is referring to land in nation states or in stateless societies, and keeping in mind that relying on terms such as “communal,” “ownership,” “beneficial occupation,” or “usufruct,” as Robert Lowie has argued, one might be masking the real pattern of rights to land and/or resources. See: R. H. Lowie, Primitive Society, (London, Engl.: Routledge 1921) at 201.
besides the ownership of the land: user rights, exchange rights, distribution entitlements, a management system and instruments authority to support the management of the resources.

In this chapter I consider Gitxsan property ownership, as it relates to their land tenure system and governance. First I examine Gitxsan property, which includes first their property as articulated in the wilp adawaak, ayuks, wams, and lastly, their real property their lax 'wiiyip and the resources on it. Second I discuss the Gitxsan land tenure system and wilp exclusivity, including the right of the wilp to grant access to, as well as alienate from, their lax 'wiiyip for specific purposes. Third, I talk about the role of the Seem'ogit, and Gitxsan governance principles. Lastly, I examine the Li'ligit as a central institution that binds wilp members together in cooperation, and demonstrates the reciprocity among all Gitxsan huwilp.

**Wilp Property and Ownership**

For the Gitxsan their *lax 'wiiyip* is part of them, their status, and their history. On May 12, 1987 Delgam 'Uukw and Gisday Wa in their opening address to the Court stated that:

For us, the ownership of the territory is a marriage of the chief and the land. Each chief has an ancestor who encountered and acknowledged the life of the land. From such encounters comes power. The land, the plants, the animals and the people, all have spirit; they all must be shown respect. That is the basis of our law.

The Chief is responsible for ensuring that all the people in his house respect the land, and all living things. When a Chief directs his House

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37 At the time of the filing of the statement of claim the Gitxsan name of Delgam 'Uukw (October 24, 1884) was held by Albert Tait, and in January 1987 the name of Delgam 'Uukw was passed on to Ken Muldoe (See: M. McKenzie, Proceedings at Trial, (1987) vol. 4 May 13 at 258) and near the end of the trial, the name of Delgam 'Uukw was given to Earl Muldoe after Ken Muldoe suddenly passed away on April 8, 1990 (S. Rush, Proceedings at Trial, (1990) vol. 319 April 9 at 23993).

38 At the time of the trial the Wet’suwet’en name of Gisday Wa was held by Alfred Joseph. A. Joseph, Proceedings at Trial (1987) vol. 23 June 19 at 1523.
properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority.

My power is carried in my House's histories, songs, dances and the crests. It is recreated at the feast when the histories are told, the songs and the dances performed and the crests displayed. With the wealth that comes from respectful use of the territory, the House feeds the name of the chief in the feast hall. In this way, the law, the Chief, the territory and feast become one. The unity of the Chief's authority and his House's ownership of its territory are witnessed and thus affirmed by other chiefs at the feast.

By following the law, the power flows from the land to the people through the Chief; by using the wealth of the territory, the House feasts its Chief so he can properly fulfill the law

Delgam 'Uukw and Gisday Wa also asserted that, as they hold the name of a Säm 'ögits, they hold title, and that the property of the wilp is part of the status named by that title. They are, as Säm 'ögits, responsible for ensuring that all the people of their wilp have enough to eat, respect the land and all living things in that territory. The Gitxsan people know it is when the Säm 'ögits directs wilp members properly, and the laws are followed, the power of the wilp is recreated. It is in the name of the wilp that the Säm 'ögits has authority to direct the wilp members on wilp lax 'wiiyip. They also assert a justification for Canada and British Columbia to negotiate with them as property owners, and to view their title in terms of their laws and obligations. The Gitxsan desire to have recognized their proprietary and management interest in the salmon fishery, in their trap lines, in the berries they gather, and the other animals they hunt. They are eager to influence Federal and Provincial policy decisions, permitting their law to affect these interests throughout their lax 'wiiyip. In the event of infringement, as a result of Crown appropriation and third party damage, trespass or nuisance, they believe that it is necessary that they be involved to set the conditions for appropriation, infringement and determination of standards for compensation.

For the Gitxsan, tenure and ownership lies coded in a series of cultural images, practices and, more importantly, the historic relationship to the land. Similarly, Gitxsan leadership, though hereditary, is contingent on responsible behaviour and the fulfilling of duties and obligations. Access to resources is granted firstly to immediate family members, and secondly to spouses of family members and their children. Generally Gitxsan property, like that of common law property, has everything to do with the rights of persons to access resources for food, ceremony and economic pursuits of the wilp. However, Gitxsan wilp property is firmly situated in the fact that persons do not necessarily have rights over “things,” but have obligations owed to each other (relations, the animals, fish, trees, rocks and so on). Thus, Gitxsan property and its underlying laws consist of sets of principles that sustain particular practices, such as fishing, hunting and sharing (both labour to access the food and the food itself) that must be discovered by listening first to the adawaak, acknowledging the ayuks and finally abstracting the principles of law that become embedded in the events such as fishing, hunting, gathering and sharing.

Since Gitxsan status is tied to governance roles, which are situated in specific locations with particular duties, the lax 'wiiyip, and the wealth that is held on it, is an intricate and vital component of Gitxsan public and private life. The nax nox or power that the wilp holds is contingent on respectful use of the territory: that, in turn, is reflected in the well-being of all members. These features stem from the capacity of the wilp to hold exclusivity over their lax 'wiiyip against other wilps. This right of exclusivity is further coupled with a correlative duty of other wilps to agree to stay out of the territories in question, unless permission is given. However, the Sae'm'oogit has the additional obligation to maintain the ecological integrity of the lax 'wiiyip in order that the animals remain. In Gitxsan society Sae'm'oogit have responsibilities to manage the resources carefully, in order that all of their wilp members have plenty to eat.

40 W. W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven, Con.: Yale University Press, 1923) at 123.
They are similarly entrusted to act as stewards of the land, rivers and air, so that the fish, birds, animals and plants will continue to exist. For the Gitxsan it is on the land that, both individually and collectively, they encounter life, and it is when the narratives and songs are told and performed at any one of Gitxsan li’ligit (feasts) that the authority of the Sæm’ooogit is legitimized. The display of the crests, the narratives and the bounty fed to guests lays the foundation for the subsequent affirmation or refuting of property decisions by the management of the wilp.

**Adawaak**

The wilp first owns its history - the adawaaks, which as charter narratives outline the migrations back into the lax ‘wiiyip, the relationships among their pteeex (clan) relatives and the lax ‘wiiyip boundaries. In some cases the adawaaks recite inter-wilp tensions and inter-community wars. Generally speaking the adawaaks record wilp origins, migrations and the lax ‘wiiyip of each wilp. Also encoded in the adawaaks are the individual Gitxsan wilp symbols of their title, the crests - ayuks which give the wilp the right to occupy and use the territory it

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42 The Adawaak of Hax bagootxw in Appendix One at 237. Explained in the Adwaak of Hax bagootxw is how relationships are maintained between sisters who live in different territories.
43 The Adawaak on the Move to Kuldo in Appendix One at 242. Gyologyet explained in the Adawaak on the Move to Kuldo how the wilps established themselves in the Kuldo Territories.
44 Adawaak of Hanamuxw in Appendix One at 240. Gwaans retold in detail that it was during the time of inter-community wars that the Wilp of Hanamuxw was formed and subdued the warring wilps.
45 Ayuks(s) are presented on T’saan (poles), gwiis gan ‘malaa (robes), am bilan (aprons) and ‘am halitx (headdresses) and relate directly to the lax ‘wiiyip. S. Marsden, Proceedings at Trial, (1988) vol. 93 May 6 at 5922 [Marsden], and also The Adawaak of Hawaaw’ in Appendix One at 264 to 265. As Tenimgyet explained how the wilp, by re-telling the Adawaak of Hawaaw’, can acquire ayuks or songs, adding to the history of the wilp through the remembering of important events. See: Appendix One at 259.
claims. Adawaaks, as Gyologyet explained at trial, are central to Gitxsan life and are considered to be the primary aspect of Gitxsan wilp property and knowledge:

Adawaak in the Gitksan language is a powerful word for describing what the House stands for, what the territory stands for, is the adawaak. It’s not a story, it’s how the people traveled back into the territory. This is the adawaak. And it’s the most important thing in Gitksan, is to have an adawaak. Without an adawaak you can’t very well say you are a chief or you own a territory. Without the adawaak – it has to come first, the adawaak – names come after, songs come after, crests come after it, and the territory that’s held, fishing places – all those come into one, and that’s the adawaak.

The adawaak is:

history, and it’s the happening of how the Gitxsan people have their names right from infant to a chief. The Adawaak refers to the songs that are made for the purpose of each chief to use. The Adawaak tells of the Nax nox, why it was created and how it’s shown amongst the people in the Feast House. The Adawaak also tells of the territory of the chief.

Ayuk

Besides the adawaak, which encompasses Gitxsan wilp history and their laws, Gitxsan wilps own ayuks. The ayuks are sets of symbols that bind the wilp to their lax ‘wiiyip and to the animals from the time before the floods. The symbols illustrate to others the wilp’s territorial

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46 At the time of the trial the name of Gyologyet was held by Mary McKenzie. M. McKenzie, Proceedings at Trial, (1987) vol. 3 May 13 at 160 [McKenzie].
47 The Adawaak on the Move to Kuldo in Appendix One at 242.
48 The Second Adawaak of Wiigyet in: Appendix One at 251. There is a place where Wiiget fell back to earth and at this place the salmon also pool before proceeding up stream. This place is considered to be an excellent fishing spot.
49 McKenzie supra note 37 at 236.
50 McKenzie supra note 46 at 185.
holdings and their relationship to other wilps. These symbols, the ayuks, as Xamlaxyeltxw\textsuperscript{51} testifies:

are always acquired from the territory, and in the ancient time it was very hard to get these ayuks.

Each house has its own ayuks, and no-one from another house is supposed to use another house's ayuk, or crest\textsuperscript{52}.

These ayuks or crests, according to Ax Gwin Desxw\textsuperscript{53} are:

very important symbols to Gitksan people. The ayuk shows how the house groups attained their land initially, who inhabits a particular piece of land, or how they killed different animals. The ayuk clearly identifies who you are, and to which house group you belong. Ayuks define how much land you have, how much power you have, and your authority over that piece of land. Nobody just goes up and uses somebody's ayuks, because if you try and take somebody's ayuks you are taking their land away.

For instance, like people like Tenimgyet in Gitwangak, their ayuks are the bear cubs\textsuperscript{54}. Our house has the grizzly bear with the two baby bear cubs on the ears\textsuperscript{55}. This identifies who I am, and I know who Tenimgyet is because I know what his ayuks are. And those ayuks are illustrated on their particular totem-poles. This shows the people that they have power and the authority over the land, they have fishing holes, the ayuk(s) clearly identify who they are.

It tells the people that this land belongs to us. If you look at Tenimgyet's ayuks and know the adawaak of how the bear captured the woman, you know that happened where Tenimgyet's territory is today. That is how the ayuks are tied right back into the land.

\textsuperscript{51} At the time of the Trial the name of Xamlaxyeltxw was held by S. Mardsen. S. Marsden, Proceedings at Trial, (1988) vol. 92 May 5 at 5870 [Marsden].
\textsuperscript{52} Marsden supra note 24 at 5922.
\textsuperscript{53} At the time of the Trial the name of Ax Gwin Desxw was held by G. Williams. G. Williams, Proceedings at Trial, (1988) vol. 105 May 30 at 6627 [Williams].
\textsuperscript{54} The Adawaak of Biis hoont in Appendix One at 251. Besides the narrative telling of the coming of the Wilp of Tenimgyet into Gitxsan territories, this adawaak describes the major ayuks of the Wilp of Tenimgyet.
\textsuperscript{55} The Adawaak of Malii in Appendix One at 257. The image of the mother bear with the two cubs abut her ears are one of the ayuks symbolizing the property of the Wilp of Malii.
These ayuks are displayed on the regalia of the Sām’oogit or Sām’ogit and on other wilp property, such as ‘am halitx, gwiis gan ‘malaa and am bilan. However, the most important examples of wilp property displaying wilp ayuks are the T’saan or poles. As Hanamuxw testified:

The pole indicates that you have a house. Without the pole it would be difficult to identify the House of Hanamuxw because your pole records the experiences of your house. They are the history of your house. The pole is evidence that Hanamuxw’s house did exist, does exist and will continue to exist.

Putting up a new pole is a way of reaffirming and confirming the Dax gyet of Hanamuxw. It is the way of establishing that the property of Hanamuxw has not been abandoned, nor will it be in the future. It is a way of telling the other chiefs that the house is as strong as it was before, and that it will continue to exist because we have a fair number of people in our houses who will continue with the activities associated with the House of Hanamuxw, and who will ensure that it will exist in the future.

As Xamlaxyetxw stated:

When the chief is planning to raise the pole, it is very important that he thinks back to his territory. It is on the pole that he puts all the power and authority that he has. He puts all the crests of his adawaak on this pole. These poles show where the chief’s jurisdiction is.

Similarly, Gwaans in her evidence testified:

The totem pole is like a map. The pole holds everything. They hold the fishing sites and they hold the hunting ground and they hold the house.

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56 Marsden supra note 24 at 5922.
57 At the time of the Trial the name Hanamuxw was held by J. Ryan. J. Ryan, Proceedings at Trial (1988) vol. 79 March 23 at 4975 [Ryan].
58 The Adawaak of ‘Neekt in Appendix One at 246. The story of the Wilp of ‘Neekt like that of the Wilp of Hanamux is recorded on the wilp’s T’saan.
61 S. Marsden, Proceedings at Trial, (1988) vol. 94 May 9 at 5963 to 5964 [Marsden].
62 At the time of the Trial, the name of Gwaans was held by O. Ryan. O. Ryan, Proceedings at Trial, (1987) vol. 16 June 10 at 1013.
The continuous succession of ownership of *lax’wiiyip* is through the passing of chiefly names that legally and spiritually connect the present generation to their ancestors. Besides *adawaaks* and *ayuks*, the *wilp* owns, as property, *wams* or names and these are significant as markers in the individual Gitxsan life cycle, especially with respect to the succession of the *Saem’oogit* and governance of *wilp* property. The inheritance of the Gitxsan *lax’wiiyip* upon the death of the *Saem’oogit* is renewed by the transfer of the chiefly *wam* and other named positions, duly witnessed by others of similar rank at various *li’ilgit* (general feasts). It is the name of the *Saem’oogit*, according to Gitxsan tradition, which carries the *dax gyet* (power) of the *wilp* and its genealogy can be traced back over the history of the Gitxsan people. In the most ordinary sense, a *wam* of a person marks the transitional stages of a person's life. One is named at birth, as a young person, and perhaps later in life. This is as Gyologyet testified:

> Starting from when a child is born they're given a name, and then at puberty. When they reach the age of adult they're given another, and if he or she is in line of becoming a Chief a name is given to that person, and it is shown in the Feasting House just who are the people that are in line to become a Chief, as they are given an extra name.\(^{64}\)

Some *wams* hold, by virtue of the name itself, political influence. The highest ranking *wam* in a *wilp* is the name of the *wilp*; for example, *Delgam’Uukw* is the highest ranking *wam* in the *wilp* of *Delgam’Uukw*. Correspondingly, the person holding this name holds the most authority in the *wilp* and is referred to as the *Saem’oogit* or *Saem’ogit*. To a large degree, the *Saem’oogit* is the embodiment of the *wilp*. Similarly, there are names for members who act as spokespersons, and

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\(^{63}\) Ryan *supra* note 62 at 1078.

\(^{64}\) McKenzie *supra* note 37 at 243.
names specific to women and children\textsuperscript{65}. However, not every person’s name traditionally permits him or her to enter the yukw. One must hold a wa'ayin wam to sit at the yukw, as it is at the yukw that wams given to wilp members are validated\textsuperscript{66}. Inheritance of wams (names) and social positions, specific to a particular wilp, are reckoned through a matrilineal descent pattern\textsuperscript{67}, and rights to resources are attributes of political status fixed by wams, which in themselves are the property of the wilp. Those who hold the authority to allocate quotas for fish, and determine the locations for hunting and trapping have obligations to ensure that there are enough resources for their kin, kin related through marriage, and those who are allied to the wilp by historic ties.

\textit{Lax'wiiyip}

For the Gitxsan their \textit{lax'wiiyip}, especially resources sites (fishing sites, mountain passes, bear dens, and so on), are subject to control by the wilp. \textit{Wilp lax'wiiyip} and the \textit{ayuks} (crests) are the material foundation of the wilp, the basis for their social identity and the history of its members. As \textit{Xhliimlaxha}\textsuperscript{68} testified:

In Gitxsan society the owner of \textit{Xhliimlaxha}'s territory are all the members of the house. This area is where they get their supply of food. \textit{Xhliimlaxha} has been the owner since they discovered it, since they left Temlaham\textsuperscript{69}.

The land is corporate property, in that the wilp as a unit holds a proprietary interest, but lends rights of access to other groups. At the same time, the land essentially holds incorporeal

\textsuperscript{65}“Introduction” in Beynon \textit{supra} note 25 at 22 [Beynon] & McKenzie \textit{supra} note 46 at 189.
\textsuperscript{66}McKenzie \textit{supra} note 37 at 218.
\textsuperscript{67}Williams \textit{supra} note 53 at 6659.
\textsuperscript{68}At the time of the trial the name of \textit{Xhliimlaxha} was held by Martha Brown. M. Brown, Commissioned Evidence (1985) vol. 1 September 18 at 1 [Brown].
\textsuperscript{69}M. Brown, Commissioned Evidence (1985) vol. 3 September 21 at 5.
attributes, in that the Gitxsan belief structure compels them to view their relationship in terms of
the human-animal relationship and their history of encounters on it. These two aspects of
property, the corporate and incorporeal, for the Gitxsan are interwoven through the presence of
the *Saem'ooqit*, who is considered to be the literal embodiment of the *wilp*'s holdings and its
activities. The right to grant or withhold consent, or to use *wilp lax'wiiyip*, is contingent on the
*Saem'ogit* or *Saem'ooqit* having the public responsibility to see that the *lax'wiiyip* is used, its
general fertility is maintained and no-one is left hungry. Those who are not members of one’s
*wilp* may be granted permission to use hunting territories and fishing stations. These persons are
part of the *wilksiwitxw* or from the spouse’s kinship groups or *andimbanak*. Others may seek
permission, which is usually granted subject to terms of some form of payment. As *Tenimgyet*
has stated, “the fish are part of the rivers, as they have their own houses,” and “it is not a *wilp*'s
right to deny another a livelihood,” however, “the fishing station at site *Gwin k'alp* is the *wilp* of
*Tenimgyet* and those people using it must adhere to the laws of the *wilp* of *Tenimgyet*.”
The user of the fishing site, berry patch or hunting territory could make an on-the-spot contribution
for the use (*daawxiis*) or, the user was expected to present the payment at a *yukw*. In response to
the contribution, the *wilp* receiving the payment would acknowledge it and state to the
community who has rights on their *lax'wiiyip*. Permission is sought from the *Saem'ooqit* to go
onto the *wilp* territories to hunt, trap, gather or fish, or as *Gwiiyeehl* testified:

After *Gitludahl* passed on and the name was passed on to me, I have the
full authority to look after the place or to give permission to anyone that
wants to go there and this includes the hunting, or trapping, or fishing,
whatever *Gitludahl* had rights to give out. It’s my responsibility to do it.
If I give anyone permission or they come to me and ask me if they want to
go there, I will show them where to go and where to trap or where to hunt
beaver or anything like that. We don’t always go into the same place at
the same year, we always move onto different territories.

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70 A. Mathews in correspondence, April 10, 1999.
71 McKenzie *supra* note 11 at 361.
In essence, ownership of Gitxsan property is predicated on the ability of the Saem’oogit to make appropriate decisions regarding the allocation of resources first to wilp members, second to relations - including spouses and their respective families - and lastly to others who seek permission. The Saem’oogit represents the wilp group’s right to exclusive possession of land and resources. As such, it is incumbent on the Saem’oogit to be able to manage resource activities, and the labour necessary, as well as to provide the appropriate political and spiritual leadership.

Together the adawaaks, ayuks, and wams give the wilp its basis for its collectivity. The adawaak situates the wilp in Gitxsan territory in relationship to other wilps. The adawaak also defined the parameters of their territory that is directly associated with their history in the territory, and the ayuks (or titles) that are carried into the yukw on ceremonial objects or on t’saan, illustrate to others present their specific lax’wiiyip. Wams reinforce the human-territorial relationship, either referencing the history directly, or through associating the person with a particular location on their lax’wiiyip and giving authority to those who have over the years demonstrated the ability to direct others and manage the resources on the wilp’s lax’wiiyip.

**Wilp Lax’wiiyip Have Fixed Boundaries**

*Wilp* boundaries have been fixed since the time when the Gitxsan returned after the ice and snow retreated. Each Gitxsan wilp, through the recitation of their adawaaks which chronicle the order in which they arrived into the lax’wiiyip after the glaciers receded, can establish a proprietary interest in their respective pteex lax’wiiyip. Furthermore, through a display of ayuks, each Gitxsan wilp can prove their respective boundaries and exclusivity to their particular lax’wiiyip. Moreover, the ayuks displayed on T’saan in any one generation lists the relationships of the wilp to their wilksiwitxw, affirming the territorial links through marriage and
the proprietary resources, uses and interests of the children. Since *huwilp adawaaks* describe the route *wilp* members took upon their return to the *lax 'wiyiip*, when the *lax 'wiyiip* is spoken about at a *yukw* it is referenced to named geographical, historical features and specific events. These boundaries originate from the time of the migrations after the glaciers retreated and the *adawaak* chronicles these migration routes into the *lax 'wiyiip* of the *wilp*, and are illustrated by the *wilp* through the owning of various *ayuk(s)* that reference particular locations. This is, as *Tenimgyet* explains:

Like, for instance, in our starvation *adawaak*, it describes in great detail our territory, the territorial names, the trails, and exterior boundaries, camp sites, bear dens; that is, where food is available.

Where there are no distinguishing physical land features, trees are blazed or rocks are piled up fixing the boundaries. As *Gwis Gyen* related:

I have talked about *Gwis Gyen*’s territory and there is *Wii Hlengwax*’s territory, there’s *Luulak*’s territory.

We use our own laws and we know where our territories are. These territories have been passed down from generation to generation. The boundaries are always the same. We always go by these boundaries because we have had these boundaries for thousands of years now and they are still the same today.

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73 The *Adawaak* on the Move to Kuldo in Appendix One at 242, and The *Adawaak* of ‘Wiihloots’ in Appendix One at 258. Outlined in these two *adawaak*s are the boundaries of the *Wilp* of *Tenimgyet* and that of the *Wilp* of *Gyologyet*.
74 Mathews *supra* note 26 at 4561 to 4577 [Mathews].
75 Mathews *supra* note 26 at 4581 to 4585 & A. Mathews, Proceedings at Trial, (1988) vol. 75 March 16 at 4586 to 4595.
76 The name of *Tenimgyet* at the time of the Trial was held by A. Mathews. *Ibid.* at 4513.
77 *Ibid.* at 4561.
78 The name *Gwis Gyen* at the time of the Trial was held by Stanley Williams. S. Williams, Commissioned Evidence (1988) vol. 1 April 11 at 1 [Williams].
79 Williams *supra* note 79 at 51.
Txaaxwok\(^{80}\) testified:

*An lii diks*, it means that this landmark is where there is a post on the corner of a boundary, or a tree that has been blazed. A boundary can be a creek or a mountain that's never moved, or the creek that is not dry, a creek that runs all the time. They call this *An lii diks*. It does not move. They don't use anything that moves because it's a boundary. It's still the same today. They never changed. No one can change that.

People sitting in the feast hall here, know that you have identified a boundary, and they know where that boundary is. You name the place where the post is, like *An lii diks*, and they know where the boundary is\(^{81}\).

As Tenimgyet clarified:

Where there are no other markers, trees are blazed, and we continually do this every time we come upon one. That is called, *Xsi gwin ixst'aat*, or we re-identify the mark by going over on top of the old blaze.

And as you get out of the tree line and start onto the mountain itself, there are piles of rocks used as markers along the ledges of the mountain. These rock piles are about 20, 30 feet apart and about two feet high. These markers are still up on the Tsihl Gwellii territory\(^{82}\).

Although the boundaries of each *lax 'wiiyip* are fixed and that specific *wilps* may lay claim to particular territories, a *wilp* may lose control over the ability to allocate resources on their *lax 'wiiyip*. According to Gitxsan law, a *wilp* must forfeit the right to a resource location when one of their members is guilty of a capital crime, such as murder, rape or larceny. In these cases, the *lax 'wiiyip* may revert back to the original *wilp*, only if the respondent is satisfied that the benefit received from the resource location has made up for the loss\(^{83}\). Also, if the *wilp* has

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\(^{80}\) The name of *Txaaxwok* the time of the Trial was held by James Morrison. J. Morrison, Proceedings at Trial, (1988) vol. 82 April 18 at 5133 [Morrison].

\(^{81}\) Morrison *supra* note 80 at 5133.

\(^{82}\) A. Mathews, Proceedings at Trial, (1988) vol. 76 March 17 at 4723 to 4724 [Mathews].

\(^{83}\) In conversation with J. Ryan, August 15, 2000.
difficulty covering the cost of funerals for its members, then it will borrow funds from others, and these people until the *wilp* is able to repay them will hold one of the resource sites.\(^{84}\)

\textit{Wilp Lax'wiiyip Exclusivity is Underpinned by the Law of Trespass}

Property rights in all societies are guarded carefully and Gitxsan laws of trespass require that the boundaries of the *wilp('s) lax'wiiyip* are known and permission is sought to hunt or fish on *wilp lax'wiiyip*. As Tenimgyet testified:

Territorial place names are announced in various ways. They are announced as an \textit{adawaak} and they are announced when you bring your soup, your tea, your bread; they are announced and said this meat comes from, and it is specified which mountain or the territory it comes from. Each creek is mentioned. So in our rules and laws, we say that if you eat and digest the words, it is within your very soul.\(^{85}\)

A hunter, according to \textit{Xhliimlaxha}, must respect the boundary lines, and, conversely, others are obligated not to cross into another’s *lax'wiiyip*. She testified:

It is Gitksan law that we have a line or boundary that whoever owns on one side cannot take from the other side. They cannot cross the line and take from the other side, otherwise they can take what one has taken. In turn the other side cannot enter into our boundary.\(^{86}\)

Trespass is equated with stealing. One knows not to go onto another’s *lax'wiiyip* and one knows the consequences of such practice. Before the *Lixs giigyet* were established in the region, a habitual trespasser could easily be killed for his behaviour. As Gwaans stated:

\(^{84}\) In conversation with A. Mathews, August 18, 2000.
\(^{85}\) Mathews \textit{supra} note 76 at 4607
\(^{86}\) M. Brown, Commissioned Evidence (1986) vol. 4 January 22 at 102.
if you cross someone's trap line to go to your own, you don't allow the trapper to use somebody else's hunting ground. That's the law of Gitksan. You have to go to your own. So if you do that and they warn you, and if you don't listen, they kill you right there. Saagit they call it.  

Similarly, Gwis Gyen testified:

In the chiefs' houses we have our laws, our laws concerning the boundaries. Each chief knows his own boundaries and this is held in their house. They know where their boundaries are and they know that no one could trespass over this boundary. They mention these boundaries in the feast hall, and they have chiefs and other Gitksan people listening to him, and they are witnessing this while he describes the boundary of his territory. Our people have our laws within the territories. Our law is that if a person has trespassed on your land and he has been warned and the third time he is caught there, he will be killed instantly. When this happens, the owner of the land will paint his face black.

In this situation, one's kin cannot seek revenge, nor reimbursement, as Gwis Gyen stated:

There was a trespasser that went onto Nishga territory, and this trespasser was killed and was put back into the T'aam Gins xhoux (Sand Lake) and the people of Tenimgyet took the body and never said anything because they know that he was trespassing.

While the Gitxsan acknowledge the seriousness of trespass, accidental wanderings and hunting on another's lax 'wiiyp their remedies are usually put aside if the person goes to the Saem 'oogit, admits their wrong doing, and offers compensation. Similarly, the Gitxsan recognize the need to "pass through" another's lax 'wiiyp in order to get to their own. Furthermore, it is acknowledged that provisioning during the course of a journey is permitted, however, one cannot actively hunt in another's lax 'wiiyp. According to Xamlaxyeltxw:

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87 When saagit or justifiable homicide occurs in Gitxsan society it is usually as a result of habitual stealing of another wilp('s) resources. Ryan supra note 59 at 1134.
88 S. Williams, Commissioned Evidence (1988) vol. 2 April 18 at 198 [Williams].
89 Williams supra note 88 at 168.
When one of the family owns one territory up further than this territory here, then they walk on the territory of that other chief’s to get to their territory. They don’t go off of the trail and start hunting on that territory. They just keep walking until they get to their own territory. They could shoot that animal on the trail, but they can’t go in and hunt on that territory.90

However, it was expected that the casual trespasser would recognize and compensate the owner of the lax ‘wiiyip at a yukw for extending this privilege. As Xamlaxyeltxw testified:

If this should happen, the person who trespassed apologizes to the chief then the chief would forgive this person. This would happen at a Feast, any kind of a Feast. This is done while the Feast is going on, in order for the people to hear.

The trespasser will compensate the chief at the time when he apologizes in the Feast house.

The Gitksan people don’t apologize just to the Chief, because no one would know about it. In order for people to recognize what has happened and what’s going on, they announce it in the Feast, and as it is a correction that is made before the people91.

Wilp Ownership Includes the Right to Grant Access

The Seem ‘oogit, in the name of the wilp, gives permission to go onto the lax ‘wiiyip to fish, hunt, trap or gather food. The right to grant or withhold consent to use wilp lax ‘wiiyip is closely linked to the owner’s responsibility to see that the land is well used, its fertility maintained, and that no one lacks basic subsistence. Those who are not members of the wilp, persons from one’s father’s side, the wilksiwitxw and from the spouses’ kinship group – andimhanak, may seek permission and be granted permission to use the laxwiiyip of the wilp.

Persons who are not related to the wilp may ask permission as well; however, access given to a particular site or resource is usually for a specific and short period, and is announced at a yukw.

90 Marsden supra note 61 at 5956 to 5957.
91 Ibid. at 5938 to 5939.
The *Saem'ooagit* has the responsibility for the management of the *lax'wiiyip*, and all *wilp* members have the obligation to seek permission from the *Saem'ooagit* to go onto the *lax'wiiyip*. It is the *Saem'ooagit*, in consultation with other *Saem'ooagit(s)*, who determines the quantities of fish, and animals trapped or hunted in each year. As *Gyolugyet* has testified:

> It's Gitksan law that we have to have permission. No one goes onto anybody's territory without getting permission from a head chief of the House of that territory, even if it's your own husband or your wife or your children. That's the law in Gitksan. Everybody has to ask permission, and be given permission.  

**Anjok**

The Gitxsan adhere to what is known as "*Anjok,*" or to be called out by the *Saem'ooagit(s)* to use a resource, in order to avoid trespass. This practice ensures that those interested in using a fishing site, hunting territory or berry patch will have an opportunity to be given permission by the *wilp* to use a particular resource of a *wilp*. *Xhliimlaxha* testified:

> When it is time for fishing or berry picking the *Saem'ogit* will invite the rest of the family. It is the traditional role of the *Saem'ogit* to call first the family, then others who are related, the parents of the spouses, and lastly others who ask permission.  

After permission has been given the *Saem'ooagit(s)* provides one with a sign or symbol that illustrates to others that permission has been given. *Tenimgyet* testified:

> In earlier years the ladies of our House would make special straps that were colourful and visible. And if someone wanted to go onto the territory they would ask permission from the chief, who controls the areas. They would give the chief something that came from their own territory.

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92 McKenzie *supra* note 11 at 361.
93 Brown *supra* note 68 at 20.
They would exchange something for the permission to go to these berry patches, and they would have these strings tied to the baskets that they called *deex iiyasxw*. They were given these fancy coloured straps to identify that they already obtained permission from the chief.

*Tenimgyet* further explains:

If a man came to the chief, and went to the territory without any member of our house accompanying him, then he would have to have some identification that said he had gained permission. This was done by a staff we call *k'aat*. That's just a large staff they use to go up the mountain. And this staff would be coloured kind of a light blue colour and the way that this colour is obtained is from a lake we call in our language *T'am si maa'yaast*, and *maa'yaast* is trimming. If you stick a “stick” into the lake sediment and leave it for a few days, it would then change the colour of this cane, and this is the “staff” that we use for identification.

*Amnigwootxw*

The *Sæm'oogits* regulate access to the *wilp’s lax’wiiyip* according to established laws. *Wilp* members have access rights to *wilp* resources on their *lax’wiiyip*, following the direction of the *Sæm'oogit*. Access rights to *wilp lax’wiiyip* are granted to non-*wilp* members; thus, all *Gitxsan* people have access to one’s *wilp lax’wiiyip*, one’s father’s *lax’wiiyip* and the *lax’wiiyip* of one’s spouse. This ensures that all *Gitxsan* people have access to the multitude of resources throughout the area. Under the principle of *amnigwootxw* *Gitxsan* children have a right of access to their father’s *lax’wiiyip* while their father is alive. After the death of their father, children

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94 Mathews *supra* note 82 at 4720 to 4721.
95 *Ibid.* at 4722 to 4723.
96 That is, rights are granted to the children of fathers are *wilp* members, as well as to one’s spouse’s *lax’wiiyip*. These rights are contingent on proper use and if the marriage dissolves, so do the rights. In conversation with M. McKenzie, April 18, 2001.
97 Williams *supra* note 88 at 232.
must ask permission, unless they are granted continued access by the *Saem’oogit* of that *wilp*.  

*Xamlaxyletxw* explains:

*Amnigwootxw* is when the son travels with his father on his territory, and he will be with his father until his father dies. But after his father dies he does not say he owns this territory. He leaves and if he wants to go back there he has to get permission from the head chief of that territory before he goes back on to the territory where he and his father were before.

Similarly, when one’s daughter marries, the *Saem’ogit* will grant to the couple hunting privileges in their *wilp’s lax’wiiyip* and the use of a fishing site. As *Xamlaxyletxw* testified:

When a young man marries into the house of the young woman and they are both Gitksan people, what usually happens is the head chief of that woman's house gives a part of the land to this young man and he tells this young man to use this land to bring his children up on this land. And he also would give him a fishing site.

If they happen to separate, then he has no rights to that territory. But if they go on living until his death, then he'll use that until his death. And then it goes back to his children.

This is known as *Yuugwilatxw*.

According to *Ax Gwin Desxw*, when he married, his wife’s *wilp* (*Haalus*) gave their family access to a fishing site:

The fishing hole is theirs, and she has some rights to it. And I have a responsibility to be with her. If we use the fishing hole it’s under her direction. I also want to encourage my children to learn about fishing, and teach them our Gitksan laws. And before *Haalus* passed on he made sure we had a fishing hole.

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99 Marsden *supra* note 61 at 5948
100 *Ibid.* at 5940 to 5941.
101 Williams *supra* note 53 at 6646 to 6647.
Furthermore, all Gitxsan wilps have the right to extend privileged amnigwootxw rights to members outside their wilp, when an individual is brought in as a guardian to care for orphaned children and wilp property. As Tenimgyet states:

There are, in our house and all Gitksan houses, two types of amnigwootxw. Privileged amnigwootxw right is you don't have a name from our house but you're privileged to come on our territory through your father's side. This amnigwootxw I'm talking about now, Charlie Smith was the actual taking of a name from our house and using it to show control, jurisdiction, and ownership. If he did not obtain the name Bii Lax ha all other chiefs wouldn't have recognized his voice and he would have had no business talking about this house, he had no rights to be a care keeper, so in that sense he had to obtain the name Bii lax ha.

You might say that the type of amnigwootxw he was given was that he took the territory and held it in trust. In this form of amnigwootxw the wilp extends to a person the authority to make decisions regarding the management of the wilp’s lax wiiyip for surviving children. The guardian will be “given a wam” from the wilp, and is entrusted with the property of the wilp. This person looks after the resources, the children and their tutelage, transferring back to them their inheritance when they come of age and are able to look after the wilp’s property. Similarly, amnigwootxw is extended to the heirs of a past wilp Sæm’ogit, allowing the wilp to show respect to that individual. In speaking about hunting privileges at a place called Tsihl Gwelli, Tenimgyet says that his grandfather’s children could trap there through amnigwootxw. Tenimgyet testified:

Amnigwootxw privileges are extended to them because they are the children of the former chief of our house.

In this case, amnigwootxw was given to the children of the father, not for fishing, but for hunting and trapping. Access to fishing sites usually ceases on the death of any Sæm’ogit, unless

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102 Mathews supra note 26 at 4557.
103 Marsden supra note 61 at 5955 to 5956.
104 Mathews supra note 26 at 4643.
permission is given. A “fishing site” usually has a guardian assigned to look after its defence and regulation. When the holder of such a “name” passes on, the obligations and responsibilities associated with that name pass to another. The new guardian of the fishing site, in consultation with the Saem’oogit, is delegated the responsibility to allocate fish to wilp members from the site in question, or to others. Priority is given to siblings and to spouses of the immediate family to ensure that the children are cared for. With respect to fishing sites, permission is given to wilp outsiders on a seasonal basis. Thus, Tenimgyet explains usage of the fishing site Gwin k’alp:

And at this fishing site we give Niis Noohl amnigwootxw to use the site. He requests permission every year to use this site.

In addition, amnigwootxw rights are extended to other Gitxsan huwilp in recognition for services. By doing this, the wilp is able to acknowledge the other’s kindness. For example, when the wilp of Tenimgyet could not afford the many funerals that they were responsible for, the wilps of Haalus and Gwis gyen paid for them. In return, the wilp of Tenimgyet extended amnigwootxw privileges to them. As Tenimgyet testified:

Gwis gyen and his father did a great amount of work within our house. When people died, it was expensive. We were down at our lowest level, and his father Ts’ii yee did a lot of work for us and helped us quite a bit, so we consider Gwis gyen as amnigwootxw. In ancient history Xsi gwin ixst’aat in the Tsihl Gwellii area was always known An t’ookxw. And it simply means a banquet table. We welcomed them and have granted permission to them to come and use our territory.

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105 Ibid. at 4521 to 4522.
106 Mathews supra note 26 at 4648.
108 Mathews supra note 26 at 4642.
In all cases, the giving of amnigwootxw privileges exists for a specific term. When a non-wilp individual is given a name in order to care for orphans, amnigwootxw privileges are extended to that person until the rightful owners are given back their names. However, it is usual to extend continued amnigwootxw privileges to this person in recognition of their service to the wilp.

**Xkyeehl**

Besides being embodied in inter-generational networks that enables anyone’s wilp to have multiple accesses to a varied lax 'wiiyip by amnigwootxw, a Sæm 'oogit can grant another wilp or individual temporary access to specific locations through the principles of xkyeehl. However, unlike amnigwootxw access given as a reward, xkyeehl is given to the individual who approaches the wilp with some form of payment. As Tenimgyet explained:

**Xamlaxelitxw** approached me with a really high priced article, which we use with our ceremonial nax nox in the feast hall. He has given me what we call an am bilan. That's part of the apron the chiefs use when they are in full regalia, and the an am bilan has these little bells and the designs on it. The reason he gave me this is he wants to use one of our fishing sites. The members of the house will have to get together along with my mother, and we will then decide which of these fishing sites will best be suited to what he wants, whether he wants spring or sockeye salmon, then a decision will have to be made on which area he wants to use. This is called xkyeehl, it is done through the yukw.\(^{110}\)

Also Gyolugyet testified:

There’s a place in our territory where they get their red dye from the rocks. And this dye is used by the carvers on the totem poles as paint, for dye on baskets and cedar mats, and it used by the Halayts for their faces. Especially the Halayts would use this red colour for their faces or for the dye for their robes and head gears. So when people needed this dye they would come to my grandmother and ask her permission to go and get this red dye. In the Feast House a gift would be given to her, as the dye would

\(^{110}\) Mathews *supra* note 82 at 4721 to 4722.
be shared. So this is why she gives the people permission to go and get what they need, and in the Feast House it is told to the people how they got this red dye and why they would give her a gift for it\textsuperscript{111}.

The granting of permission and the acknowledgement of this permission by the giving and accepting gifts for the use of another’s wilp resources, or xkyeehl, at a yukw formalizes the wilp’s authority over the lax ‘wiiyip in question. Such practices affirm the authority of the Sæm oogit in public to grant permission, and the wilp’s right of exclusivity. Thus others, unrelated to the wilp, can acquire rights to resources or resource locations (or labour) through payment at a yukw\textsuperscript{112}. In practice, Gitxsan hold rights against each other, and owe obligations to one another. Gitxsan tenure and ownership arises, and is maintained, through the fulfilment of obligations to others, in combination with the title to the land itself.

\textbf{Wilp Ownership Includes the Right to Alienate the Lax ‘wiiyip}

In Gitxsan society the boundaries of wilp lax ‘wiiyip have been divided and fixed by the Creator\textsuperscript{113}, and the resources are given to the wilps to use as their table. The wilp is entrusted with the management of these territories as long as they are respectful. Part of this obligation of respect is to provide for the funeral of the departed Sæm oogit, in a manner fitting of the honour of the departed. However, there are some situations, such as the failure on behalf of a wilp to pay the funeral expenses of a wilp member, especially a departed Sæm oogit, another wilp must sponsor the funeral and a lien is placed on the wilp’s lax ‘wiiyip until this debt is paid back. In the situation when it is necessary to compensate another wilp for the loss of a life, either by accident or homicide, wilp lax ‘wiiyip is given to other wilp as compensation, until their hearts are

\begin{footnotes}
\item[111] McKenzie \textit{supra} note 98 at 418 to 419.
\item[112] In correspondence with A. Mathews, April 19, 1999.
\item[113] Morrison \textit{supra} note 80 at 5124.
\end{footnotes}
full (as determined by the recipient wilp), and eventually this lax 'wiiyip reverts back to the original wilp, and this is one of the purgatives of the Seem 'oogit.

In order to uphold the honour of the wilp, the incoming Seem 'oogit must be able to afford the responsibilities of this office. Part of this responsibility is to pay for the funeral of the late Seem 'ogit. Though most of the obligations for this expense fall on the shoulders of the new incumbent, the wilp will pool its resources to sponsor the various ceremonies and feasts that accompany the funeral and the memorial ceremonies. In some cases, these expenses are paid for by one’s wil’na t’ahl or wilksiwitxw. In these situations, one’s wilp owes a debt, and until the debt is paid, the creditor’s wilp may hold part of the debtor’s wilp’s lax ‘wiiyip. As Txaaxwok explained:

Sduutxw’m lax ha is the owner as I stated before. Anytime when these people were working together on a funeral feast, they were helped by Waiget (of the Fireweed) with all the expenses in the feast. The Xsi maxhla saa Giiblax territory was turned over to Waiget. They turned it over to him because that’s the only way they can thank these people.

The Fireweed put up the feast and the Wolf and the Frog Clan were seated. All three clans were there to witness and approve what was put into the feast.

Wiaget had become the Dax yuk dit lax yip, the caretaker of the territory. This is what was approved at the feast.

In keeping with restorative justice principles, if a feud between two persons escalates and one is killed, the wilp of the offending party could transfer some lax ‘wiiyip, until their hearts are full. This basically means, that when there is a Mix Kaax, peace made between two wilps, over the wrongful death of one of its members, restitution must be made in the form of the transfer of a

114 O. Ryan, Proceedings at Trial, vol. 19 June 15 at 1275 [Ryan].
116 Morrison supra note 115 at 5244.
117 McKenzie supra note 37 at 249.
portion of the offending wilp's resource property (hunting area, fishing station or trapping line) until such a time when the other wilp believed restitution for the loss had been fulfilled. For example, Gwaans testified:

*Hanamuxw* acquired the fishing site *An si bilaa* after *'Niitsxw* was killed. *Ha'atxw* was trying to marry his sister, *'Niitsxw's* sister. *'Niitsxw* refused to let *Ha'atxw* marry his sister, and *Ha'atxw* killed him. There was a peace made between them, *Gawa gyanii* and the fishing site of *An si bilaa* was given to *Hanamuxw*.  

Similarly, *Antgulilbix* related that the wilps of *Antgulilbix* and *Tsibasaa* were awarded, as *xsiixw*, for the killing of *Yal*, the territory beyond the ridge outside of Kispiox:

At the end of the *Xsi Wis An Skit* grandmother told me, at the end where the ridge is, is their boundary, but the other side of the ridge was given to both *Antgulilbix* and *Tsibasaa* as a compensation because *Yal* was murdered on the ice where *Xsagangaxda* runs into the Skeena River.

There was a tree standing there and they would smear this tree with blood. The crest on this tree is a sun. That's the *Giskaast* crest, and that tree represents the compensation that was given in exchange for the blood (of *Yal*) and it won't be taken back from us until the end of the world.

Besides being awarded *lax'wiiyip* for compensation for the accidental or intentional death of another, one's wilp could acquire territories as a result of inter-community raiding and warfare.

As *Lelt* stated after the failed raid of the Stikine:

The big chief of the Stikine waved the wings of the birds of Meziaden. And as he waved them, he said, there will be peace. This will be your land, we will not return here, we will return to our own village and there will be no more wars.

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118 Ryan *supra* note 114 at 1249 to 1251.  
119 At the time of the trial, the name of *Antgulilbix* was held by Mary Johnson. M. Johnson Proceedings at Trial, (1987) vol. 10 May 26 at 617.  
120 M. Johnson, Proceedings at Trial, (1987) vol. 13 May 29 at 800 to 801.  
121 At the time of the trial the name of *Lelt* was held by Fred Johnson. F. Johnson, Commissioned Evidence (1986) vol. 1 September 2 at 1 [Johnson].
Then the Stikine person waved his hand, saying “this will be your land.”
“This will be your land.” He waved his hand some more. And he blew the
eagle down. The eagle down floated all around.

*Xsisxw.* They compensated us for the killing of *Txawok* and *Ligigelwil*\textsuperscript{122}

Furthermore, even if there is an accidental death, as happened at Kispiox, the offending *wilp* was quick to offer compensation. As *Antgulibix* testified:

This happened at Kispiox. The folks from Glen Vowell were pretending
to attack Kispiox, they pretended to have a war and they captured one of
the chiefs, from the house of *Ma’uus*. They took him away to Glen
Vowell. On the next night the people of Kispiox were preparing to attack
Glen Vowell and take back the one that was captured. After they left the
ladies also decided to go. The ladies got guns that were also emptied of
bullets. Then they started out over the ice to Glen Vowell.
And not far from *Gwin o’op* they met men from the House of both
*Dawamuxw’s* and *’Niista huuk’s* and his brother, *Laan*. The ladies
pretended to shoot him. They just said "*guxw, guxw, guxw*". One young
lady that came along with them pointed the gun to the side of this man and
it went off. The man said slowly "You -- you shot me." and then he
flopped down really slow.

The *wilp* of the young lady who shot the man sent a little boy to spy on the
house of the man who died. When the little boy came back to their house,
he said the other house was singing their war song. They were preparing
to strike back.

The Chief had put on all his regalia -- his blankets, head dress and got his
rattle; and he went to the other house. When the Chief went into
the house, he sang his *Xsinaahlxw* (breath song) with his rattle in his hand.

After the breath song, he spoke to the Chiefs of the man that was shot and
he told them he was willing to give part of his house’s hunting ground to
them. So everything was settled.

He gave the land, the hunting ground after the breath song, as *xsisxw* -
compensation\textsuperscript{123}.

Although it appears that the *wilp* may alienate their territory as a means to settle or prevent a
blood feud, the *lax ‘wiiyip* in question is still owned by the *wilp* that offered it. This portion of

\textsuperscript{122} Johnson *supra* note 121 at 59 to 61.

\textsuperscript{123} M. Johnson, Proceedings at Trial (1987) vol. 12 May 28 at 748.
territory will eventually be returned to the original wilp, when the other wilp has determined that the loss that occurred has been forgotten. As the lax 'wiiyip does not belong to individual Gitxsan people, it is held, and its use is allocated and administered by the residing Saem'oogit, for the benefit of all wilp members, and it can only be alienated under certain circumstance, and only then for particular periods\(^\text{124}\).

**The Saem'oogit and Governance Principles**

The Saem'ogit (or Saem'oogit) represents all wilp members' rights of ownership, acting as a steward of the land and has the responsibility to direct and safeguard the wilp's production components: the fruits of the land, labour and knowledge necessary for each wilp member to attain the appropriate standard of living. In accordance with Gitxsan rules of succession most every one in a wilp has the opportunity to become a Saem'oogit. Although it is more likely that one will inherit a position from a close relative, it takes more than just being in line for this position.

The Saem'oogits and Saem'ogits are responsible for the management of wilp property. This entails that they interweave aggressive exclusivity with the conferring of rights of access to others, based on reciprocity. This necessitates, first that wilp members have enough for food, to cover the costs of running the fishery, to cover the wilp's trade, and to be able to provide for collective wilp obligations. Also, the Saem'oogit must ensure that wilp needs, in conjunction with other huwilp, do not damage the breeding stock. Similarly, in the seasonal round associated with hunting, trapping, and berry picking, it is the responsibility of the Saem'oogit to direct when, and where, one hunts or traps, again in conference with other Saem'oogits or Saem'ogits, in order to protect the animals. The Saem'oogit, in consultation with wilp members, then allocates access

\(^{124}\) In conversation with D. Ryan, January 29, 2003.
to resources to the spouses of the wilp members in order that the children are cared for.

Similarly, one's father's wilp reciprocates, allocating or granting permission to their wilp's resources. Although property and rank comes from the mother's family, the father's family occupies an important place in Gitxsan society. It is the responsibility of the father's family at a birth to provide the cradle, and at a death it is the father's descendants who look after the body, dig the grave, and provide the coffin. During an early lifetime, it is the task of the father's family to teach the ayook and it is the duty of a father's family to put the money up to validate the names a person receives over their lifetime. During the father's lifetime, permission is sought through the father, and afterwards permission is granted by the new Saem'oogit. This establishes a pattern of reciprocity that continues throughout the father's lifetime. At the time of the father's death, though a person is enveloped by the father's wil'na t'ahl, the contribution of the father's family is never forgotten.

Wilp resources are allocated to others for good deeds, and one may draw upon wilp resources through payment. This is expressed in the day-to-day routines of wilp members, relatives, spouses and non-wilp members to ask permission from the Saem'oogit to go onto wilp lax'wiyiip to hunt, trap, fish or gather berries, and it is incumbent on the Saem'oogit to know the capacity of resources in order that thoughtful advice be given to wilp members. If wilp members disregard the word of the Saem'oogit and over-hunt or over-fish, the fish or animals have the right to withdraw from the wilp's lax'wiyiip. Each wilp member must respect the authority of the Saem'oogit, as she alone bears the cost of the animals' withdrawal from the territory. The Saem'oogit must ensure that respect is afforded towards the animals in that wilp members are

125 McKenzie supra note 37 at 213 to 216 & McKenzie supra note 98 at 383.
126 Ryan supra note 60 at 5030.
127 McKenzie supra note 46 at 203 to 204.
128 Mardsen supra note 61 at 5940 to 5949.
129 Mathews supra note 26 at 4582.
expected to not overkill them\textsuperscript{130}, to thank them for submitting\textsuperscript{131}, to look after their remains in order that they too may be reincarnated\textsuperscript{132} and each \textit{wilp} member has an obligation not to trespass on another’s \textit{lax 'wiiyip} while hunting, trapping or gathering. These relationships are vetted and witnessed at any one of the \textit{wilp}-sponsored \textit{yukw}s. One is trained in the \textit{wilp}'s \textit{adawaak}; \textit{ayuks} and \textit{ayooks} and one’s character and ability to manage the resources of the \textit{wilp} are factored into the decision by both the current \textit{Sаем'оогит} and other \textit{wilp} members.

\section*{Succession of the \textit{Sаем'оогит}}

The \textit{dax gyet} of the \textit{wilp} is contingent on the \textit{wilp} being able to fulfil its ritual obligations at the passing on of one of their members and at the succession of either \textit{Sаем'оогит}. Thus, it is incumbent on the current or incoming \textit{Sаем'оогит} or \textit{Sаем'огит} to be able to ensure individually and collectively that \textit{wilp} members are able to sustain its members, to respect the animals and fish, and meet their ritual and ceremonial obligations. The passage of the Gitxsan \textit{lax 'wiiyip} upon the death of the \textit{Sаем'оогит} is renewed by the transfer of the chiefly name duly witnessed by others of similar rank at a \textit{Yukw}. At the time of a \textit{Sаем'оогит} or \textit{Sаем'огит}'s impending death, members of one’s \textit{wilp} and \textit{wil'na t'ahl} congregate to initiate discussion of who is going to be the successor\textsuperscript{133}. As Xamlaxyeltxw testified:

\begin{quote}
It is only when the chief dies, that the name of the head chief is passed on. The head chief is responsible for the house and it is he who has the power for that house, and the only time they can put this name on somebody is when the chief dies. When the new chief takes the head chief's name, then he is responsible for everything in that house\textsuperscript{134}.
\end{quote}

\textsuperscript{130} Mathews \textit{supra} note 76 at 4668 to 4670.
\textsuperscript{131} \textit{Ibid.} at 4669.
\textsuperscript{132} Mathews \textit{supra} note 26 at 4565 to 4566 & Ryan \textit{supra} note 60 at 5027.
\textsuperscript{133} Marsden \textit{supra} note 24 at 5926
\textsuperscript{134} \textit{Ibid.} at 5911.
The qualities of the person chosen for this position must be more than just being in line, and being able to manage and afford the obligations of the Yukw. As Hanamuxw testified, the elders must have observed a potential Sæm’oogit as able to:

handle situations, and I think one of the most important qualities that they need to see in you as the future candidate for a chief is whether you accepted your creator, the protection that he gives you, the guidance, the wisdom that he provides for you and that you respect your elders at all times.

At the conclusion of wilp and wil’na t’ahl meetings a successor is asked to be the Sæm’oogit. Those in attendance endorse the new Sæm’oogit, and the community begins the funeral preparations for the departed Chief. Emphasis at this time is on the burial of the departed Sæm’ogit, however the incoming Sæm’oogit is introduced to the rest of the community. With the inheritance of the Sæm’ogit’s wam, comes the inheritance of wilp property, as Gyolugyet testified at trial:

All the Chiefs get together, they come with their regalia on, and they sing their limxoo’y (dirge songs). They speak to the dead Chief. The Chiefs say all what he has done during his lifetime, we repeat his adawaak, and name all the feasts that he has put on. We call the new Chief out by her baby name, asking for her to come in. We ask her to see her grandfather buried.

As Hanamuxw testified at trial when she assumed the hereditary title of Hanamuxw, her elders addressed her with this statement:

"Hlaa niin xsi gyalatxwit dim ant guuhl hli dax gyets dip niye'en. Dim guudinhl wa midim’y ama gya’adihl Lax yip" This roughly means: that you are the one that has been selected to take the land that was your inheritance, to hold it, and to take care of it.

135 Williams supra note 53 at 6680.
136 Ryan supra note 57 at 4982.
137 M. McKenzie, Proceedings at Trial (1987) vol. 5 May 15 at 283 [McKenzie].
138 McKenzie supra note 137 at 311 to 312 & 332 to 333 & McKenzie supra note 37 at 246.
This means the land that your forefathers had, that includes the regalia, the *adawaak*, the *pole*, the resources on the land, the name *Hanamuxw*, and the right to use that name within the Gitksan territory and that you are the one that has been selected to take the land that was your inheritance, to hold it, and to take care of it. This also means the right to use the authority of the chief, which includes providing leadership for the people, the *Gisk'laast* as well as the other clans in Gitsegukla. It means preserving the history of the house. It means taking care of the present, and always with the idea that you link it with the future. It means having the right to assist not just the people in your own house, but everyone in your community if they need help. It means going to other levels of authority whenever you need to negotiate with them to take care of the needs of the people, or it may mean going to neighbouring nations and negotiating with them issues that deal with the Indian problems, or it may mean offering suggestions as to how these can be solved. It also means that you as the chief have the responsibility of training the younger members of your family so that all the traditions, all the customs, all the rituals within your house are maintained. So in a sense the chief is also the teacher for the younger people as well as a counsellor, as well as a spiritual leader.\(^{139}\)

At the *Hidinsim Getingan Yukw* (headstone or totem pole raising feasts usually held a year after the passing of the *Sæm’oogit*) the new incumbent is fully endorsed by Gitxsan society. At a series of *yukws* the hosting *wilp* displays its *dag gyet* by asking other *huwilp* to endorse the new *Sæm’oogit*. It is at this time that the *Gal dim algyak*\(^ {140}\) (speaker) for the *wilp* introduces the *Sæm’oogit* to the community, leading her to the seat in the *Yukw* of the departed *Sæm’ogit*. The other *Sæm’oogits* from other *wilps* call out her new name as she passes them, they say: “*Ee dim uma yees*”\(^ {141}\). During the course of events, the *Gal dim algyak* calls out the names of the boundaries of the *wilp’s lax’wiyiip*, and the *adawaaks* of the *wilp* are re-enacted. Similarly the *wilp’s ayuks* are either recounted or performed using the *wilp’s* songs and dances. The other *Sæm’ogits* in attendance, in response to the presentation of the *Sæm’oogit’s* symbols of authority, 

\(^{139}\) Ryan *supra* note 60 at 5006 to 5007.  
\(^{140}\) Williams *supra* note 53 at 6655 to 6656.  
\(^{141}\) “*Ee dim uma yees*” means “on the breath of your ancestor.” McKenzie *supra* note 11 at 334.
present their *adawaak*[^142]. This presentation constitutes a re-enactment of the time the Gitxsan were cast out of *T'am Lax amit*, and their return to the region after the ice left.

The *adawaak* told by the new *Seem'oogit* at this time indicates to the community one’s knowledge of the *wilp's lax'wiiyip*, its history, all its *ayuks* and its inter-relations to all other *huwilp*. Accuracy on behalf of the incumbent is imperative, as the *adawaak* is a description of the property of the *wilp*. In addition, it is within the ritual of the *yukw* that the *dax gyet*, or power of the *Seem'oogit*, is refuted or affirmed, as *Ax Gwin Desxw* explained:

> The authority is within that particular house group, and the main host of that feast is mainly the hereditary chief of that house who is the major decision-maker along with his house members. They are the ones that are in main control of the feast. What the chief is doing is that he is demonstrating publicly in that feast to the other chiefs that he has invited, that he knows the laws that he has to follow for that particular feast, and he is demonstrating publicly that he has land, that he has fishing holes, that he has power, that he has wealth and that he owns the land; and these are my other members of my immediate house. He is publicly telling all the people in that feast hall, that this is who I am, I am a chief, I am a high chief, and this is my authority[^143].

It is important that the witnessing *Saem'oogits* and *Saem'ogits* pay close attention to what is recited at this time. This is as *Gitludahl*[^144] has said:

> The Chiefs are there and they witness everything that is done during the feast. They see that everything is done properly, and that we speak about what is to be done. And that is why all the chiefs are there to witness the feast. If everything is done the right way, they say they are glad they attended and witnessed the feast. They are all satisfied. If I say anything wrong or something is given away that does not belong to *Gitludahl* or in any of our territories, one of the chiefs is going to stand up and speak up and say this is not true[^145].

[^142]: McKenzie *supra* note 37 at 237.
[^143]: G. Williams, Proceedings at Trial (1988) vol. 107 June 1 at 6812 [Williams].
[^144]: The name *Gitludahl*, at the time of the trial was held by Peter Muldoe. P. Muldoe, Proceedings at Trial, (1988) vol. 97 May 16 at 6090 [Muldoe].
[^145]: Muldoe *supra* note 144 at 6113.
If the new *Saem’oogit* makes an error it is up to the *Saem’oogits* and *Saem’ogits* witnessing the *yukw* to tell the ‘*Nii dil* (sponsor of the incoming *Saem’oogit*), who will in turn inform the new *Saem’oogit*\(^{146}\). The new *Saem’oogit* will rectify the error at a subsequent *yukw* called to correct the mistake, as *Tenimgyet* testified:

You stand up and speak and mention that this is not quite right (either a boundary, *adawaak*, or *ayuk*) and then it is noted by the people, by whoever’s House that is putting on the feast. It is noted what you objected to, and so the next time you put up your feast what others have objected to, it is then corrected\(^{147}\).

At the various *Yukws* that are associated with the funeral of the departing *Saem’ogit* and the investiture of the incoming *Saem’oogit* is the public display of the *wilp*’s possessions and prosperity. As *Gyolugyet* testified, this *Yukw* is to:

get the people together to witness the giving of the name of the deceased chief to another. Of course, there is a lot of people that we ask to work for the family, especially at the Burial Feast; and even at a Totem Pole Feast. There are people that are invited and asked to do certain work. Like at the burial, we have to get people to dig the grave; at a totem pole raising, we have to have people dig a hole to put the totem pole in, so all these little things that are done, we have to pay them for this. The other chiefs would witness that the family has paid for whatever is necessary.

The most important part of a Feast is when a name is given to a chief and the authority of what that name stands for, and what it holds. The names of the House’s fishing sites, the trap lines on the territory, these are things that have to be told to the people every time there is a new chief. At every Feast there has to be an *adawaak* given. When one person dies in a House, the *adawaak* of that House is told in the Feast House. The *adawaak* tells how they get their names, their songs and their fishing places, where they hold their trap lines, their hunting places, and their berry picking places; these are all told at a Feast, so that everyone knows and understands where these people have their territory and how they get their names. This is the importance of a Feast. We change our names four times before we become a chief. So with all these changes, we have to have a Feast so that these changes may be recorded, as names are also given to others in the House.

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\(^{146}\) In conversation with G. Williams, May 20, 2002.

\(^{147}\) Mathews *supra* note 82 at 4756.
In the name of the wilp the new Säm’oogit affirms the boundaries to their lax’wiiyip and their claims to the ayuks. At the yuks associated with the succession of the Säm’oogit, the adawaak is recited and the nax nox of the wilp performed. In response to this display of dax gyet, other huwilp in attendance endorse the new Säm’oogit and wilp’s claim of ownership by responding with their adawaak and displaying their nax nox and ayuks. Throughout the life of a Säm’oogit, she will be called upon to witness other new Säm’oogits’ initiations, to bury other wilp members, to help the wilp, the community, and look after the wilp’s property (lax’wiiyip, wams, ayuks and adawaaks). During her later years, she will be actively grooming another to take her place when she passes on.

The Education of the Säm’oogit

In the early life of all Gitxsan people they are trained in the adawaaks of their father’s and mother’s wilps, the respective ayuks and boundaries of the lax’wiiyip. Ax Gwin Desxw states:

The education of a chief starts at a very early age. I probably was around four or five when we started to learn the stories of our huwilp. Also we used to help our parents out at the smokehouse. We went fishing with them. We always used to help them. And they always told us how to help the elders and people who were in need.

Children are instructed in the adawaak, first of their father’s wilp, then of their mother’s. As Hanamuxw testified:

So your training is based on what your future is going to be. Your training is given first by your wilksi witxw. That is their prime responsibility, to train you, but then your wil’na t’ahl also plays a very important part in insuring what you have learned from the wilksi witxw is correct and that you maintain the standards that are expected of you as the chief designate.

Our wilksi witxw is responsible not just in training the chiefs but also the other members of my family. Our wilksi witxw has a responsibility of

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148 McKenzie supra note 11 at 353 to 354.
149 Williams supra note 53 at 6651.
150 Ryan supra note 57 at 4978.
ensuring all the members in my immediate family have the same knowledge as I have. Members of the wil'na t'ahl, like Gwis gyen, will for instance, every time we go to his house he will tell us about the rules and regulations of the Gitksan. He will be telling us about the adawaak. Over time this training becomes more philosophical, spiritual and the moral aspects of adawaak are taught, as Tenimgyet testified:

After I received my first name, Ligii ooyax the teaching started progressing from there. We are first told short versions about the Biis hoont Adawaak. As you grow older the adawaak continues to expand in more detail with the territorial names, the trails, the cabins, the exterior boundaries, and what we do from day to day. It covers philosophy, spirituality, the purification ritual of sisatxw, about reincarnation and why we have certain nax noxs. Adawaaks are about life, death, and survival, and how we do it and how we realize things. Like, for instance, in our starvation Adawaak of 'Wiihloots' it describes in great detail our territory, how to know the hunting signs, our camp sites, the bear dens, and where food in general is available.

More importantly, as Xamlaxyeltxw testified, the basis for the Saem'ooqit authority is rooted in the adawaak. He testified:

In the beginning when there were the Gitksan people here they used to live in long houses. The chief would sleep at the back centre of the house and then his brothers and his nephews would live along the sides. Early each morning the chief would rise and he would tell his brothers, nephews and the house members the adawaak. He would go over the adawaak, and then he would go over his plans of what they were going to do that day. If they were going to have a feast, they would plan the feast.

When the older chief passes, the new chief takes the same name, he does the same thing. Every morning he rises early and tells the adawaak, and this keeps going on and on, and they keep changing chiefs. They still do

151 Ryan supra note 60 at 5030.
152 Mathews supra note 26 at 4559.
153 The Biis hoont Adawaak in Appendix One at 251.
154 The Biis hoont Adawaak in Appendix One at 251.
155 The Adawaak of 'Wiihloots' in Appendix One at 258.
156 The Adawaak of Hawaw' in Appendix One at 259.
157 Mathews supra note 26 at 4560.
the same thing, they tell the *adawaak*, and what has happened during the lifetime of the first chief.\(^{158}\)

In historic times, the children would accompany their parents as they travelled around the respective *lax wiiyips*, learning how to hunt, trap, and gather berries and fish\(^{159}\). During these times *adawaak* is no longer a narrative, and for the persons who are to become the *Saem’oogit* it must be part of their experience, as *Tenimgyet* testified:

I remember one time at *Xsi Gwin ixstaat* near our berry patch called *Win luu gan*. We went out early in the morning. My uncle, *Ax dii mihl* didn’t tell me where we’re going. He just said “Come.” We went, and we went up the trail past this berry patch, and he took me to a bear den he knew there. This was early March. The snow at the mouth of the cave was just beginning to melt.

He sharpened the end of a stick and he gave it to me and said, “Get in there and wake the bear up.” With great respect and honour for my uncle, I went in. I went half-way in and just like everybody else, I chickened out and came crawling back out.

So he told me, “Just go in there. It's not going to kill you. Just wake him up,” which I did. I felt better when he told me about our *adawaak*, *Biis hoon*, because I had sincere belief in the *adawaak*. So I went in there and gave the bear a good poke. I could feel the bear moving around. I then came back out, and the bear was right behind me.

And my uncle shot the bear once. When the bear was half dead, my uncle grabbed me and rubbed my face on the bear’s mouth giving me power, the same power as the grizzly had at the time of *Biis hoon*\(^{160}\).

Concurrent to this education, one is presented to the community at various times throughout one’s early life. As *Gyolugyet* explains:

The way I describe myself from birth up until now shows the preparation to become a Chief. In Gitksan law, right from infants we prepare our children to reach the stage of becoming a head Chief of a House, or to

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\(^{158}\) Marsden *supra* note 24 at 5896.

\(^{159}\) In conversation with A. Mathews, April 23, 2001.

\(^{160}\) Mathews *supra* note 26 at 4578 to 4579.
become the wing of a Chief of the House. This began when I was born. Two weeks later there was a Feasting put on by my family’s House, for the head Chiefs to recognize me, and our wilxsi’witxw would aid me in any way, and this was the first time that they have given me what is needed for this preparation. A cradle was made for me by my uncle, ’Wii Hlengwax and they put me in this cradle and they took me around to the head Chiefs to give power to me. I was given my infant name, K’am akst. Three years later my father’s sisters came and they pierced my ears and the day after it was done they held a Feasting to show the head Chiefs that I had my ears pierced, and then a name was given to me again at that time, Sgwina mix\textsuperscript{161}.

**Dispute Resolution Responsibilities**

Those who show leadership promise, early in their life have their ears pierced in order that they neither hear bad things about others, nor engage in gossip that will hurt another\textsuperscript{162}. This marks to others that they were being trained to be impartial, and were receiving additional training in spiritual matters to prepare the mind and body to take on the additional responsibilities of being the Xsgoogam Saem’oogit\textsuperscript{163}. These additional responsibilities include the mediation of disputes. The most common internal wilp dispute among the Gitxsan is over the inheritance of a name. If the ailing Saem’oogit has not clearly identified her successor, her choice is not supported by wilp consensus, or the Saem’oogit passes away unexpectedly, those making the choice may disagree among themselves as to who will inherit the Saem’oogit’s position. The wilp, if they are unable to resolve the matter amongst themselves, can either at the time of the passing Saem’oogit’s funeral announce to the community they are burying the name\textsuperscript{164}, or they may call on other Saem’ogits and Saem’oogits to mediate a resolve. As Gyolugyet testified:

\textsuperscript{161} McKenzie supra note 37 at 212 to 216.
\textsuperscript{162} Ibid. at 216 & McKenzie supra note 11 at 363.
\textsuperscript{163} There are various ranks of Saem’oogit, and a Xsgoogam holds the authority to delegate to other persons who are designated as Hli Kaaxhl. McKenzie supra note supra note 142 at 161 & Ryan supra note 60 at 5011. The rank and wilp affiliation of a Saem’oogit is shown by the seating order at a yukw. McKenzie supra note 37 at 270.
\textsuperscript{164} Ibid. at 250 to 251.
Miluulak died, one of the head chiefs of the Gisk'aast, and they had to have a person to take her name.

At that time there was the two people who could be the chief. They both felt that they ought to be the person to take the name of Miluulak. It was not settled by the day of the funeral amongst the Miluulak's House. The family was still pulling for one, or the other.

This is when the chiefs of the different clans, the Frog and the Fireweed, were called to Miluulak's House. The head chiefs, who were called to the House, were asked to settle this. So after a lengthy discussion, we settled that one of the people would take the name of Miluulak, and the other would look after the territory.

This panel of Sæm'ooigits works with the wilp to find a solution that all can agree on. The conflict, as well as the resolution, is brought out in the open at the inauguration of the new Sæm'ooigit. As Gyolugyet explained:

All this had to be told at the Feast of how the family disagreed and how it could not be settled. It was also told that they called on the chiefs of the different clans to settle it for them and that they had all agreed, the family of Miluulak's, and the wil'na t'ahl agreed with that. This was all said and settled in the Feasting House.

Another common dispute between the huwilp is at the time of the succession of the new Sæm'ooigit over the presentation of the adawaak. The adawaak told by the new Sæm'ooigit at this time indicates to the community one's knowledge of the wilp's lax 'wityip, its history, all its ayuks and its inter-relations to all other huwilp. Accuracy on behalf of the incumbent is imperative, as the adawaak is a description of the property of the wilp. In addition, it is within the ritual of the yukw that the dax gyet, or power of the Sæm'ooigit, is refuted or affirmed.

It is important that the witnessing Sæm'ooigits and Sæm'ogits pay close attention to what is

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165 McKenzie *supra* note 137 at 366.
167 Williams *supra* note 143 at 6812.
The Chiefs are there and they witness everything that is done during the feast. They see that everything is done properly, and that we speak about what is to be done. And that is why all the chiefs are there to witness the feast. If everything is done the right way, they say they are glad they attended and witnessed the feast. They are all satisfied. If I say anything wrong or something is given away that does not belong to Gitludahl or in any of our territories, one of the chiefs is going to stand up and speak up and say this is not true.\footnote{Muldoe supra note 144 at 6113.}

If the new Sæm'oogit makes an error it is up to the Sæm'oogits and Sæm'ogits witnessing the yukw to tell the 'Nii dil (sponsor of the incoming Sæm'oogit), who will in turn inform the new Sæm'oogit. The new Sæm'oogit will rectify the error at a subsequent yukw called to correct the mistake, as Tenimgyet testified:

You stand up and speak and mention that this is not quite right (either a boundary, adawaak, or ayuk) and then it is noted by the people, by whoever’s House that is putting on the feast. It is noted what you objected to, and so the next time you put up your feast what others have objected to, it is then corrected.\footnote{Mathews supra note 82 at 4756.}

Similarly, a Sæm'ogit in the role of a 'Nii Dil, uses his own knowledge to assist others in resolving conflicts, as Tenimgyet stated:

I will speak of how my role as a 'Nii Dil was when there was a dispute concerning the area around Boulder Creek. Sinankxws came to me when there was a meeting in Hazelton about this area and it was said that this area was theirs. So I spoke to her 'Nii Dil. I then rose at the meeting, and said the Boulder Creek area actually belonged to them, was true.

Also the late Ax tii hiikw was in a similar situation when the Ganeda was trying to put a chief’s name on a non-Indian. Lelt said it’s up to our 'Nii...
Dil to say, and then my grandfather, Ax tii hii kw, stood up and he says “No, it cannot be held by this person,” and it was then stopped 170.

In other situations, such as larger problems between communities, the Seem'ogits and Seem'oogits are “pulled out,” to a series of meetings to resolve either a local concern or to forward a concern to an outside community. As Tenimgyet testified:

Sinankwxs means that we have to involve other chiefs, the wilxsi leks and others. Then you do “sisixsek,” that mean “you pull out the chiefs,” the forerunning chiefs, to make the decisions. This is not in the Feast Hall, but when you have a dispute you would go to certain chiefs and ask them to help you in these decision-making roles. We usually “pull them out” from all the houses. We try to pull from every house in each of the villages. At times we go to the Wet’suwet’en in Hagwilget, so everybody is involved 171.

As Hanamuxw testified at trial, all the Seem'ogits and Seem'oogits are bound to consult with others:

Consultation starts at your house level and then it would go to your wil'na t'ahl and to your wilksiwitxw. Next, the village must decide if the action that has been proposed is right, this involves all the clans 172.

As explained by Ax Gwin Desxw, the Seem'ogits and Seem'oogits have the final word:

Generally there is a fair bit of discussion on certain issues. Different individuals, whether they are young or older, make their views known publicly, and in some cases where things are very difficult, the chiefs will listen and if things are not going properly, they will speak, and then they overrule what the younger people are saying. And even the council, they are the last ones to speak, they say the final word, and nobody else speaks after that, and then the discussion is finished. The Chiefs have the final word 173.

170 Ibid. at 4756 to 4757.
171 Ibid. at 4756.
172 Ryan supra note 60 at 5013
Management Responsibilities

The Säm 'oogit directs and protects wilp resources for use by its wilp members, the spouses of wilp members, one’s father’s family, and lastly, all others who ask to use this property. Thus, any one Gitxsan person will have access to their own wilp’s lax ‘wiiyip, the lax ‘wiiyip of their father’s wilp, and the lax ‘wiiyip of their spouse’s wilp. The Säm ‘oogit, in the role as steward, controls not only the members of her wilp, but also access to wilp resources by related huwilp. The Säm ‘oogit, according to Richard Daly, exercises a proprietary right towards the land vis-à-vis the claims of other groups and simultaneously reciprocal stewardship vis-à-vis the land and creatures who live on it. Wilp members look to the Säm ‘oogits and Säm ’ogits to manage wilp resources in order that individual wilp members can support their families. Thus, access to resources of wilp members are safeguarded by the Säm ‘oogit authority of the manage wilp members claims, as well as give voice those rights protecting them against the claims of others. It is expected that wilp members, as well as non-wilp members will heed the word of the Säm ‘oogit, as the individual has equal obligation to the animals, plants, and fish who reside on the territories and in the streams, even though it will be the Säm ‘oogit, in the name of the wilp, that will bear the burden of shame, if the animal, plants and fish disappear from the lax ‘wiiyip.

The Fishery

The Säm ‘oogit, in the name of the wilp, organizes and directs the fishery and manages hunting and trapping on the lax ‘wiiyip in accordance with selective harvesting principles. If a wilp takes too many fish in one season, they run the risk of other wilps, as well as neighbouring

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communities upstream from them not meeting their quotas. In order to keep the peace, it is the responsibility of the *Saem’oogit*, in consultation with wilp members, to determine the number of fish needed\textsuperscript{175}. Each member is asked to review their larders to determine their needs for the upcoming year based on their consumption of fish of the previous year. Before allocating to the wilp’s need, the *Saem’oogit* must ensure that debts from trading owed by the wilp, and the costs associated with the running of the fishery are met. Thus, as Tenimgyet explained:

She asks me “how much do you need?” I tell her how much I need, how much my sister needs, and how much my brothers need. This is calculated along with what is needed for our trade and what might be needed as the payment for the equipment that we will be using.

In late August we congregate at the smoke house and my mom would have a tarp laid out here, a bright red tarp, and all the fish that was processed all summer would be divided and counted into bundles of 40, we call *k’i’yhl luuks*.

People give us things, like, for instance, the net was supplied by one of the Kitwancool members, and in return he wants some of these prize fish, prized *huxws* (Spring Salmon); and in the case of the boat, that boat we use *T’ewelasxw’s* boat. The stern kicker itself is supplied by our minister, Reverend McLeod and in turn we have to pay him back. Usually we try to deal with these outside things first before we accommodate our own needs\textsuperscript{176}.

**Hunting**

The *Saem’oogit* can only allow wilp members to take the amount of fish, or game, that is needed, and no more. Other *Saem’oogit* consult with each other in order that they know what the needs of their wilp members are to make sure that they do not deplete the stock. After the fishery

\textsuperscript{175} Ryan *supra* note 60 at 5007.

\textsuperscript{176} A. Mathews, Proceedings at Trail, (1988) vol. 74 March 15 at 4651 to 4660 [Mathews].
has shut down in early fall, hunting and trapping is planned. As Tenimgyet testified:

We look after the land by using it. If you don’t hunt and fish your territories, the salmon, the mountain goats, the beaver, and the ground-hogs won’t stay round. If you are not active they just go away. We’ve always taken just what we needed, and then we protect the life cycle of the rest. We have always limited our hunting to fall and winter, when the young are no longer dependent on their mothers. We guard the spawning beds, we burned the berry patches to keep them healthy and productive. We even used controlled burning to get rid of the insects which kill off the trees.  

All Gitxsan people must follow the rules of the hunt, and share what has been taken. According to the Adawaak ‘Wihtloots’, if Gitxsan people quarrel over food, a siyehl widit (curse) will be brought onto their wilp. When the law of respect and sharing is broken, tss’uu wijix will occur or the animals and fish will disappear, leaving the wilp to starve. The laws of the hunt and sharing were put in place to ensure that those in the hunting party adhere to specific codes of behaviour, and the accompanying Seem’ogits are responsible for ensuring that the laws are followed. Similarly, their laws of sharing reflect first an age grade that looks after the elders first, and the families with small children (property flows through the matri-line) so this means that brothers (hunter and fishers) supply their sisters with food resources, who in turn will support their brother’s political roles. Husbands and wives are looked after accordingly by their own wilp. The laws, as Tenimgyet says, are:

The first one is we decide on how many animals we are going to kill, depending on the number in the hunting group, and then we don’t over kill.

The second one is never kill a mother sheep with young ones.

The next one is the animal has to be cleaned where it was killed. Gaak, the raven, who announced the kill, has to be fed.

A. Mathews in: R. Daly, Proceedings at Trial, (1989) vol. 187 February 23 at 12086 to 12087. Mathews supra note 26 at 4582 to 4585 & Mathews supra note 176 at 4589 to 4595. This means “they fought over the kill of a caribou.” Mathews Ibid. at 4586. Ibid. at 4588.
After field dressing, the cuts, the hide, whatever that we do not need, has to be burned, in order that we satisfy our belief in reincarnation.

The fifth one would be the actual roasting of the head of the goat, which is pointed towards the mountains that provided this goat, as thanks.\textsuperscript{181}

Similarly, as Giltudahl has said about the adherence to the laws of the hunt:

I will show them where to go and where to trap, or hunt beaver. We don’t always go to the same place in the same year, we always move onto different territories.\textsuperscript{182} Gitxsan hunters upon return to their village further divide what has been killed and share first with their elders\textsuperscript{183}, their wilxsileks\textsuperscript{184} and those in which they have special obligations towards, one’s ‘Nii dil.

Gitxsan ayooks of naa hlimoot’ besides directing them to share amongst themselves, respect each other and the environment, the Saem ogits must inform each other of their hunting plans, as Txaaxwok testified:

The three clans that lived at Kigasgas, the Fireweed, Frog clan and the Wolf clan decided to meet with each other to discuss how to use the area called Luu skadakwit for hunting. In this area there is moose, bear, ground squirrels, and at the lake called Dam ansa koots, there is beaver.

The meeting was called to decide what animals were to be hunted in this area, and how many would be killed.\textsuperscript{185}

\textsuperscript{181} Mathews \textit{supra} note 82 at 4668 to 4669.
\textsuperscript{182} Muldoe \textit{supra} note 72 at 6310.
\textsuperscript{183} Mathews \textit{supra} note 82 at 4670.
\textsuperscript{184} Wilxsileks is the plural form of wilksiwitxw, one’s father’s side. \textit{Ibid.} at 4671.
\textsuperscript{185} Morrison \textit{supra} note 113 at 5234 to 5235.
Trap Lines

Besides fishing sites and hunting grounds, the wilp owns trap lines. Txaaxwok in his evidence about the management of his wilp's trap lines stated:

We start to trap in some areas in the fall and winter, then and we moved back and forth over a larger area. You know when to start and when to end trapping or hunting in an area. You are going back and forth on this territory in order to cover the whole territory. Sometimes in the spring when young ones come you must be careful and not shoot them.\(^{186}\)

The Gitxsan, in order to protect their historic interests after the Crown asserted sovereignty, registered their trap lines with the Province\(^ {187}\) (and have paid vigilant attention to their transfer on the death of a Saem'ooogit. As Gyolugyet testified:

In 1935, Joseph Danes died. He was Gyolugyet at that time and while he was alive he would go onto our territory and hunt and trap. Sometimes Joseph Danes would take Tommy Muldoe (from the wilp of Spookw' and at this time his name was Madiigim gyetu) up onto our territory and they would trap together. After Joseph Danes died in 1937 Tommy Muldoe claimed this trapping area as his own. My mother heard about this and went to Captain Mortimer, the Indian Agent in Hazelton, charging Tommy Muldoe with trespassing.

My family went to the hearing called at the Indian Agent office in Hazelton and it was not settled that year. The next year Tommy Muldoe again tried to claim the trap line on our territory as his. So my grandmother went to the wilp of Spookw' and said “You are not going to own that territory.” They said “It does not belongs to Gyolugyet, but it belongs to all the Houses.” So we went to the Court again. This time all head chiefs from the different clans came to the hearing. Now all the chiefs that spoke said that this territory belonged to Gyolugyet and their other Houses in their Wi'nat'ahl. The chiefs pointed out to the Indian Agent and they mentioned all the creeks that they knew were on that

\(^{186}\) Morrison *supra* note 80 at 5136 to 5137.

\(^{187}\) The Gitxsan in keeping with their commitment to comply with the Queen’s Law registered their traplimes with the Province. They also have abided by the requirement to take inter-wilp property disputes to the residing Justice of the Peace, who for most of the last century has been the local Indian Agent. In conversation with M. McKenzie, December 16, 2001.
territory and told who held the creeks, and they are from Gyolugyet's, like Kwamoon, Hlo'oxs and Mediik. They told Mr. Muldoe that he had his own House and own territory, that he was not supposed to be on Gyolugyet's territory. So that is when it was settled then and he did not try again to take over and own our territory.\(^{188}\)

However, as Gyolugyet continues, some Gitxsan people have trespassed on to others' territories when registering their trap lines:

Mr. W. Danes, who is the son of Joseph Danes, has a trap line on the territory called Win skahl Guuhl. In order to get to his trap line he needs to go through the Am Nigwootxw, which is on our territory. Also occasionally he will ask permission to go and trap on that place. We always give permission as he is the son of the late Joseph Danes who was Gyolugyet before me. However, Mr. W. Blackwater, one of our neighbours has a trap line that overlaps on our territory. The same happened when Mr. W. Wilson registered his trap line in Smithers; he partly registered his trap line on our territory. These events happened because the Provincial Fish and Wildlife Department insisted that everyone register their trap lines on their traditional territories or lose them.\(^{189}\)

However, as Txaaxwok testified:

My father held the name of Waiget, and was the registered owner of the trap line on the territory called Luu ska' yans't. When he passed on there was a caretaker for the territory for a while and then the name of Waiget was passed to Elsie Morrison. The trap line is now registered in her name; she is the legal owner of it.

And speaking of his territory, he continues:

Mr. John Robinson was the holder of the registered trap line in Txaaxwok's territory as he was Txaaxwok before me. Just before he died he transferred the trap line to me, and the person that replaces the chief is to manage resources on the territory.\(^{190}\)

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\(^{188}\) McKenzie \textit{supra} note 19 at 441 to 442.

\(^{189}\) \textit{Ibid.} at 462 to 463.

\(^{190}\) J. Morrison, Proceedings at Trial, (1988) vol. 84 April 20 at 5287 & 5300 [Morrison].
Ecological Concerns

With respect to hunting and trapping of wildlife, the Saem’ogits believe that the animals and birds have been placed in particular locations for their benefit, and that part of their responsibility is to be actively engaged on the territories. However as Txaaxwok says:

The other Chiefs taught me how to hunt and to trap, and to go to certain places at different times of the year for different animals, how to learn to use the territory, and not to abuse it. There are some places where you can get mountain goats and caribou. They told me that certain mountains are better than another place. The name of the best place is Xsi Maxla Saa Giibliax. The best place to get moose is a place called Lax stanaast, it is a naturally open place. Also at Lax stanaast is a plant we call Ax, it tastes like a potato and is shaped like a banana. That is where we dig this root up. If you wanted to trap beaver, for example, you go down to a place where the river is quiet, where the dams are. But if you want to get prairie dogs, then you have to go further up the river and onto the plateau.

When we trap beaver we set our traps in a certain way so we do not trap the female beavers or the young ones. We set our traps away from the beaver houses, by a creek that runs into the pond usually about one hundred yards away from the beaver house. We do that to protect the young and the females.

You count to make sure what animals you have taken out of an area, and you have to move around, and you learn not to overkill the animals as they will never come back.

You never leave any meat in the bush to rot, and you always clean up in the area where the animal was killed. You never shoot an animal that you do not need. Any animal that you kill is based on your house’s need.191

When you are out on the territory hunting or trapping you are not alone. There may be 10 to 15 other chiefs and sub-chiefs there as well, like myself, managing their territory. We all talk to each other as we have to know where everyone has been trapping, where they have been hunting, and what animals have been taken. We have to report this to each other to know what animals have taken from the different groups and locations each year.192

191 Morrison supra note 80 at 5123 to 5124
192 Ibid. at 5143.
Because I am a hunter and trapper, I know what should be done on that territory. When a person replaces the other Chief, it is up to the Chief to manage the animals on the House's hunting ground. It is up to the Chief to see that the laws are followed, and this is no different than thousands of years ago, because the fish have been set there for us by the Creator, the animals have been set there for us by the Creator, and the Creator has shown us how to fish, hunt and trap.\(^{193}\)

Similarly, when speaking about the obligations that the *Seem'oojit* has towards the berry grounds and it is important that every few years the area is burnt, in order to preserve the quality and quantity of the berries, *Saxum Higookx*\(^ {194}\) explained:

> In our tradition we usually burn the berry patches over in order for the berries to come back. The berries usually come back about three years later after we burn it.\(^ {195}\)

Besides directing the seasonal round of subsistence activities, the obligation that the Gitxsan have towards the animals extends beyond just making sure that they do not over-fish, hunt or trap. It is incumbent on the *Seem'oojit* to ensure that the environment is conducive for the animals to continue with their lives. Besides directing the fishery from April until late September or early October, the *Seem'oojits* are also responsible for the environment of the salmon. As *Ax Gwin Desxw* has said regarding stream and river habitat:

> We guard the salmon spawning beds, as you can not walk on where fish eggs are laid. It is important that you clean out the trees that have fallen into the streams. You respect the salmon and do not play with salmon bones, or make fun of them. And, you return the remains to the river.\(^ {196}\)

\(^{193}\) Morrison *supra* note 190 at 5285 to 5286.

\(^{194}\) Vernon Smith at the time of the trial held the name of *Sakum Higookx*. V. Smith, *Proceedings at Trial*, (1988) vol. 89 May 2 at 5616 [Smith].

\(^{195}\) Smith *supra* note 194 at 5665.

\(^{196}\) Williams *supra* note 143 at 6815.
Li'ligit

It is at the various li'ligit (feasts) that Gitxsan huwilp come together to acknowledge the history, the continuation of the wilp, the bounty that has come from the lax 'wiiyip, and to endorse the current business. The Saem'oogit, as trustee of wilp resources, has the main responsibility to direct and safeguard the wilp's resources and property. It is incumbent on the Saem'oogit to ensure that all wilp members have surpluses available to fulfil the wilp's collective obligation to host or contribute to a yukw. When wilp members are unable to contribute to the funeral expenses for their departed, it falls on non-wilp members to put up necessary funds and goods to maintain the dax gyet of the wilp. However, for doing this, the wilp that was assisted risks eroding its lax 'wiiyip base, unless the debt is repaid.

There are li'ligit for naming, the first kill of a young man, marriage, adoption, divorce, the settlement of disputes, the wiping off of shame, funerals, succession of Saem'oogit or Sæm'ogit, and the raising of a pole or a headstone. Besides li'ligit that are

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197 There are various times in a person's life that one is named. McKenzie supra note 37 at 243.
198 Ibid. at 248.
199 Ibid. at 244.
200 There are two types of adoption, sihlguxhlaust and ts'itimluudit and both types of adoption must be verified at a Yukw. See: McKenzie Ibid. at 244 & McKenzie supra note 98 at 369, 378 & 381; M. Johnson, Proceedings at Trial, (1987) vol. 11 May 27 at 636 & 656 [Johnson]; Ryan supra note 62 at 1076 to 1078; Harris supra note 62 at 10896 to 10898.
201 Johnson supra note 200 at 629.
202 McKenzie supra note 37 at 249.
203 Ibid. at 245.
204 There are a series of feasts for a Funeral, these being: Xmi 'yeenasxw (“Smoke Feasts” associated with funeral announcements); Bexwixsxw/Ludelinxw (Welcoming guests to the community usually associated with a funeral or totem pole raising); Hl'oom (Settlement Feasts payment by the Wilp of the funeral expenses); Bax'magam Lo'op (settling of the final costs and setting of a gravestone or headstone). Ibid. at 249 to 250.
205 Sometimes at the death of Saem'oogit the family has not decided who will succeed, and the name is buried for a while and this feast is called Dim tk'awl'ok'dimhl wa. Eventually the wilp will call a Gisyadinasimweh, which is a yukw to announce their successor to be verified by the community. Ibid. at 250 to 251.
associated with wilp relations, there are also ceremonies of *Xai mooksisim* (first snowfall)\(^ {206} \) and the *Skoog’m hon* (first salmon ceremony)\(^ {207} \) that honour the bounty that comes from the *lax’wiiyip*, specifically recognizing the willingness of the animals and salmon to submit themselves to the Gitxsan as food.

In December, or after the first snowfall, the *Lax Gibuu pteex* hosts the *Xai mooksisim Lax Gibuu*. The *Lax Gibuu’s ‘Nii dil* (sponsor) calls on the *Lax Gibuu pteex* to put on a feast for the villagers, as it is the time in which the footprints of the wolves are seen in the snow. This feast, the *Xai mooksisim Lax Gibuu*, is a way for the Gitxsan to give thanks to all the animals for submitting to them as food. All of the foods that come from the territories are served, and the places that they have come from are named\(^ {208} \). In April, when the Spring Salmon return, the first salmon is caught, placed on a special mat and carefully cooked. Pieces of this fish are given to the other villagers, and as one receives this fish, one gives thanks to the creator for providing salmon. In this ceremony, the *Skoog’m hon*, the creator is asked to protect the salmon and replenish them. Also, one asks the creator to protect the fishermen as they fish on the river. Above all, one asks forgiveness from the creator for having to destroy creatures smaller than oneself in order for one’s life to be sustained\(^ {209} \).

In terms of keeping track of wilp obligations, especially when it comes to the burial of wilp members or the passing and succession of a *Sæm’oogit*, the current or incoming *Sæm’oogit* is responsible for managing wilp resources in order that all wilp members can contribute to the *yukw* of others, or any *li’ligit* hosted by the wilp. This entails knowing what surplus food and cash is available from each wilp household, so that the wilp can sponsor or contribute substantively to any one of the *li’ligits* the wilp has been invited to. Furthermore, it is the

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\(^ {206} \) Mathews *supra* note 76 at 4675.
\(^ {207} \) Ryan *supra* note 60 at 5027.
\(^ {208} \) Mathews *supra* note 76 at 4675.
\(^ {209} \) Ryan *supra* note 60 at 5027.
responsibility of the Seem 'oogit to pay particular attention to the ritual aspects of the li 'ligit in question, ensuring that wilp members are informed and practised in their roles for the event. Moreover the li 'ligit is informed by a set of laws and rituals which emphasizes the de-centralized and independent nature of Gitxsan huwilp, while at the same time reiterating the principles of sharing and reciprocity amongst them.

It is at the yukw, or feasts associated with funerals, especially, that the initiation of the Seem 'oogit or Seem 'oogit, can be considered to be the central institution of the Gitxsan as it is at the core of their social and landholding system. During these series of yukws (that may take up to several years to complete), the host wilp displays and performs the wilp's ayuks and may relate the adawaak either as a narrative or through the presentation of a play accompanied by songs and dances. It is at these yukws that the relationship between the huwilp and the lax 'wiiyip is brought to life. Gifts of food (and other items) are first announced and then served (as well as given) to those present. It is at the yukw, through the public display of ayuks and the telling of the adawaak witnessed by other Seem 'oogit, both from one's wil'na t'ahl, wilksiwitxw and other pteexs, that the hosting wilp and Seem 'oogit validate and affirm the claim of ownership to the lax 'wiiyip.

It is at a yukw that the Gitxsan formalize their social, political and legal affairs. All acquisitions and inheritance of wams and lax 'wiiyip, declarations of formal rights of access, marriage agreements and trade alliances are validated and witnessed at these yukws. It is at the yukw that dax gyet or power of life expressed in all creatures, and in the land itself, is displayed. This is expressed, and acknowledged by Gitxsan people through the acting out of the nax nox of the wilp at the yukws. This power, or dax gyet, is expressed as a showing of wealth that comes

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210 McKenzie supra note 37 at 243
211 McKenzie supra note 137 at 295.
from the ability to manage the wilp's resources on the lax 'wiiyip for the well-being of all wilp members. Ax Gwin Desxw calls this the “feast economy,” and testified at trial:

At the yukw there is a redistribution of the wealth. Certain individuals, like people from your father's side, are commissioned to undertake certain tasks, and whatever wealth you have is transferred or given over to these people. Whatever money or gifts you have taken in, is given back. At the end of the yukw, money is given out to the high ranking chiefs, to your father's side or whomever you have asked to do certain things for the main house group.

Also the food you bring to the feast is given out to all the other guests in the feast hall. There is usually more than enough food and some is given out at the end of the yukw, it is redistributed. This is called Ligii will, and it means all the gifts and all the food in your possession represents the wealth of a particular house. The more food you have indicates the wealth of that particular chief in that house group.

We always used to live off the land. All the food and all the activity came from the land, and you ensured that you prepared berries, you prepared moose meat, bear meat, salmon, you did all these things, and planned out the amount of food that you have to survive all winter, and to give at a yukw.

They can distribute other things if they want. I have seen where they have distributed guns that are worth a thousand dollars, and TV's. I can see that in the future when we have the rightful economic benefits from our territories that we could give more valuable things as we gain the economic benefit from our territories and redistribute this in the feast system.212

When animals from a hunt, fish or berries are given at a yukw, the location of where they have been taken is announced. Tenimgyet quite eloquently testified:

All what you take off your territory, and the location where it came from is announced at the feasts. You would name each place on your territories where this food comes from. If it was given by wilksiwitxw, you would mention that.

212 Williams supra note 143 at 6818 to 6820.
The food is announced and they say where this meat comes from, and they specify each mountain where the berries come from or whose territory where it comes from. Each creek is mentioned where the fish are caught.

While you are eating this food, you digest the part of the territory where it comes from\(^{213}\).

During the performance of the *Nax nox*\(^{214}\), or if the *Nax nox* touches the guests, those performing or touched are compensated. In historic times the *Seem’oogits* or *Sæm’ogits* would be given a feather or eagle down; now, as *Gyoluugyat* explains, they are given money:

If the chiefs at the *yukw* have been touched by this *Nax nox*, or a song, you give them money. Before money we gave each a feather or down. The feather or down would be given after the *Nax nox* went around. The host chief now gives money out and records the name of the chief who has been given money, because this money has to be returned during another feasting.

The same way with *Nax nox*, and there is a time at the feasting that a chief would make a dance, a song is sung, a person is in their regalia and this is what we call *Gus maga ‘mix Kaax*. This is the “returning of the down or the feather"\(^{215}\).”

In practice, Gitxsan hold rights against each other, and owe obligations to one another. According to Richard Daly, at the root of Gitxsan ownership is the management of the necessary labour to access the resource sites for their self-preservation, and is this expressed at any one of the Gitxsan *li’ligit*. Daly states:

The nature of the relationship between proprietor and land is one of balanced, reciprocal interaction, not at all unlike that which carries on between two founding clans in a village, or between two Houses in a mother’s side – father’s side relationship to one another. The land is the

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\(^{213}\) Mathews *supra* note 176 at 4607.

\(^{214}\) *Nax nox* is either owned by the *wilp* or by individuals. This power is acquired by either an event or events experienced on the *lax ‘wiiyip*. McKenzie *supra* note 11 at 362.

\(^{215}\) McKenzie *supra* note 137 at 294.
material foundation of the House, the basis for the very social identity and history of its members\textsuperscript{216}.

Daly continues:

These inter-House relations that deal with both use and the proprietorship of territory, and use and proprietorship of kinship labour and fertility are symbolized by the payments that go on in the feast hall. Announcements about family business, and the accompanying exchange of gifts and services between the sides of the family work to legitimize relationships which each child has with the House of both parents. These Houses acknowledge the rights of the children, through their whole lifetime, to use and enjoy the benefits from the land and labour of the two Houses with which they are most intimately connected. These relations between Houses are in essence economic even though they have vivid domestic, political and legal dimensions as well\textsuperscript{217}.

Gitxsan tenure and ownership arises, and is maintained, through the fulfilment of obligations to others, in combination with the title to the land itself. Gitxsan society is predicated on the acknowledgement that in the distant past disputes have arisen and that the sanctity of life, both human and animal, warrants respect. Since the return to the lax ‘wiiyip after the fall of T’am Lax amit, the Gitxsan have adhered to the ayooks of the hunt and fishery, and against trespass onto another’s lax ‘wiiyip as recorded in individual wilp and huwilp adawaaks. Wilp members look to the Saem ‘oogits and Saem ‘ogits to manage wilp resources in order that individual wilp members can support their families. Furthermore, the dax gyet of the wilp is contingent on the wilp being able to fulfil its ritual obligations at the passing on of one of their members and at the succession of either Saem ‘oogit or Saem ‘ogit. Thus, it is incumbent on the current or incoming Saem ‘oogit or Saem ‘ogit to be able to ensure individually and collectively that wilp members are able to sustain it members, to respect the animals and fish, and meet their ritual and ceremonial obligations.

\textsuperscript{216} R. Daly, "Our Box Was Full"— The Gitksan – Wet’suwet’en Economy" Opinion Evidence, June 1987 at 100 [Daly].
\textsuperscript{217} Daly supra note 216 at 64.
Through the holding of a name owned by the wilp, or that of an ancestor, they become privileged to host or witness ceremonial events. More importantly, they are accountable for the present conditions of the lax’wiiyip through participation in the decision-making processes associated with the allocation of user rights; first, to wilp members, second, to their spouses (and their parents) and third, to others for good deeds or by payment to the wilp. Furthermore, as wilp members of hunting, trapping, gathering and fishing parties they must adhere to the laws of the fishery and hunt or trap only in areas that have been designated to them by the Saem’oogit.

Regardless of how the Saem’oogit is chosen, she must be endorsed by other Saem’ogits and Saem’oogits at a yukw and the individual chosen must be able to have the necessary character in order to be able to fulfill the responsibilities, duties and obligations that come with that office. Gitxsan governance starts when the individual is given a wa’ayin wam, or a name that permits one to enter and witness the events at a yukw, conferring onto the incumbent the right to witness community leadership decisions. After one is able to sit at a yukw, one has the potential to become the Saem’oogit. As the office of the Saem’oogit is a lifelong station, after initiation the incumbent must be capable of holding the office, fulfilling the ceremonial duties and managing the lax’wiiyip for the benefit of the wilp members. If the current Saem’oogit is female, her brother is usually chosen to look after the lax’wiiyip and manage the fishery, hunting, and trapping. If the Saem’ogit is male, he would make most of the final decisions with respect to the lax’wiiyip in consultation with other wilp members, and he would delegate responsibilities according to the strengths of the individuals in the wilp.

In terms of governance it is at the yukw that the allocation of access rights is confirmed and announced to the entire community, as well as an accounting of wilp resources that have come from the lax’wiiyip. It is also at a yukw that the social and political relationships among the Gitxsan are illustrated, and affirmed. When Saem’ogits and Saem’oogits from the huwilp in turn recount their adawaak and perform their nax nox, they are illustrating to the other witnesses in
the *yukw* their relationship, both historically and currently (usually in regard to a marriage, birth of children, at the death of *wilp* member or *Sæm’ogit* or *Sæm’oogit*, as well as at the conferring of *wa’ayin wams* and for the succession of a *Sæm’ogit* or *Sæm’oogit*). In order to achieve and maintain *wilp* standing it is necessary for the *Sæm’oogit* to ensure that all *wilp* members are able to sustain themselves using *wilp lax’wiiyip*, and the *wilp* has the required surplus in order that it may fulfill its ceremonial obligations at funerals, the annual *Xai mooksisim* (First Snowfall) and the *Skoog’m hon* (First Salmon) ceremonies, as well as being able to coordinate and manage the erection of a *T’saan* (pole), that solidifies one’s role as the *Sæm’oogit*. Thus it is incumbent, in consultation with *wilp* members and other *Sæm’ogit* and *Sæm’oogit*, to know how many fish are needed for each family, the number of animals trapped or hunted, and the conditions of their *lax’wiiyip* in general. In order to achieve this annually, the *Sæm’oogit* is kept abreast of the conditions on the *lax’wiiyip*. The *Sæm’oogit* must make sure, or delegate the responsibility to ensure, that the paths are kept clear, the salmon spawning beds are not disturbed and obstructions in the river are cleared.

An additional role of the *Sæm’oogit* is to settle disputes and to provide leadership for the community. Disputes that arise within the *wilp* are usually settled within the *wilp*. However, if settlement is not possible, other *Sæm’ogits* and *Sæm’oogits* are called in, according to the tradition of *sisixsek*. Likewise, when there is a larger problem that affects the entire community, it is the *Sæm’ogits* and *Sæm’oogits*, in consultation with *wilp* members, who are called on to make the necessary decisions. The *Sæm’ogits* and *Sæm’oogits* will listen to *wilp* members, and eventually they intervene and give direction to the concern to form a consensus. However, consensus building requires that the *Sæm’ogits* and *Sæm’oogits* be well informed of the issue, and either carry out consultation with their *wilp* members, or lead the debate.

All Gitxsan people are taught the *adawaaks* from their father’s and mother’s families. It is in the *adawaak* that the boundaries of individual *lax’wiiyip* have been recorded, and make
reference to the ayuks. Ayuks may be either exclusive to a wilp, or may be shared by a series of wilps. Besides these references the adawaaks, in narrative form, hold the important ayooks of the wilp that govern how the Gitxsan people must behave towards one another, as well as conduct themselves while fishing, hunting, and gathering food and also how the Saem 'ogits and Saem 'oogits must perform management tasks and dispute resolution duties. Property relations, for the Gitxsan, are maintained by strict adherence to the ayooks, as spoken in the adawaaks, which are premised on respect and recognition.

Gitxsan property, their lax 'wiiyip, their adawaaks, ayuks and wams, are the exclusive to wilp. Resources on wilp lax 'wiiyip are first allocated to wilp members, second to spouses and third to those from one's father's family. Wilp resources may also be allocated to non-wilp members through privileged amnigwootxw and by payment to the wilp or xkyeehl. It is at the li 'ligit or feast that socially and politically individual wilps in Gitxsan society illustrate their power, through their generosity. It is also at the li 'ligit that wilp solidarity is demonstrated, the wealth that comes from the lax 'wiiyip is accounted to community, and redistributed.

Since the coming of the Lixs giigyet and the establishment of the reserve system the Crown has afforded little time to the Gitxsan that either acknowledges, understands or accommodates Gitxsan laws, their land tenure system or management scheme into either Federal or Provincial law. After this time the ability of the Gitxsan to adhere to their boundaries and to act with their ayooks has been severely compromised. The Gitxsan had attempted to negotiate their laws into early Provincial management up until 1927 and when their was renewed hope to negotiate a conclusion to the land title question in 1973, the Gitxsan were eager to establish a blanket trapline licence throughout their traditional territories and were interested in establishing joint management of the salmon fishery in the Skeena, Kispiox and Bulkley watersheds as a platform for their reconciled relationship with Crown sovereignty. It was apparent by 1984 that
these negotiation attempts had failed, leaving the Gitxsan little choice but to litigate, based on their continued ownership.
Chapter Four

Trials of the Gitxsan: 

In 1884 the Gitxsan argued that the reserve system was akin to laming an animal. Although an animal may live, the quality of its life diminishes as it loses its feet, and so on until it is unable to fend for itself. The practice of using the *lax 'wiiyp*, for subsistence and ceremonial purposes through fishing, hunting, gathering and trapping, under Provincial and Federal management, has weakened the ability of the Gitxsan to derive a livelihood. It was the goal of the Gitxsan when they filed their claim on October 24, 1984 against the Province, to argue that their *ayooks* and governance had a place in contemporary Canadian society, and that their *ayooks* of *naa hlmooot* (their laws of sharing) and traditional management regimes warranted respect and recognition. The Gitxsan believed that their aboriginal and title rights to their *lax 'wiiyp* still existed, until they formally surrendered them to the Crown. Moreover, it was their belief that the ensuing treaty relationship could start from the respectful position of integrating their *ayooks* into Provincial and Federal legislation. The Gitxsan fully acknowledge the presence of the *lxs giigyet* and their desire to live in the area, however, they also believe that the Crown has an obligation to them as indigenous people to protect their resources (which could include forestry and mineral resources) and their aboriginal title lands. When the Gitxsan filed suit against the Province they had exhausted all respectful avenues for negotiation. In the Opening Statement of the Plaintiffs, *Delgam'Uukw* and *Gisday Wa* asserted:

Officials who are not accountable to this land, its laws or its owners have

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attempted to displace our laws with legislation and regulations. The politicians have consciously blocked each path within their system that we take to assert our title. The courts, until perhaps now, have similarly denied our existence. In our legal system, how will you deal with the idea that the Chiefs own the land? The attempts to quash our laws and extinguish our system have been unsuccessful. Gisday Wa has not been extinguished.

If the Canadian legal system has not recognized our ownership and jurisdiction but at the same time not extinguished it, what has been done with it? Judges and legislators have taken the reality of aboriginal title, as we know it, and tried to wrap it in something called aboriginal rights. An aboriginal rights package can be put on the shelf to be forgotten or to be endlessly debated at Constitutional Conferences. We are not interested in asserting aboriginal rights. We are here to discuss territory and authority. When this case ends and the package has been unwrapped, it will have to be our ownership and our jurisdiction under our law that is on the table.2

A total of thirty-five Gitxsan and thirteen Wet’suwet’en Sæm’ogits and Seém’oogits filed suit against the Attorney General of British Columbia arguing that, as they had not surrendered ownership and jurisdiction over the lax ‘wiiyip, they governed themselves according to the ayooks as laid down in the adawaaks. As far as the Gitxsan were concerned, their title and authority over their lax ‘wiiyip had not been extinguished. The Gitxsan asked the Court to define their legal rights in terms of ownership and jurisdiction, enabling the Sæm’ogits and Seém’oogits to negotiate a Treaty placing this ownership and jurisdiction in the context of Canada. For the Gitxsan the purpose of the litigation from 1987 until the Supreme Court ruling in 1997 was to find a place for Gitxsan ayooks of nàa hlimoot3 (laws of sharing) in Canada, to legitimize their governance, the gim litxwid4 (alliances of the Sæm’ogits and Seém’oogits and their Hlikaaxh5)

5 According to Maize Wright, Gitxsan Community Planner, Hlikaaxh (the persons considered “chiefs” in their own right) are under the authority of the Sæm’oogits or Seém’ogits and are assigned wams, or names, associated with particular locations or characters referenced to wilp lax ‘wiiyip or adawaak. These individuals could be considered to be in line for the position
and to participate in the resource management and access inside their territorial boundaries
(ansjok).

The Delgam’uukw litigation is an integral part of the Gitxsan struggle to achieve their
goal of integrating their ownership and jurisdiction over land and authority through political
negotiation and the Canadian Courts. At trial, the Seem’ogits and Seem’oogits argued that their
aboriginal rights included the right to govern their traditional territories (lax’wiiyip) for
themselves and their house (wilp) members according to their laws (ayooks), their political
alliances (gim litxwid), their legal code (adawaak) and the social institution of the feast (yukw).
They argued that their rights included the right to ratify or refuse land titles or grants issued by
the Province of British Columbia as of October 24, 1984, and claimed damages for the loss of all
lands and resources transferred to third parties since the establishment of the colony in 1862.
The province of British Columbia counterclaimed that the plaintiffs had no right, title or interest
in and to the disputed territory and its resources, and that the plaintiffs’ cause of action with
respect to their aboriginal title, right or interest in and to the territory was solely for
compensation from Canada.

This chapter outlines the Gitxsan litigation that was taken to the British Columbia
Supreme Court and Court of Appeal, then to the Supreme Court of Canada, and lastly the rulings
of all three courts. The Gitxsan position has remained constant since the assertion of Crown
sovereignty, in that they hold title, until it is formally ceded to the Federal Crown, and in terms
of reconciliation of their aboriginal rights and title, they desire access and management rights to
their entire lax’wiiyip, as well as the right to self-government, based on the principles of the gim
litxwid (alliances among the Gitxsan) contained in the adawaaks and their ayooks.

Seem’oogits or Seem’ogits at the time of the incumbent’s death. In addition these individuals
form an advisory council around the Seem’ogits and Seem’oogits. See: M. Wright, A Study of the
Traditional Government of the Gitxsan: Its Relevance Today (Unpublished Master’s Thesis,
University of British Columbia, 1997) at 41.
The Trial: *Delgam’Uukw v. the Attorney General of British Columbia, 1991*\(^6\)

The Gitxsan, spurred by the lack of movement at the Treaty Table in the late 1970’s and an inability to negotiate any substantive relationship with either the Federal or Provincial Crown, elected to pursue the matter through the Courts. They filed suit against the Attorney-General of British Columbia on October 24, 1984. The trial took place over 3 years from 1987 to 1990, during which time the British Columbia Supreme Court was asked to rule on the legitimacy of Gitxsan ownership and jurisdiction that would enable the Gitxsan, through treaty, to place this ownership and jurisdiction into the context of Canada. *Saem’ogits* and *Saem’oogits*, in their pleadings (in 1984), admitted that the underlying title to the soil of the territory, as outlined in their Statement of Claim, was in the Crown in Right of British Columbia. However, they alleged that their aboriginal title and rights entitled them to occupy and possess their individual *wilp* territories. As to aboriginal title, the Gitxsan and Wet’suwet’en acknowledged they could not alienate their lands by sale, transfer, mortgage or other dispossession, except to Canada, in accordance with the requirements of the Royal Proclamation, 1763. The *Saem’ogits* and *Saem’oogits* sought to establish that they continued to be an organized society with common language, traditions and culture similar in all important respects to the kind of social organization enjoyed by their ancestors. Thus, they led their evidence in their respective languages, presented their customs, told their *adawaaks* (oral histories) and explained their *ayooks* in order to support and to confirm the theories, as well as findings of the expert evidence from anthropology, archaeology, linguistics, history, geology and fisheries.

The Gitxsan believed that they met the four requirements of the *Baker Lake* test\(^7\) for.

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\(^7\) *Hamlet of Baker Lake (et al) v. Minister of Indian Affairs and Northern Development (et al)*
establishing aboriginal title as an organized society. Specifically, the Gitxsan presented evidence that:

- they and their ancestors were members of an organized society,
- their society occupied the specific territory over which they assert aboriginal title,
- that this occupation was exclusive, and
- that this occupation was established when Great Britain asserted sovereignty.

The Gitxsan argued that they and their ancestors have from time immemorial lived in, owned, controlled, possessed and exercised jurisdiction over their territory according to their laws.

During the course of the trial in the British Columbia Supreme Court, 1987 to 1991, the Gitxsan opened their *gelenk* (treasure boxes) and told the Court how they originally lived in the territories claimed in the Skeena-Bulkley-Kispiox watersheds, were expelled and their subsequent migration back. The *Seem’oogits* and *Seem’ogits* told the Court how they held authority and that it was contingent on adherence to their *ayooks*, which included stewardship towards the land and animals. The Gitxsan stated in their pleadings that they had not relinquished title to their territories, and contended that their jurisdiction and authority ought to encompass their entire *lax’wiiyip*.

The judgment handed down in 1991 by Chief Justice McEachern fell short of their expectations. Chief Justice McEachern only saw the trial as “political,” “about vast forest reserves,” in a “vast emptiness” in northwest British Columbia. The Chief Justice was only able to conclude that Gitxsan aboriginal interests in the territory were lawfully extinguished by the Crown during the colonial period and non-reserve Crown lands, titles and tenures granted by the

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9 *Delgam Uukw* 1991 supra note 6 at 117.
Crown since the creation of the colony are unencumbered by any claim of aboriginal title\(^\text{10}\). In this matter, he referenced the 13 *Calder Proclamations*\(^\text{11}\) as evidence of extinguishment of “aboriginal title” by the Colony and relied on them as “clear and intentional extinguishment” of Gitxsan aboriginal interest to their *lax 'wiiyip* outside of their villages and reserves. However, the Chief Justice continued and determined that the Gitxsan, Wet’suwet’en and Gitanyow were entitled to a declaration that they could use vacant Crown Lands within the territories for aboriginal sustenance pursuits, subject to Provincial law and Federal regulations\(^\text{12}\).

The Chief Justice, in essence, affirmed the traditional stance of British Columbia towards aboriginal title\(^\text{13}\) and mused that Gitxsan life, either currently or historically, was “far from stable and it stretches credulity to believe that remote ancestors considered themselves bound to specific lands\(^\text{14}\),” suggesting that the Gitxsan land tenure system and its governance were hollow. Moreover, the Chief Justice felt that this instability continued into the present, in that “they [the Gitxsan] have gradually moved into other segments of the cash economy,” and increasingly do not pursue “an Aboriginal life” and that “there is practically no-one trapping and hunting full time.” The Chief Justice determined that even in these “aboriginal pursuits, the plaintiffs do not seem to consider themselves tied to particular territories\(^\text{15}\).”

Again, the Chief Justice uses the documented record selectively, in that, (although he lauds the use of Hudson’s Bay Records\(^\text{16}\)), he dismisses the Chief Factor’s observations that the Gitxsan actively pursue trapping. Trapping was carried out, however, according to their law\(^\text{17}\).

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\(^{10}\) *Ibid.* at 387 to 388.

\(^{11}\) *Calder v. the Attorney General of British Columbia* [1973] S.C.R. 313 at 324 to 339 [*Calder*].

\(^{12}\) *Calder supra* note 11 at 425.


\(^{14}\) *Delgam 'Uukw* 1991 *supra* note 6 at 177.

\(^{15}\) *Ibid.* at 117 to 118; 371 to 374.

\(^{16}\) *Ibid.* at 201.

and surplus pelts (that were not used for domestic purposes – clothing, shoes and blankets) were used as “gifts” at Yukws and “for gambling.” The Chief Justice’s only conclusion, however, was that “commercial trapping” was a phenomenon of European contact.

The Chief Justice, besides upholding the traditional stance of the British Columbia government that “aboriginal title no longer exists,” also concluded that the Royal Proclamation of 1763 did not have any application or operation in British Columbia, and the “Indian title arising from occupation” was lawfully extinguished between 1803 and 1858. Furthermore, subsequent and various aboriginal rights, after British assertions of sovereignty, existed at the discretion of the Crown. The Colonial Crown’s intention had been clear: it meant to extinguish First Nations’ land rights in order to give unburdened title to Newcomers. As far as the Chief Justice was concerned, it was beyond his authority to rule on the issues of separate sovereignty, or the legislative authority of the Gitxsan and Wet’suwet’en. Furthermore, “as Judges could not impose non-legal solutions on parties,” he was reluctant to comment on general social justice issues.

The Chief Justice felt that fishing was the only “aboriginal” activity exercised and did not require any more territory beyond the existing Reserve allocations. Thus, the Chief Justice suggested that Gitxsan “aboriginality” depended on the practice of fishing, hunting and gathering throughout the claimed territory, and that the use of historic territories and activities had been abandoned long ago. The Chief Justice said:

Witness after witness admitted participation in the wage or cash economy. Art Mathews (Tenimyget), for example, is an enthusiastic weekend aboriginal hunter. Pete Muldoe (Gitludah) has followed a variety of non-aboriginal vocations including logging on the lands claimed by another chief; Joan Ryan (Hanamuxw) teaches school in Prince Rupert; and many,

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19 Delgam 'Uukw 1991 supra note 6 at 203 to 204.
20 Ibid. at 118.
many Indians and chiefs have found seasonal or full-time employment in the forest products and coast commercial fishing industry\textsuperscript{21}.

Although the Chief Justice made a ruling permitting the introduction of oral histories, in 1988\textsuperscript{22}, as a means to prove ownership, in the end, in effect, he gave them no weight. It is apparent that the Chief Justice was reluctant to endorse the significance of oral histories. For the most part, it appears that the Chief Justice dismissed most of the oral testimony in which the witnesses themselves could not directly state as fact, or relate, in the case of the Gitxsan, to their wilp or house boundaries. What the Chief Justice failed to connect was that events (whether these events were a migration, hunting excursion or war party as well as the route taken to get to the actual location) and locations where events occurred were, and are, used by the Gitxsan as maps while they are on the lax 'wiiyip.

The Chief Justice further contended what was offered as proof of the adawaak's authenticity was personal knowledge. As personal knowledge, the Chief Justice felt that the information lacked trustworthiness, in that each wilp placed different significance on the private or public use of the adawaak. For the Chief Justice there was a serious lack of details about the specific lands the plaintiffs were describing, and that the plaintiffs sought to authenticate the adawaaks by referencing published material, which did not tie the narratives back to the lax 'wiiyip themselves. Furthermore, as the Chief Justice pointed out, many of these published adawaaks held references to historic phenomena, such as guns, moose, the Hudson's Bay Company, and to peoples outside the statement of claim area and that the adawaaks to which the

\footnote{\textit{Ibid.} at 178.}

\footnote{This decision by the Chief Justice on admission of oral histories and evidence, as well as evidence from deceased persons, was laid down as a series of tests for Counsel to follow. However, it is evident from the proceedings that counsel for the Gitxsan and Wet'suwet'en neglected to contextualize the adawaaks, ayuks or ayooks for the Court. \textit{Uukw et al v. R. in Right of British Columbia and the Attorney General of Canada} [1988] 1 C.N.L.R. 188.}
witnesses referred were not exclusive to the Gitxsan people\(^23\). It appears that the Chief Justice placed emphasis on the mythological or legendary characteristics of the accounts, instead of legal meaning; that is, the boundaries, how rights were allocated, how transgressions were adjudicated, and how subsistence activities were to be carried out.

The *adawaaks* of the Gitxsan (as well as other West Coast First Nation peoples' oral histories and related property) before *Delgam 'Uukw* (1991)\(^24\) were defined as "myth or legends about their past" and were analyzed in terms of how they contributed to their rich cultural and artistic life. Ethnographers Franz Boas\(^25\) (1899 to 1915) and Marius Barbeau\(^26\) (1915 to 1957) recorded narratives, photographed totem poles and other regalia, and generally treated the *adawaaks* and *ayuks* as traditions that were on the verge of disappearing\(^27\). Boas recorded hundreds of narratives throughout the Northwest and his analysis emphasized both the unique material cultures of specific societies, as well as where both stories and social organizational attributes intersected amongst the different cultural groups\(^28\). Boas’ work, though immensely important, does not tie the specific wilp histories to specific territories or governance practices.

\(^{23}\) *Delgam 'Uukw* 1991 *supra* note 6 at 175 to 182.

\(^{24}\) *Delgam 'Uukw (Muldoe) et al. v. R. in right of British Columbia and Attorney General of Canada* [1997] 3 S.C.R. 1010 at 1065 to 1079. However, the Supreme Court granted a re-trial in part as it was determined that First Nation oral histories could be used to determine their claim of title.


\(^{27}\) This ethnographic period from 1899 through to the 1960's, is known as “salvage ethnography,” where teams of ethnographers would go into the field and collect ethnographic material (language, narratives, ceremonies, cultural practices, clothing, religious artefacts, and so on), of indigenous cultures that were thought to be on the verge of disappearing. The purpose was to “collect” as much information as possible about Indigenous peoples and their cultures before they “died out” or were “assimilated” into the broader population. Emphasis was placed on examining and recording the historic social structures, ceremonial life and cultural uses of images and narratives. See: G.W. Stocking, *Objects and Others: Essays on Museums and Material Culture* (Madison, Wisc.: University of Wisconsin Press, 1983).

\(^{28}\) Boas *supra* note 26 at 565 – 958.
Furthermore, though the Gitxsan are sometimes allied to their neighbours, the Nisga’a and Tsimshian, and share many of the narratives analyzed, they are only obliquely alluded to.

Similarly, Barbeau, working with Mr. William Beynon\(^\text{29}\) as well, continues to place significance on the mythological and ceremonial nature of collected narratives, with a similar oblique reference to governance and territory. However, unlike Boas, Barbeau did record a wider range of narratives from specific Gitxsan, Nisga’a and Coast Tsimshian communities. Similarly, the comparatively recent work by ethnographer John Cove\(^\text{30}\) further analyzed the texts collected by Beynon and Barbeau that related the mythological narratives to aspects of Gitxsan spirituality. Again Cove’s analysis gives the impression that the *adawaaks* are stories situated in the Gitxsan’s past. The importance of such analysis, as anthropologist Marie François Guedon\(^\text{31}\) points out, is that one has to understand the cosmology of the Gitxsan in order to comprehend how authority and influence in the community is held. Guedon states:

> [t]here is between the play and reality a very thin line which is easily crossed when one remembers that in the Tsimshian cosmology all representations, all images of an event or entity, call the power of that event back into action\(^\text{32}\).

In terms of Reconciliation, this comment by Guedon and the analyses undertaken by Boas, Barbeau, Beynon and Cove are especially apt and invaluable. It may be observed that Gitxsan cultural life has remained constant, despite the pressures of Canadian life. These past records and the interpretations of the *adawaaks*, in conjunction with the testimony of the

\(^{29}\) William Beynon was one of Franz Boas’s informants as well as a collector in his own right. Mr. Beynon held the *wam* of *Gusgai’ in* among the Coast Gitlan and recently his notebooks have been published. See: W. Beynon, *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks*, ed. M. Anderson and M. Halpin (Vancouver, B.C.: University of British Columbia Press, 2000).

\(^{30}\) J. Cove, *Shattered Images: Dialogues and Meditations on Tsimshian Narratives* (Ottawa, Ont.: Carleton University Press, 1987) at 49 to 156.


\(^{32}\) Guedon *supra* note 31 at 311.
*Saem’ogits* and *Saem’oogits* given during the trial from 1987 until 1990, as well as in the Affidavits and Commissioned Evidence, illustrates a high degree of fidelity, and this corpus of material can be read as an indicator of how much the Gitxsan rely on, and refer to their *adawaak*, in a continuing and contemporary manner. Beside this, it was evident during the trial, that the purpose of the *adawaak* was to bring the past into the present, to show that the *ayooks* given to the Gitxsan people promote respectful relations, not only between the *wilps*, but also between the Gitxsan and the animals.

With respect to the “proof of the authenticity of the *adawaak*,” and lack of detail about the land in the *adawaaks*, the Chief Justice neglected to see that it was not important that the events coincide directly with the landscape as the Province understood it, but how the *Saem’ogits* and *Saem’oogits* saw the land, used the land, and were able to assert their authority over the land, as well as enlist the cooperation of *wilp*, their *wil’na t’ahl* and the *wilksiwitxw* to access resources for their mutual benefit. That is, the Gitxsan people turned to the knowledge remembered in the *adawaak* of each *wilp*. The *adawaaks* speak directly to the calamities that were cast onto the Gitxsan for disrespecting the animals, as well as relations with each other. The *ayooks* were given to all Gitxsan in order that the *huwilp* could co-exist in mutual respect. However, the Chief Justice, though he recalled in great detail that although *Saem’oogits Gylolgyet* and *Antigulilbix* knew the history of their *wilps* and spoke comprehensibly about their “legends,” neither were deeply familiar with the boundaries of territories which suggested to him that their territories were not “held exclusively.” What the Chief Justice missed was that Gitxsan people through their *Saem’ogits* and *Saem’oogits* can only control the access to the *lax ‘wiiyip* they claim as their own, subject to any lien of access for another *wilp*’s contribution to funeral costs of one of their members, and for the loss of life at the hands of one of their members. Thus, exclusivity.

33 *Delgam’Uukw* 1991 *supra* note 6 at 179.
is relative to the *wilps*’ affiliations it has with other *wilps* and its obligations. However, the Chief Justice was able to ascertain:

> there are far too many inconsistencies in the plaintiffs’ evidence to permit me to conclude that individual chiefs or Houses have discrete aboriginal rights or interests in the various territories defined by the internal boundaries\(^{34}\).

Unfortunately, the Chief Justice was unable to understand that the *adawaaks* are told in the context of the governance of the *wilp*, and it is within the telling of, and referencing of, current business, that territorial boundaries are maintained, access shared and disputes brought to the surface and settled. Furthermore, *adawaaks*, though exclusive to the *wilp*, are shared with others in the region. This shared exclusivity cements people from other villages together, based in marriage and kinship, as they can speak of their common origins\(^{35}\). It is through public performances, the telling of, or listening to, the *adawaak* at the *yukw* in which property relations within the *wilp*, and to other *wilps* is stated\(^{36}\). The *adawaak* is where the record of the degree of exclusivity of territoriality is maintained amongst first the Gitxsan, and then their neighbours, the Tsimshian, Nisga’a, Gitanyow, Tahlman/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekani peoples\(^{37}\). It is at the *yukw*, that *wilp* property, especially resources that come from the territory, is accounted for, and more importantly, re-distributed back to the community\(^{38}\).

The Chief Justice, besides considering and rejecting the claims of ownership of the Gitxsan, examined and rejected their claims to governance. It is clear that the Chief Justice ignored the opening statement by *Sæm 'ogits Delgam 'Uukw* and *Gisday Wa*. It was said that the purpose of the trial was to “find a place for Gitxsan and Wet’suwet’en law and jurisdiction in

\(^{34}\) *Ibid.* at 443.

\(^{35}\) M. McKenzie, *Proceedings at Trial*, vol. 8 May 21 at 468.


Although there was no argument for sovereignty, the Gitxsan argued for inclusion of their law, jurisdiction, social and political institutions. The Gitxsan considered that their claim to ownership entitled them to govern their territory through their own institutions, regulating the harvesting, management and conservation of those lands and resources. As such, they claimed the right to ratify land titles, leases or grants issued by the province after 1984 and that these rights were affirmed as of 1982 by s. 35 of the Constitution Act. Thus, they sought provincial-like powers in the area of land use, social service, health and education. Regarding governance, all the Chief Justice could say was:

that it was inconceivable that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with the power to legislate, took title to all the land of the colony and set up the authority of the Crown.

Furthermore, in speaking with respect to the post-1871 situation, the Chief Justice continued:

the enactment of the British North America Act, 1867, and the adherence to it by the colony of British Columbia in 1871, which was accomplished by Imperial, Canadian and colonial legislation, confirmed the establishment of a federal nation with all legislative powers divided only between Canada and the province.

What is conspicuous is the absence of the Gitxsan or other First Nations' voices as part of the Confederation debates in 1870. In addition, there are no records of the responses by Victoria or Ottawa to the petitions sent by the Gitxsan, in the 1880's, asking Government to meet with them and examine their laws, as a means to integrate them into Canada. In the end the Chief Justice

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39 Delgam 'Uukw 1991 *supra* note 6 at 128.
40 Ibid. at 407.
41 Ibid. at 408.
concluded that the *ayooks* of the Gitxsan:

during the course of the trial that what the Gitksan and Wet’suwet’en witnesses describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves\(^{42}\).

The further rejection of Gitxsan *ayooks* is particularly strange as the *Sæm’oogits* and *Sæm’ogits* pay close attention to how access rights to *wilp* resources are allocated and managed. Access is given first to kin and those related through marriage, and then through the principles of *amnigwootxw* or *xkyeehl*. Here the Chief Justice concluded that *amnigwootxw* rights were “so flexible and uncertain that they cannot be classified as laws\(^{43}\).”

It appears that the Chief Justice missed the essence of Gitxsan property – the right to a livelihood by controlled access. Potentially any one Gitxsan person has access to at least three distinctly different territories (so in any Gitxsan family, husband and wife, there are at least five areas which the family can draw on). More particularly, *amnigwootxw* rights are conferred onto a father’s children, in order that they may accompany and help him when he goes onto his *wilp*’s *lax’wiiyip* to hunt, fish, gather or trap. *Amnigwootxw* rights are given by the *wil’na t’ahl* to the guardians of orphans. In this case the foster family is granted access (and other privileges) in order that they may raise the orphaned children on their *lax’wiiyip*. With respect to the *xkyeehl* rights, these rights, like *amnigwootxw* rights, are conferred on to a person for a specific period, place and resource. The person in essence “purchases or leases” access to a particular location or resources. Again, the decision, though announced by the *Sæm’oogits* and *Sæm’ogits* to the community at a *li’ligit*, is made by the *wilp* as a whole, whether to accept, or reject the request by the outsider.

\(^{42}\) *Ibid.* at 379.  
As Mark Walters\textsuperscript{44}, legal scholar, has suggested, discussion about “Gitxsan lifestyles” may be immaterial, considering that it is the responsibility of the Crown to adhere to the constitutional principle of “exclusivity” that unmistakably contends that, in order for the Crown to hold “title” to territory, it must clearly and unequivocally demonstrate that the land discovered was vacant, won in war, or had acquired “title” purchased in a public forum. Furthermore, Walters advocates that the rights of the First Nation Community are bound up in the terms of cession, even if the community has lost its territory through an altercation, and, in situations where the community has yet to cede its territory, the “property rights” associated with their laws, remain intact. Neither of these situations occurred before the trial in 1984.

\textit{The Gitksan do it with Appeal: The British Columbia Court of Appeal Decision, 1993}\textsuperscript{45}

To Gitxsan and Wet’suwet’en people, the date of 8 March 1991 is known as “Black Friday.” Black Friday is the day the Chief Justice of the British Columbia Supreme Court handed down the \textit{Delgam’Uukw} Trial judgement. The trial decision, as Chief Joseph Mathias (Squamish) noted, had “eliminated the basis to negotiate,” suggesting that there “was nothing to compel the parties to come to the table\textsuperscript{46}.” Though both Provincial and Federal ministers responsible for Indian Affairs were quick to counter such a claim, as well as affirming their commitment to negotiations, the \textit{Delgam’Uukw} decision raised the possibility that “land” would

\textsuperscript{45} \textit{Delgam’Uukw (Muldoe) et al. v. R. in right of British Columbia and Attorney General of Canada} [1993] 5 W.W.R. 97 [\textit{Delgam’Uukw 1993}].
[w]e were brought very quickly to a realization that foremost in the minds of the people we were meeting with was the land question,” and now “[w]e’re going to have to reconsider the context of negotiations.\textsuperscript{47}

After the conclusion of the British Columbia Supreme Court trial in 1991, the Provincial position on aboriginal title changed, accepting at least that First Nations in British Columbia had, at the very least, a “political” claim to title. As such, the Province was willing to negotiate treaties with British Columbia First Nation communities. In support of this change in perspective the Province of British Columbia, Canada and the First Nations Summit accepted the British Columbia Claims Task Force’s Report that provided the mandate for the British Columbia Treaty Commission.\textsuperscript{48}

Although the Province conceded for the Appeal that there had been no “blanket extinguishment prior to Confederation” and it submitted that some aboriginal rights may have been extinguished or impaired as a result of the Province exercising its right to land (and resources) under s. 109 of the Constitution Act, 1867, the Province continued to contend that the plaintiffs did not have a right of ownership of, or a proprietary interest in, the lands and resources which they claimed. The Province agreed with the Chief Justice, as they believed the plaintiffs had failed to prove they held the claimed lands exclusively, nor had they proved they maintained external or internal boundaries. With respect to jurisdiction or self-government, the Province also agreed with the Chief Justice, in that though the plaintiffs had lived in organized societies, and certain rights or freedoms to self-government may continue to exist, they were subject to the

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\textsuperscript{47} McCullough \textit{supra} note 46 at 10.

\textsuperscript{48} In 1993, the British Columbia Treaty Commission Office opened its doors with a mandate to facilitate tripartite agreements that would give British Columbia First Nation communities, the Federal and Provincial Crowns “certainty and finality.” \textit{British Columbia Treaty Commission Act}, 1995 c.45.
laws of Canada and the Province. The Province agreed with the Chief Justice with respect to the weight that was given to the expert evidence and the Hudson’s Bay records, and also supported the Chief Justice’s conclusion as to the value of the oral histories. Lastly, the Province agreed with the Chief Justice that he was correct to characterize the plaintiffs’ aboriginal rights as *sui generis*. The Province, however, qualified this point by suggesting that the precise location, scope, content, and consequence of the plaintiffs’ aboriginal rights remain the subject of negotiation and further judicial consideration.

The Gitxsan were quick to file an appeal, even though the Province was willing to meet the Gitxsan at the negotiation table, and the Gitxsan felt that though the Province had modified its position from “blanket extinguishment” to recognizing that there was, at least, the “political legitimacy of aboriginal rights and title and inherent rights to self-government”, there was not enough clarity to bring the Gitxsan a satisfactory treaty. The Gitxsan felt that negotiating under the assumption that Gitxsan land and rights had been legally extinguished at the time of “sovereignty,” only to be politically resurrected in the *Constitutional Act* of 1982 and endorsed by the Province, was far too ambiguous to achieve the necessary “certainty and finality” desired by the Gitxsan. The Gitxsan preferred a negotiating position that unequivocally acknowledged their proprietary claim to their *lax ‘wiiyip* and their aboriginal rights to self-government.

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The Majority Decision

The Court of Appeal judgement was handed down on 25 June, 1993, when all five Appeal Court Judges agreed that aboriginal rights “to title” existed (based on the modified stance of the Province), but rejected contemporary claims of ownership by the Gitxsan by 3-2. The Court of Appeal clearly incorporated the change in the Province’s position, in that there was “no blanket extinguishment of title prior to 1871,” and that the Gitxsan had an existing aboriginal right of “occupancy and use” over much of the territory claimed. The Judges agreed that the extent and content of such title should be left to negotiations.

The majority judgments of MacFarlane J.A., (Taggart J.A. concurring) and Wallace J.A. concluded that the trial judge had made no palpable error in his assessment of the evidence, and they agreed with the Chief Justice’s conclusions that any aboriginal right held by the Gitxsan to exercise jurisdiction over the territory had been extinguished by 1870. The Appeal Court, incorporating the new position of the Province, allowed for the possibility that “aboriginal title” had not been entirely extinguished by the colony of British Columbia prior to 1871, but after Confederation First Nations held non-exclusive aboriginal title. According to Macfarlane J.A., the continuance of aboriginal title and rights lay in the argument that:

I do not think that all aboriginal interests in respect of land were extinguished before 1871. They (aboriginal rights or title) could not be extinguished by the Province after 1871. The trial judge held that legislation enacted between 1858 and 1871 providing for the settlement of the colony was completely inconsistent with the continued exercise of aboriginal rights, and that a clear and plain intention to extinguish aboriginal rights should be inferred from that legislation. I am not persuaded aboriginal rights could not coexist with settlement, nor that the Crown intended, by virtue of those legislative steps, to completely negate the Indian interest. Indeed, the British continued to recognize the Indian interest. The Crown promised to preserve and protect Indian settlements. The Terms of Union, 1871 between British Columbia and Canada.

53 Delgam’Uukw 1993 supra note 45 at 99 to 100.
provided that lands would be set aside, and would be transferred to the Dominion for the use and benefit of the Indians, a process not completed until 1938. The courts have continued to give effect to claims in respect of aboriginal rights. For instance, they have recognized unextinguished fishing and hunting rights in places other than reserves, but having a connection with aboriginal lands. All of this supports the conclusion that the pre-Confederation legislation was not clearly and plainly intended to extinguish aboriginal rights.

Macfarlane, J.A., when speaking about aboriginal rights, concluded that:

The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. Rights of occupancy are usually exclusive. Other rights, like hunting or fishing, may be shared. What is an aboriginal use may vary from case to case. Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of an aboriginal society. The nature and content of the right, and the area within which the right was exercised, are questions of fact.

The precise bundle of rights that a particular aboriginal community can assert may depend upon a number of factors including the nature, kind and purpose of the use of occupancy of the land by the aboriginal community in question, and the extent to which such use and/or occupancy was exclusive or non-exclusive.

Concerning the claim to governance of the territories in question, Macfarlane J.A. agreed with the trial judge that the division of powers at Confederation had extinguished any Gitxsan rights:

I have said there is no question the Gitksan and Wet'suwet'en people had an organized society. It is pointless to argue that such a society was without traditions, rules and regulations. Insofar as those continue to exist there is no reason why those traditions may not continue so long as members of the Indian community agree to adhere to them. But those traditions, rules and regulations cannot operate if they are in conflict with laws of the Province or of Canada. In 1871, when British Columbia joined Confederation, legislative power was divided between Canada and the provinces. The division exhausted the source of such power. Any

54 Ibid. at 178, para. 279.
55 Ibid. at 128 to 129, para. 65 to 66.
form of Indian self-government, then existing, was superseded by the
Constitution Act, 1867, as adopted by the Province in 1871\textsuperscript{56}.

As Robert Freedman\textsuperscript{57}, legal scholar, points out, there was a degree of ambiguity surrounding the
meaning of self-government, and this may have had its roots in how the pleadings themselves
were set out. In the statement of claim the \textit{Sæm’oogits} and \textit{Sæm’ogits} asked the Courts to
"recognize that they governed themselves" according to their own laws, and that they have the
right to govern themselves. Such a statement, Freedman suggests, could entail anything from a
measure of self-regulation in the territories of the Gitxsan to the ability that they could make
their own laws, independent of either Canada or British Columbia, through their own institutions.

When speaking

about jurisdiction, Macfarlane, J.A. in supporting the trial judge, elaborated on his conclusion:

Rights to self-government, encompassing a power to make general laws
governing the land and resources in the territory, and the people in that
territory, can only be described as legislative powers. They serve to limit
provincial legislative jurisdiction in the territory and to allow the plaintiffs
to establish a third order of government in Canada. Putting the
proposition in another way: the jurisdiction of the plaintiffs would
diminish the provincial and federal share of the total distribution of
legislative power in Canada\textsuperscript{58}.

As Macfarlane, J.A. concludes:

Furthermore, the claim to the right to control and manage the use of the
lands and resources in the territories cannot succeed because the plaintiffs
failed to establish the necessary ownership needed to support such a
jurisdiction\textsuperscript{59}.

\begin{footnotes}
\item[56] \textit{Ibid.} at 178, para. 281.
\item[57] R. Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of
the Decision of the British Columbia Court of Appeal in \textit{Delgamuukw v. British Columbia}"
\item[58] \textit{Delgam’Uukw} 1993 supra note 45 at 151, para. 165.
\item[59] \textit{Ibid.} at 153, para. 174.
\end{footnotes}
Wallace, J.A. in responding to the plaintiff’s pleadings that they continued to hold jurisdiction, stated:

Jurisdiction or self-government includes the power to pass laws which will be recognized by the community in question, and the ability to enforce such laws. Prior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction in the territory to the extent made possible by their social organization. However, once sovereignty was asserted, the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants.\(^{60}\)

Wallace, J.A. determined that:

After the exercise of sovereignty by the Crown, the plaintiffs no longer retained the aboriginal right of self-government or jurisdiction over any part of the territory or the members of their House. Any rights of self-regulation must arise from agreement between the plaintiffs and the provincial or federal Crown or by decision of the trial court. The plaintiffs established a non-exclusive aboriginal right of traditional occupancy and use of that portion of territory designated by the trial judge.\(^{61}\)

It is surprising that the analysis of self-regulation or self-government was interpreted in such narrow and absolute terms. The British constitutional principle of “Continuity” seemingly implies that the First Nation communities have a right to govern themselves according to their law in all matters, except where aboriginal law and the common law would intersect. In these situations, such as natural justice concerns and when the Crown’s sovereignty is put in jeopardy, it is expected that both parties ought to be afforded the respect of sitting in council to come to a mutual agreement as to the shape of the law, as well as the expected and necessary remedy. Outside of these concerns, First Nation people, including the Gitxsan, have the right to govern themselves and to expect both protection from third party interest from the Crown, as well as the

\(^{60}\) *Ibid.* at 224, para. 478.

cooperation of the Crown in safeguarding these rights, in light of Federal or Provincial legislative imperatives.

The Minority Decision

Lambert J.A., drawing on the “settlement rule” and the “Doctrine of Continuity,” stated that aboriginal title is only one aspect of aboriginal rights, and as a “right” it had its origins in the First Nation societies that existed before European settlers arrived. Lambert J.A. contended that at the time of contact and declaration of sovereignty, these rights continued and warranted protection both from the aboriginal societies as well as recognition and protection by the common law. As Lambert, J.A. maintains, the settlement rule stipulates:

If, either before or after the beginning of the process of settlement, Sovereignty was asserted by the Crown, that Sovereignty would carry with it the power to make just laws for all the inhabitants of the land over which Sovereignty was asserted, but Sovereignty itself would not displace the existing rights and social system of the indigenous people.

Lambert J.A. held that it follows that when the Crown asserted sovereignty and adopted the common law as the law over the territories in question, then it would be the common law itself that recognized, adopted and affirmed the rights and titles of the indigenous peoples. As Lambert J.A. pointed out, unless the laws of the indigenous peoples were inconsistent with Sovereignty itself, or inconsistent with the laws made applicable to the whole territory and with

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62 Ibid. at 275, para. 659 to 660.
63 Ibid. at 274, para. 656.
64 Ibid. at 290, para. 719.
65 Ibid. at 290, para. 721.
66 Ibid. at 273, para. 654.
the principles of fundamental justice\textsuperscript{67}, then the common law would have adopted the laws of the indigenous peoples as well.

Lambert J.A.'s explanation of the nature of aboriginal rights may have provided the basis for analyzing the "content of those rights," not as specific activities but the whole distinctive \textit{sui generis} nature and intent of the title rights. Lambert J.A. stated:

Accordingly, I think that a different approach is required, an approach that tries to characterize aboriginal rights in terms of aboriginal society rather than western society\textsuperscript{68}.

Lambert J.A., following \textit{Sparrow}, suggested that the analysis of the "right" in question "must uphold the honour of the Crown" and "must be in keeping with the unique contemporary relationship, grounded in history and policy between the Crown, and Canada's aboriginal peoples\textsuperscript{69}.

Thus, "aboriginal rights" that warrant protection may in fact be the "integral and distinctiveness\textsuperscript{70}" qualities that tie the community to particular locations, sets of inherent relationships among themselves, beliefs about who they are, and how they must act towards the land, and each other. Thus, according to Lambert, J.A., the purpose of s. 35 was not to protect First Nation rights as they were in 1778, but:

Its purpose must have been to secure to Indian people, without further erosion, a modern unfolding of the rights flowing from the fact that, before settlers with their new Sovereignty arrived, the Indians occupied the land, possessed its resources, and used and enjoyed both the land and resources through a social system which they controlled through their own institutions. That modern unfolding must come not only in legal rights, but, more importantly, in the reflection of those rights in a social organization and in an economic structure which will permit the Indian peoples to manage their affairs with both some independence from the

\textsuperscript{67} \textit{Ibid.} at 273, para. 655.
\textsuperscript{68} \textit{Ibid.} at 277, para. 666.
\textsuperscript{69} \textit{R. v. Sparrow} [1990] 1 S.C.R. 1075 at 1110 [\textit{Sparrow}].
\textsuperscript{70} \textit{Sparrow supra} note 69 at 1099.
remainder of Canadian society and also with honourable interdependence between all parts of the Canadian social fabric.\textsuperscript{71}

This type of relationship requires that the Crown examine Gitxsan laws and legal institutions, especially the community's relationship to their land and political organization. As Lambert J.A. notes:

they are not asserting a claim to govern themselves within the geographical boundaries of the territory. They are claiming the right to manage and control the exercise of the community right of possession, occupation, use and enjoyment of the land and its resources which constitutes their aboriginal title, and they are claiming the right to organize their social system on those matters that are an integral part of their distinctive culture in accordance with their own customs, traditions, and practices, which define their culture.\textsuperscript{72}

These rights, that of use and enjoyment of their aboriginal title lands, and especially the ability to participate in the management of these affairs, is situated in the Doctrine of Continuity. As the Doctrine of Continuity suggests, the laws of the First Nation community, unless they are clearly and plainly extinguished, or modified through negotiation, remain intact. As Lambert, J.A. outlined in his reasons:

The Gitksan and Wet'suwet'en people had rights of self-government and self-regulation in 1846, at the time of sovereignty. Those rights rested on customs, traditions and practices of those people to the extent that they formed an integral part of their distinctive cultures. The assertion of British Sovereignty only took away rights that were inconsistent with the concept of British Sovereignty. The introduction of British Law into British Columbia was only an introduction of such laws as were not from local circumstances inapplicable. The existence of a body of Gitksan and Wet'suwet'en customary law would be expected to render much of the newly introduced English law inapplicable to the Gitksan and Wet'suwet'en people, particularly since none of the institutions of English law were available to them in their territory, so their local circumstances would tend to have required the continuation of their own laws. The division of powers brought about when British Columbia entered into

\textsuperscript{71} Delgam 'Uukw 1993 supra note 45 at 277 to 278, para. 669.
\textsuperscript{72} Ibid. at 350, para. 971.
confederation in 1871 would not, in my opinion, have made any difference to Gitksan and Wet’suwet’en customary laws. Since 1871, Provincial laws of general application would apply to the Gitksan and Wet’suwet’en people, and Federal laws, particularly the Indian Act, would apply to them. But to the extent that Gitksan and Wet’suwet’en customary law lay at the core of their Indianness, that law would not be abrogated by Provincial law of general application nor by Federal law, unless those Federal laws demonstrated a clear and plain intention of the Sovereign power in parliament to abrogate the Gitksan and Wet’suwet’en customary laws. Subject to those overriding considerations, Gitksan and Wet’suwet’en customary laws of self-government and self-regulation have continued to the present day and are now constitutionally protected by s. 35 of the Constitution Act, 1982. 

The Gitxsan in the past put aside many of their sanctions that the Lixs giigyet found to be too harsh. Likewise, the Gitxsan modified their Li’ligit in order that the Lixs giigyet were not offended by the practice of it, and placed limits on their ritual obligations to each other. Similarly, they accepted after the fire in 1872 that they would speak within the law. Later, in 1888 they further agreed to defer to the “White Man’s Law,” to settle disputes. The Gitxsan argued in the Court of Appeal in 1993 that they had laid out their land tenure system and governing institutions, which reflected the essential characteristics of ownership. In doing so, they suggested that it was within their distinctive land tenure system that self-government was described. The Gitxsan claimed that they have not relinquished their right to harvest the resources (including trees and minerals) that would enhance both their social and natural environments, the essence of their aboriginality. Though the majority decision in the Court of Appeal case in 1993 supported the trial decision with respect to “title and self-government,” there was enough ambiguity raised as to the soundness of “title” in British Columbia by the minority decision to warrant the Gitxsan to enter into Treaty talks. The dissenting opinions of Lambert, J.A. and Hutcheon (in part) acknowledged that Gitxsan rights to their territory

73 Ibid. at 363 para. 1029.
were communal in nature and that a declaration of sovereignty by the Crown did not necessarily abrogate their rights to self-regulation for the preservation and enhancement of their own social, political, cultural, linguistic and spiritual identity, and concluded that land use outside of, as well as adjacent to, Gitxsan villages, could be determined by either another trial, or by agreement.  

The Negotiation Interlude

The Seem'ogit in 1884 were very clear that they, as owners, were willing to sit and discuss how the land was to be used, by whom and for what purpose. The Gitxsan Seem'ogit of Gitwangak petitioned Victoria to stop miners from staking claims up the Lorne Creek, without their permission. Similarly, in 1889, Seem'ogit Gyetm Galdoo from Gitanmaax appealed again to the Government to stop the Lixs giigyet from occupying the land without Gitxsan permission. In 1908 and 1909 the Gitxsan again tried, through both petitions and hearings, to address the title question. In 1915 at the McKenna – McBride hearings, each Seem'ogit presented an argument concerning the unresolved land question, only to be told that the Commission mandate was limited to the size of Reserve lands, and not the title question. When the Federal Cabinet modified its position to negotiate Comprehensive Claims, after the Calder decision in 1973, the Gitxsan were prepared to sit and negotiate. In October of 1984, the Gitxsan filed their statement of claim, intending to challenge the Provincial position regarding aboriginal title and rights, with the aim to align their traditional governance and territorial holdings with that of the Provincial and Federal Crowns.

Prior to the Court of Appeal hearing in 1991, the Gitxsan elected not to accept the offer from the Provincial government to enter into treaty negotiations, until there was a clearer

74 Ibid. at 100.
position taken on aboriginal title. While the majority decision of the Court of Appeal endorsed many of the findings of the Chief Justice, they overruled his findings on blanket extinguishment of Aboriginal Title pre-Confederation and they re-enforced the urgency of a negotiated settlement. Although the Gitxsan did not achieve as decisive a ruling on Appeal as they desired, and while the negative findings regarding the nature of Aboriginal Title and the rejection of their claim to self-government argued strongly in favour of taking an appeal to the Supreme Court of Canada, the Gitxsan nevertheless were resolved to give negotiations a chance. The Gitxsan entered into the *Accord of Respect and Recognition*\(^75\) an agreement with British Columbia and Canada. The *Accord* stipulated that the tri-partite process should be able to reach a Treaty within 18 months, with the option of a further continuance on the adjournment of the appeal to the Supreme Court of Canada, if negotiations were going well.

For the Gitxsan “certainty” could be achieved in the Statement of Intent (SOI) area through agreements with Canada that outlined the Gitxsan commitment to Canada. The Gitxsan also wanted a commitment from Canada that would see the current level of funding maintained for language, culture, health and community infrastructure. It was assumed that the Gitxsan would take control of existing reserve lands, capital and revenue trusts, and would be able to base their self-government on the *wilp* system.

In the SOI area, the Gitxsan contended that the optimum relationship with the Provincial government was based on the co-management of resources and services with the appropriate Provincial Ministry\(^76\). Thus, the Gitxsan vision of “finality” was a working relationship between *huwilp* and Provincial Ministries. The Gitxsan looked to write a series of agreements with

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\(^75\) British Columbia, Gitxsan and Wet’suwet’en, *An Accord of Recognition and Respect* June 13, 1994. The intent of the *Accord of Recognition and Respect* was “to seek an adjournment, for a period of one year, from the Supreme Court of Canada, of the appeal in *Delgam’Uukw v. British Columbia* in order for all three parties to negotiate a settlement.” The *Accord* was renewed in July of 1995.

Provincial Ministries (especially Forestry) that incorporated access to actual, and potential, resources throughout their *lax ‘wiiyip*, either through employment guarantees or by revenue sharing. The over-riding aim was to channel revenue from resource extraction back into the region, in order to support self-government.

Gitxsan, Provincial and Federal negotiations lasted for five months. The Provincial government suspended negotiations on February 1, 1996 citing fundamental differences “on the nature and scope of aboriginal rights and jurisdiction." With the conclusion of the Main Table negotiations, the Province also elected not to renew the *Accord*. The Province determined that many of the broader issues between the Province and the Gitxsan would “first require the Supreme Court of Canada to decide the Delgam ‘Uukw appeal." However, the Federal Deputy Minister, Scott Serson, held the view that:

> slow but steady progress has been made at the treaty table with the Gitxsan. There are clearly different points of view in a number of areas, but this is understandable and expected at this early stage of the negotiations. British Columbia has indicated their willingness to continue to negotiate these matters with the Wet’suwet’en. In our view there is every reason to continue to negotiate the same matters at the treaty table with the Gitxsan.

These encouraging words did not move the Province to reconsider their stance. The Gitxsan felt that the Province was unwilling to contemplate any perspective that deviated from their interpretation of the Court of Appeal’s majority decision in *Delgam ‘Uukw*, which though it acknowledged that there had been “no blanket extinguishment of title prior to 1871,” this right was limited to site-specific activities, where the extent and content were to be left to negotiations.

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79 Robinson *supra* note 77 at 9.
Similarly, the Province's position was that any self-government rights were limited to reserve lands, site-and-activity-specific rights, and any self-government parameters to existing Indian Act management arrangements. Although all parties had been encouraged to negotiate a settlement, it became impossible to continue. The conclusion of the Gitxsan negotiations was actually quietly spoken. John Cashore, New Democratic Party Minister responsible for Aboriginal Affairs, said, “we are simply not making any progress.” The Gitxsan chief negotiator’s response was more candid, that is, Don Ryan contended “[p]olitically, the [government is] afraid to make any decisions.”

Delgam’Uukw v. British Columbia [1997]: Aboriginal Title, Infringement, Consultation and Compensation

After five months of negotiations spread over three years, Gitxsan Main Table negotiations folded, and, with the breakdown in negotiations, the decision to proceed with the appeal to the Supreme Court of Canada was mutual. The primary issues on appeal included:

- whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government,
- what was the ability of this Court to interfere with the factual findings made by the trial judge,
- the content of aboriginal title and how it is protected by s. 35(1),
- its proof,
- whether the plaintiffs had made a claim for self-government, and
- whether the Province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the Indian Act.

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80 Delgam’Uukw 1993 supra note 45 at 176 to 182, para.
82 Delgam’Uukw 1997 supra note 24.
83 Ibid. at 1061, para. 72.
The Supreme Court of Canada held that the pleadings had not precluded the lower Court from entertaining claims for aboriginal title and self-government, and that a new trial was necessary. More importantly, as the trial judge refused to admit or gave no independent weight to the oral histories, and then concluded that the appellants had not demonstrated the required degree of occupancy for ownership, the Supreme Court of Canada speculated that if the oral histories had been assessed correctly, the conclusion on this matter may have been different. The Supreme Court of Canada, in keeping with its ruling in _Van der Peet_\(^84\) (where the Court had determined that before settlement First Nation communities lived in organized societies), the First Nations perspective, according to their traditions, was significant. The Supreme Court of Canada examined the source of Aboriginal title, determined that it was a pre-existing right, prior to the assertion of Crown sovereignty, and that it continued after the assertion of sovereignty until it was explicitly extinguished. The Supreme Court also defined the content of title, set out the test for its proof, expanded the basis for government infringement, and stated that consultation, as well as compensation, was part of the fiduciary obligation of government. The Gitxsan were not expecting such a far-reaching decision. _Sām ogiit Wiis Elaast_ quietly stated "[t]he power of the blanket is still very alive and we’re going to carry it forward\(^85\)." According to _Maas Gaak_\(^86\), "consultation is now part of the government and corporate dealing with aboriginal people, a legacy of this case\(^87\)."

\(^{84}\) _Regina v. Van der Peet_ [1996] 2 S.C.R. 507 [Van der Peet].
\(^{86}\) D. Ryan, from 1993 until 1999 was the Gitxsan chief negotiator, and he holds the name of Maas Gaak.
\(^{87}\) MacQueen _supra_ note 85 at A1.
Aboriginal Title – Its Nature and Proof

The Courts have identified aboriginal rights (title being a subset of rights) as *sui generis*, and as such they cannot be defined entirely by French, English or Aboriginal property law; however, they hold a set of distinctive features. First, aboriginal rights are held communally and related directly to the distinctive First Nation community’s use and occupancy of their traditional territories, prior to the assertion of Crown sovereignty. Second, they are considered to be site specific and the precise bundle of rights is dependent on the nature, kind and purpose of the use and occupancy by the First Nation community, and to the extent whether or not the use and occupancy was exclusive or non-exclusive. Third, aboriginal rights cannot be alienated, other than by surrender to the Crown. The Supreme Court of Canada in 1997 now recognizes that there is a range of aboriginal rights that are constitutionally protected under s. 35. This spectrum includes:

- aboriginal rights that involve practices which were integral to the aboriginal society before contact, but no title is proved;
- site specific rights to engage in certain activities at particular places, but where title is not claimed, and
- aboriginal title that is a right to the land itself.

The Court resolved that “aboriginal title” is a right to the land itself, and it is not limited to the right to carry on traditional practices or activities. Rather, aboriginal title is a broad right to exclusive use and occupation of land for a variety of purposes, which in themselves need not be aspects of historic aboriginal practices, customs or traditions integral to the distinctive aboriginal culture. Aboriginal title is a property interest and can compete on an equal footing with other property interests. The Supreme Court of Canada determined that an aboriginal land base, resulting from aboriginal title, is greater than the present day Indian reserves, and is not limited

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88 *Delgam’Uukw 1997 supra* note 24 at 1083 to 1088, para. 116 to 125.
to traditional use sites. As such, the land base has an inescapable economic component. As Lamer C.J. determined:

First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses the land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, the lands held pursuant to aboriginal title have an inescapable economic component. Also, aboriginal title is a collective interest that is held communally, and as it is a collective right to land held by all members of an aboriginal nation, decisions with respect to that land are also made by that community. Thus it follows that decisions regarding its use must be made in accordance with the laws and procedures of the First Nation community in question, as Lamer C.J. stated in Van der Peet, referencing Brennan J., writing for a majority of the Court in Mabo:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. As the aboriginal title source is through an aboriginal people’s original occupation of the land, and not Crown legislation or Crown grant, it is sui generis and must be understood by reference to the common law and the aboriginal perspectives. As such, according to Lamer, C.J. aboriginal title can be summarized by two propositions:

[F]irst, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second,

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89 Ibid. at 1111 to 1112, para. 166.
91 Delgam 'Uukw 1997 supra note 24 at 1082, para. 114.
that those protected uses must not be irreconcilable with the nature of the group's attachment to that land\textsuperscript{92}.

And, second:

In conclusion, the content of aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

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. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land -- it is a \textit{sui generis} interest that is distinct from "normal" proprietary interests, most notably fee simple\textsuperscript{93}.

The Supreme Court of Canada concluded that where there was a "definable First Nation title" to territories, the relevant evidence that can establish aboriginal title includes historical, archaeological, as well as aboriginal laws, physical occupation, and oral histories. More importantly, in order to support the First Nation perspective, Lamer, C.J. restated what he had said referencing \textit{Sparrow}\textsuperscript{94} and \textit{Van der Peet}, that is:

\begin{quote}
Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case\textsuperscript{95}.
\end{quote}

\textsuperscript{92} \textit{Ibid.} at 1083, para. 117.
\textsuperscript{93} \textit{Ibid.} at 1087, para. 124 & 125.
\textsuperscript{94} \textit{Sparrow supra} note 69 at 1112.
\textsuperscript{95} \textit{Van der Peet supra} note 84 at 551, para. 49 to 51.
This statement regarding evidence suggests that oral histories, narratives that are part of the legal code and so on, of a First Nation community warrant consideration on their own merits. However, as Lamer continues, they must be cognizable to the Court.

Lamer, C.J. further determined that for proof of aboriginal title, as it is neither entirely defined by First Nations' law nor by the common law, both the aboriginal perspective and the common law perspective must be taken into consideration. In terms of the relevant common law proof, evidence of physical occupation is pertinent to possession of the land; however, the First Nation perspective is imperative. The Court elaborated on this aspect by stating:

[I]f at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.\(^96\)

The Court determined that 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 resources. However, as Lamer C.J. continues:

There is no need to establish an unbroken chain of continuity between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title.\(^97\)

For proof of such title, the Court laid out several options. First and foremost, the land must have been occupied prior to sovereignty.\(^98\) This will allow the community to use its land tenure system supported by oral history to situate themselves in their claim area. More importantly, if

\(^96\) *Delgam'Uukw* 1997 *supra* note 24 at 1100, para. 148.

\(^97\) *Ibid.* at 1100 to 1101, para. 149.

\(^98\) *Ibid.* at 1097 to 1102, para. 143 to 151.
present occupation is relied upon as proof of occupation pre-sovereignty, there must be continuity between the present and pre-sovereignty occupation. Though the Court approached this clause in terms of an absolute, in that it lays this part out as a condition of continuity, it also elaborates on this section, by adding that “continuity does not necessarily mean an “unbroken chain of habitation.” Thus, the Court has taken into consideration the “reserve system” and its effect on the territories of First Nation peoples, their land use since sovereignty, as well as the exploitation of the First Nation’s lands by the Crown. Lastly, at sovereignty, occupation must have been exclusive. All in all, these criteria suggest that for proof of title the First Nation community can put forward evidence of their land tenure system and how rights are allocated, enforced or rescinded.

Infringement

The Supreme Court, besides laying out a specific “test” for the determination of title and its use, also argued that this title is not absolute, and “aboriginal title” may be infringed on. The Court’s reasoning is based on the premise that First Nation Communities now live amongst and are part of “a broader social, political and economic community, over which the Crown is the sovereign.” As Lamer C.J. states:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part, limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

99 Ibid. at 1102 to 1104, para. 152 to 155.
100 Ibid. at 1104 to 1106, para. 156 to 158.
101 Ibid. at 1107 to 1108, para. 161.
102 Ibid. at 1107 to 1108, para. 161 to 162.
The Court found that government may infringe on aboriginal title, but must justify any infringement. The test which government must meet to justify an infringement has two parts:

First, the infringement of the aboriginal title must be in furtherance of a legislative objective that is compelling and substantial.

The second part requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

A broad range of legislative objectives can meet the first test of the justification analysis, as Lamer C.J. continues:

The general principle governing justification laid down in Sparrow and embellished by Gladstone, operates with respect to infringement of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with assertion of Crown sovereignty, which entails the recognition that ‘distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community.’ In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by references to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

Since aboriginal title has the quality of “exclusive occupation,” the Crown’s fiduciary duty requires that aboriginal title be given priority:

What is required is that government demonstrate ‘both that the process by which it was allocated and the actual allocation of the resource which results from the process reflect the prior interest’ of the holders of aboriginal title in the land. By analogy with Gladstone, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the

103 Ibid. at 1108, para. 162.
104 Ibid. at 1111, para. 165.
resources of British Columbia, that the conferral of fee simples for agriculture, and the use of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal users of their lands (e.g. licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.\footnote{Ibid. at 1111, para. 167}

Though the Court did not elaborate on how the Crown was to approach this issue, it did suggest that the Crown’s “fiduciary obligation” may be satisfied through consultation\footnote{Ibid. at 1112 to 1113, para. 167 to 168.}, which in some cases will require compensation\footnote{Ibid. at 1114, para. 170.}.

**Consultation and Compensation**

The common law duty to consult with First Nations was established by the Supreme Court in *Sparrow*. This principle, at least in the context of resources to which First Nation people have constitutionally guaranteed access, is clear. In *Sparrow* the Court said:

> The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely expect, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries\footnote{Sparrow supra note at 68 1119.}.

The Supreme Court earlier held in *Van der Peet* that the need for Government to consult was a non-judicial means to reconcile the prior “occupation of lands by aboriginal communities with the assertion of sovereignty by the Crown over those lands.” Here again the Court was plain, recalling that:

\footnote{Ibid. at 1111, para. 167}
for many years, the rights of the Indians to their aboriginal lands —
certainly as legal rights — were virtually ignored, [and] the objective is
rather to guarantee that those [land and resource use] plans treat aboriginal
peoples in a way ensuring that their rights are taken seriously\(^\text{109}\).

Similarly, in the Court of Appeal, McFarlane J.A. stated in *Delgam’Uukw* that:

> consultation and reconciliation is the process by which the Indian culture
can be preserved and by which other Canadians may be assured that their
interests, developed over 125 years of nationhood, can also be
respected\(^\text{110}\).

Again, in *Delgam’Uukw*, the Supreme Court of Canada made consultation an important aspect
for the presence of First Nations, and as a means to reconcile the continued presence of
communities with that of Crown use, the settlement of foreign populations, and third party
tenures. The Supreme Court of Canada concluded that, as aboriginal title is the “right to
exclusive use and occupation,” encompassing the right to “choose to what uses land can be put”
(subject to the principle of equitable waste) and that the lands “held pursuant to aboriginal title
have an inescapable economic component\(^\text{111}\),” this necessitates the involvement of the First
Nations peoples in decisions about their land. At minimum, Lamer C.J. states:

> The nature and scope of the duty of consultation will vary with the
circumstances. In occasional cases, when the breach is less serious or
relatively minor, it will be no more than a duty to discuss important
decisions that will be taken with respect to lands held pursuant to
aboriginal title. Of course, even in these rare cases when the minimum
acceptable standard is consultation, this consultation must be in good faith,
and with the intention of addressing the concerns of the aboriginal peoples
whose lands are at issue. In most cases, it will be significantly deeper than
mere consultation. Some cases may require the full consent of the
aboriginal nation particularly when the provinces enact hunting and
fishing regulations\(^\text{112}\).


\(^{110}\) *Delgam’Uukw* 1993 *supra* note 45 at 179, para. 284.

\(^{111}\) *Delgam’Uukw* 1997 *supra* note 24 at 1111 to 1112, para. 166.

\(^{112}\) *Ibid.* at 1112 to 1113, para. 168.
Aboriginal title has an inescapable economic component. As such, the Supreme Court of Canada outlined that “compensation for breaches of fiduciary duty” is a well-established aspect of aboriginal rights. The Court suggests that:

In keeping with the duty of honour of the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.

The Supreme Court of Canada decision deviated from the traditional attitude that unabashedly denied title to First Nation communities who had not entered into agreements of surrender. It clearly stated that “title existed, until it was lawfully extinguished,” and, as the Trial Court had ignored the oral histories and other testimony of the Gitxsan and Wet’suwet’en people, which in the Supreme Court of Canada’s eyes would have enabled the lower courts to conclude that the Gitxsan and Wet’suwet’en held an aboriginal title in their territories, granted the Gitxsan a “re-trial.” In granting a new trial, the Court elaborated on the content of aboriginal title, that encompasses an area larger than existing reserves, and broader than site-specific-activities, which have been defined by aboriginal rights activities. Thus aboriginal title confers upon the holders a broader range of rights that could include forestry, mining, oil and gas development and so on, limited only by the principles of equitable waste. Furthermore, as a means to reconcile the past occupation of the First Nation community with that of the Crown, the Supreme Court of Canada determined that aboriginal title rights could compete with other property rights, and, as such, the community had the right of consultation, and if the infringement was justified, could press for compensation. The community right of consultation, in the eyes of the Court, since aboriginal title was a “property right,” was more than mere notice and the community had the right of refusal, especially where their hunting, trapping, gathering or

113 Guerin v. the Queen [1984] 2 S.C.R. 335.
114 Delgam’Uukw 1997 supra note 24 at 1114, para. 169.
fishing rights would be severely impacted. As part of this reconciliation, the Court specified that compensation was due, and like the B.C. Court of Appeal, encouraged the parties to negotiate, rather than litigate. In terms of self-government, the Court postponed this issue to another day.

For the Gitxsan the Supreme Court decision meant two things. First, they could continue to use their *ayooks* as the basis for negotiation, including their boundaries, and second, they could put forward their social and political structure as justification to continue to hold onto ownership, and establish concrete Federal protection for their aboriginal rights and title in their *lax 'wiiyip*, as well as establish a basis for an ongoing working relationship with British Columbia in the area of resource management.

In terms of reconciliation, the Gitxsan have the opportunity to take their title concerns back to court. However, the Supreme Court of Canada has in its definition of aboriginal title laid the foundation for negotiations to proceed. That is, a First Nation community which has not surrendered their title to the Crown, is not required to surrender their title as a precursor to most economic endeavours, except where the use of the territory conflicts with the nature of the community's Indianness. For the Gitxsan their Indianness is bound up in the social and political institutions which require them to respect the animals, the *lax 'wiiyip* and each other. Also, the Supreme Court of Canada, even though it has enlarged the scope of infringement onto aboriginal title to include most legislative initiatives, requires that the Crown engage in meaningful consultation, and accommodates First Nation rights.
Chapter Five

Gitxsan Reconciliation

The Gitxsan have sought, through their early petitions, statements, and as part of different delegations to national Constitutional conferences on aboriginal rights, proposals that argue for a means to embed their laws and customs into the fabric of Canada as the basis to establish self-government and the management of the resources throughout their *lax 'wiiyip*. In 1984 they filed suit against the Province as a means to compel a negotiated settlement. As a result of their litigation1 (following that of other British Columbian First Nation Communities2), the Courts have encouraged all parties to negotiate settlements and have assisted in determining a test for aboriginal rights, delineating the parameters and content of aboriginal title, and added consultation and fair compensation for infringement onto their rights and title to the list of existing fiduciary obligations. Currently, (as of 2005) the Gitxsan have yet to come to an agreement as to the shape of their territorial relationship and inherent right to self-government with the Crown in Right of Canada and British Columbia. In essence, the Land Question for the Gitxsan is unfinished business.

This chapter probes the Gitxsan treaty proposition in relation to the current Federal and Provincial positions. First examined is the Crown’s current treaty position, both the Federal and

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Provincial policy and, second, Gitxsan Acts of Reconciliation are considered as the basis for the Gitxsan Treaty.

As I have explained in earlier chapters, the Federal government stated its position on comprehensive claims in August of 1973, and their subsequent policy by 1981 stipulated that the community's aboriginal title was to be ceded, in exchange for a modified title (reserve lands), user rights within the traditional territory and compensation. In the latest comprehensive claims development, as set out in 1993, there is no required blanket extinguishment of aboriginal rights in exchange for modified rights and title; however, First Nations are required to provide “certainty” with respect to land rights, and “finality” regarding the receiving of compensation. Currently, the British Columbia and Federal governments are negotiating agreements that fall within these parameters with respect to land rights, and a negotiated self-government that has a combination of municipal and provincial-like powers. In essence, First Nation communities are being granted an enlarged “Reserve,” having ownership of the resources on those lands (trees and minerals, but not oil and gas), and modified aboriginal rights, subject to other First Nation and Newcomer interests, throughout their traditional territories.

3 Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy, Comprehensive Claims (Ottawa, Ont.: Ministry of Supply and Services, 1981).
4 The Liberal Party, prior to its election in 1993, outlined in its platform document “The Aboriginal Peoples of Canada” that the government of Canada would not “require blanket extinguishment of aboriginal title,” but aimed for “certainty and finality.”
Past Usage of the Crown

In the past, the Crown, drawing on the principles of the *Royal Proclamation* of 1763, has sat with First Nations to work out the terms of their continued land and use rights on Crown lands. Generally, at the onset of Treaty, Crown representatives have acknowledged the community’s traditional territory, and their land use, setting aside fixed acreage as a reserve for their continuing exclusive use and benefit. The community retained subsistence rights throughout their traditional territories on vacant Crown lands, subject to Crown regulation, and have had a portion of their territory set aside as a Reserve for their continued use and benefit. Resources, such as timber and mining leases, on reserve lands would have been negotiated for sale or lease by Government (subject to the approval of the community) for the benefit of the community. Also, when the Crown required additional lands for roads, waterways, railroads, public works, settlements, and so on, the Crown would purchase the Reserve lands outright, lease the lands, or provide the community with alternate lands. The First Nation interest in the land, however, at the time of surrender, was deemed to be less than fee simple, and contingent on the prevailing attitude toward First Nations’ rights in general\(^8\).

Along the road of reconciliation, there have been attempts by government and First Nations to try to rectify the current situation. During the *White Paper*\(^10\) debates, in 1968 to 1970, it was apparent that First Nations across Canada sought a renewed relationship with the Federal government that would be enable them to settle past grievances (based on the Treaty

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\(^9\) *St. Catherine’s Milling and Timber Co.* (1889), 14 A.C. 46 (P.C.).

relationship\(^{11}\), while Cabinet sought to transfer services for First Nation people to the Provinces, and vest individual First Nation people with “land ownership” in “fee simple” taken from the existing reserve communities. First Nation communities were confronted with the prospect of having their “reserve lands” divided up, and the “Indian Act” dissolved. In the treated areas, it appeared that the “cede and surrender agreements” that the communities had entered into, in exchange for “protection,” were now being disregarded\(^{12}\). However, it appeared that although government wanted to divest itself of “Indians and Indian lands,” it was willing to act on its lawful obligations when it came to past grievances regarding the sale or lease of reserve lands, cut-off lands that had been taken as a result of the findings of the McKenna-McBride Commission, and fraud with respect to the acquisition or dispossession of reserve lands by employees or agents of the federal government. With respect to First Nation communities, who had not entered into agreements of surrender, the government argued that aboriginal title claims “were too general and too vague to be capable of specific remedy.” Needless to say, the *White Paper* was shelved, and little was accomplished until the Nisga’a took their claim to the Supreme Court in 1973.

The Nisga’a, in the *Calder*\(^{13}\) case, sought to establish that their aboriginal title in the Nass Valley had never been extinguished prior to British Columbia entering into Confederation in 1871. Although the Supreme Court’s ruling was inconclusive, the *Calder* decision made it clear that aboriginal title was alive as a legal concept, and spurred the existing complacency of the Trudeau government to revise its stance with respect to areas of Canada where First Nation

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peoples had yet to enter into formal agreements with the Crown. Also in 1973, sixteen chiefs filed a caveat on the title to approximately 700,000 square kilometres of land in the North West territories, based on the claim that they had never ceded their aboriginal rights to the Crown, and the James Bay Cree, in 1973, also obtained an injunction to halt the construction of a hydro-electric dam at James Bay. After the failure of the White Paper and the success of Calder, Re: Paulette and the James Bay injunction, the federal government modified its position and has attempted over the years to settle these outstanding concerns. The legal grounds for claims were expanded in 1984 when the Court handed down its decision in Guerin which provided a judicial remedy to First Nation people for breach of the fiduciary obligations owed to them by the Crown, and in 1990, fiduciary obligations of the Crown were raised to the constitutional level when the Supreme Court of Canada, in Sparrow, gave the ruling that “existing aboriginal and treaty rights of the aboriginal peoples of Canada were hereby recognized and affirmed.”

In terms of a negotiation mandate, although the Federal government has been clear from the onset of 1973 that it has been willing to sit and discuss aboriginal rights in broad terms and to a large degree hand over to the community defined land and management rights, it has insisted on the cooperation of the Provincial or Territorial government in question, when it comes to either fulfilling treaty obligations, or concluding title claims. At this time, in 1973, the Federal Comprehensive Claims policy could arguably be characterized in terms of the “past usage of the Crown,” meaning that the Community had to agree to the prerequisite of “blanket extinguishment” in exchange for conferred rights. For example, the James Bay Cree, in their

15 La société de développement de la Baie James, [1975] R.J.Q. 166. In 1975, the James Bay Cree and the Northern Inuit signed the first contemporary Treaty with Canada and Quebec. See: Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association and Canada, Agreement between the Government of Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association and the Government of Canada (Ottawa, Ont.: Department of Indian and Northern Affairs, 1975) [Grand Council of the Crees].
17 Sparrow supra note 2 at 1119.
Treaty of 1975\textsuperscript{18}, after they agreed to “cede and surrender” their claim to their traditional lands, received lands that are partitioned into three Categories (I, II, & III). On Category I lands, the Cree hold exclusivity, and these lands can only be surrendered to the Province of Quebec. However, the Province of Quebec owns the mineral and sub-surface rights, but their dispensation is administered according to \textit{Indian Act} standards. In other words, if Quebec requires access to such resources, other lands or compensation will be offered in exchange for the surrender of these lands to Quebec. Category II lands are under provincial control; however, any mineral extraction is subject to consent of the community in question, and James Bay Cree and Inuit aboriginal user rights must be accommodated. If Quebec requires the land for the purpose of development, the lands in question will either be replaced or compensation will be awarded. A third category of land use (Category III) permits all persons access to subsistence resources (First Nation or the Newcomers) under Provincial laws and regulations; however, only First Nation or Inuit people have year-round access for hunting, fishing and trapping, and are able to cut wood without a permit. In terms of government, the entire region of James Bay will operate under the jurisdiction of the Municipality of James Bay where local communities are able to pass by-laws, subject to veto by the James Bay Municipality. The terms and conditions of the James Bay Treaty are similar to the Numbered treaties in that the James Bay Cree have a demarcated land base, the ownership of resources on reserves is vested in the Province of Quebec (even though there is some benefit that returns to the community) and the James Bay Cree have aboriginal rights use, subject to regulation by Quebec throughout their entire traditional territory.

In separate sets of negotiations, which started in the wake of the James Bay and Northern Quebec Inuit Associations and the Berger Inquiry into the proposed Mackenzie River pipeline\textsuperscript{19}, the Inuvialuit at the mouth of the Mackenzie River achieved a settlement in 1985. The Inuvialuit

\textsuperscript{18} Grand Council of the Crees \textit{supra} note 15.

\textsuperscript{19} Canada, \textit{Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry}. 
Final Agreement\textsuperscript{20}, (although like the James Bay Agreement in that the community ceded and surrendered their territory in exchange for rights) organizes their reserve in a slightly different fashion. The Inuvialuit structured their reserve lands and governance along a traditional conception of their rights and the differences between themselves and their southern indigenous neighbours. Their conceptual framework looked first to protect the lands they traditionally moved across in pursuit of caribou, their inland fisheries, and access to the shoreline in order to reach marine mammals and fish.

The Inuvialuit community, like the James Bay Cree, holds a series of tiered titles. However, as the main thrust of the Inuvialuit agreement is for the protection for wildlife and traditional pursuits, while permitting eco-friendly development, their institutions, such as the Land Use Planning Commission and the Land Use Applications and Review Committee, are intrinsic for the regulation of activities in the region. The purpose of these organizations, controlled by the Inuit, is to assist the Territorial governments with the administration of land use regulations, as well as to develop systems and procedures for administering environmental standards in the Inuvialuit region.

Recently, the Nunavut Agreement\textsuperscript{21} takes what was initiated by the Inuvialuit a step further. First, the Inuit of the Tungavik Federation of Nunavut, like the Inuvialuit, own in fee simple approximately 18% of the land in the Nunavut territories, and on that land they own 10% of the subsurface rights. As in the Western Arctic Agreement, the Tungavik Inuit have various Boards overseeing the management of these lands. Even though Inuit make up 80% of the population and as such are in essence self-governing, the current disposition of the land (82% of

\textsuperscript{20} Canada and The Committee for Original People’s Entitlement, The Western Arctic Claim: The Inuvialuit Final Agreement (Ottawa: Ont.: The Department of Indian and Northern Affairs, 1985) See also: http://www.ainc-inac.gc.ca/pr/agr/inu/wesar_e.html

\textsuperscript{21} Canada and the Tungavik Inuit of Nunavut, Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada (Ottawa, Ont.: Department of Indian Affairs and Northern Development, 1993).
the lands are federal Crown lands, as opposed to 18% that are held by the Nunavut Tungavik Inuit in "fee simple") makes their relationship much more restricted. Likewise, Nunavut, as a territory, does not hold title to either the lands or the non-renewable resources, thus it does not hold exclusive legislative authority over these lands or resources. However, Nunavut, although currently a "territory," anticipates full provincial status replacing the dominance of Ottawa with local administrative structures composed mainly of Inuit. For the time being, Nunavut lands and resources are co-managed between Ottawa and Nunavut, as set out by the various Boards.

Even though the Nisga’a in 1973 broke the impasse with the Calder decision, it was not until the summer of 1991 that the Province of British Columbia agreed to sit with the Nisga’a and Federal government to negotiate a settlement. Currently, only the Nisga’a people have a modern day treaty with both the Federal and Provincial governments in British Columbia. The Nisga’a sought an agreement that reflected and acknowledged their continued struggle since 1884 to reach an equitable solution to their land question, and pressed for recognition of their aboriginal title based on their historic use and occupation in the Nass Valley.

Pursuant to the Federal Government's comprehensive claims policy, treaty negotiations with the Federal government commenced initially in 1976 based on the 1973 commitment. Although there was a shift in the general Federal policy with respect to resolving claims by First Nation communities where there were no formal surrenders, British Columbia, unlike Quebec in 1975, only elected to participate at the negotiation table as an observer. It was not until 1991 that the Nisga’a, or any other First Nation communities in British Columbia, had the commitment from both the Federal and Provincial governments to conclude treaties. British Columbia

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22 Nunavut Wildlife Management Board; Nunavut Impact Review Board; Nunavut Planning Commission; Surface Rights Tribunal & Nunavut Water Board are to work with Ottawa to ensure that Inuit rights are maintained in conjunction with regional development.
23 Canada, Discussion Paper on Indian Land Claims in B.C. (Department of Indian and Northern Affairs for the Conference on Aboriginal Rights, Prince George, September 22 to 24, 1978).
24 J. Chrétien, Statement made by the Honourable Jean Chrétien, Minister of Indian and Northern Development on Claims of Indian and Inuit People, August 8, 1973.
became a full participant at the Nisga’a Treaty Table on March 20, 1991 when the B.C. Minister for Native Affairs, Jack Weisgerber, signed a framework agreement with the Federal Minister of Native Affairs and Northern Development, Tom Siddon, and Nisga’a Tribal Council President Alvin McKay, along with six other Nisga’a leaders. This was the first indication that the aboriginal title question in British Columbia could be resolved. The Nisga’a Final Agreement provides for a Constitution, outlines Nisga’a villages and Nisga’a Lisims government, and has a Fishing Agreement that is negotiated outside of their treaty, and rests on the premise of “certainty and finality” in exchange for definitions to inherent, as well as delegated, rights.

The Nisga’a have been granted, in fee simple, a 2,000 square kilometer land base along the Nass River for their exclusive use and occupation. Nisga’a designated lands outside of the "Nisga’a Lands” are partitioned into different categories of exclusivity, which reflect Nisga’a traditional use, the need for the Nisga’a people to be engaged in the regional economy, and will enable the Provincial government to accommodate Nisga’a site specific aboriginal rights.

Furthermore, in a separate agreement, and not constitutionally protected, the Nisga’a have access to Nass River salmon and the oolichan fishery, in proportion to the estimated run, limited by conservation and use by other stake holders. Only on Nisga’a Lands (See: Appendix “A” of the Nisga’a Final Agreement), do the Nisga’a people, under a Constitution outlining the powers of their government, have the capacity to make laws with respect to land use, language and culture (in keeping with Federal and Provincial standards). In lands outside of Nisga’a Lands,

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26 Canada, British Columbia and Nisga’a Nation, Nisga’a Final Agreement (Ottawa, Ont.: Department of Indian and Northern Affairs, 1999) [Nisga’a Final Agreement].
27 The Nisga’a Final Agreement follows the settlement model for the James Bay Cree, and Naskapi of the James Bay region of Quebec, the Northern Inuit of Ungavaa, the Inuvialuit of the Mackenzie River delta, and the Council for the Yukon Indians, the Sahtu Dene, the Champagne - Aishink, the Gwich’n, the Nunavut and lastly, the Tłı̨ch’o Agreement.
28 Canada and the Nisga’a Nation, Nisga’a Harvest Agreement, August 1998 [Nisga’a Harvest Agreement].
29 Nisga’a Final Agreement supra note 26 at 159 to 183; 231 to 232.
(See: Appendix “D - 7” of the Nisga’a Final Agreement) the Nisga’a have been given both aboriginal user rights, and first refusal of any forest tenure, to the extent of their traditional boundaries. The Nisga’a Nation has been given a priority right to backcountry tenures or agricultural leases, for the purpose of economic development in this area. Furthermore, in these lands, the Provincial government (through the appropriate Ministry) and the Nisga’a Nation expect to co-manage the tenures, especially with respect to forestry licences for the setting of cutting rates, and mining leases, and subject to any overlapping claim by other First Nation communities in the region. Although in these peripheral lands (See: Appendix “J”) the Provincial government holds exclusive jurisdiction, it acknowledges “aboriginal user rights” for fishing, hunting, trapping and the gathering of foodstuffs, and some Nisga’a rights are contingent on other neighbouring First Nations’ rights of exclusivity or rights of first refusal. If government requires lands in these areas that put Nisga’a aboriginal user rights in jeopardy, the Nisga’a expect to be consulted, and will be compensated accordingly, either by an exchange of lands (in areas covered by Appendix “D - 7”) or through a cash settlement. Both the Provincial and Federal governments have received certainty with respect to land rights, and have accepted responsibility for the costs of the post-treaty relationship.

With respect to self-government, the Nisga’a (as early as 1888) have had administrative control over their village affairs through the Indian Advancement Act and the current Indian

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30 Canada, British Columbia and Nisga’a Nation, Appendices: Nisga’a Final Agreement (Ottawa, Ont.: Department of Indian and Northern Affairs, 1999) at Appendix B – 3, 63 to 66 [Appendices]
31 Ibid. at Appendix E, 351 to 354.
32 Ibid. at Appendix H, 379 to 394.
33 Nisga’a Final Agreement supra note 26 at 55.
34 Ibid. at 41 to 46 pt. 55 to 86.
35 Ibid. at 21 to 214 pt. 3 to 13.
36 Nisga’a Simigat (male hereditary chiefs) and Sigidimhaanak (the matriarchs) modified their ayuiks of governance to accommodate the Newcomers’ concept of democracy in 1888, as laid out in the Indian Act of 1884, choosing to elect their village leaders in accordance with prevailing standards. However, as P. Stewart (Deacon of the Christ Church and steward in the Church Army – Kincolith July, 10 2003) explained, although the Nisga’a hold elections, the
Act\textsuperscript{38}, and have accepted the terms of a delegated municipal-style government, with some provincial-like powers limited to Nisga’a Lands and over Nisga’a citizens\textsuperscript{39}. The Nisga’a Constitution formalizes the authority of the village governments and the central Nisga’a Lisims Government over their election practices, assets (including the development of public institutions, corporations and other property that is deemed to belong to the Nisga’a) and Nisga’a forms of marriage, supports Nisga’a language and cultural values, and accepts the Canadian Criminal Code and the Charter of Rights and Freedoms\textsuperscript{40}. More specifically, it also provides for the creation of Nisga’a Urban Locals for Nisga’a citizens who reside outside of the Nass Valley a means to participate in Nisga’a Lisims Government\textsuperscript{41}. In addition to the powers of their government, the Constitution makes provisions for Nisga’a elders, the Simigat and Sigidimhaanak to provide interpretation of the Ayuuks to the Nisga’a Lisims Government\textsuperscript{42}. Nisga’a jurisdiction and legislative authority, on Nisga’a lands and over Nisga’a citizens, will prevail over Federal or Provincial laws when there is a conflict\textsuperscript{43}. However, by virtue of the agreement, outside of Nisga’a Lands, Nisga’a Ayuuks will not have any effect, and disputes between British Columbia and the Nisga’a will be resolved according to the terms of provincial policy\textsuperscript{44}.

Nisga’a community agreed that only Simigat were eligible to run for Band Council Office. This, they said, was to preserve some continuity between Nisga’a law and the expectations of the Newcomers. The decision to go forward with “Band Councils” according to the Indian Advancement Act, in 1888, was reached by consensus first in Kincolith, then Greenville, Aiyansh and lastly Canyon City under the urging of Anglican missionaries Robert Doolan, James McCullagh and Robert Tomlinson respectively, under the auspices of Bishop W. Ridley (In conversation with B. McKay, July 10, 2003).

\textsuperscript{37} An Act for conferring certain privileges on the more Advanced Bands of the Indians of Canada S.C. (47 Vict. c. 27 1884) [Indian Advancement Act].

\textsuperscript{38} Indian Act R.S.C. 1985 c. 1-5

\textsuperscript{39} Nisga’a Final Agreement supra note 26 at 159 to 183.

\textsuperscript{40} Ibid. at 17 to 19 pt. 8 to 14.

\textsuperscript{41} Ibid. at 162 pt. 12 to 14.

\textsuperscript{42} Ibid. at 160 pt. 9.

\textsuperscript{43} Ibid. at 166 pt. 36.

\textsuperscript{44} Ibid. at 230 to 240.
The Nisga’a people have been able to achieve, in their agreement with Canada and British Columbia, what they set out to do after 1888. They have set aside for their exclusive use and enjoyment land that is adequate for their future generations. These lands are held by the Nisga’a Nation in “fee simple,” but perhaps more importantly, these lands are contiguous and the Nisga’a as a community have the ability to determine land use, permit individual Nisga’a people to hold portions of this territory for private use, and use their own laws to govern themselves within this area. Although their historic aboriginal rights outside of Nisga’a Lands are subject to provincial regulation, they have been able to secure a commitment from the Province that these rights will be respected, that the Provincial government is willing to consult with them regarding infringements, and they will be either receiving cash compensation or alternative secure areas. Furthermore, the Nisga’a have available a portion of the Nass River salmon fishery in proportion to the estimated size of the run, and the assurance that they can determine whether to sell or use the fish for subsistence. What the Nisga’a achieved is distinctly different from the goals of the Gitxsan.

Although the Federal Crown no longer uses the terms that require the First Nation community to “cede and surrender” their lands in exchange for an “exhaustive list of rights,” the Crown still demands a demarcated land base and will not open the terms of treaty after the agreement has been supported by legislation. Furthermore, the Federal treaty mandate with British Columbia First Nation communities is couched in terms of the Memorandum of Understanding between the Provincial and Federal governments, as confirmed by Ron Irwin, Federal Minister for Indian and Northern Affairs in 1993, when he stated: "the federal government is chiefly concerned with dissolving the Indian Act, and sorting out changes in

jurisdiction with the provinces." In other words, contemporary treaties in British Columbia are seen as the beginning of a process that shifts the administrative responsibilities of First Nation reserve lands, existing trusts, and so on from Indian Affairs onto the community, and, as Irwin further pointed out, treaty settlements are perceived as down payments for the provincialization of aboriginal services such as education, social services, health, income assistance and so on. The Province, like the Federal government, seeks a clear definition of territorial and aboriginal user rights, and wants assurance that First Nation communities will relinquish their current "tax free status," and integrate their land use plans on their "enlarged Reserves" and in the peripheral lands, with Provincial fiscal concerns. Although the Federal government acknowledges, as policy, First Nations' "inherent right" to self-government, it insists that the final jurisdiction of the community must be shaped through negotiation with not only the community, but also with the participation of the Province (and in some cases municipalities) to determine the extent of the First Nations' legislative powers.

Where appropriate, the First Nation community will own all forest and mineral resources (regarding oil and gas, the community will receive royalties at an agreed-upon rate and this will be considered as part of the settlement) on these additional reserves, subject to terms undertaken to access the resource. Regarding the fisheries, while First Nation communities will have the right to the fisheries on their territories, the Federal Crown retains the right of overall allocation to the community and management of the fish stocks. Furthermore, there is a step-

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50 Lheidli T'enneh supra note 6 at 65 to 66.
out agreement with respect to the payment of taxes. Similarly, the Provincial Crown’s idea of reconciliation is based on a tiered relationship with the land, access to specific Crown resources and clearer defined areas where community members may undertake aboriginal user rights. First, the Provincial Crown is willing to add on to the already existing reserves for the community’s exclusive use and occupation (up to 20% more territory for the First Nation community exclusive use and benefit)\(^\text{52}\); second, on vacant Crown lands First Nations will be asked to identify locations where aboriginal rights’ activities will likely be undertaken, which will then be set aside for First Nations use (whether it be hunting, trapping, fishing, gathering or for ceremonial uses), subject to Crown regulation. A third category of land is identified where the community’s aboriginal rights activities may be undertaken, subject to both Crown regulation and other First Nations’ claims. More importantly, the community will have broader rights to particular resources (especially forestry and mineral resources) not only on their enlarged reserves, but on their peripheral lands adjacent to these additional reserves through backcountry tenure licences, or first refusal on other alternate economic opportunities. Also, where appropriate, the First Nation community will be given the first right of refusal on agricultural, grazing, or mining leases, and will be eligible to bid on Government contracts and Forest Tenure Licences within the limits of their traditional territories. Furthermore, through the identification of locations by treaty where aboriginal rights activities could occur (aboriginal title) on vacant Crown lands, the Province feels confident that it can meet its fiduciary obligations of consultation\(^\text{53}\) and, if necessary, accommodation and compensation through its current policy\(^\text{54}\).

\(^{52}\) *MOU* *supra* note 5 at Annex A at A-2 to A-3 and Annex C at C-1 to C-11.

\(^{53}\) The Supreme Court determined that the Crown has a duty to consult when aboriginal title and rights was going to be infringed on, before the conclusion of a treaty. See: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

Self-government is limited to settlement lands as stipulated by the agreement, and First Nations' ability to make law is limited to municipal affairs, language and cultural activities, and land use within their borders. Moreover, governance will be negotiated outside the final agreement and will not be constitutionally protected under ss. 25 or 35 of the Constitution Act. The First Nations’ government structure will be determined by a Constitution, be democratically elected, fiscally accountable and adhere to standards generally accepted by other Canadian governments. Lastly, the Federal government has agreed to pay compensation to the community based on a ratio determined by the cost of additional lands and resources transferred to the community from the Province, minus the costs of negotiations. Additional funds will be allocated to the community to assist with Treaty implementation costs and support for self-government is to be shared between the Federal and Provincial governments.

In terms of governance, the First Nation community is expected to draw up a constitution that organizes its governing bodies along the lines of Indian Act Band government that provides for elected representatives, fiscal accountability and transparency. Even though this current model allows the community broader decision-making authority over such matters as culture, language, and land use on their “expanded reserves,” it does not permit the community to greatly influence land use throughout their traditional territories outside of the “expanded reserve.” Similarly, governance is limited to the designated areas that are covered by “Treaty”, and the post-Treaty fiscal relationship with respect to the delivery of services, (such as education, health care, social assistance, and so on) in conjunction with the Provincial standards. However, the current Treaty Model does not leave much latitude for continued economic growth throughout the community’s entire traditional territory, especially the ability to control resource

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55 MOU supra note 5 at 4 pt. 11.10 to 5 pt. 1.15.
56 Ibid. at 5 pt. 1.16; 6 pt. 2.1 to 2.4 & 7 pt.2.6 to2.10.
development in the regions that will invariably affect the community’s ability to access their s. 35 rights, once the ink is dry.

**Gitxsan Acts of Reconciliation**

The Supreme Court of Canada in 1997 set out an expanded definition of title, its proof and inherent limit, and the infringement and consultation principles gave government and the Gitxsan an alternative path to the establishment of a treaty relationship. Thus, with the new parameters, definitions and Crown fiduciary principles and the change in the Federal Comprehensive Claims position that did not require the First Nation community to "cede and surrender" their territory in exchange for an "exhaustive list of rights" as a prerequisite to negotiation, the Courts have now provided the opportunity for the Gitxsan to put forward their concept of reconciliation as a model for treaty, based in their law and governance. During the Delgam'uukw trial from 1987 until 1990 the Gitxsan relied on their own laws, their distinctive tenure system and their governance institutions to assert their claim of ownership.

The Delgam'uukw claim is distinctly different from the Calder action initiated by the Nisga’a. The Nisga’a argued in Calder that they held their territory as an organized society, and continued to do so until the Crown sat with them and purchased the rights to the soil\(^57\). The Nisga’a determined that the Crown had an obligation to settle the title question, set aside a portion of this territory for their continued use and enjoyment, and to clearly state their rights on vacant Crown lands. In order to meet the Crown as equals and “to speak with one voice,” they elected to place their lands in a “Common Bowl” and attempted to negotiate a relationship with

Canada on that basis. The Gitxsan, unlike the Nisga’a, have not put their land into a “common bowl,” and they have not accepted the village or municipal model form of government that makes allowances for elected representatives. Instead the Gitxsan hold and use their lax ‘wiiyip as wilp members, coming together as a community to make decisions as allied wilps, the gim litxwid respecting the office of the Sæm ‘oogits. The gim litxwid are alliances among the Gitxsan, first among the same pteex (clan) and also through their marital relations. The Gitxsan have relied on how they create and maintain alliances amongst each other for access to resources outside of their own wilp lax ‘wiiyip, as well as control over the resources and labour for the management of their lax ‘wiiyip.

The Gitxsan, after the Supreme Court decision in 1997, offered to both the Federal and Provincial governments a means to re-start the treaty-making negotiations suspended in February of 1995, through their Reconciliation Agreement, and proposed that the talks could be premised on the principles of amnigwootxw and xkyeehl, that draws on the dax gyet of the Sæm ‘oogit(s) or Sæm’ogit(s). More specifically, they desired to enter into a formal relationship with Canada that would permit Canada continued access to their entire lax ‘wiiyip thus actively reflecting the constitutional protection of Gitxsan aboriginal user rights situated in their principles of

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59 The Gim litxwid are the alliances among the Sæm ‘oogits or Sæm’ogits that take into account all relationships ranging from direct kin, related persons by pteex, those families that have forged political relationships, past and present, and lastly through the temporary right of amnigwootxw (privileged rights for either children to access resources on their father’s lax ‘wiiyip or for good deeds to the wilp) and through payment to the wilp or xkyeehl. The Gitxsan have relied on how they create and maintain alliances amongst each other for access to resources outside of their own wilp lax ‘wiiyip, as well as control over the resources and labour for the management of their lax ‘wiiyip. In conversation with D. Ryan, January 29, 2004.

60 The jurisprudence under s. 35 of the Constitution suggests that government action which interferes with the exercise of aboriginal rights is recognized and affirmed by s. 35, and this creates fiduciary duties on the government responsible for the interference (Sparrow supra note 2 at 1108).
amnigwootxw or privileged access to wilp resources for “good deeds”\textsuperscript{61}. With respect to Gitxsan and Provincial Crown renewed relations, the Gitxsan expect to work out a more tempered, business-like relationship than presently prevails, based on xkyeehl, which allows British Columbia access to their lax 'wiiyip. In this way consultation protocols are stressed, as well as compensation for the use of the lax 'wiiyip\textsuperscript{62}.

In terms of Gitxsan culture, when it comes to the sharing of resources from the lax 'wiiyip, the wilp not only has a proprietary interest in the specific resources that come directly from their holdings, they can call on relations (cousins or relatives by marriage) to assist them in maximizing their access to these resources, especially the fishery, berry picking or the mountain goat hunt. However, the wilp, by accepting the labour of others, also assumes the obligation of sharing the resources themselves. Gitxsan wilp economy depends not only on its huwilp connections by yuugwilatxw (marriage), pteex affiliations, political alliances or through obligations (created by amnigwootxw rights, xkyeehl, or by xsiiwx) but also relies on the social ties that any Gitxsan person brings to the wilp through different resources and locations throughout the entire territory claimed by the Gitxsan. Also, those outside of the wilp, by accepting access to specific resources through the principles of amnigwootxw, also accept the responsibility of the obligation to assist the wilp at ceremonial events through resource contributions, mainly at funerals or during the pole-raising feasts. Similarly, when a wilp accepts xkyeehl, the wilp is obligated to accommodate the request of those who have asked to access wilp resources. It is within this internal system of reciprocity that the Gitxsan believe they may establish a nation-to-nation relationship with Canada, and a nation-to-province relationship with British Columbia.

\textsuperscript{61} Reconciliation supra note 58 at 2 pt. 1 through 5.
\textsuperscript{62} Without detailing the past relationship between the Gitxsan and the Province of British Columbia, the establishment of a concise business-like relationship could possibly assist in rectifying the historical position of the Provincial Crown towards First Nations' territories in light of its previous position of unilateral extinguishment of their aboriginal rights with respect to land.
More importantly, these Gitxsan concepts of amnigwootxw and xkyeehl establish a means for the Gitxsan and the state - Canada and the Province of British Columbia - to interact with the land and the resources on it, in terms of a hierarchy of interests. For example, with land (and resources) a series of interests can be built up more readily; as property in land (and resources) is characteristically distributed among people in a series of rights that can be held by different segments of society. Thus, the Gitxsan can divest itself of exclusivity, through extending privilege and imposing compensation requirements on Canada and British Columbia respectively, in its lax'wiiyip according to the terms of treaty. On the pragmatic level, the Gitxsan want to move the debate out of the current policy of "certainty and finality" that limits discussion to "expanded" reserve lands, and self-government limited to village matters and the additional reserve lands, towards a model that speaks to their rights of access to resources throughout their entire wilp lax'wiiyip, their obligations and duties to each other as indicated through wilp alliances, and of equal importance, their historic and continued relationship with the land itself, in a managerial capacity. With respect to the Gitxsan-Canada relationship, the Gitxsan feel that the relationship should be based on privileged reciprocity, in that Canada must find a means to protect Gitxsan interests that does not erode their capacity to avail themselves of their s. 35 (1) rights, or continue to lessen the capability to control their s. 35 (1) use, in light of other users.

Likewise, where legislative interference is both justified and inevitable, this necessitates that British Columbia and the Gitxsan can refer to a set of procedures that acknowledges and identifies land use, clarifies Gitxsan governance, outlines consultation protocols, and finally sets in motion consideration for accommodation.

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63 *Reconciliation supra* note 58 at 4 pt. 8 through 9.
64 *Ibid.* at 3 pt. 6 a,b & 7. a,c,d.
**Gitxsan Treaty Model**

The starting point for the Gitxsan treaty model is that Gitxsan interests (both their right to live in their *lax 'wiiyip* and to access the resources) encompass an interest in fish, game resources, and fur. Since the Gitxsan’s main objectives are in preventing and circumventing damage to their *lax 'wiiyip*, and as they have coexisted with the salmon and other wildlife for thousands of years and wish to continue this relationship, they would rather avoid being paid compensation for this loss. Furthermore, the Gitxsan have not just been passive consumers of these resources, they want an active role in determining the disposition of the allocations. The relationship the Gitxsan have with their *lax 'wiiyip* is not separable from their identity. They are “who they are” because of their relationship with the territories. Although the Gitxsan no longer entirely rely on hunting, fishing and trapping for their subsistence, and are engaged in the *lixs giigyet* economy, this in itself does not abrogate who they are, or their obligations to the *lax 'wiiyip*.

The Gitxsan believe that collectively Canada, British Columbia and the *Sæm 'ogits* and *Sæm 'oogits* need to set criteria for co-management and consultation protocols in order that the Gitxsan will be apprised of any legislative initiative leading to infringement by British Columbia or Canada that affects their ability to access their known aboriginal rights on their territory with respect to fish, animals, berries and fowl, so that they can meaningfully participate in discussions that will lead to the appropriate solutions for infringement (access and regulation of standards for forestry, hydro development, mining or oil and gas production, and so on) or compensation. As for the ability to regulate environmental standards, it is hoped that Canada will continue to assist the Gitxsan with education and training, in order that they are able to achieve the necessary standings with respect to enforcement, as well as remain competitive with the Newcomers for

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66 *Haida supra* note 53 at para. 16 to 24.
67 *Reconciliation supra* note 58 at 4 pt. 8 b.
alternative employment in the region. In a contemporary context, it still means that the Gitxsan should be accessing their share of the salmon, steelhead and trout fishery, using their choice of gear (whether nets, traps or weirs).

The Gitxsan believe that they are in the best position to manage the wildlife that resides and passes through their territories, and expect Canada to support them in this matter, as they believe at minimum they have an aboriginal right to hunt, trap, gather and fish in the lands that they have traditionally occupied since time immemorial. As the Gitxsan feel that there are going to be infringements onto their aboriginal user rights by legitimate Provincial legislative objectives, they are prepared to work out the terms of any infringements and the consultative protocols with British Columbia. However, in keeping with the principles of xkyeehl, payment should be allocated, both formalizing the commitment to allow British Columbia use of the lax 'wiiyip and second, ensuring that Gitxsan equitable rights to their livelihood in the region are maintained despite infringements.

Fish, Wildlife and Fur Resources

The Gitxsan understand that salmon and the other animals know no boundaries, so an enlarged land base through claims negotiations does not guarantee that their continued needs will be met, nor does it ensure that the lands necessary for the existence of the animals or fish existence will remain immune from third party damage or alternate use. To this end, it has been maintained by the Gitxsan that this will entail the creation of standards for environmental protection for the salmon fishery and migratory birds, and the ability of the Gitxsan to be actively engaged in the regulation of the fishery and habitat management in general.

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68 Ibid. at 3 pt. 6 e.
69 Ibid. at 4 pt. 8 a.
Regarding fish (and other s. 35 resources), as it is in the best interests of all parties, the Gitxsan feel that they can provide Canada with the locations of wilp fishing sites, (and habitat ranges for specific animals), as well as providing detailed user information, especially the number of salmon, and species, captured. In terms of the seasonal management of the salmon fishery, the Gitxsan must be consulted for their consumption requirements, and have the ability to fulfill their aboriginal trade obligations. Moreover, the Gitxsan desire to maintain their s. 35 fishing rights, be allocated a commercial inland river fishery, and receive funding to support habitat restoration. They believe that they can work with the Department of Fisheries and Oceans supporting the current direction and shifts in management and policy development that set up regional consultative bodies. However, they would like to control who composes this Advisory Board (of Säm `oogit or Säm `ogit and/or designates) and what it is meant to achieve. That is, the Gitxsan feel that they must be able to participate with the collection of information, as well as with the operational aspects of fisheries management (monitoring, enforcement, training and scientific research). As this new initiative encompasses all users, including the sports fishery under Provincial jurisdiction, the Gitxsan are confident that this level of cooperation will assist in maintaining their allocation numbers, as well as sustain funding for fish habitat and stream restoration. More specifically, they feel confident that the regional management route (involving representatives from all parties) will enable each wilp in the desired latitude to conduct its fishery accordingly.

The Aboriginal Aquatic Resource and Ocean Management Program (AAROM) approaches the allocation of fish and aquatic resources from the perspective that First Nation communities can play a larger and significant role in the management of fisheries resources. See: Department of Fisheries and Oceans, “Strengthening Our Relationship: The Aboriginal Fisheries and Beyond” (Ottawa, Ont.: Ministry of Supply and Services, 2002).
Regarding trap lines, the Gitxsan desire full authority to assign and monitor trap lines through a Blanket Trap Line Licence that encompasses their entire lax 'wiiyip\(^7\). More importantly, such a licence will enable the huwilp to reclaim the right to assign trap lines within their wilp lax 'wiiyip boundaries to wilp members, and upon the death of the Sæm’oogit or Sæm’ogit this property would automatically transfer to the appropriate incoming Sæm’oogit according to Gitxsan laws of succession. It is expected that the trapper will work the trap line according to Gitxsan ayooks. In addition, the wilp will inform the user of all trap line levies, as determined by the relationship the user has with the wilp, and set by a consensus to be administered by an official in the Gitxsan Resource Management Office. Furthermore, this Resource Directorate will be responsible for keeping track of the number of animals and locations where they were taken. The money collected will first look after administration (including accounting expenses), and secondly, habitat assessment and restoration. Quotas for the fur harvest will be set according to prevailing Gitxsan standards, in consultation with Provincial authorities. Gitxsan trappers will be encouraged to move about throughout the territories, and if they require access to additional trapping in areas other than their own wilp's lax 'wiiyip, they must seek the permission of the appropriate Sæm’oogit or Sæm’ogit. It will be up to the Sæm’oogit to authorize the Resources Directorate to assign access to the trapper. Those trapping in another’s lax 'wiiyip will pay an additional surcharge to the Resource Directorate, which will be returned to the wilp in question. In the event that a wilp member trespasses, any traps and other equipment from the area in question will be confiscated and fines will be levied against the said member. Gitxsan ayooks regarding the capture of fish, animals and plants are situated in their renewed contract with the animals and fish themselves: if the Gitxsan over-hunt, trap, or fish the animals and fish will not remain in their lax'wiiyip. If this is the case, the wilp

runs the risk of not being able to sustain itself using its resources. Although families share, there is no guarantee that the Saem’oogit or Saem’ogit or another wilp will extend either amnigwootxw rights or accept xkyeehl if the trapper, hunter or fisher is known to over-exploit a resource.

Forestry

The Gitxsan’s working assumptions with respect to forestry development are that disturbances to the soil, changes to the quantity or quality of stream water will in some way impact on their ability to access fur, fish, berries or other plants according to traditional use and occupation. As stated earlier, according to Gitxsan legal principles, Gitxsan aboriginal rights are exercised only by Gitxsan wilps and wilp members. On each wilp lax ‘wiiyip, Gitxsan aboriginal rights and title are used solely by the wilp responsible for the specific lax ‘wiiyip, subject to Gitxsan ayooks and allocation decisions made by each wilp’s Saem’oogit or the person designated by her. Each wilp has the right, subject to Gitxsan ayooks, to use their fishing sites, hunting grounds, trap lines and berry patches. The Gitxsan believe that the exercise of each wilp’s aboriginal rights and title requires the conservation of sufficient habitats for plants and animals on its lax ‘wiiyip and the preservation of all cabins, camp sites, and trails. In order to achieve a balance between Gitxsan protection of their aboriginal rights and title and the Crown’s right to enact compelling legislative imperatives72, the Gitxsan propose that the Ministry of Forests does not infringe on any wilp’s exercise of their aboriginal rights or title without prior consent. However, the Gitxsan believe that the development of clear guidelines outlining conditions of infringement, and joint protocols with respect to consultation procedures, which include

72 Delagm’Uukw 1997 supra note 1 at 1111 para. 165.
information exchange, can only minimize the impact of forest development on their aboriginal rights and title\textsuperscript{73}.

The Gitxsan believe that in order to achieve meaningful reconciliation, consultation with the Provincial Crown must reflect their ongoing aboriginal rights and the title interests of each wilp before cutting permits to forest resources are allocated. It is expected that the Provincial Crown will consult with the appropriate wilp Sæm ‘oogit, Sæm ‘ogit (or delegate) with the sole purpose of first presenting a cutting plan that will not disturb the soil, change plant and animal habitats, change the quality, quantity or location of streams, change the means of access to the lax ‘wiyiip or preclude future economic and educational activities by the wilp\textsuperscript{74}. In such cases, it should be expected that consent will be forthcoming\textsuperscript{75}. Deeper consultation shall be required if the forest use proposed by the Ministry results in more than ten percent of the lax ‘wiyiip area soil being disturbed\textsuperscript{76}. In such case the Gitxsan will require that the Ministry respond to deeper consultation by implementing an alternative forest use proposal that achieves the same legislative objectives, but does not infringe on the wilp’s ability to exercise its aboriginal rights and title. Consent of the wilp will be required if more than ten percent, but less than thirty percent of the soil is disturbed\textsuperscript{77}. Lastly, if the Ministry of Forests’ proposed forestry uses more than thirty percent of any wilp’s lax ‘wiyiip at any one time, the lax ‘wiyiip will be considered unable to sustain the wilp’s aboriginal rights activity and the wilp will consider its ability to carry out its aboriginal rights impossible, thus defining their lax ‘wiyiip as “destroyed”\textsuperscript{78}.” At this level of infringement the wilp has the right to withhold consent\textsuperscript{79}. If the Ministry and Gitxsan wilp

\textsuperscript{73} British Columbia and the Gitxsan, \textit{A Cooperative Agreement to Plan and Manage Forest Use}, July 2, 1998 [\textit{A Cooperative Agreement}] See: Appendix Three at 264.

\textsuperscript{74} \textit{A Cooperative Agreement supra} note 73 at 3 pt. 5.1.5.

\textsuperscript{75} \textit{Ibid.} at 5 pt. 7.4.a.

\textsuperscript{76} \textit{Ibid.} at 5 pt. 7.4.b.

\textsuperscript{77} \textit{Ibid.} at 5 pt. 7.4.c.

\textsuperscript{78} \textit{Ibid.} at 6 pt. 7.4.d.

\textsuperscript{79} \textit{Ibid.} at 6 pt. 7.7.
representatives feel that they are unable to reach a consensus on these matters, then they shall follow a dispute resolution process that first seeks to resolve the matter between the Gitxsan and within the Ministry\textsuperscript{80}, and, as a last resort, refers the matter to a Scientific Panel\textsuperscript{81} for resolution. It is expected that as part of the relationship between Gitxsan \textit{wilps} and the Ministry of Forests, there will be a high degree of information sharing, and that all parties entering into discussions are doing so freely and cooperatively with the goal of finding a solution to the immediate problem\textsuperscript{82}. The Gitxsan expect that (although the relevant \textit{wilp} requires to be consulted prior to the Chief Forester’s Allowable Annual Cut disturbs more than ten percent of the area of the \textit{lax ‘wiiyip}’s soil) all compensation will be directed to the \textit{Gim litxwid} based on a negotiated agreement and compensation index.

\textbf{Mining Resources and Oil and Gas}

Regarding oil and gas exploration, as well as mining ventures, Gitxsan concerns are focused on the long-term impacts that these endeavours will have on \textit{wilp lax ‘wiiyip}, and revenue sharing related to the resource\textsuperscript{83}. With respect to mining resources, although there have been in the past coal, copper, silver and gold resources found on Gitxsan territories, the Gitxsan believe that any other resources would be mined according to their standards. If the potential resource exploitation were to contravene the principles of “equitable waste,” the Gitxsan would

\textsuperscript{80} \textit{Ibid.} at 8 pt. 12. \\
\textsuperscript{81} \textit{Ibid.} at 8 pt. 12.2 to 12.4. \\
\textsuperscript{82} \textit{Ibid.} at 6 to 7 pt. 8. \\
\textsuperscript{83} Supporting this argument is the \textit{Indian Oil and Gas Act}, (R.S. 1985 c. 1 – 7) in particular section 6(2) that states: Nothing in this \textit{Act} shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled. This clause may be interpreted to mean that until an agreement has been reached between the Gitxsan, Canada and British Columbia, oil and gas resources (as well as other mineral resources remain the assumed property of the Gitxsan. Accordingly, the presence of these resources on the \textit{lax ‘wiiyip} does not categorically mean that the ownership of these resources will not be on the negotiation table.
desire that the appropriate technology be developed to accommodate extraction, without posing an environmental hazard that will put the inherent limit of their title at risk.

While the Supreme Court of Canada in *Delagm 'unukw* has affirmed that the First Nation Community may engage in resource activities that have not been part of their historical livelihood ventures (especially forestry or mining ventures) they may not do so to the extent that it destroys their relationship with the land. Although the Gitxsan can propose convincing arguments for oil and gas ownership, based on use and occupation of their *lax 'wiiyip*, they may be compelled to suspend their rights to the *lax 'wiiyip* for the purposes of providing the required security for the development of resources (forestry, mining, oil and gas, as well as secondary industry such as the construction of sawmills and so on). In order that the community be able to engage in seemingly contradictory endeavours, that put their s. 35 rights or title at risk, and be able to underwrite development of non-traditional resources, it may be necessary that the Gitxsan and Canada jointly write the necessary enabling legislation, which on the one hand guarantees third parties the necessary security while at the same time provides the Gitxsan with a temporary alternative definition to their aboriginal title and rights for the purposes of development; specifically, a title that allows the Gitxsan to suspend access to s. 35 resources, without surrendering their aboriginal title. Similarly, the Crown could in fact stipulate to third parties that their interests are, as Michael Jackson, legal scholar, has described:

a composite grant by the Crown pursuant to its underlying title and the right to beneficial enjoyment derived from Aboriginal title. The agreement could then contain a provision providing explicitly that the First Nation signatories affirm the specified existing rights and interests granted to third parties. This provision could be reinforced by others such as those found in the Yukon Final Agreements, to the effect that a First Nation will not exercise or assert its Aboriginal title in conflict or inconsistent with specified third-party interests.

Thus, development goals of the Gitxsan fall into three areas, first, the development of a framework (to which Canada is a party) of the Gitxsan assertion of their title to oil and gas (and mineral) resources. Second, the Gitxsan seek to ensure that the environmental and socio-cultural impact of energy exploration, development, transport and use are adequately and responsibly addressed, and the objectives relating to these impacts are integrated into all development policies and programs to which the Province of British Columbia is a party. Third, that policy and procedure associated with development must ensure that future generations of Gitxsan have secure access to any and all benefits arising from the development of oil and gas (forestry or other minerals) on the lax 'wiiyip, and that measures are taken to ensure their efficient and conservative use. Furthermore, the federal Crown could keep to a minimum acreage of land that is required for development, extraction, maintenance, and delivery of either oil or gas (minerals); and that environmental standards for development, extraction, and delivery are adhered to. Moreover, at the time of any well shut-down (or mine closure), the Crown will ensure that the habitat restoration has been carried out, as well as disposing of the legislation that provided for the development. Also, the Crown, although it may not have much say in where royalties are either invested or spent, has an obligation to assist the Gitxsan in the negotiation of a fair rate of return, and has a role to play in making sure that the royalties are transferred to the community in accordance with any previously negotiated agreement.

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Governance

Governance for the Gitxsan is situated in the authority of the Saem’ogits and Saem’oogits that recognizes first their traditional alliances, and second the tradition of sinankxws (pulling the chiefs out for consultation), while maintaining individual wilp members’ rights to be involved with the decision-making process. The Gitxsan seek recognition of the authority of the Saem’ogit or Saem’oogit by Canada and British Columbia. This also entails acceptance of how the Saem’ogits or Saem’oogits are trained, chosen and respected in Gitxsan society; as well as their obligations, duties and responsibilities to their wilp, the pteex and wilksiwitxw affiliations, and their huwilp alliances. As the ultimate authority in wilp matters, they alone make final decisions. However, there are some situations in which the Saem’ogits and Saem’oogits come together as family alliances or members of the same village, and as a nation to make decisions.

Wilp resource and land management is not a solitary endeavour: the day-to-day management is delegated to various wilp members, and at the head of the wilp management team is the Saem’oogit. Similarly, the Saem’oogit confers with other Saem’oogit in order that everyone is kept apprised of all subsistence activities, and the condition of the lax’wiiyip. The relationship the Gitxsan have with their lax’wiiyip through the social and management responsibilities of the Saem’ogit and Saem’oogit lies at the heart of Gitxsan governance, and those who eventually take on the position of a Saem’oogit can either inherit the position from the departing Saem’ogit, or are appointed through a consensus of wilp members. Regardless of how the Saem’ogit or Saem’oogit is put into office, the other Saem’ogits or Saem’oogits must approve this appointment at a yukw called especially for this confirmation.

Since land and resources management is of primary importance to the Saem’ogit and Saem’oogit, affecting all Gitxsan people, they alone must make the final decisions with regarding its disposition. This does not preclude a body of advisors from among the general Gitxsan
population however, as the *Səem’oogits* ultimately bear the responsibility for the condition of the *lax ‘wiiyip*, then it must be their authority that endorses the action undertaken on the land.

Likewise, even when the *Səem’ogits* and *Səem’oogits* make the final decisions, this does not stop *wilp* members from either bringing up concerns prior to the decision making, debating solutions, or being responsible to act on the decisions of the *Səem’ogits* and *Səem’oogits*. Thus, the shape of Gitxsan governance is firmly rooted in the *wilp*, and relies on the public role of the *Səem’ogits* and *Səem’oogits* to bring *wilp* concerns forward, and to assist *wilp* members in coming to a consensus with presented business.

In terms of administration of *wilp* resources, such as fur, fish and fowl, as well as forestry, mining, and oil and gas revenues, several questions need to be considered. First, how are individual Gitxsan s. 35 rights to be met in light of the overall conservation of fur, fish and fowl resources? Second, how will the authority of the *Səem’ogits* and *Səem’oogits* be supported, as those who have the final say on matters related to *wilp* management on their *lax ‘wiiyip*, as liaisons with Provincial and Federal leaders regarding s. 35 rights to resources, and as decision-makers with respect to alternative uses of the *wilp* *lax ‘wiiyip* throughout the entire statement of claim area? Initially, all Gitxsan people are trained in the laws of the fishery and the hunt, and they know that the permission must be sought first from the *Səem’oogit* to use *wilp* resources and *wilp* resource sites. Thus, it may not be a burden to require Gitxsan people to report to a central Resource Management Office the numbers, species and locations of animal and fish taken during the seasonal subsistence round. The Resource Management Office may use these observations (as well as samplings of related scientific data) of the hunters, trappers and fishers to determine the conditions of the habitats. If the reporting is accurate and kept current, the *Səem’oogit*, on the advice of the Resource Management Office, would be able to caution hunters, trappers or fishers when they were approaching limits, as well as over time build up profiles of any region to predict when to stop hunting, trapping or fishing; or to commence the activity.
In terms of the Gitxsan people supporting the authority of the Saem'oogits and Saem'oogits to act in private wilp matters and with respect to their public role, a Saem'oogit's behavior is continually scrutinized by wilp members, as well as by others of similar rank. It has always been that a wilp member may not bring shame or embarrassment onto the wilp, likewise, a Saem'oogit must always be cognizant of the gravity of her decision. Furthermore, the Saem'oogit must not act outside of the law. To this end, decisions that the Saem'oogit makes are made in consultation with one’s wilp, duly witnessed. If the problem is a village concern, then it is the Saem'ogits and Saem'oogits who discuss the issues, and pass on their decisions to the appropriate venue. Similarly, if the issue is of concern to the Gitxsan as a whole, then as many of the Saem'ogits and Saem'oogits possible, with their advisors, will debate the problem and arrive at the solution. From this consensus, (depending on the issue it could range from 40% to 75% of the Saem'ogits and Saem'oogit, a ratio as set by the Gitxsan people) the appropriate office will be authorized to notify the appropriate agency of the decision. Thus, the leadership role of the Saem'ogits and Saem'oogits starts in the wilp, decides village matters, confers on issues of all Gitxsan concerns, and is responsible to interface with the Crown. The long-term political success of the Saem'ogits and Saem'oogits, however, lies in how well they have been able to harness the labour of their wilp members, for the benefit of the wilp. With this in mind, leadership success may also be contingent on how well wilp member expertise is delegated, and how the Gitxsan use funds from compensation and royalties for projects that benefit all Gitxsan.

With respect to the relationship between the Gitxsan and the Crown (Provincial and Federal) that centres on protection of their s. 35 rights, which are both “land based” and associated with “livelihood concerns,” as well as “clarity with respect to protocols regarding consultation,” the Saem'ogits and Saem'oogits could easily delegate representatives from their gim litxwid (alliances), where the conclusions are duly witnessed by all Saem'ogits and Saem'oogits at a Li’ligit organized for the occasion. For administration purposes, the Resources Management
Office (responsible for Fish, Fur, Wildlife, Plant Life (Mushrooms and Berries)) could act as a clearing house for information and the bringing together of the parties, as well as coordinate any agreed-upon dispute resolution process.

Conclusion

The Gitxsan are relying on their commitment to their lax'wiiyip as the compelling reason to be able to take on the responsibility for the stewardship and management of the territories that will ensure that, at minimum, their s. 35(1) rights are upheld. They are willing to take on the necessary challenges as co-managers of the forest, mining and oil and gas resources in the region of their traditional territory, in order that they are able to continue to afford to live in the region and exercise their aboriginal rights. The setting of joint environmental standards and indices for resource sharing among the huwilp and between Canada (in the case of oil and gas) and British Columbia (in the case of the development of third party forestry, mining, agricultural leases and so on) is at the heart of the Gitxsan, Canada and British Columbia treaty. As such, it is imperative that Canada is prepared to support the Gitxsan when they consider that their s. 35 rights are in jeopardy. To ensure that this is feasible, Canada could develop joint legislation with the Gitxsan and the Province of British Columbia that outlines standards for environmental protection of Gitxsan lax'wiiyip in light of their s. 35 rights that supports the fiduciary obligations of the Crown for anticipated continual economic development in the region and to set, in conjunction with Canada and British Columbia, consultation criteria for legitimate legislative

86 The goal is to avoid a potential claim as in the case of Guerin, where Indian Affairs was negotiating a surrender on the one hand with Musqueam, and a lease with an outside party on the other, or as in Kruger (Kruger v. The Queen (1985) 3 C.N.L. R. 15) and Apsassin (Apsassin v. Canada [1993] 2 C.N.L.R.) where Indian Affairs was negotiating with the Department of Transport and the Department of National Defence, respectively, for community lands, as well as setting the process for such discussions, and compensation.
infringements in order to protect Gitx̱san aboriginal rights, thus ensuring that accommodation meets with their approval. In terms of the Gitx̱san relationship with the Province of British Columbia, the development of compensation indexes that attempt to accommodate the Gitx̱san perspective on resource development, and address the sharing of resource revenues, must be achieved. Furthermore, since the assertion of sovereignty, the Gitx̱san traditional livelihood base has been altered; they seek additional economic opportunities to be opened up in the region\(^{87}\), as well as being involved in setting the standards for the delivery of human and social services\(^{88}\).

Currently, although the Federal government insists that blanket extinguishment is no longer required as a precursor to a Land Claim Agreement, the Government requires “certainty and finality.” However, the existing policy still requires that the community identifies additional lands, which will include a proportion of resources, which the community will have “exclusive” control over, and even though the community will also be identifying site specific aboriginal user rights throughout their traditional territories, these activities will be subject to Crown regulation, as well as Crown appropriation. To these lands, the community is expected to cede their original claim. What the Province hopes to achieve is “certainty” as to who has jurisdiction for any given aboriginal right activities, as well as closure to the aboriginal title question. This still translates into “cede and surrender,” in that the community is expected to accept a “enlarged reserve” and modified title and access to s. 35 rights to the remainder of their traditional territories. This model prevents any meaningful or continuous relationship with the resources on or below the community’s traditional territories, providing little or no security beyond the compensation packages. For the Gitx̱san, their relationship is with their entire lax’wiixip and their history is living.

In their generosity, the Gitx̱san have permitted the peaceful settlement of their lax’wiixip

\(^{87}\) Reconciliation supra note 58 at 3 pt. 6 f.
\(^{88}\) Ibid. at 3 pt. 6 g.
by the lixs giigyet through the acknowledgment that the underlying sovereignty to the soil is vested in the Crown, at the expense of their own rights and livelihood. They believe that their relationship with Canada should be based on acceptance of their distinctiveness and protection of their s. 35 rights. The Supreme Court of Canada in Delgam 'uukw enlarged the scope of Aboriginal title to include the possibility that the community was not required to cede its territory, unless the use sought after was contrary to the “Indianness” of the community. This suggests that Gitxsan jurisdictional parameters have also been expanded, and leaves room for a treaty relationship that has the potential for a continual relationship with the community’s entire territories that includes non-traditional use, such as forestry, mining, and oil and gas development. Such a possibility suggests that the Federal Crown’s fiduciary duty of protection is also expanded up to the boundaries of Gitxsan huwilp, and it is possible that their next court appearance will be based on the Crown’s inability to protect their self-preservation. It is expected at that time the Crown through consultation, accommodation and possibly compensation could work out the particulars, according to the joint protocols.

The critical difference between the Gitxsan model for treaty and that of the current comprehensive claims position is in the fact that the Gitxsan claim the right to manage their rights according to their ayooks throughout their entire lax 'wiiyip, and are prepared to meet this challenge in the Court Room. They do not want a “certainty and finality treaty” that allocates to them enlarged reserves and requires them to cede forever any access to resources or jurisdiction over the lax 'wiiyip that has formed their identity. Nor do they believe that the current Reserve or Village Self-Government Model can adequately speak to efficient delivery of their social and cultural needs, while encouraging self-sufficiency. The Gitxsan believe that individuals have obligations and duties to their wilp, their kinship alliances, their social alliances, and to the lax 'wiiyip. As such, they believe that their relationship with the Crown is situated in Crown
respect and recognition of their institutions, and the challenges of providing ongoing livelihoods for wilp members in the lax 'wiiyip.

In order to affirm this ongoing commitment, the Gitxsan, Canada, and British Columbia may desire to raise a T'aan\(^\text{89}\) that illustrates this renewed relationship and the terms of their commitment. Such activities, such as naming and applying symbolic meaning to the potential of the relationship, without surrendering to one another, would eliminate the need to extract the promise of finality from the Gitxsan. Having Canada and British Columbia define its relationship to the Gitxsan, and having this relationship marked on a T'aan that in itself has a life span, begs periodic review of the terms of the relationship for all parties. A T'aan, as a marker that can be read, requires literacy and continued information exchanges in order for the principles to be understood. The Gitxsan are willing to meet the challenges of co-management, and if Canada is willing to take on a meaningful role that protects their title and rights, which enable the Gitxsan to continue their relationship with their lax 'wiiyip despite third party use, British Columbia and indeed all concerned can be guaranteed certainty.

\(^{89}\) There are a series of events that are necessary for raising a T'aan. First the carver (the carver chosen usually is from one's wilksiwitxw) must be chosen and the work formally commissioned and second, the ayuks from the wilp must be selected and approved by all. Lastly the T'aan will be raised. The most important events are around the choosing of the ayuks, and the T'aan raising. The primary ayuks on a T'aan symbolize the wilp's territorial holdings and they must be accurately depicted reflecting the wilp's inter-relationships with other wilps, especially kin relations. See: M. McKenzie Proceedings at Trial, (1987) vol. 4 May 13 at 213; 237 to 238; 246 to 247 & 250; M. Johnson, Proceedings at Trial, (1987) vol. 11 May 27; O. Ryan, Proceedings at Trial, (1987) vol. 17 June 11 at 1078; 184 to 1094, J. Ryan, Proceedings at Trial, (1988) vol. 80 March 23 at 5017 to 5018 & 5026; S. Marsden, Proceedings at Trial, (1988) vol. 93 May 6 at 5922 & S. Marsden, Proceedings at Trial, (1988) vol. 94 May 9 at 5963 to 5964.
<table>
<thead>
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<th>Abbreviations</th>
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<tr>
<td>Alta. L. R.</td>
<td>Alberta Law Review</td>
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<td>Am. Anthro.</td>
<td>American Anthropologist</td>
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<td>Am. Eth.</td>
<td>American Ethnologist</td>
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<td>Anthro.</td>
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<td>B.C. Hist. Quart.</td>
<td>British Columbia Historical Quarterly</td>
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<td>B.C. St.</td>
<td>B.C. Studies</td>
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<td>Buffalo L. R.</td>
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<td>Can. Geo.</td>
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<td>Can. Hist. Rev.</td>
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<td>Can. Jour. of Nat. St.</td>
<td>Canadian Journal of Native Studies</td>
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<td>Can. N. L. R.</td>
<td>Canadian Native Law Reporter</td>
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<td>Const. For.</td>
<td>Constitutional Forum</td>
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<td>Dal. J. Leg. St.</td>
<td>Dalhousie Journal of Legal Studies</td>
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<tr>
<td>Ethnoh.</td>
<td>Ethnohistory</td>
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<td>Hist. of Pol. Th.</td>
<td>History of Political Thought</td>
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<td>J. of Hist. of Id.</td>
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<td>J. of Can. St.</td>
<td>Journal of Canadian Studies</td>
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<td>Man, L. Jour.</td>
<td>Manitoba Law Journal</td>
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<td>Nat. St. Rev.</td>
<td>Native Studies Review</td>
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<td>Osgoode Hall L.J.</td>
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<td>Phil. Quar.</td>
<td>Philosophical Quarterly</td>
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<td>University of Toronto Faculty Law Review</td>
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<td>J. of Am. Folk.</td>
<td>Journal of American Folklore</td>
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Glossary

Adawaak: The narrative owned by a particular wilp or by Houses denoting both their migration back into the wilp lax 'wiiyip and the boundaries to their particular territories.

Agaag'y: Name of Ska 'wò's second son.

Aks naagelgaa: The name of the creek up by Mezziaden Lake that Naa gel gaa claimed after the battle with the Ts'its'aawit peoples.

'Am halitx: Refers to the headdresses containing sea otter whiskers.

A mix k’aaax: Part of the arbitration process that is instigated after issues between families or nations have escalated to killing. This speaks of the spreading of Eagle Down.

Amnigwootxw: Permission to use another’s territory based on several reasons. For example, members of one’s father’s family can use one’s mother’s territory, or, permission may be given for good deeds done toward the wilp. If children are orphaned, their wams are held in trust for them by another, and in the meantime, those looking after the children are given permission to use the wams and ayuks of their wilp for those children’s benefit.

Am sk’iik’: Dried salmon eggs.

Amxsiwaa: This is another word for ‘mes - make-up. This term also means that animals dress up pretending to be humans.

An bax: A pole that the wilp of Tenimgyet puts up for the children of Biis hoont.

Angol hon: The name of the village where one of Biis hoont’s brothers lived.

Anjok: The act of asking permission to use the territory of another.

An si bilaa: The name of the fishing site that was given to the wilp of Hanamuxw for xsisx from the wilp of Luutkudziwas’.

Antgulilibix: Antgulilibix became the name of the young man who saved the Baby Goat. He alone was saved from the landslide that was invoked by the One Horned Mountain Goats after the young boys taunted and tossed other Baby Mountain Goats into the fire and this name, Antgulilibix comes from the whirlpool that took the tree down.

Antimahlasxw: Narratives added to the history of a wilp, usually referencing a property transfer.

Ax: A potato-like vegetable.

Ayook(s): Laws given to the Gitxsan in order that they may co-exist with each other and the animals.

Ayuk(s): Symbols that represent title to particular lax ‘wiiyip or fishing sites by the wilp.
Bax'magamweh: Pole-raising feast and acknowledgement of and fulfillment of obligations to ancestors.

Baxmagam Lo 'op: Settling of the final costs and setting of a gravestone or headstone.

Bexwinxwxw/Ludelinsxw: Welcoming guests to the community (usually associated with a funeral or totem pole raising).

Bitxw yukw: The name of a feast that is held after a woman is divorced, and the terms of the settlement are announced to the community.

Biis hoont: name of a wilp of Tenimgyet('s) adawaak.

Bii Lax ha: The name of another village that Biis hoont had to start, as her bear children were hard to live around.

Dag gyet: Power and authority of the Saem'oojit and Saem'ogit to delegate in the name of the wilp.

Daiks: refers to a delicacy served at the Xai mooksim yukw. It is a combination of soap-berries and snow.

Dax yuk dit lax yip: Refers to the caretaker of the territory, until a debt is cleared up.

Delgam'Uukw: Person's wilp name.

Dim lip gyathi: Means: free to be who you are.

Ee dim uma yees: Means: on the breath of your ancestor.

Gaak: Raven

G'aaats: A term associated with incest or marrying someone from one's own pteex.

Gala sim kuuba xwdaakintxw 'y: Means: Come along my grandchildren I need help.

Galaa'uu: He is the brother who killed 'Wiihloots.

Gal dim algjak: Speaker at a yukw.

Galdim xsan: The box given to Ska'wo's sons Ligii yuun and Agaag'y by their father, the man covered with stars. The box contains the Xsan.

Galtsaps Biis hoont: The little bears could not get along with the other villagers, so Biis hoont moved and started this village.

Ganoots it: The main character in the adawaak of Haat'ixslaxnox.
Gawa gyanii: The name of the feast to celebrate peace or the formal settlement of a dispute or war.

Genada: Frog Clan.

Gex’gam: A feast that informs the community of the crests to be carved on the pole.

G’ilhaast: The name of a large tree that the sisters found on their travels, See: Adawaak of Hax bagootwx

Gilt’xega: A Feast to announce the appointment or advance payment of engaging in a major battle.

Gim litxwid: The alliance of Gitxsan Sæm’ogit(s) and Sæm’oogit(s).

Ginii glai: Was from the Ts’its’aawit, who was a Halayt.

Gisday Wa: The kungax of the house of Gisday Wa talks about the people coming from the east when a bow and arrow fight takes place between the Wet’suwet’en and the Naskoteen peoples.

Giskaast: The name of the Fireweed clan.

Gisyadinisinweh: The name of the feast that transfers a living chief’s name to another.

Gitan gasx: a name of an ancient Gitxsan village of Kisgagas.

Gitangwelkxw: Is the place where the mother bear swam across the river with two cubs around her ears, and was shot by the Gitxsan.

Git axsol: A location on Tenimgyet’s lax’wiiyip.

Git haahl miikik: The name of Bella Coola.

Git lax an dek’: An ancient village where the wilp of Tenimgyet originates.

Gitludahl: One of the four huwilp that come from the pteex of Gisk’aast.

Guks heldim guutxws: A shame feast to restore status when someone else has brought shame onto a Gitxsan person.

Guks yi’ooksxw: A cleansing feast for the public restoration of a Sæm’oogit or Wilp member that has brought shame to the wilp, or a member of the wilp.

Gus magam ‘mix Kaax: This means the returning of the down.

Guutgo’oo: Name of one of the cousins in the adawaak relating the move to Kuldo.

Guxsan: One of four huwilp that come from the pteex of Gisk’aat.
Guxw uutxw: This is the name for a steam bath

Gwaalaasxw: Sister of Wiiget who was adopted into the wilp of Sakxum higookx.

Gwaans: This name means “When the eagle flies around and lands on top of the tree,” and this is a chiefly name in the wilp of Hanamuxw.

Gwanks: Springs water.

Gwiis gan ‘malaa: The general word for Blanket Robes.

Gwin Gibuus: The name of the fishing station to which the dogs tracked the Hawaaw’, where the warriors killed it.

Gwin ixstaat: The village where one of Biis hoont’s brothers lived.

Gwit ts’ilaasxwt: The place where the traps are in the Kuldo area.

Gyanimx: Refers to contemporary Gitxsan language.

Gyologyet: A chiefly name of the Xsgooim səm’ogit of the wilp Gyologyet meaning “to stand in one accord.”

Haahl daax: The surrounding mountains.

Haakasxw: The name of the serpent that came up river.

Halaltxwista giikw: Means “Sister it is falling down.” See: the Adawaak of Hax bagootxw.

Halayt: The power in the crest, ceremony and so on.

Haldaakxws: Means “Medicine, where are you?”

Hanak: When a young girl becomes a woman and is able to marry.

Hanamuxw: Hanamuxw is one of the houses of Gisk’aast established in Kitsegukla and they hold the Adawaak of Ska ‘wo, (the man in a hat, who is covered with stars).

Hawaaw’: Monster who came up the Xsan.

Hidinsim Getingan: The series of feasts for raising a pole.

Hidimsimgan: Pole-raising feast and acknowledgement of and fulfillment of obligations to ancestors.

Hlaa niin xsi gyalatxwit dim ant guuhl hli dax gyets dip niye’en. Dim guudinhl wa midim’y ama gya’adihl Lax yip: The recipient is the one that has been selected to take the inheritable land, to hold it, and to take care of it.
*Hla mitxw hli set:* This means sacred smoke that comes from a purification ritual.

*Hlikaaxhl:* Those who hold chiefly names in the *wilp* and have duties assigned to them by their *Sæm 'oogit* or *Sæm 'ogit.*

*Hl’oom:* Settlement Feasts or payment by the *Wilp* of the funeral expenses.

*Huwilp:* Plural of *wilp.*

*K’aat’:* Staff used to indicate that permission has been given to the person to be on the *lax ‘wiiyip* of another.

*K’l’yhl luuks:* Refers to bundles of 40’s.

*Ksiisxw:* A feast for the compensation or payment made for a major crime.

*Kungax:* Dance of the *Wetsuwet’en.*

*Kuukunuxws:* The name of *Suuiigos’s* sister’s husband, who is a brave man.

*Laalaxoo:* A swampy area on the *lax ‘wiiyip* of *Tenimgyet.*

*Lasya ‘a:* The month closest to April in the Julian calendar: it is the month that the Spring salmon return.

*Laxgibuu:* The Wolf clan.

*Lax lilbax:* The name of the lake where *Biis hoont* had the second village of *Bii Lax ha.*

*Lax oo ‘l:* The name of the grandmother who was eaten by the *Hawaaw’*, and it means “eyebrow.”

*Laxsel:* Raven clan.

*Laxskiik:* Eagle clan.

*Laxts ‘ap:* Name of a village in the Kuldo area, located at the mouth of the *Xsit’in* where it entered into a lake.

*Lax ‘wiiyip:* The traditional territories of the Gitxsan and Gitxsen people. This territory is located around the upper Skeena and Nass watershed encompassing the Bulkley, Babine and Kispiox Rivers.

*Ligii ooyax:* First name of *Tenimgyet,* meaning “staying in one place.”

*Ligii yuun:* Name of *Ska ‘wo’s* first-born son.

*Li’ligit:* The feast complex of the Gitxsan.
Limx Hawaaw’: The name of the paddle song composed by the wilp of Tenimgyet after the death of the Hawaaw’.

Limx oo’y: A dirge song.

Lixs giyet: Those who are not Gitxsan.

Loo hliigyotxw: The feast for the appointment and initial payment for the work to make the totem pole.

Luu hetxw halayt: Welcoming ceremonies when guests come from other villages to participate in the raising of a totem pole.

Luu lax saaxsit: A location on the lax ‘wiiyip of Tenimgyet where ax grows in abundance.

Luu Tsobim tsim yibit: The name of the place where the Tsi tsa wit people lived underground.

Maa’yaast: Is the name of the colourful trimming given to ladies to put on their baskets, indicating that permission has been given to them to use the berry grounds.

Malii: The name of this wilp refers to the adawaak of the two bear cubs-children Biis hoon brought back after her brother killed their father. The Cubs and Biis hoon were banished from their village as the bears could not easily live around humans.

Mediik: A mythical Grizzly Bear that lives in the lake at the foot of Stekyooden.

‘Mes: Make-up that is used to disguise the faces of both animals and people.

Mesxw: The name of Biis hoont’s dog, who aids in finding her.

‘Mii k’ooxst: Salmon berries.

Naa dim ant naks hlguuhlxwy’a Ska ‘wo”: “Who is going to marry my daughter, Ska ‘wo.?”

‘Naa gel gaa: The name of one of the warriors that accompanied ‘Neetkt from Kitwancool.

Naa hlimoot’: Laws of sharing and how food is divided up amongst the community.

Naga ihl: The name of the younger sister in the adawaak of Hax bagootxw.

Nagun: Name of one of the cousins in the adawaak relating the move to Kuldo.

Nax nogam lik’t’nsxw: The name of the big grizzly who married Noxs Mesxw.

Nax nox: is the power within a person, which is expressed throughout life; it is in the wams, the ayuk(s) and adawaak(s), and acted out at the yukws.
'Neekt: Means tongue-licked.

'Nii Algaya: A relative of Biis hoont who went down to Kalum.

'Nii dil: The person who stands up for you when you receive an important wam.

'Niikyap: Name held by David Gunanoot, at the time of the trial.

'Niis 'yook': A relative of Biis hoont who went to the Nass.

Noxs Mesxw: The name of the girl who was captured by the Bears.

Oodihl hen mi yee'n: “You are not fit to marry my daughter.”

Oo hal daawihl: The ceremonies surrounding cremation, which were given to the Gitxsan in the Adawaak of Waa k'oox (of the other world).

Oowiniits: A little mouse that helps one and symbolizes one's conscience.

Pteex: This term refers to one of the four, or related, clans in Gitxsan society.

Saagit: When one habitually trespasses onto another wilp('s) lax'wiiyip, one may be beaten to death and the family cannot retaliate.

Sagayt ga ak: The name of the elder sister in the adawaak of Hax bagootwx.

Sakxum higookx: Person's name bestowed by their wilp.

Saem 'ogit: Term given to a male person who holds the name of the wilp.

Saem 'oogit: Term given to a female person who holds the name of the wilp.

Si gyetxw metx: Makes reference to pretending; for example, the Mountain Goats pretended to be people.

Sihlguxhixwst. This is when someone raises an orphaned child as their own.

Sim algaya: Term given to an ancient Gitxsan language.

Simaneks yukw: Marriage feast.

Sisatxw: Purification rituals used by men before they go hunting.

Sisixsek: Means “pulling the chiefs out” to resolve a dispute which encompasses all of the communities.

Siyehl widit: Is a curse that will be brought onto one's wilp for fighting over food.
Ska 'wo: Name of the young woman who was taken into heaven and returned to earth mentioned in the Adawaak of the Wilp Hanamuxw.

Skoogim hom: The first spring salmon caught in a village, which is carefully laid on a mat, carried to the village, cooked and distributed to everyone, at all times giving thanks to the salmon for returning.

So’o: Food or gifts that are taken home after a feast.

Stekyooden: The name of a mountain in Gitxsan territories where the historic city of T’am Lax amit was located.

Suuwiigos: The name of a warrior in the wilp of Gyoluugyet.

Suuwiis ‘wen: Means “to blow the chief out of the yukw.”

Taas lax wiiyip: The territory that Xsuu was on when he was killed by the Ts’its’aawit people in revenge for the previous battle.

T’am Lax amit: The name of the city that the Gitxsan had lived in before the disasters occurred.

Tenmigyet: The name of the youngest brother who rescued Biis hoon and became Wii Säm’ogit, and the name means “half-human and half-bear.”

Teets: These are messengers that the wilp sends out to the various villages to announce events such as a yukw.

T’soan: The general name for Memorial poles.

Tsawaas: The name of the brother of Suuwiigos in the wilp of Gyoluugyet.

Tsibasaa: The brother of Antgulilbix.

Tsihl Gwellii: The location on the territories of Tenimgyet where ‘mili kooxst grow.

Ts ‘imaakhl gan k’ok’: Another location on the lax ‘wiiyip of Tenimgyet.

Tsilim tk’iiwen: The name of the youngest brother of Suuwiigos.

Tsimganootsenex: The name of the wilp of Niikyap.

Tsimxsan: Now known as the Tsimshian language.

Ts’imilguudit: is when a person or persons (either adults or children) are taken into a wilp to raise the house population because the house is facing a serious population decline.

Tsim ts’itixs: A location on the way to Tsihl Gwellii.

Tsi’ itsa’aawit: The name of the nomads who occasionally raid the Gitxsan.
Tss’uu wijix: Means: they fought over the kill of the caribou and brought a curse on their wilp.

Txemsim: The name of an ancient man in Northwest society.

Umxwihl ganhl wil dit: Means: “It does not like to played with.” See: the second adawaak of Antgulilbix.

‘Waak: A baby mountain goat.

Wa’ayin wam: A name that is given to a person in order that they may enter a Yukw.

Wam: A name given to a person at birth. Throughout their lives they may be given other names reflecting altered status they attain. All “wams” given are owned by the wilp.

Wiigyet: A name in the wilp of Gwis Gyen, given to the stranger who lived with his sister, Gwaalaasxw.

‘Wiigwanks: Is a place where the coho gather in late summer and early fall.

‘Wiihloots’: He was killed by his brother, Gallaa’uu.

Wii Sæm’oogit(s): Another term for the name of the Chief who holds the House name.

‘Witax max meexw: The name of the man with the big earrings in the second adawaak of Antgulilbix.

Wijix: The name for caribou.

Wildim waax: The name of the brother who died of starvation in the adawaak of Hax bagootxw.

Wilksiwitxw: One’s father’s family. It is one’s father’s family that provides one’s first and last bed, one’s cradle and coffin. One’s father’s family also is responsible for one’s early education, as well as providing money to one’s mother’s family at yukw(s) throughout one’s lifetime and to sponsor the feast where one receives names.

Wilnad’ahl: The extended matrilineal family, though this may be in a different huwilp, and hold similar pteex membership.

Wilp: The primary property holding unit in Gitxsan society is the wilp. This term has been used in the past to describe the natal family as well as a living dwelling. More importantly, a wilp are all family members that a person, including all aunts, uncles and cousins, can trace through their maternal grandmother.

Wilxsi bagwinsxw: Those who are called upon to be undertakers.

Win laax lislisxwhl anuhl: Describes where the slides come down on both sides of the mountain.

Woo’uamst: Means: One must peel the outside bark of spruce trees off, and eat the inside.
Xai mooksisim: The name of the feast held at the first snowfall by the laxgibuu pteex of each village.

Xamlaxyeltxw: This name means: “when people go wading into the water.”

Xhla hanak/Upgyets: A coming-of-age feast for young women and men.

Xkyeehl: Rights to resources in exchange for gifts (money, prestige objects and so on) given in front of the community at a yukw.

Xmi’yeenasxw: “Smoke Feasts” associated with funeral announcements.

Xsagangaxda: This is the place where Yal was killed, where the creek flows into the river on the ice.

Xsan: Name of the main river that flows through the lax’wiiyip of the Gitxsan.

Xsgooim saem ‘ogit: Another term associated with the head saem’ogit.

Xsiixs: Compensation given for an intentional or accidental death.

Xsit’in: Name of a stream in the Kuldo area.

Xsi Gwin alak: A fishing station in the Wilson Creek area. During the fishing season the wilp members of Tenimgyet put aside salmon that the seals have eaten or are too damaged by their travels upstream for the bears.

Xsi gwin ixstaat: The name of the village where Tenimgyet lived.

Xsi gwina k’ohlxw: The place where the grandmother in the wilp of Tenimgyet met the Hawaaw’.

Xsi Wis An Skit: This is a ridge that defines the territory that was given to the wilp of Antgulibix and Tsibasaa for the murder of Yal on the ice.

Xsugwinlik’T’insxw: The name of the place where creeks converge in the Kuldo area.

Xsuu: The name of one of the warriors that accompanied ‘Naa gel gaa from Gitsegukla.

‘Yagaa deets: The name of one of the warriors that accompanied ‘Naa gel gaa and ‘Neekt.

Yagaxa Loobit: The place where Galaa’uu’s mother died.

Yukw: General terms associated with a feast.

Yuugwilatxw: Extending rights to one’s spouse.
Appendix One

Adawaaks of the Gitxsan

The following Adawaaks were related to the Court from 1989 until 1991 by various Gitxsan Seem'ogits and Seem'oogits. The first three adawaaks, the First Adawaak of Antgulilbix Adawaak of Tsibasaa, Antgulilbix and the Adawaak of Haat'ixslaxnoox, relate how through general disrespect of the animals by over-killing, making fun of their remains, and taunting the sky, the Gitxsan were banished from the lax'wiiyip. The Adawaak of Hax bagootxw and the Second Adawaak of Antgulilbix recall the time of the first people returning to the lax'wiiyip and the initial hardships of relearning how to live in the area. In the Adawaak of Sindihl and the Adawaak of Hanamuxw tells of the conflicts in the community and the coming of the laws of respect amongst the people. The Adawaak on the Move to Kuldo relates how the wilp of Gyologyet re-establishes itself in the Kuldo region before its move to the village of Kispiox. In the adawaaks of the Adawaak of Gyoluugyat and the Adawaak of 'Neekt it is described how relations are built amongst unrelated wilps and neighbouring people through marriage. Also it is described that is the women who carry the name of the house, even though it is usually are the men who defend and govern the wilp. Similarly, in the Second Adawaak of Sindihl it is told how inter-village cooperation is asked for when neighbouring communities invade Gitxsan territories, and how ayuks related to specific historic events are remembered. In the next series of adawaaks, the Adawaak of the Nisga’a Wiigyet and the Adawaak of Wiigyet, the relationship between the Nisga’a and the Gitxsan is related, as well as Gitxsan marriage laws. In the Second Adawaak of Wiigyet a fishing site is described that belongs to the Wilp of Wiigyet. Like in the Adawaak of Wiigyet, the Adawaak of Biis hoont chronicles the migration of the Wilp of Tenimgyet into the lax'wiiyip of the Gitxsan after the initial migrations. Here the Wilp of Tenimgyet argues for integration into pre-existing Gitxsan communities. The Adawaak of Malii described the ayuks of the Wilp of Malii. Whereas, the Adawaak of 'Wiihloots’ both the territory of the Wilp of Tenimgyet and the ayook(s) oinaa hlimoot’ (laws of sharing) are related. Lastly, the Adawaak of Hawaaw’ is told, which describes one of the Wilp of Tenimgyet’s ayuks and fishing sites.

The First Adawaak of Antgulilbix

More particularly, in the adawaak of Antgulilbix there was a young man at T’am Lax amit who knew how to hunt. It was known that no animal was safe because when he went out to hunt, he killed all of the animals that he saw. One day, he saw many Mountain Goats and he killed them all, except one very small and young goat. He painted its face with vermilion, and let it go, saying that it was too young and small to kill. The hunter then returned to T’am Lax amit with all his meat. In retaliation the Mountain Goats came to his village disguised as humans and invited everyone to their village for a feast.

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1 The Adawaak of Antgulilbix was related to the Court by Olive Ryan (O. Ryan, Proceedings at Trial, vol. 17 June 11 [Ryan]) at 1112 to 1117.
The Mountain Goats and the Eagles went into *T'am Lax amit* disguised as human beings. The villagers thought that the Mountain Goats were people, and they invited them into their Houses. The Mountain Goats did not want to come in to the people’s houses, and they scattered around the village. A little boy saw the Mountain Goats and noticed that when they were in front of people they looked just like people, but when they were not they looked like goats.

The people of the village were then sent *teets*\(^3\) to invite them to the village of the Mountain Goats, and when they arrived the people went to the *halayt*, *Luu hetxw halayt*\(^4\) that was put on for them. The Mountain Goats prepared a Feast for the people and began to put on their *halayt* and after three days the people left.

The people were invited back to the Village of the Mountain Goats, and it was then that the little boys started to make fun of the little Goats. The Older Boys warned them, the Hunters warned them, the Elders warned them, “do not tease the little ones.” The little boys started to grab the little Goats, and began to throw them into the fire. The Older Boys tried to stop them, the Hunters tried to stop them, the Elders tried to stop them. One young man held onto one of the baby goats - *'waak*, and would not let him be thrown into the fire. It was the Young Goat that the young hunter had put *'mes*\(^6\) on his face.

The others who were still on the Mountain in the Village of the Mountain Goats were in the Feast Hall. All the *Seem’oogit* from *T’am Lax amit* were in the Mountain Goats’ village; where they pretended to be people, to be *Si gyetxw metx*\(^7\) – and the *halayt* was going really strong and soon the walls of the hall began to shake, and they shook harder, and then the walls started to collapse. The walls of the Mountain above *Stekyooden*\(^8\) collapsed around all of the *Seem’oogit* and people.

As the walls of the Mountain came down, the Little Goat with the *'mes* on his face turned to the young man, who had saved him, and pushed him outside. All the *Seem’oogit* and *Seem’ogit* were killed, they all fell down the Mountain and into the River. This young man was alone saved. The young man was afraid, for he was high on the Mountain and was frightened to go down. The Little Goat then lent him his shoes and gave him his blanket so that the young hunter could jump as far and as safely as possible, and they both went down the Mountain.\(^9\)

At the bottom of *Stekyooden*, the young hunter found all the bodies of the people who were at the *yukw*; he alone had been saved. The people left behind in *T'am Lax amit* were wondering where all the *Seem’oogit* and *Seem’ogit* were and why were they taking so long. Then the young hunter

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\(^3\) In Gitxsan, “*teets*” are the messengers that the *wilp* sends out to announce events such as a *yukw*, and so on. Ryan *supra* note 1 at 1079.

\(^4\) The *halayt* encompasses the crest power of the *wilp*, and is in part the ceremonial display during public events. *Halayt* is also a person who has the power to heal another. *Ibid.* at 1080.

\(^5\) The *Luu hetxw halayt* are the ceremonies and events welcoming visitors to villages for a *wilp*-sponsored gathering. *Ibid.* at 1081.

\(^6\) *Amxsiwaa* or *'mes* is what the Gitxsan call makeup. *Ibid.* at 1114.

\(^7\) The term “*Si gyetxw metx*” makes reference to pretending; for example, the Mountain Goats pretended to be people. *Ibid.* at 1114.

\(^8\) *Stekyooden* is known today as Seeley Lake. See: M. Johnson, Proceedings at Trial, (1987) vol. 11 May 27 at 666 [Johnson].

\(^9\) Johnson *supra* note 8 at 666 to 669.
arrived and he told them what had happened. He said that from that day onwards they must hunt leniently and they must never kill the wild animals in large numbers. The villagers accepted the warning.¹⁰

**The Adawaak of Tsibasaa and Antgulilibix**¹¹

For a while the people lived at T'am Lax amit and remembered the advice of the young hunter, “not to overkill the animals or to poke fun at them.” After a summer, when all the salmon had been smoked and stored for the winter, it was time to relax a little and prepare to fish for trout before the river iced over.

All the hunting for mountain goats and groundhogs had been done and the people had returned from the mountains after all the berry picking. There was nothing left to do. So the young women went to the lake at the foot of Stekyooden, and they caught some grouse and trout.

After they caught a lot of trout, they cut out the backbones, leaving the tails. And as they stayed at the lake, the young women learnt every dance, and all the songs. So while the women were dancing, one young lady cut one of these back bones and put it on her head as a decoration. And she admired herself in the reflection of the lake, and she saw that the bone looked really, really beautiful and that she danced very gracefully. So she ran and told the others what she had found, showing them how she had fixed the fish bone in her hair. All the young women got back bones, and decorated their heads with them.

Some people came to the lake and saw the young women dance with the fish bones in their hair. They saw this, they did not put a stop to it, and they smiled at what was going on. So after when they all went home, the people of T'am Lax amit heard a terrible noise.

The people watched where the noise was coming from, and they saw some great big trees were being thrown above the tops of the rest of the tall trees, and they just stood there wondering what was happening. There was something going down the little stream that runs from the lake into the Skeena River.

There was something following this little stream, and tramping down the trees. Finally they saw this great huge bear, a grizzly bear that they have never seen before. The Sæm'ogit(s) sent messengers through the village to get the warriors ready. The strong young men came out with their spears, bows and arrows, and stone hammers; all the young men came out to meet this great grizzly bear.

This great Bear gets into the water swims across the river and lake and the warriors went in front of him, to discover that he was Mediik.¹² The warriors shot at him with their arrows, but instead of flying high the arrows all fell back, hitting the warriors. All the warriors were wounded.

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¹¹This *adawaak* was related to the Court by Mary Johnson. (M. Johnson, Proceedings at Trial, (1987) vol. 10 May 26 at 665.

¹²Mediik is a supernatural bear that lives in the lake at the foot of Stekyooden. *Ibid.* at 666.
Mediik continued to advance, trampling the warriors, crushing them into the ground. Mediik continued crashing through the village and killed a lot of the people. And after that Mediik turned and went into the water again, following back up the stream that he came from, disappearing into the lake\(^\text{13}\).

The wise elders had told the young people not to play around with fish or meat because the Sun God gave them food to eat. It is known that one should only take just enough to eat. To the Gitxsan the deaths at T'am Lax amit by Mediik were the revenge of the trout, because the young women played around with their bones\(^\text{14}\).

The Adawaak of Haat'ixslaxnox\(^\text{15}\)

The people at T'am Lax amit continued to ignore the warnings of the Sun God. Though they respected the Spring Salmon by showing reverence to their chief and by sharing it around to all, a little boy poked fun at the Mountain and the Sky.

It was after that the snows came. It was the month of Lasa ya'a\(^\text{16}\) (April) and they had caught some spring salmon. They started to cook the spring salmon; the salmon were cut in half because they were so big. Some sticks were sharpened and stuck through the salmon so it wouldn't fall into the fire while it roasted. When they were cooked, they pulled out these small sticks.

They gave one of these small sticks with fish on it to a small little boy, and the boy went off enjoying his fish, eating it off these little sticks. He looked up to the mountain of Stekwooden, and he saw a cloud covering the top of the mountain and some snow, and he talked to the mountain, “What are you going to do with this?,” waving the little stick, “You are snowing again.”

And that same night they were all snowed in, the Houses were all covered with snow and they couldn't go out. They were out of wood, and were cold; the Chief sat down and covered himself with a warm blanket.

The people saw that the snow grows thicker all around them, and ice is forming in the valleys. The ice starts to cover the villages, and soon everyone is covered with ice. The People are afraid, and now are under ice and snow. Ganoots 'it was there, and he started to fight with the people. The people are screaming, and Ganoots 'it was scratching at them. As Ganoots 'it scratches he starts to chip away at the ice. The ice started to crack up and soon opened up, and Ganoots 'it comes out of the ice\(^\text{17}\).

Finally he saw a little bird where the smoke hole was, a little bird sat on the smoke hole with a leaf and ripened berries in its mouth. The Chief said, “Am I seeing things,” he said. And they

\(^{13}\) Ibid. at 665 to 668.

\(^{14}\) Ibid. at 668.

\(^{15}\) Johnson supra note 8 at 666 to 670.

\(^{16}\) Lasa ya'a is the name for the month of April, when the Spring Salmon return. Ibid. at 671.

\(^{17}\) D. Gunnanoot, Commissioned Evidence, (1986) vol. 1 February 28 at 85 to 86.
looked and it was real. So the wise people asked the young men to dig through the snow. They know that now it is just them who are snowed in, and they believed it was summer in the rest of the land.\(^{18}\)

The little boy when he went outside poked his salmon stick at the Mountain and Sky making fun at them. This was taken as disrespect and the Sky snowed. Winter lasted a long time. When they got out of the ice and snow their land was changed and it was like new. Each group followed those they could understand, so some went in different directions.\(^{19}\)

**The Adawaak of Hax bagootxw**\(^{20}\)

After the snow stopped falling and the ice began to melt the people started to move from under the glaciers. The earth was like new, and they could only speak to those that they knew. There was little food left as the land was like spring. So people could not live altogether, they had to disperse along the river.

Two sisters\(^{21}\) and a brother\(^{22}\) traveled and all the while their brother, *Wildim waax*, was starving and he soon died.

And not long after he died, the sisters, *Sagayt ga ak* and *Naga ihl* heard the drumming of a grouse, and they planned to kill it. The elder sister, *Sagayt ga ak*, lay down near the log where they heard the grouse drum. And so the elder sister hid herself underneath the moss beside the log, but she missed the grouse and she just caught a few of the tail feathers.

And then the younger sister, *Naga ihl* lay down and tried catch the grouse. The younger sister caught the grouse, and they killed it.

They sat down and both cried. They remembered their brother had just died and then and there they composed a dirge song.

After that they traveled again, and they found a great big tree and they called it *G'ilhaast*.\(^{23}\)

They continued to travel and they saw a trail on the side of the mountain. They made a snare out of some roots, and set the snare. They then hid themselves away from the snare. Not long after that, a goat came along and they caught him in the snare. The Goat tried to get away, but all that

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\(^{18}\) Johnson *supra* note 8 at 670.

\(^{19}\) There used to be one language at *Tam Laxa mit* before they used *tsimxsan* language. They called this *sim algayax* and now the Gitxsan use what is known as *gyanimx*. *Ibid.* at 668.

\(^{20}\) The Wilp of Hax bagootxw is closely related to the Wilp of Antgulibix as both Wilp(s) share an aspect of the Mountain Goat *adawaak*, and share the use of the crest of the One-horned Goat. However, they do not share the same territory as do the Wilp(s) of Antgulibix and Tsibasaa. *Ibid.* at 669; 670 & 674.

\(^{21}\) The two sisters were named *Sagayt ga ak* and *Naga ihl*. *Ibid.* at 669 to 670.

\(^{22}\) Their brother was named *Wildim waax*. *Ibid.* at 670.

\(^{23}\) This plant is the fireweed and also sometimes used as the general name for the totem poles. *Ibid.* at 674.
happens is that he is hung upside down over the side of the mountain. One of the sisters cried out "halaltxwista giikw." So they walked over and they caught the one-horned goat.

**The Second Adawaak of Antgulibix**

There were some young people playing on a great big log, a cottonwood tree at the end of a village, and they always liked to play there. The log did not like it and it said, "umxwihil ganhl wil dit." So before they knew it they were drifting. One time a whole bunch of young people were on the log, and they were drifting away. They could not do anything but let the log drift. Some of the young people starved to death and they were dumped into the water.

Some seagulls landed on the drifting log and the young people managed to kill a few. They sliced the meat very thin, laid it on the log and the sun cooked it. That is how a few of them survived.

While they were drifting they heard a terrible noise and the noise was not far from the shore. As they drifted on this great big tree they knew they were coming closer to this great big noise. They managed to jump off and swim to the shore. They stood on the shore and saw this whirlpool swallow up the great big tree that they were on.

They started to wander around at the edge of the water until they found a place where someone had been cutting wood long time ago and there was moss growing on it. It looked like somebody had been living there for a long time. As they wandered around they found some fresh wood cuttings and then they found a little hut where a man sat facing the other way and without seeing them this man says "Come in if you are the ones on that the drifting tree from far away," he said. And they went in.

He gave them something to eat and they stayed with him. And they saw that he wore great big ear-rings, and his name was 'Wiitax max meexw.'

These young people stayed with him, and they liked him. 'Wiitax max meexw told them he was going fishing tomorrow. He said to them that every time he would go out and catch some spring salmon, a person with one foot always came along and grabbed all the fish and so he got nothing. "So," he said, "you young people will hide yourself tomorrow," he said, "then I'll go fishing. If he comes, then I'll holler at you whenever he grabs the fish. I'll just say, "gala sim kuuba xwdaakintxw’y.""

They went out fishing the next day. They heard a noise because he got only one foot, and when he came along he grabbed the spring salmon like he always does, and 'Wiitax max meexw cried

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25 Johnson supra note 10 at 620 to 622.
26 Umxwihil ganhl wil dit means that the log did not like being played on. *Ibid.* at 620.

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out, "gala sim kuuba xwdaakintxw'y," and his grandchildren came and helped him take back the spring salmon, and they beat the one-footed person up.

'Wiitax max meexw did one more thing. The young people said he just stooped and dipped his ear-rings into the water where the beavers were and he would catch them.\(^{30}\)

And one night the young people remembered their village and they became lonesome to go back home. As soon as they thought that 'Wiitax max meexw knew their thoughts, and he said to them "Tomorrow you young people will go home." He made them each a package of fish and beaver meat, dried fish and dried beaver meat, and he showed them the way to go and told them not to come back or try to find him anymore. "Just don't come back," he said.

They did go, and they were not far from their village, but not long after that one of the young people went out alone to try to find 'Wiitax max meexw, but he never found him and he got lost in the wood. He disobeyed what the 'Wiitax max meexw told him to do.

The Adawaak of Sindihl\(^{31}\)

There is this village known as Gitangasx\(^{32}\) and it was situated at the head waters of the Xsan.

When Sindihl was still living in Gitangasx they found a stone figure in the water. He saw this stone figure in the water, and then he organized his family to get it out. They finally dragged it out and it looked like a totem pole, but it was made out of stone. Sindihl wanted to erect this stone figure near his house, so he invited the surrounding villages to his village. While Sindihl was out inviting the surrounding villages, this stone figure disappeared. After Sindihl got back to his village he found out that the rock had disappeared. So, he remembered the figures that were on the rock and he carved them onto a wooden pole before his guests arrived. After this pole was carved it was erected outside his house, and the image on it is known as ha'nii laahl gaak.\(^{33}\)

When there was too many people at Gitangasx, other people started to move. We moved to Gitan'yaaw.\(^{34}\) After this, Sindihl moved towards and travelled to Gitan'yaaw. When they got to Gitan'yaaw, then they erected a copy of the same pole that they had left behind in Gitangasx.\(^{35}\)

A village was made at Gitan'yaaw, and a lot of people moved here before the flood. When the flood started they survived by building rafts, and the families all gathered on one raft. After the flood subsided they drifted along the coast to Alaska.

\(^{30}\) The young people were shown how to catch beaver with snares submerged in the water. Ibid. at 621.

\(^{31}\) S. Marden, Proceedings at Trial, (1988) vol. 93 May 6 at 5894 to 5998 [Marsden].

\(^{32}\) Gitangasx is the first village of the Gitxsan people located at the head waters of the Xsan. Marsden supra note 31 at 5894.

\(^{33}\) Ha'nii laahl gaak means where the mother crow sits with her young in the nest. This is also an ayuk in Wilp of Sindihl. Ibid. at 5896.

\(^{34}\) Gitan'yaaw is the present day Kitwancool. Ibid. at 5899.

\(^{35}\) The tool used to carve the totem poles is known as dax winsxw. Ibid. at 5897.
When they got there, they remembered their own territory, their own land, and they did not want to lose this land, so they made a plan that they will return. They waited a while and then they returned to Gitan’yaaw.

Sindihl like the other families from Gitan’yaaw, left this land and came back towards Meziadin Lake, and they stopped for a while at a place called Anx ts ‘imilixhł naageets’. They lived for awhile at Anx ts ‘imilixhł naageets’. They looked at the land very careful, and after inspecting the land, they decided to claim this area. After they had lived at Anx ts ‘imilixhł naageets’, they started travelling again and they got to a place known as Aks naagelgaal.

When they got to Aks Naagelgaa they lived there for a time and they inspected the land. After the inspection was done they claimed this land. Then after they moved from Aks Naagelgaa they travelled, and they got to a place known as Win sgahlguu’l.

And they did the same with this territory, they claimed it and they travelled on again, and they got to a place called Ski geenit. They lived at Ski geenit for a time and inspected the land and claimed it. They moved from Ski geenit and they went towards the Nass River.

Then they moved to a place called Sin Gewin, and when they left Sin Gewin they travelled to the west side of the Cranberry River. They own this territory until it goes into Gitan’yaaw Lake. When they came here Wixa showed Sindihl where to build his house.

The Adawaak of Hanamuxw

After the Gitxsan were banished from T'am lax amit the Gitxsan and other communities of people wandered around trying to find places to live. People began settling along the rivers once again. This is about Ska ‘wo, a young girl. The people continued to fight among themselves, and between villages. The fighting became so prolonged that eventually there were very few people left, in fact only Ska ‘wo and her Grandmother were left alive. Afterwards, when Ska ‘wo returned with her three children, her sons continued the fighting, with interspersed periods of peace.

Ska ‘wo’s grandmother took her out of the House to a small cabin. When it was time to eat, they pulled on a string that was connected to the main House. They pulled and pulled and nobody came.

Meanwhile the village on this side of the river, and the village on the other side were engaged in war. Ska ‘wo and her Grandmother did not know this was happening. So they kept pulling the string, they wanted to eat, to have a meal like amxsiwaa. They continued to pull the string and still there was -- nothing. They waited. So the grandmother walked outside and saw the Houses. She went inside to check to see if anyone was there, but there was nobody there. So she went

36 The Nass River is where the boundary of the Nisga’a and the Gitanyow stands; this boundary is at the place called Git xsi ts‘uuts’xwit. Ibid. at 5901.
37 The Adawaak of Hanamuxw was related to the court by Olive Ryan. Ryan supra note 1 at 1098 to 1103.
38 Ibid. 1 at 1098.
39 When girls become hanak (women, or when they start to menstruate) they move to another place when they menstruate. Ibid. at 1098.
back to Ska ‘wo and told her that no one was home. She said she has checked all the Houses and that there was no one home. The grandmother noticed that they were killing people in the other village.

Ska ‘wo and her Grandmother decided to leave their village and go into the forest. They left the village -- didn't want to be there. The grandmother started to call "naa dim ant naks hlguuhltxwy’a Ska ‘wo". "Who is going to marry my daughter?"

A small squirrel came, like a human, "I am the one that is going to marry your daughter", he said to her. And the grandmother asked him, "What did you do when the warriors come?" Then they saw the squirrel went up a tree and he began to throw pinecones down. They picked the cones and threw them down. And the grandmother said to him, they said “oodihl hen mi yee'n". You are not fit to be a man to marry my daughter.

And they started again and they said -- hollered again, and she said, "Who is going to marry my daughter?" "Naa dim ant naks hlguuhltxwy’a ska ‘wo".

And the man came and the grandmother said the same thing. She asked, "What did you do when the warriors come?" And this man was acting like a skunk and when the grandmother recognized that he was a skunk they left.

And the grandmother started to holler again, "Who is going to marry my daughter, Ska ‘wo?" They travelled so many miles, and the grandmother wanted someone to marry this girl, and one by one the young men came and one by one they showed themselves to be one of the animals. The Grandmother did not accept them.

Still she hollered the same thing, "Who is going to marry my daughter, Ska ‘wo?" And a young man came. He was so shiny, his body was really bright all over, his name was Gyedim max maaga'y 40 and he stood beside this woman and the girl. The grandmother asked him what he going to do when the warriors showed up, and the man said, "I'm going to show you."

And this grandmother replied said, "Are you going to marry my daughter?" And this young man never answered her until he put the woman under his arm and the girl under the other arm, and he said, "don't open your eyes", to the grandmother. "If you hear a noise, do not be afraid, and don't open your eyes until we get there." So the old woman was so anxious to see what's going on when she heard the noise, she opened her eyes. They were back on the ground, and they tried to leave the ground three times. After the third time, the man said to the grandmother, "You not fit to travel".

So he went to one of the trees and took a branch out. He put the grandmother in the hole where the branch had been. He left her stuck in the hole and said, "So the people will hear you forever."

He then took Ska ‘wo after he put the grandmother in the tree. The man told her the same thing. He told her not to open her eyes when they heard the noise. Though the girl was scared, and heard lots of things like thunder, the girl knew when they had landed in heaven, and the man said

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40 Ibid. at 1102.
"You can open your eyes now." And Ska 'wo opened her eyes and look around, there is no mountain. They were alone in heaven, and the moon was shining in the House.

The man and Ska 'wo made love. And Ska 'wo had three children -- two boys and a girl. The first boy was named Ligii yuun, and the second boy was called Agaag'y.

The man with the stars all over him, Ska 'wo’s husband, looked after his family. When the children were grown up he put them back in the world. This man with the stars all over gave his eldest son, Ligii yuun, a little box, called Galdim xsan. His father took him back to his mother’s village. When they got there the people were re-building the Houses.

The sons, Ligii yuun and Agaag'y, took their gambling sticks from the box their father had given them and went to the other villages. They would gamble and sometimes they would win, or they would lose. Sometimes they would run away from the village. In the box that their father had given them was “Xsan” and when they opened it the mists and the river came out. When the villagers would run after Ska ‘wo’s sons, Ligii yuun and Agaag’y would take out the river and mists to hide themselves. However, sometimes the boys would start wars between the villages, and to protect themselves their father had also given them a little axe called Ts’aaxw. When they struck the ground with the face of the axe, the earth would cover the village behind them.

The wars that had been taking place when Ska ‘wo escaped was started by the Laxsel pteex (Geneda or Frog/Raven) and they almost killed everyone. When Ska ‘wo and her children returned to her father’s village, there was a second series of wars. At this time the Giskaast (Fireweed) fought the Laxsel (Geneda), the Laxgibuu, and after a time the Giskaast were engaged in war with the Laxskiik (Eagle). These wars were not fought to annihilate the people, but to subdue them, to create a peace.

The Adawaak on the Move to Kuldo

The first people in Gitan gasx were two cousins, one was named Nagun and they called the other Guutgo’oo, and they were always together. One day they found an old lady walking around with a pack on her back and crying. They saw her walk to one village then to another and all the time she was crying. The two cousins finally asked her why she was crying, and asked her to sit down and have some fish. And the old lady took her pack off, put it down here, and said, “Yes, I will have a bite of fish.” So all three of them sat down and had some fish, they had something to drink, and soon the old lady packed up and went.

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41 From the term meaning gambling sticks, comes the name of the wilp and Sæm’oogit of Guxsan (meaning gambler) Ibid. at 1103. The wilp of Guxsan is one of the five Giskaast wilps at Kitsegukla. The others are Wiigyet, Gwis gyen, Xsgogimlaxha and Hanamuxw. Ibid. at 1117.

42 Ibid. at 1098 to 1102.

43 One of the crests of the wilp of Guxsan is the earthquake-making device. Ibid. at 1108 and S. Marsden, Proceedings at Trial, (1989) vol. 233 June 7 at 17082.

44 The move to Kuldo was related to the Court by David Gunanoot, and at the time of this evidence he held the name of ‘Nikyap. Gunanoot supra note 17 at 35 to 40.

45 An alternate spelling for Gitan gasx is Kisgagas. Ibid. at 42
She went away for a long time. First she would make one camp, then she would make another camp. She would stay there for awhile, make a fire and then she would move to another place and make another camp, stay there for a while then make another fire. She kept on travelling again. She would move her camp here and there, and soon she was on top of the mountain, and then she would be in the valley and she would gather the wood and start another fire until she got back to where Gautgo'oo was. This old lady started to fish, cooked this fish and was giving this fish to the people at Gautgo'oo's village. However 'Niikyap thought that something going to happen to them, as the fire that this old lady started was too bright and smoky. 'Niikyap felt that they were going to be killed by some people so he wanted everyone to move, and they did. They moved towards Kuldo.

They stopped there, and they started to look around for a place to live, for some place to fish and some water to drink. They found a canyon, and they walked along the top trying to find a place where they could get to the other side, soon they found a fluted log that was long enough to lay across the canyon, so they walked to the other side.

They used another log as a canoe, to get across the river again so they could go back and forth across the river. They went down the river until they came to a place called, Wiigwanks. They stopped there for a while, but there was no fish there. They went up the mountain to look around for food. When they got on top of the mountain they found a big meadow, and thought that maybe some caribou would be there, but there were none. They thought that there might be some ground hogs, and they soon found that this was true. They ate many and dried some, so they started to travel again. Soon they come to a lake.

At this lake, as soon as they started a fire, the water would come up, so they had to move away from the water's edge. They just kept going and moving their camp from place to place. Soon they found a place with gwanks. They went a little further, and then they stayed there.

The young kids took a long pole and put it right into the middle of the gwanks, and the pole disappeared. There was no bottom to the spring. So the adults came and did the same thing, they put another pole, this time a big white pole. This pole started to shake and they let it go, and it too disappeared. Soon they found this white pole in the middle of the lake that they had left. After that they had put another pole in the gwanks, they followed the Xsit'in down towards the lake.

Where the creek Xsit'in enters the lake they built the village of Laxts'ap. Soon an old man went looking for fish. Everybody said that he was not going to find any fish and that he was wasting his time. So he told his wife, you better fix up my pack and fill it up with everything what is good to eat, I'm going up there to look for fish. The old lady fixed up his pack and the old man took off, going up the river. He heard some nice water down river, so he went down there and looked for any fish. He soon found that there were no good places to catch the fish. Still he kept on going.

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46 This speaks to the wanderings of the people, while they were looking for a place to live.
47 This makes reference to the occasional lava eruptions in the upper Nass River region. Ibid. at 36.
48 The preparation and giving of fish, food, in this case acknowledges the previous gift of food by the cousins to the woman's peoples. Ibid. at 36.
49 Coho pool at Wiigwanks in the late summer and early fall, but at the time when everyone had first come to this place, there were no fish. Ibid. at 37.
50 Gwanks means “Spring Water.” Ibid. at 37.
So instead of continuing downstream he went up again. Still he could not find a good place where there was fish. Still he kept on going until he found a place where a bigger creek comes in, in front of him, he stopped right there because the canyon was so steep he could not even cross. So he followed that creek and went down to the water's edge. The creek comes out at Xsugwînîlîk T'însxw\(^{51}\).

There are big flat rocks at the mouth of this river. There are three big flat rocks in the river and the old man sat on that big flat rock, and unpacked his lunch, and eats it. A short time later the fish start to jump, they jump right out of the water in front of the old man. He watches again, there goes another one, another fish. There goes another one. There is lots of fish and even the old man saw fish swimming around.

He built two fish traps but all he could think about was that he wanted to go home to his wife, where the family is. So he went back to Gitan gasx, he said “I got the place, let’s go up there.” He told his nephews to get ready and cut the trail to go back to the fishing spot.

Finally, he finished the fish traps. They set the traps and all they wanted to do was fill the smoke house with fish. They caught so many fish that they filled the smoke house up, and then some. He told his nephews to take half the smoked fish and go back to Gitan gasx and put up the feast for those still there, and tell the people that if anybody wants to fish all they have to do is to put their hands in the water. They all packed up and went to Gwit ts’ɪlāaasxwət, where those traps were.

When they got there, they built their own smoke houses, and they started to dry fish. They fished for spring salmon, sockeye, coho and in the winter steelhead.

This is the time that Nîkkyap built his own house, which was called Tsimganootsenex. They stayed there and they went back to the little lake that sometimes rises up, to get groundhogs.

**The Adawaak of Gyuluugyt\(^{52}\)**

The people still lived at Gitan gasx\(^{53}\). In the wilp of Gyuluugyt and Gitan gasx there is a warrior called Sîuwîgoos.

Besides the people from the House Gyuluugyt there is another group of native people called the Tsi’ its’ aawit. They live further up north and they came down to Gitan gasx, and saw that the people of Gitan gasx had quite a bit of land. They decided to raid the village of Gitan gasx to get their land.

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\(^{51}\) *Ibid* at 38.

\(^{52}\) The Adawaak of Gyuluugyt also tells of the migration from Gitan gasx (Kisgagas) to Kuldo by the wilp of Gyuluugyt. This adawaak at the time of the trial was related by Mary McKenzie, who held the name of Gyuluugyet. M. McKenzie, Proceedings at Trial (1987) vol. 3 at 160 and M. McKenzie, Proceedings at Trial, (1987) vol. 4 May 13 at 222 to 229 [McKenzie]

\(^{53}\) Gitan gasx is the name of the village of wild rice and it was located up north near Bear Lake McKenzie *supra* note 52 at 222.
Suuwiigos had a brother by the name of Tsawaas and while he was on his trapline, he was killed by the Tsi’ its’ aawit. This made Suuwiigos furious, and Suuwiigos asked for a group of people to go with him to raid the Tsi’ its’ aawit.

This group of warriors came upon a place where there is smoke coming out from the ground, and this is where the people called Luu Tsobim tsim yibit lived. The scouting party returned and Suuwiigos prepared himself to declare war with these people.

In preparation for war, Suuwiigos killed a grizzly bear. He took almost the whole hide, with the head and paws. He cleaned it, scraped all the fat off it, and then he went and got pitch from the jack pine trees, and he rubbed it on the fur of the grizzly bear. As he rubbed the pitch on the fur he also covered it with sand. Once in a while he tested this hide to see if arrows would go through it. He shot at this hide and found that it was ready.

Gyoluugyat knew that this armour was ready for him, so the war party set off again and they went to where the people of Luu Tsobim tsim yibit lived. He ordered his army to sneak up to this place, and meanwhile he draped himself in this grizzly bear skin, and he walked down to the opposite end of the village. This is where the Suuwiigos in the grizzly bear skin walked into the underground village. When the people of Luu Tsobim tsim yibit saw this grizzly bear, they tried to kill it.

They shot at the bear with all their arrows, but they did not penetrate the bear. When all their arrows were used up, the war party went underground killing them all. When this was over Suuwiigos returned to Gitan gasx.

After Suuwiigos returned to Gitan gasx he knew that he had to have a brave person to help him, as he knew that there would be more raiding. He knew this because there were still more Tsi tsa wit in other places. Suuwiigos had a lovely sister, and he wanted someone to marry her. He sent word around that he had a beautiful sister and that he wanted a brave man to marry her. So men of other villages started to come to Gitan gasx. From these men Suuwiigos did find a man among them for his sister.

One day this man came, who had heard about Suuwiigos bravery and cunning, and he also heard that he had this lovely sister who needed a husband. So he went Gyoluugyat’s House and saw Suuwiigos, and Gyoluugyat never turned. This man, whose name was Kuutkunuxws, saw Gyoluugyat laying alongside the fire putting heat on his back, so Kuutkunuxws went over to the fire.

It was Suuwiigos that he saw in Gyoluugyat’s House. Now Kuutkunuxws went and ruffled this fire, and sparks came off, and some fell on Suuwiigos’ back. He never turned, and again Kuutkunuxws made the fire flare up, and more sparks flew. Suuwiigos never moved.

So Kuutkunuxws stepped back towards the door and he stood there. This is when Suuwiigos got up with a club and he went towards Kuutkunuxws and asked him what he was doing, and Kuutkunuxws never said anything. Suuwiigos said “If you don’t tell me what you’re doing here,” he said, “I’ll club you.” He raised his club, again Kuutkunuxws never blinked, and that was

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54 Luu Tsobim tsim yibit means those who live underground. Ibid. at 223.
55 Ibid. at 224 to 225.
showing Suuwiigos that he was very brave. Suuwiigos knew too that Kuutkunuxws was a very brave man. Right there he said to Kuutkunuxws that he was a brave man and that if he wanted to marry his sister he would let her marry him. Now, these two, Suuwiigos and Kuutkunuxws, travelled together after Kuutkunuxws married Suuwiigos' sister.

While these two were looking for more of the the Tsi tsa wit they came across a big tree, and they made their camp underneath this tree. During the night they heard noises, and it was coming out from the tree that they were under. Now, Kuutkunuxws went up and to see what was making this noise on this tree, and he sees this human being, but it was a giant human being. Now, he came down and told Suuwiigos about it. Now Suuwiigos went up to see this big human being. He knocked it down and Kuutkunuxws swung it to the ground.\textsuperscript{56}

These two still travelled on, and they knew were on the heels of another group and soon they were to meet with other group of people, and that they would have a wil digitxw Kuutkunuxws and Suuwiigos thought they had met their enemies, but it was only a grizzly bear, and they shot it with their arrows. So they split the bear between them.\textsuperscript{57}

\textbf{The Adawaak of 'Neekt}\textsuperscript{58}

This is about how two brothers and their sister went up the Nass River, during the oolichan fishery. They met up with some Haidas on the Nass who wanted to marry their sister. Their sister tried to get consent from the two brothers, but they did not give their consent. The Haida Chief was in love with this girl and she wanted him take her back home to the Queen Charlotte Islands. So, eventually the Haida Chief killed the two brothers and kidnapped the woman taking her across to the Queen Charlotte Islands.\textsuperscript{59}

There she lived for a few years, but wanted to escape from the Queen Charlotte Island because every time that she had a male child the Haida Chief (her husband) would kill it. This happened twice. The third time she had a baby it was again a male. The mother was scared because eventually the child would be killed.\textsuperscript{60} She was told to behead the Haida Chief one evening and have a canoe ready.

As the boy was growing older, the mother was scared as she hid the fact that her child was a boy by taking a long strand of her hair and tying the little boy's penis right around the back so he looked like a girl.

The woman beheaded her husband the Haida Chief and in the night mother and son fled. They used the canoe that she had readied, and they fled across towards Prince Rupert, the mouth of the Xsan.

\textsuperscript{56} This is why the crest of the supernatural giant human is shared by these huwilp. \textit{Ibid.} at 225.
\textsuperscript{57} Kuutkunuxws and Suuwiigos, besides splitting the bear, they split the crest of the bear.
\textsuperscript{58} The Adawaak of 'Neekt was related to court by Glen Williams. G. Williams, Proceedings at Trial (1988) vol. 105 May 30 at 6649 to 6651. [Williams].
\textsuperscript{59} Williams \textit{supra} note 58 at 6649.
\textsuperscript{60} The Haidas were afraid that when male children grew up they would be very fierce and seek revenge against the community. So the mother planned with the assistance of an elderly woman in that community, to escape. \textit{Ibid.} at 6650.
The Haidas were in chase, and as she going across the ocean her son was crying and crying and the mother was paddling. In order to quiet the boy she used the tongue from the boy’s beheaded father as a soother. As she was getting near the mouth of the Xsan they became lost, and a bear on the shore in a song told them which way to go.

They missed the mouth of the Xsan because of all the mist, and they went right up to the Nass River. They stayed at Kincolthas and at different villages along the Nass River, and eventually ended up at New Aiyansh. As the boy grew up, she told the history of what had happened to them, but all the other younger boys made fun of him because he had sucked his dead father’s tongue, his name was ‘Neekt’.

He grew up to be really fierce. He was very angry and he started killing people. He and his mother eventually found their way back down to the Village of Gitwangak. The people of Gitwangak had been warring with the Haisla people, and they were also expecting retaliation from the Haidas.

At Battle Hill, about five miles from Gitwangak, they built a fort. They built a palisade around it, and they had five houses on top. And they rolled big logs up there surrounded them with branches, so when the attack came they could just cut the ropes and let the logs roll down. They killed all the Haidas.

**The Second Adawaak of Sindihl**

The Ts ‘its’aawit declared war on the Gitan ‘yaaw people and they killed most of the people. After the war there was just a few people left alive, and what they did is they gathered at one place and made a village at one place, and there was just a few left, and this is why it is known as Gitwinhlgur’t. There was a man from Gitsegukla and he married to a Gitan ‘yaaw woman. One day the women from Gitan ‘yaaw went towards the Gitan ‘yaaw Lake to preserve moose hides in order to make their clothing. While the women were doing this the Ts ‘its’aawit killed most of the villagers off.

The women heard the commotion outside the camp and she knew what the Ts ‘its’aawit were doing, so she ran and she ran as fast as she could, but one of the Ts ‘its’aawit warriors saw her running away, so he ran after her, and just when she was getting to the other side of the Lake, this Ts ‘its’aawit shot her with an arrow, and she died instantly.

**The Second Adawaak of ‘Neekt’**

At one time they had a war with the Ts ‘its’aawit people. One time they came upon the village of Gitan ‘yaaw, and they raided the village. After they killed most of the most of the men there, they kidnapped the women and children. Only the old men were left in the village.

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61 When the boy grew up his name was ‘Neekt, which means tongue-licked. *Ibid.* at 6651.


63 As a man from Gitsegukla had married the woman from Gitan ‘yaaw, the two villages were allied. *Ibid.* at 5902.

64 The Second Adawaak of ‘Neekt was related to the court by Stanley Williams. S. Williams, Commissioned Evidence, (1988) vol. 2 April 18 at 149 to 151 [Williams].
The old men that were left after the Ts 'its 'aawit took the women and children went towards Gitwingax. When they got to the village of Gitwingax, they told what had happened. They took out the bravest warriors there, 'Naa gel gaa and 'Neekt were the brave warriors from Gitwingax. The nephews of 'Naa gel gaa and 'Neekt were also brave warriors.

The men from Gitan 'yaaw also went to Gitsegukla and they took out the bravest warriors from there, which was 'Yagaa deets and Xsuu, and they also gathered their nephews who were also brave and they were quite young. 'Yagaa deets, 'Naa gel gaa, 'Neekt and 'Naa gel gaa, they all went with the Kitwancool men towards Kitwancool and the next day they went off to have war with the Ts 'its 'aawit. Before they went all of the warriors prepared themselves.

They went towards Gitan 'yaaw and then they went past Gitan 'yaaw to the lake, Mezziaden Lake, and 'Naa gel gaa sent about two young warriors to see where the Ts 'its 'aawit were.

The young warriors from the war party got to the other side of the lake and they saw smoke coming from the other side of the lake. They then ran on the ice like wolves.

There was an elder called Ginii glai from the Ts 'its 'aawit, who was a Halayt, he had powers, and he told his people that the Gitxsan warriors were coming. The younger Ts 'its 'aawit laughed at the old Halayt, telling him, "Why would they come here? What would they want here?"

The young warriors turned back to their camp along the banks of the Xsi Txemsem and they told the others where the Ts 'its 'aawit had camped out. They prepared to go, and they did go until late in the day and it was night when they got to the camp of the Ts 'its 'aawit. All of the Ts 'its 'aawit were sleeping. There were a lot of Ts 'its 'aawit and there were a lot of the Gitxsan people. The warriors soon surrounded the camp of the Ts 'its 'aawit people. The leaders were 'Naa gel gaa, Xsuu, 'Yagaa deets, 'Neekt. They told these young warriors what to do.

They used their spears and some of them used their bow and arrows, and they killed all the Ts 'its 'aawit. Some of them were still sleeping when they had the spear through their chests, and some of them still had their legs up.

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65 The Ts 'its 'aawit people were nomads, they never had a village or any one place, they just kept travelling on and on. Where they were depended on where they would make a kill. At these places, the Ts 'its 'aawit would live until they have eaten whatever they killed, and then they would move on, and they kept doing this. If they made a big kill at one spot they would live there for a time, for a number of days. Williams supra note 64 at 148.

66 Kitwancool is also known as Gitanyow. Ibid. at 147.

67 Sisatxw is a set of rituals that warriors undertake to ready themselves for battle, and warriors do not drink water. Ibid. at 148.

68 They live on the banks of Xsi Txemsem. Ibid. at 149.

69 According to Mary McKenzie, a Halayt has the ability to see into future events. M. McKenzie, Proceedings at Trial, (1987) vol. 7 May 20 at 389 to 392.

70 There spears are made from the horns of the Mountain Goat affixed on to wooden shafts. Williams supra note 64 at 148.

71 When the Gitxsan used sleep they would get two poles, stand them near the fireplace, put a pole across it and rest with their legs on it. Ibid. at 149.
The Halayt that was there knew that the Gitxsan were coming, but the Gitxsan could not kill the Halayt. Every time a Gitxsan put his spear in the heart of the Halayt and pulls it out the Halayt would just put his hand on his chest and rub it and he would be cured again. They tried to kill him and they were finally tired of trying, so ‘Yagaa deets grabbed him and Xsuu cut his head off and he threw it in the fire. They hung on to him while his head burnt in the fire, and he finally died.

Behind the camp of the Ts 'its 'aawit they found the women and children of Gitsegukla in an ice house. The Gitxsan warriors took the women and the children of the Kitwancool from this ice house, and there was one lady there that knew the language of the Ts 'its 'aawit and she told what happened to them.

At the Mezziaden Lake, ‘Yagaa deets said he would have the lower part of the lake, and Xsuu would have the upper part of the lake. They were going back to Gitsegukla and they came upon a creek, and ‘Naa gel gaa finally took a drink. He had his spear and he stood it in the creek and he said, "’Naa gel gaa."' and this creek is known as Aks naagelgaa.

After they got back to the Kitwancool village, the people of the Gitwingax and people of Gitsegukla returned home, and then after this the people of Kitwancool had a yukw called Gilt 'xega73. All the warriors were paid for helping them out.

It was close to winter and Xsuu went on the territory of Taas lax wii yip, and he was setting the dead fall traps on his territory. He came upon a bear which was hibernating up in a Hemlock tree. He saw that the top was a big hollow, and there was a bear in it as his head was sticking out. Xsuu left his bow and his arrows at the bottom of the tree, and he took his knife up on the tree to kill the bear. While he was climbing the tree to get the bear, he did not know there was some Ts 'its 'aawit, were there also. He heard something so he looked up and the Ts 'its 'aawit had surrounded him.

He got down from the tree and he took his bow and arrows and he was ready to shoot the Ts 'its 'aawit people. However, he pulled his bow too far back and the bow broke. He was then killed by the Ts 'its 'aawit people.

When ‘Yagaa deets found out that Xsuu was killed by the Ts 'its 'aawit people, he felt bad and he said, “I am not going to claim Mezziden Lake that I claimed before with Xsuu.”

The Adawaak of the Nisga’a Wiigyet74

Txemsim's sister got sick and when his sister was sick, he walked over to his sister and he told her “I know where you could get a remedy for your sickness. It is up on the swamp behind the village.” Txemsim gave his sister instructions and told her what to do when she went towards the swamp. And after he told the instructions, he went running up to the swamp himself.

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72 'Naa gel gaa, means “this is my water.” Ibid. at 150.
73 At a gil ts 'ek yukw all the warriors are paid for helping win the battle. Ibid. at 151.
74 The Nisga’a Adawaak of Wiigyet was related to the court by Stanley Williams. Williams supra note 64 at 161 to 162.
The instructions that Txemsim told his sister is “When you will get to the swamp and you will holler “haldaakxws” and then the medicine will answer you – “Ooooh.”

When Txemsim got to the swamp, he dug himself into it and he hid under the moss by the edge of the swamp. He had told his sister before, “When you get there, take all your clothes off, and you will see something sticking up, and you will sit on it and you will move back and forth.”

So this is what Txemsim’s sister did, she took her clothes off and she saw this thing sticking up and she sat on it and she moved back and forth. And not very long after that, Txemsim just got up and put his arms around the waist of his own sister.

The Adawaak of Wiigyet

Wiigyet was from Gitsilis. His sister was Gwaalaasxw and they are from the Laxskiik pteex, eagle clan. In the beginning Wiigyet was quite young and his sister was also a young woman. He was living with his own blood sister. The Saem’ogit(s) and Saem’oogit(s) came together and had a meeting. The Saem’ogits and Saem’oogit(s) were going to get a pole about two wings long and about 4 inches around, and sharpen it at both ends of this pole.

The Saem’ogit(s) and Saem’oogit(s) were going were going to take this pole and put it up the woman’s body and then dig this pole in along beside the river. The Saem’ogits(s) and Saem’oogit(s) were going to do the same to the young man. After they had done this, they were going to build a big fire and they roast them alive. After they were cooked on one side then they would turn them around, so that they would burn.

They were going to do this to the brother and sister, but there was one Saem’ogit took pity on these two young people and he told the other Saem’ogit(s) and Saem’oogit(s) “No, we should not do this. What we will do is we will take them across the river and we will put them there and we will not give them anything, any food, or anything to start a fire with. We will just leave them there. We will just leave them there until they die.”

They took them across the river and they went along the banks of the Xsan. They first went upstream, and then they travelled down and they were quite weak when they got close to the village of Gitwingax. Sakxum higookx found out about them, and he took pity on the young girl and he took her into his house.

The young man travelled on. He travelled on towards Gitsegukla, then he came upon the village and there was Gwis Gyen, Guxsan, Haakasxw, and Gwis Gyen took this young man in. Gwis Gyen held a feast and he took this young man in and he gave him the name Wiigyet.

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75 Haldaakxws refers to the medicines found in swamps. Ibid. at 162.
76 This Adawaak of Wiigyet was related to the court by Stanley Williams. Ibid. at 104 to 105
77 Laxskiik are the eagle pteex, and are from the Nass region. Ibid. at 104.
78 “Two wings long” is about two fathoms in length. Ibid. at 104.
79 The laws concerning g’aats (incest) are very strict, and if a man and woman from the same pteex marry, they would be put to death. Ibid. at 104.
80 The name of Gwaalaasxw is still in Sakxum higookx’s wilp. Ibid. at 105.
81 In the ancient times Wiigyet belonged to the Wilp of Gwis Gyen. The Wilp of Gwis Gyen had a ts’imilguudit (an adoption of adults into a wilp) and brought Txemsim into the wilp of Gwis
The Second *Adawaak of Wiigyet*[^82]

Wiigyet became very greedy over the years, and he was so greedy that he ate up everything he could see. So when he was travelling he found a man living all alone with a lot of dried swan in his *Wilp*, and Wiigyet said, "Where did you get all these swans."

The man who was alone showed him the skin of a swan. Then the man said, "I just wear this and go out on the water and catch the swans. I tie two or three feet of the swans together and bring them over to the shore."

Wiigyet because he was so greedy tied the feet of many swans together, and the swans suspected something going on because they felt something around their feet. So they all started to fly away, and they took to the air with Wiigyet in tow.

Wiigyet looked down and he was high in the sky, and if he fell he hoped that he would land on a rock. If he landed on the earth he knew he would sink down into the earth. He landed on a rock, and he nearly covered it.

He was face down, and could only move his face. His arms were stretched out and he could not move them. All the animals came and looked at him. They all listened to him ask for "Help." But, they could not help him.

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**The Adawaak of Biis hoont[^83]**

This *adawaak* begins at *Git lax an dek*. The chief of the village was *Bii lax ha*, and the brothers were *Tenimgyet* and *'Wii hloots*'. One day, fine beautiful day around the middle of August, when the women went out to pick berries, berries called *'mii k’ooxst'*[^84].

These berries grow at a place called *Tsihl Gwellii*. The women went out to pick these berries early in the morning, and picked all day, filling the *galenk*[^85]. Among the women there was a girl called *Noxs Mesxw*[^86], she was very proud, very choosy and very picky, as two of her uncles were chiefs, and her father was head chief.

On the way home this proud young lady stepped and slipped in some bear dung, which got her very angry and she started calling these bears names; she called them *naak*[^87].

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[^82]: This place is one of Wiigyet's fishing sites. M. Johnson, Proceedings at Trial (1987) vol. 12 May 28 at 759.
[^83]: The *Adawaak of Biis hoont* was related to the court by A. Mathews, Proceedings at Trial, (1988) vol. 73 March 14 at 4563 to 4577 [Mathews].
[^84]: *Mii k’ooxst* are salmon berries. Mathews *supra* note 83 at 4563.
[^85]: *Galenk* are bent boxes that are for putting berries in, and they are also used to put your memories in. *Ibid.* at 4563.
[^86]: *Noxs Mesxw* becomes *Biis hoont* after she is rescued by her brothers.
[^87]: *Naak* in Gitxsan means someone without a father or mother, and is considered to be strong language. *Ibid.* at 4564.
After saying that they continued their way home to the village. They hadn’t gone very far, and the straps of Noxs Mesxw’s boxes started breaking, and she stopped to fix them. It took sometime to fix them, and as soon as she fixed them they would break again. The other ladies saw that she needed help and they tried to help her, but she said “No, get out of here, I don’t need your help.” Nevertheless, they kept on trying to help her. This happened three times, and as it was getting towards evening, so Noxs Mesxw told the ladies “I don’t want any of your help, just go and call my brothers, they will come and get me,” which the other ladies did. Not so long after the ladies left her, Noxs Mesxw could see her two brothers coming towards her. At this time they did not look too strange, except they had bear hides across their shoulders. When her brothers met up with her she said “Oh, I’m having trouble with my back pack, can you help me.” “Oh, Yes,” they said, and quickly gobbled up all the berries and smashed the box and threw it away. Then they said “Okay, we are going home,” and they went.

They came to a village and it looked a little strange to Noxs Mesxw. The houses were all the same, but the people looked different because they all had bear skins hanging the wrong way. Anyway, her brother took her into a house. Now, Noxs Mesxw knew it was different because her father always sat at the back of the house, and here he was sitting in the middle of the house.

Later that evening Oowinjiits came to where she was sitting and tickled her. Noxs Mesxw turned around and she saw this mouse and the little mouse said “My grandmother wants to see you.”

The mouse asked Noxs Mesxw to clear away the branches and go into another house. The Grandmother said to Noxs Mesxw when she went into the other house “Take out the plugs from within your ears and throw it into the fire.” And this Grandmother Mouse told Noxs Mesxw that she had been taken by the bears because she had laughed about their bear dung. The Grandmother mouse was going to tell her what to do, otherwise her house would be wiped out, the whole village will no longer exist. So the Grandmother mouse said she should listen and do what she was told. The Grandmother mouse told the girl “Every time you use the washrooms bury it deep and put one of your bracelets, brooches or earrings on top of the dirt,” which the girl did.

Now Noxs Mesxw knew the bears took her. When she used the washroom she would put a piece of her jewellery on top of it. After she finished all the little bears would come and take her jewellery, put it on the end of a stick and start swinging it around and would say “Look, no wonder why she laughed at us, it looks better than ours.” And they all lived there all summer.

Once in awhile the chief would tell them go get some fish, which they did, and they would come back with great big strings of fish. There would be hundreds of fish on the line when they

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88 Oowinjiits is a little mouse that helps one’s and symbolizes one’s conscience. Ibid. at 4565.
89 Noxs Mesxw was actually asked to open up her ears and listen carefully to what was going to be said to her. Ibid. at 4565.
90 M. McKenzie had told the Court that the bracelets, earrings and necklaces that she wore carried the symbols of her rank of Seem’oogits. See: McKenzie supra note 46 at 216 to 217.
91 At Xsi Gwin alak (in the Wilson Creek area), during the fishing season the wilp members of Teningyet put aside salmon that the seals have eaten or are too damaged by their travels.
came back, and then the chief told the younger children “Don’t eat the skin from the fish because it will be too slippery for your stomach.”

Sometimes when they would go fishing one of them would be missing, and the chief would organize an *Oo hla daawihl saa waak’ooxst*[^92]. And this happened all summer, and some of the bears would just come back in little parts, maybe just the feet would come back, or hand, or some of them would come back whole with big holes here and there. And the chief was talking to his people, and say “You see that bear is not completed, that is because the Humans never followed the rules back in your village, they spoiled and damaged or never followed the burning of the hide.”

Towards the fall near the end of September, early October, the Chief of the Bears put on a big feast, to marry *Noxs Mesxw* because they were getting ready to hibernate. So the Chief put on a big feast. After all the witnesses had spoken the Chief said “*Naa loosim dim ant nekxsw hlgwuulxw ‘y,* my daughter, *Noxs mesxw*[^93].” One bear volunteered, and jumped up, and said “I will marry her,” and the Chief said, “Where are you going to stay with her, which part of the country, where?”

The Bears said, “At the bank, the bank of the river.” “No,” the Chief of the Bears said, “No, because *Mesxw*[^94] is going to find her.” Right away these Bears knew that *Mesxw* was one day going to find her. The Chief kept asking and then telling every one that they could not marry her because *Mesxw* would find her.

Finally one Bear in the back said, an old bear sitting here taking care of his wounds which he collected all summer, a big grizzly, he said “My grandmother” as he poured hot pits from the fire onto some crack on one of his foot all the time jumping around on the bank saying “Oh, oh”, because the pits would burn on his foot. Then he said “I will marry her.”

And the Chief of the Bears asked, “Where are you going to stay with her, where are you going to live, which part of the country.” “Oh,” he said, “I’m going to take her up *Win laax lislixswhl anuhl*[^95].”

The Chief of the Bears said “Okay, you have her because *Mesxw* will have a tough time trying to find her there.”

Then all of the Bears got up from the Feast and they all departed from the village. As they travelled, couples would drop off here, there, here, there, until the Bear and *Noxs Mesxw* were the last two to keep on going. They were going to this place called *Win laax lislixswhl anuhl*.  

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[^92]: *Oo hla daawihl saa waak’ooxst* refers to when somebody dies and is cremated, as instructed by the *Adawaak of Waa k’ooxs*. They say when somebody dies it means he has gone to another world. *Ibid.* at 4566.

[^93]: *Naa loosim dim ant nekxsw hlgwuulxw ‘y* means “who is going to marry my daughter, *Noxs Mesxw*.” *Ibid.* at 4567


[^95]: The place called *Win laax lislixswhl anuhl* is where the slides come down on both sides of the mountain. This mountain is shaped like a satellite dish. Sound or movement is amplified at this place. *Ibid.* at 4568.
When they got there the big Bear, grizzly Bear, told her to go and get some bows for their mattress and for bedding. The lady knew for humans, but not for bears. She went and got the softest parts of the bow, collected them and put them down nicely. But, this big guy grabbed them and threw them all out and said “This is no good, it does not work, it is not good, it is too hard, and you get bruises on it, just imagine if you sleep on this all winter, you will get bruises all over.”

He went out and showed her. He went out and got great big tops of the trees and put them there, and the girl said when he came home that it is just as soft as anything that she did, the branches were off the ground just like natural spring mattress. And they prepared to sleep for the winter.

Before they started to sleep for the winter he said, “every time you get hungry just to say “I am hungry, and I want to eat,” or just say, “I will have some pieces.” The Bear said to her, “I will pull some food out of my back pocket and give it to you.”

And meanwhile back at the village the Git lax an dek' people were looking for her, and they found the place where the ladies had said where they had left her. The ladies had told the search party what had happened. The search party saw that there were bear tracks beside human tracks, and they knew that their sister had been taken by the bears. They went home that winter. The oldest brother started a sisatxw.96

When the oldest brother did the sisatxw, he cheated. He slept with his wife and had sex with her, so when he went up to look for his sister, he would never find the path. Every time he came close to the dens, and the big bear, he would put his finger his mouth to test the wind, and the wind pointed him to another direction. He could not get close to the bear dens at Win laax listisxwihil anuhl.

The second brother followed sisatxw ritual carefully, and the only mistake he made was when he had to eat the woo ’uumst.97 His mistake was not that his woo ’uumst(s) were of all different lengths. He peeled the ends, and ate it, and he light the bark that was left and inhaled the smoke from the burning bark. As he inhaled the smoke he would call for the Bear, “Eh.”

The smoke for the woo ’uumst bark travelled up towards the Bear den. When he did that the smoke of what he did went into the bear den, and this big bear fan it out.

The Bear knew that the brother was trying to perform the sisatxw, so he did the same thing. However, the second brother cheated and was getting too sick over this stuff, so he cut some of the woo ’uumst short. So when he got close to the bear den, the big bear would stick his finger in his mouth and point him out the way.

96 Sisatxw is a purification ritual for hunters, as well as warriors. Ibid, at 4569.
97 With woo ’uumst one must peel the outside bark off, and eat the inside. They would take the outside peel and then burn it where the thorns are. One cannot eat this in the summertime as it is poisonous at this time. Ibid, at 4569.
When the baby brother, *Tsilim tk’iiwen*²⁸, was preparing his *sisatxw*, he did do everything right. He went to the *guxw uutxw*²⁹ for the right amount of days and his *woo ’uumst* was all of the right lengths, and the smoke went in the right directions.

And when the youngest brother was doing the *sisatxw*, he would spit some of the juice from the *woo ’uumst* into the mouth of the dog, so both the dog and the man were now *sisatxw*.

When he inhaled the smoke from the *woo ’uumst bark*, he puffed it out and it came out as arrows that stuck in the ground fast at the back end of the Bear’s den. The big bear could not pull them out. The Bear den was filling up with *hla mitxw hli set*³⁰.

As their den was filling up with *hla mitxw hli set*, *Nax nogam lik’I’nsxw*, the big grizzly, started to teach his wife what he would do. He knew that the hunter, *Tsilim tk’iiwen* was going to come now, so he started to show *Biis hoont*³¹ what the people back in her village were doing. He would just point at a wall and show her saying “See this is what they are doing here, see the mistakes they are making.” And he taught *Biis hoont* the song to sing when he was dying. He also taught her the song that she should sing after he had died. He taught her not to burn his hide after they had killed him. He wanted his hide left intact. She was to just skin him and not to put it on the ground, or get it dirty in any way. He didn’t want any part of his hide dirty³².

He also told his wife, *Biis hoont*, “When you are carrying me home, and you are tired, put this hide over you, but tell your brother not to look back but look straight ahead.” This is what *Nax nogam lik’I’nsxw* told his wife *Biis hoont*³³.

Meanwhile, her young brother, *Tsilim tk’iiwen*, was coming. He started off early, he knew that all the hunting signs were all there. First he saw the chickadees³⁴. Also, *Gaak*, the crow³⁵. All the signs were there, and he kept going until he was at the foot of *Win laax lislisxwhl anuhl*. His sister could see him coming way over and *Biis hoont* started hollering and screaming. Her brother could not hear her as she was still with the Bears, and so he kept walking and noticed that the chickadees and *Gaak* was still with him.

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²⁸ This name, at the time of the trial, is held by R. Morgan’s young boy and he was adopted into the *wilp* of *Tenimgyet* through G. Brown. This name means “if you are inside the bear den the bear’s paws come ahead of the body. *Ibid.* at 4569.
²⁹ *Guxw uutxw* is the name for steam bath. *Ibid.* at 4569.
³⁰ This means filling up with smoke. *Ibid.* at 4569.
³¹ After *Noks Nesxw* slept with her Bear Husband, and became pregnant, she was known as *Biis hoont*. *Ibid.* at 4570.
³² The bear was telling *Biis hoont* that you must always respect other people, and you should never say anything that is disrespectful of others. *Ibid.* at 4572.
³⁴ When one is going hunting, especially for a big grizzly bear, and if the chickadees come from ahead of you and sit behind you, one goes straight ahead. If the chickadees come from whatever any direction, one will make the kill for the opposite direction and that is the direction that one will make a kill. *Ibid.* at 4571.
³⁵ If the crow just flies over you, and does not say anything, and one hears just the wing beat, one knows for certain that the kill will come soon. *Ibid.* at 4573.
At the foot of *Win laax lislxwəhl anuhl* he stopped. There his sister ground some soft snow round into a ball and she put her fingerprints and hand marks on it and dropped it down the mountain. It rolled down and landed right on his snowshoes. He picked it up and let his dog sniff it. The dog just made one bark and started wagging his tail. He knew his master was up there.

The dog knew that *Biis hoont* was up there. He started wagging his tail and jumping and barking, and started to go up the mountain.

The brother started to go up. All the instructions were there, his sister was in the cave. *Tsilim tk'iiwen* came right to the mouth of the den and his sister poked her head through the cave and said, “Just wait. Just wait here. Don’t do anything. Just wait.” She went back in. Not long after the brother heard her sister’s little cubs being born. He could hear the cubs. Then she handed them out to him one by one. There were two cubs. And she told her brother the instructions that were to be carried out after *Nax nogam lik'I' nsxw* had been killed.

*Biiis hoont* said “Do not kill him yet. Do not do anything. Let him come out. Come out of the cave.” Which he did, and then they killed him outside the cave. And when he was dying, the woman sang the dirge song that he had taught her, and after that, they put his body on these hemlock branches that they had prepared to lay the body on after they killed him. They dressed his body on these branches so that they could keep his body off the ground, not to get it dirty.

It was after that they started their way down the mountain, back to their village. The way down was pretty steep, and *Biis hoont* had just given birth to these two cubs. She said to her brother, “Do not look back. Just go straight ahead, whatever, here, anything. Look straight ahead. Do not turn back. Do not look back.”

When they were descending from this cave, *Biis hoont* put this hide on and she walked down perfectly without slipping. When she did this, her brother heard a big grizzly. But he kept going straight ahead. He could hear this grizzly behind him, but he knew not to turn around, but to walk on straight ahead. When they came to the edge of the village, that is when *Biis hoont* sang the other bear song.

*Biis hoont*’s father who was missing her came running up and greeted her meeting her. She handed him his grandchildren the two bear cubs. The big grizzly had instructed *Biis hoont* when they had arrived at her village to put up an *an bax* pole for the cubs to play on. And these little bears, as they grew a little older they would run up and down this *an bax*. Now every time these little bears would run up the *an bax*, they would see outside on the great big *haahl daax*.

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106 The Bears have told the Gitxsan that the hunters must never kill anybody inside a den, or bears will never have cubs. *Ibid.* at 4575.
107 When she put on her husband’s skin she would turn into a grizzly bear – *Tenimgyet*. *Ibid.* at 4575.
108 When someone has killed a bear they will sing a song as they walk into the village. If they have killed a male, they sing *hiilee* in the song, and if it is a female bear, they sing *oolee*. *Ibid.* at 4575.
109 Whenever the *wilp* of *Tenimgyet* sets up camp they are instructed to set up this pole, *an bax*. *Ibid.* at 4575.
110 *Haahl daax* is the name for mountains. *Ibid.* at 4576.
All this time when Biis hoont was captured and held by the bears there was no food in the village, there was almost a famine in the village. They had nothing. Even the fish disappeared. This was just as the Grandmother Oowinjiits had told her would happen\textsuperscript{111}.

These little bear cubs would climb the an bax and see little puffs of smoke along the sides of the mountains. They would point at them and say, "There is my grandfather's smoke, my grandfather's." The hunters would go and find the bears in their dens. These little bears would know exactly where the bear dens were.

When these little cubs were growing and they were getting bigger and bigger they got meaner and meaner so the mother Biis hoont started her own village, because these cubs could not get along with the other villagers. So Biis hoont started her village at this place called Galtsaps Biis hoont.

Even when Biis hoont had her village here, the bear cubs still could not get along with the villagers so eventually they had to get rid of the bear cubs. So Biis hoont moved to Bii Lax ha on the Lax lilbax and in summertime the bear cubs would come to Biis hoont's village to set their T'\textsuperscript{in}\textsuperscript{112} to trap sockeye.

They would make the T'\textsuperscript{in} out of poles that had been carved with human images, and they were set up across the stream. So the carved poles stretched across this creek. One night, this creek was small, and for some reason or another the river came up tremendously overnight, and the pressure of the river going through these poles made them shake, and the people who were living here left the village overnight thinking that it was an animal or some warriors that had come to attack them. They went that night and camped right at the mouth of Tsihl Gwelli.

In the morning they decided to leave Tsihl Gwelli for awhile and go to where they knew their brothers were living. One was at Gwin ixstaat and the one was at Angol hon. So Bii Lax ha, Biis hoont, Hatee decided to go here. Spookw went all the way to Hagwilget. 'Nii Algyax went down to Kalum. And 'Niis 'yook' went to the Nass, and Bii Lax ha, Biis hoont went with their brother to Gwin ixstaat\textsuperscript{113}.

\textbf{The Adawaak of Malii}\textsuperscript{114}

A mother grizzly bear was crossing the river with her two baby bear cubs right around her ears at a place called Gitangwelkw. The mother grizzly bear was trying to cross the river, and while she was swimming across the river one of the cubs fell off and drowned and she started crying. Meanwhile two hunters in the wilp of Malii were watching and as the mother bear came to the shore, they killed her. They killed the grizzly bear, and then they made the song, the lament song.

\textsuperscript{111} If Biis hoont followed the mouse's directions, everything would come back once she was recaptured. \textit{Ibid.} at 4567.
\textsuperscript{112} \textit{T'\textsuperscript{in}} is a fish trap. \textit{Ibid.} at 4582.
\textsuperscript{113} \textit{Ibid.} at 4582.
\textsuperscript{114} \textit{The Adawaak of Malii} was related to the Court by Glen Williams. G. Williams, Proceedings at Trial, (1988) vol. \textbf{10} at ***.??
The Adawaak of ‘Wiihloots’

‘Wiihloots’ and his brother Galaa’uu lived at the big village An gol hon and their brother, Tenimgyet lived at Xsi win ixstaat. All of them originated, from Tsihl Gwellii, from Git lax an dek’, and from time to time they remembered the vast amount of many caribou that came through the Tsihl Gwellii area116. At the time there was hardly any meat available, only fish available though Galaa’uu had a great big t’in, fish trap.

Though they had lots of fishing they did not have any meat. As they knew their territory really well, they remembered the caribou that came through Tsihl Gwellii. So the brothers set off from An gol hon past Xsi win ixstaat. They took the trail from Tsim ts’itixs.

They followed this trail to the top end of their territory coming from An gol hon to Tsihl Gwellii. When they got there, there were not a lot of caribou, but they killed one Wijix at place called Ts’imaakh gan k’ok’117. That is where they picked up this Wijix, and they chased it down to the flats just at the head of the swamp area called Laalaxoo just above Git axsol.

The brothers had both shot one arrow at the same time and both of the arrows killed the Wijix. When they got to the dead Wijix caribou the brothers fought over the dead animal. It ended up that Galaa’uu killed ‘Wii hloots’ over the Wijix118.

Galaa’uu was trying to decide if he should hide the body of his brother when this raven flew over and sat beside him and started cawing, telling the world of his kill119. It was only then that Galaa’uu started to grieve when he saw that Gaak was coming. Gaak came, flew over him and sat right close and started cawing. It was only when Gaak started to caw, that Galaa’uu composed a limx oo’y120. After he did that, he cremated his brother there, ‘Wii hloots’, and turned around and went back An gol hon.

This caused a curse to fall on Galaa’uu and ‘Wii hloots’ House for the laws of sharing were broken because the brothers fought and ‘Wii hloots’ was killed over food. So when Galaa’uu went back all his t’in were empty. He couldn’t catch any fish. He couldn’t hunt for anything. It caused a famine on his House. Though he was a proud man, he went by his brother’s house at Xsi gwin ixst’aat to see if there were any fish for him there121. Nevertheless, Galaa’uu went up, left Xsi gwin ixst’aat, went along the river and came to a place we call Tsim ts’itixs.

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115 The Adawaak of ‘Wii hloots’ was related to the courts by Arthur Mathews. Mathews supra note 75 at 4581 to 4584 & A. Mathews, Proceedings at Trial, (1988) vol. 74 March 15 at 4548 to 4605.
116 Mathews supra note 115 at 4583.
117 The Wijix or caribou was killed at a place called Ts’imaakh gan k’ok’, which means mouth of the snare. Mathews supra note 107 at 4583.
118 Ibid. at 4584.
119 Mathews supra note 75 at 4573.
120 Mathews supra note 107 at 4587.
121 At Xsi gwin ixst’aat, where Tenimgyet lived, all fishing sites are placed at strategic points as a first line of defence if there is a war coming up from down on the coast. They always place a watchman looking down the river. They had no fear from upriver because that was where their friends and relatives lived. Ibid. at 4589.
Galaa 'uu took this route, went up around the height of land, and came to a creek we call Xsi gwin biyoosxw. He went alone with his mother. He was heading towards where he knew a bear den was at a place called Xsi gan ts'elhlxwit on the mountain Haahl daax.

All they could find was a root from a fern that is like a potato. They were very hungry and they could roast these roots, they knew there was an abundance of them along this luu lax saaxsit. After they set up camp, his mother and he went to get some of this ax. When they got back, they dig a pit, and lined it with rocks to roast this ax122. They were running out of all their provisions and the only thing they had left was just a tiny piece of dried salmon eggs, called am sk'iik'.

He left his mother at the camp and he went towards the bear dens. He knew his mother was dying so he hurried to where he knew there were bears. He found a bear sleeping. He killed it and quickly peeled and dressed the bear. However, when he got back to his camp at their camp at Yagua Loobit123, his mother was dead. She was still holding a roasting stick in her hand. He then cremated his mother there.

He cremated his mother, her heart and her liver. He fulfilled his obligations to her. He went back to where he had killed the bear and dried the rest of the bear and went back to Xsi gwin ixst'aat, along the same route. He then told his brother Tenimgyet what had happened and what he did to their brother, ‘Wii hloots’. The brothers amalgamated the houses together, and Tenimgyet became the head chief124.

**The Adawaak of Hawaaw**125

And this Hawaaw' was terrorizing and devouring people. News of it came up the Xsan from Git haahl miilik126 Soon after it was told that it coming up, the Hawaaw' arrived, and came to Xsi gwin ixst'aat127. This Hawaaw' came to the same place to where our Great-grandmother was living. She had left the house early one morning and went to sit on the edge of the Xsi gwina k'ohlxw. Our Great-grandmother started to cry as she remembered all of our ancestors that had gone, her name was Lax oo'128.

Lax oo' was crying remembering the ancestors, as she was crying this Hawaaw' let out one terrible scream that all the people at that village of Xsi gwin ixst'aat heard, and when they went out to investigate what had happened. They found Lax oo' had been devoured by this Hawaaw'. Only Lax oo's ankles were left on the shore. And from that they knew that something had happened because they found the footprints from this beast, the Hawaaw'.

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122 Ibid. at 4592.
123 Ibid. at 4595.
124 The name Galaa 'uu is never used as it has a curse on it, and the name ‘Wii Hloots’ has been moved down as it has lost power because of what the brothers did. Ibid. at 4596.
125 A. Mathews, Proceeding at Trial, (1988) vol. 76 March at 4730 to 4733 [Mathews].
126 The Hawaaw' came up the Xsan (Skeena River) from Git haahl miilik (Bella Coola). Mathews supra note 125 at 4730.
127 Xsi gwin ixst'aat is a name of an ancient village were the wilp of Tenimgyet lived at the time when the Hawaaw' came to the Xsan. Ibid. at 4730.
128 Their grandmother’s name was Lax oo’, meaning eyebrow. Ibid. at 4732.
The people quickly gathered the rest of the village and their dogs, and they went out after this Hawaaw'. The dogs picked up the scent quickly, and some of the people jumped in the canoes because they didn't know where it was but knew that the dogs were going to chase it down. The dogs picked up the scent and chased this Hawaaw' down towards the river by the fishing site called Gwin Gibuus\textsuperscript{129}.

There, some of our warriors were ready and pierced the body of the Hawaaw' with their arrows killing it. The warriors opened it up to investigate, and they found inside, lodged inside the stomach of this Hawaaw' some pearl earrings, and they knew these earrings knew were from a high prince as they saw the markings on them on these abalone shells. The warriors knew that this Hawaaw' had devoured a high prince from beyond the coast. The warriors composed a song, Limx Hawaaw\textsuperscript{130}.

\textsuperscript{129} It is at the fishing site, Gwin Gibuus eels are caught. \textit{Ibid.} at 4732.
\textsuperscript{130} After the Hawaaw' had been killed by the warriors, they composed Limx Hawaaw', a paddle song. This song is owned by the Wilp of Tenimgyet. \textit{Ibid.} at 4733.
Appendix Two

A Reconciliation Agreement
Between
Her Majesty The Queen
In Right of British Columbia
And
The Hereditary Chiefs of the Gitxsan

WHEREAS the Province of British Columbia suspended treaty negotiations with the Gitxsan Hereditary Chiefs on February 1, 1996 pending the Supreme Court of Canada decision in Delgam’Uukw v. The Queen;

AND WHEREAS the Supreme Court of Canada rendered its judgment in Delgam’Uukw v. The Queen on December 11, 1997,

AND WHEREAS the Parties to the Agreement wish to pursue the approach recommended by the Supreme Court of Canada in Delgam’Uukw:

THE PARTIES AGREE AS FOLLOWS:

General

1. This Agreement is without prejudice to:

b) any aboriginal rights, aboriginal title or aboriginal interest of the Gitxsan;

c) any legal or equitable interest of either Party;

d) any interest subsequently recognized or acquired pursuant to a treaty by either Party; and

e) any agreement, position, or action which either Party may pursue in litigation or otherwise.

2. The discussion and implementation of this Agreement and associated agreements is a priority for the Parties, and each Party will take reasonable steps to ensure that it has the necessary commitment, human and financial resources in place to discuss and implement this Agreement and associated agreements.

3. British Columbia and the Gitxsan will make best efforts to negotiate and finalize a contribution agreement by October 31, 1998 to assist the Gitxsan to prepare and participate in the discussion and implementation of this Agreement and associated agreements.

4. The Parties agree to cooperate in attempting to ensure that the government of Canada, in fulfilment of its lawful and fiduciary obligations to the Gitxsan, financially supports and participates in activities resulting from this Agreement and associated agreements, where appropriate and applicable.

5. The Parties agree to involve local government, local communities and local Crown land tenure holders in bilateral discussions and initiatives, where appropriate and applicable.
BC Gitxsan Bilateral Issues

6. The Parties agree to begin discussions on bilateral matters, including the following:

a) Gitxsan participation in regional and wildlife and wildlife habitat management;
b) forestry, to include at least the following subject matter:
   - development of a Gitxsan/MOT forestry consultation protocol, including
     Traditional Use Studies and Landscape Unit Plans;
c) Gitxsan participation in a Northwest First Nation Resources Officer
   training/implementation initiative;
d) respective understanding and mutual obligations flowing out of the Delgam Uukw
   decision;
e) Consultation on mining and petroleum development;
f) Gitxsan economic opportunities;
g) Gitxsan human resource social services, and
h) Other subjects, as agreed by the Parties

7. The Parties agree to establish a Xsu'wii'ax Table for the discussion of bilateral matters
   including the following:

a) consultation regarding forest development in the Bear Lake area;
b) training initiatives for Gitxsan in the Bear Lake area;
c) economic opportunities, including forestry initiatives, for Gitxsan in the Bear Lake area;
and
d) access issues in the Bear Lake area.

Canada-Gitxsan Bilateral Issues

8. The Parties acknowledge that Canada has the primary responsibility with respect to
   certain bilateral matters, including the following:

a) fisheries;
b) capacity-building; and
c) compensation.

9. The Parties agree to cooperate to attempt to ensure that Canada addresses Canada-
   Gitxsan bilateral issues, including those set out in 8, a), b) and c) above.

BC-Canada-Gitxsan Tri-partite Issues

10. Subject to Canada’s agreement, the Parties agree to resume tri-partite discussions on the
    following matters:

a) tri-partite matters set out in the Gitxsan Framework Agreement, dated July 13, 1995,
   including the following:

   i) governance, including health, social services, administration of justice, policing and
corrections;

ii) fiscal arrangements, including financial benefits, resources royalty sharing, taxation and administration;

iii) ownership and jurisdiction over lands and resources;

b) other matters, including:

iv) Canada's approach to compensation; and

v) other subjects, as agreed by the Parties.

11. The Parties agree to cooperate to attempt to ensure that Canada agrees to resume discussions on the matters set out in section 10 above.
Appendix Three

July 2, 1998

A COOPERATIVE AGREEMENT TO PLAN AND MANAGE FOREST USE

BETWEEN:

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTRY OF FORESTS

(hereinafter referred to as the “Ministry”)

OF THE FIRST PART

AND:

HOUSES OF THE GITXSAN AS REPRESENTED BY THEIR CHIEFS

(hereinafter referred to as the “Gitxsan”)

OF THE SECOND PART

(hereinafter referred to as the “Parties”)

WHEREAS:

A. the Parties wish to cooperate in good faith in the planning and management of forest use within the area identified by the Ministry as the Kispiox Forest district, and identified by the Gitxsan as part of its House Territories;

B. the Gitxsan have certain unextinguished aboriginal rights and aboriginal title;

NOW THEREFORE the Parties agree as follows:

1. Definitions

1.1. “Agreement Area” means the area that is outlined on the map attached as Schedule “A” to this Agreement

1.2. “House” means a Gitxsan House whose authority is derived from the Gitxsan social, cultural and political institutions that had been established for some time within a defined area in 1846 and which now holds the aboriginal right and aboriginal title in parts of the Agreement Area. A list of Gitxsan Houses is set out in Schedule “B” of this Agreement.

1.3. “Chief” means the Head Chief of each Gitxsan House.

1.4. “Ayuuk” means the Gitxsan laws that govern the relationship among Gitxsan people, and between Gitxsan people and other people, other living things and the land.

1.5. “Forest Use” means the consumptive and non-consumptive use of all forest resources for which the Ministry has responsibility including, but not limited to, responsibilities
under the Ministry of Forests Act, the Forest Act, the Forest Practices Code of British Columbia Act and the Range Act.

1.6. “Consensus” means a structured deliberate process which collaboratively seeks an outcome that accommodates, rather than compromises, the interests of all concerned.

2. Area of Application

2.1. This Agreement applies throughout the Agreement Area.

2.2. This Agreement should not be construed as recognition by the Ministry or the Province of the Gitxsan territorial boundaries or of any other aboriginal peoples’ territorial boundaries within the Agreement Area.

3. Purpose

3.1. The Parties enter into this Agreement to achieve the following purposes:

3.1.1.1. discharge of the Ministry’s legal obligation to the Gitxsan Houses,

3.1.1.2. resource planning,

3.2. To establish an Administrative Committee to monitor the implementation and funding of this Agreement.

3.3. To provide a framework and process to ensure the opportunity for continuing communication, consultation and co-operation between the Parties.

4. Without Prejudice

4.1. This Agreement is without prejudice to the aboriginal rights, aboriginal title or aboriginal interests of the Gitxsan. It is without prejudice to any legal or equitable interests of the Gitxsan or the Province, or any interest which either party may have recognized or may acquire pursuant to any treaty. It is without prejudice to any position either party may have taken or may take in any litigation.

5. Aboriginal Rights and Aboriginal Title

5.1. This Agreement is intended, among other things, to implement the 1996 Supreme Court of Canada decisions on aboriginal rights (R. v. Van der Peet, R. v. N.T.C. Smokehouse and R. v. Gladstone) and the 1997 Supreme Court of Canada decision on aboriginal title (Delgam’uukw v. the Queen) within the Agreement Area and is based on the following principles:

5.1.1. Gitxsan aboriginal rights and title are exercised solely by the House and by Gitxsan House Members.

5.1.2. On each House territory, Gitxsan aboriginal rights and title are exercised solely by the House responsible for that territory, subject to Gitxsan ayuuk,

5.1.3. Each house has the right, subject to Gitxsan ayuuk, to exercise its aboriginal rights and title on the territories and fishing sites for which it is responsible,

5.1.4. The decisions of each House with respect to its aboriginal rights and title shall be made known through the Chief of that House or through a person designated by him or her,

5.1.5. The exercise of each House’s aboriginal right and title requires, but is not limited to, the conservation of sufficient habitat for those plants and animals on its territories and on other territories and other lands as required, to enable the House to
fully exercise its aboriginal rights and title to hunt, fish, trap, harvest timber, gather plants and other resources and conduct other practices on its territories over both the long and short term,

5.1.6. The exercise of each House’s aboriginal rights and title requires, but is not limited to, the preservation of all cabins sites, village sites, grave sites, trails, resource gathering sites, spiritual sites that the House requires to exercise its aboriginal rights and title to hunt, fish, trap, harvest timber, gather plants and other resources and to conduct other practices on its territories over both the long and short term,

5.1.7. Where the Parties cannot agree that a proposed forest use will enable animals, plants or animal and plant habitat to be conserved as required by Section 6.15 or will enable sites to be preserved as required by Section 6.16, the proposed forest use shall be deferred or rejected, pending the exhaustion of the dispute resolution process under Section 12.

6. Infringement

6.1. The Ministry shall not infringe on any House’s exercise of its aboriginal rights or authorize any such infringement except to the extent necessary for the purposes of conservation or public safety.

6.2. The Ministry shall not infringe on any House’s exercise of its aboriginal title or authorize any such infringement except to the extent necessary to meet a compelling and substantive legislative objective, being one which is directed to either one of the purpose underlying the recognition and affirmation of aboriginal rights by section 35(1) of the Constitution Act, namely:

6.2.1. the recognition of the prior occupation of North America by aboriginal peoples; or

6.2.2. the reconciliation of aboriginal prior occupation with the assertion of sovereignty of the Crown.

6.3. If a Gitxsan House determines that a proposed forest use will infringe on the exercise of its aboriginal rights and title without its consent and contrary to this Agreement, the proposed forest use shall be referred to the dispute resolution process under s. 12.

6.4. In cases where aboriginal title is infringed, the level of compensation required for the Ministry to meet the Provincial Crown’s fiduciary duty obligation to the House will be determined by negotiation between the Ministry and the House or, in the case of disagreement, by reference to the dispute resolution process under s. 12.

7. Consultation

7.1. To facilitate the consultation process, the Parties shall develop a plan and timetable to assign specific House territories or groups of territories to specific Landscape Units and to integrate the boundaries of Gitxsan and Ministry management units.

7.2. At each consultation session the Ministry and each Gitxsan House or group of Houses will plan forest use activities on a territory or group of territories that will allow for each House’s aboriginal right to choose to what ends each piece of land in its territory will be put.

7.3. The fiduciary obligation of the province to reflect the prior aboriginal title interest of each House when it allocates resources to others will be exercised by the Ministry by consulting with the relevant Gitxsan Houses on the Chief Forester’s determination of the
Allowable Annual Cut in the forest management area which covers the Houses' territories, the apportionment of that cut by the Minister and on the allocation of the apportionment to third party forest tenures.

7.4. Each consultation between a Gitxsan House and the Ministry will be at one of the four categories as follows:

7.4.1. Mere consultation shall be required if the Forest Use proposed by the Ministry will not disturb the soil, change plant and animal habitat under s. 5.1.5, change the quantity, quality or location of streams, change the existing means of access to the territory or to preclude future economic and educational activities by the House.

7.4.2. Deeper consultation shall be required if the Forest Use proposed by the Ministry will result in less than ten per cent of the territory area being cumulatively subject to soil disturbance, change to plant and animal habitat under s. 5.1.5, change to the quantity, quality or location of streams, change to the existing means of access to the territory or to preclude future economic and educational activities by the House.

7.4.3. Consent of the House shall be required if the Forest Use proposed by the Ministry will result in more than ten per cent but less than thirty per cent of the territory area being cumulatively subject to soil disturbance, change to plant and animal habitat under s. 5.1.5, change to the quantity, quality or location of streams, change to the existing means of access to the territory or to preclude future economic and educational activities by the House.

7.4.4. Forest Use proposed by the Ministry will be considered to destroy the ability of the each House to sustain future generations of House members and thus be irreconcilable with the existence of aboriginal title if it will result in more than thirty per cent of the territory area being cumulatively subject soil disturbance, change to plant and animal habitat under s. 5.1.5, change to the quantity, quality or location of streams, change to the existing means of access to the territory or to preclude future economic and educational activities by the House.

7.5. The Minister shall respond to mere consultation by communicating its decision to the House representatives.

7.6. The Minister shall respond to deeper consultation by implementing any alternative Forest Use plan proposed by the House that will achieve the same legislated objectives as the Forest Use proposed by the Ministry and does not infringe on the House's aboriginal rights and title.

7.7. The Minister shall respond to a House's withholding consent for a Forest Use or the irreconcilability of a Forest Use with aboriginal title by not authorising the Forest Use.

7.8. Notwithstanding section 7.3, prior determinations of Allowable Annual Cut, apportionment and forest tenure agreements with third parties shall not prevent the implementation of any obligations, processes, agreements and decisions arising out of this Agreement.

7.9. Nothing in this Agreement shall restrict the Ministry from consulting with other groups.

7.10. The Ministry shall not delegate any of its obligations under this Agreement to third parties.

7.11. A process for public and third party communications and consultation shall be jointly developed by the Parties.
8. Information Exchanges

8.1. The Ministry shall disclose without cost all information concerning harvesting, silvicultural, forest road construction, forest health, or other information concerning its site-specific activities in the Agreement Area to the Gitxsan. Any information provided by the Ministry shall be consistent with the Freedom of Information and Protection of Privacy Act.

8.2. The Ministry shall make available to the Gitxsan all Geographical Information Systems data bases in its possession covering the Agreement Area.

8.3. The Gitxsan shall provide information regarding activities, rights, and interests in the Agreement Area where such information would contribute to planning initiatives of the Ministry.

9. Funding

9.1. The Parties will cooperate to attempt to secure funds for Gitxsan planning, training and economic opportunities under this Agreement and any subsidiary agreements as follows:

9.1.1. to March 31, 1999 the Ministry will make available to the Gitxsan approximately $__________ from its existing program budgets,

9.1.2. for fiscal years from April 1, 1999, the Parties will negotiate further funding arrangements.

9.2. Notwithstanding any other provisions of this Agreement, the payment of money by the Province or the Ministry pursuant to this Agreement is subject to;

9.2.1. there being sufficient monies available in appropriations, as defined by the Financial Administration Act (the Act), to enable the Province, in any fiscal year or part thereof when any payment of the money by the Province falls due pursuant to this Agreement, to make that payment,

9.2.2. the Treasury Board, as defined in the Act, not having controlled or limited, pursuant to the Act, expenditure under any appropriation referred to in the preceding subparagraph.

9.3. Any funds provided may be subject to certain terms and conditions particular to that funding arrangement.

10. Term

10.1. This Agreement shall remain in effect until amended or replaced by a treaty which covers the subject matter of this Agreement.

10.2. This Agreement may be amended by written agreement of the Parties.

10.3. This Agreement may be terminated by either party on 30 days' written notice given to the other Party.

11. Administrative Committee

11.1. The Parties shall establish an Administrative Committee upon the signing of this Agreement. The committee shall consist of up to eight members with equal representation of the Gitxsan and the Ministry.
11.2. The Administrative Committee shall establish terms of reference including consensus and decision-making procedures for the review, interpretation and implementation of this Agreement.

11.3. The Administrative Committee shall make recommendations by consensus which shall be forwarded to the Parties as specified in Section 13.1.

12. Dispute Resolution

12.1. In the event that the Parties cannot reach consensus on matters arising out of this Agreement, the dispute shall be resolved as follows:

12.1.1. The first level of attempted resolution shall be between the relevant District Manager and the relevant House representatives.

12.1.2. If the District Manager and the House representative are unable to resolve the dispute, then the next level of attempted resolution shall be between the relevant Regional Manager and the relevant House representatives.

12.1.3. If the Regional Manager and the House representatives are unable to resolve the dispute, then the issue shall be decided by an independent arbitrator.

12.2. In the event of a dispute as to the scientific probability that; i. proposed forest use will enable animals, plants or animals and plant habitat to be conserved under Section 5.1.5, or ii. an infringement determined by a Gitxsan House under Section 6.3 will achieve the conservation and public safety purposes anticipated by the Ministry, the dispute shall be referred to a Scientific Panel made up of one Gitxsan nominee, one Ministry nominee and an independent chair chosen by the nominees.

12.3. The Scientific Panel shall make majority recommendations to the Parties based on information supplied by the Parties and any additional information contributed by the Panel Members.

12.4. The Ministry shall pay all costs incurred by the Scientific Panel to the amount of a mutually agreed upon budget.

13. Notice

13.1. Any notice given pursuant to this agreement shall be made in writing and shall be effectively given and sent by registered mail, facsimile or other means of electronic communication to the appropriate address set out below:

if to the Gitxsan:

Chief Negotiator
Gitxsan Treaty Office
P.O. Box 229
Hazelton B.C. V0J 1Y0
Facsimile: (250) 842-6828
if to the Ministry:

District Manager
Kispiox Forest District
Bag 5000
Smithers B.C. V0J 2N0
Facsimile: (250) 842-7676

14. Agreement

This Agreement constitutes the whole agreement between the Parties except as amended by future agreement.

IN WITNESS WHEREOF etc.......

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