1 CORAM: Taggart, Lambert, Hutcheon, Macfarlane, Wallace,
2 J.J.A.
3
4 June 15, 1992
5 Vancouver, B.C.
6
7 THE REGISTRAR: Order in court.
8 MR. CLARK: Before the case is called, I'm here to
9 perform a citizen's arrest for the crimes of treason
10 and complicity to genocide of Lambert, Taggart,
11 Macfarlane and Wallace. These proceedings are a
12 crime in progress and must not continue.
13 HUTCHEON, J.A.: Let's have him removed.
14 TAGGART, J.A.: Mr. Sheriff, will you escort Mr. Clark
15 out of the courtroom, please.
16 Call the case, please.
17 THE REGISTRAR: In the Court of Appeal for British
18 Columbia, Monday, June the 15th, 1992. In the
19 matter of Delgamuukw versus Her Majesty the Queen at
20 bar, my lords.
21 TAGGART, J.A.: Yes, Mr. Arvay?
22
23 SUBMISSION BY MR. ARVAY:
24 Thank you, my lord. At the end of last Friday
25 I was just about finished my submissions and I was
26 at paragraph 176. There I was simply pointing out
27 that there was in the private law context certain
28 analogies to be drawn where a court has an
29 ongoing --
30 TAGGART, J.A.: This is tab 7?
31 MR. ARVAY: Page 72.
32 TAGGART, J.A.: Yes.
33 MR. ARVAY: The quote there from Professor Sharp
34 summarizes in a rather helpful way, I think,
35 examples in private law situations where courts
36 continue to have an ongoing role in the course of
37 litigation. I caution, I suppose, the court to be
38 careful to how one applies the rules that are
39 created in the private law context to public law
40 litigation, particularly the public law litigation
41 of this type. This is, without question, a very
42 unique lawsuit and it calls for unique and
43 innovative remedies that work in this lawsuit,
44 whether or not they might work in the context of
45 other lawsuits. Now, that essentially concludes my
46 submissions with respect to what this court should
47 do by way of remedies. The only other part of the

1 submission that I would ask your lordships to turn
2 to that relates to remedies is at tab 10, and it's
3 very short. This deals with the question of
4 compensation.
5 The Appellants are of the view as we are that
6 not only the issue of quantum -- well, first of all,
7 let me back up for a moment. It is the Appellants',
8 I suppose, initial view that because Aboriginal
9 rights are proprietary in nature that therefore
10 compensation should follow, and their submissions on
11 that issue don't really go beyond that. Our
12 submissions are because Aboriginal rights are not
13 proprietary in nature, at least in any common-law
14 sense, damages does not following upon their
15 extinguishment. And on page 113 in tab 10 I cite
16 from the decision of Calder, Mr. Justice
17 Hutcheon's decision at tab 168, for that
18 proposition. I'll also ask you to note that Mr.
19 Justice Tysoe of the Court of Appeal at page 498
20 came to same conclusion.
21 LAMBERT, J.A: Your position is if they are
22 proprietary then there would be a claim to
23 compensation, but they're not proprietary and if
24 they're not proprietary there is no claim to
25 compensation?
26 MR. ARVAY: Certainly the latter is my position. Even if
27 it was said that they were proprietary I wouldn't --
28 I'm not conceding that compensation would be
29 available and I don't have any developed argument on
30 this point, and given the position of the Appellants
31 it didn't seem necessary to provide your lordships
32 with any elaborate argument on this point. But
33 you'll recall when we were going through some of the
34 material last day that the nature of constitutional
35 rights of public law litigation in general are
36 damages are not considered always the first-line
37 response to a violation of rights. Obviously if the
38 rights are proprietary in the common law sense then
39 certainly a stronger argument can be made that
40 compensation is payable. But if it came to that I
41 would want to have an opportunity to address your
42 lordships on how given the nature of this
43 litigation, given the nature of the rights being
44 asserted, that a blanket entitlement or entitlement
45 at large would be inappropriate. But certainly my
46 main position is because they're not proprietary in
47 any common law sense damages are not an appropriate

1 remedy in any event for extinguishment. This part
2 of my factum is very brief, as you see, and it is
3 obviously incomplete insofar as what could be said
4 on the issue of damages.
5 Given what appears to be a very mutual position
6 of the Appellants and the Province with respect to
7 the issue of damages, not only the quantum, the very
8 entitlement of it, I think it should be left to the
9 parties to work out. I've refrained from saying any
10 more than I had to on this point.
11 I can tell your lordships -- I'm sure you're
12 going to hear about this in the next little while --
13 the Australian High Court has just handed down a
14 fairly important decision on Aboriginal rights. All
15 I have is a newspaper report from the weekend. I am
16 making arrangements to get a copy of the decision,
17 it's a very long decision. The newspaper report
18 simply says the common law of Australia recognizes a
19 form of native title to land reflecting the
20 entitlement of the indigenous inhabitants, and the
21 Australian High Court has ruled in a landmark
22 decision, a six-to-one decision that came down June
23 3rd. I do not know the name of it; it's not
24 referred to. The only reason I raise it at this
25 point is according to the newspaper report the High
26 Court said that the native title was capable of
27 being extinguished, without compensation, by a
28 state, provided that the state did not act
29 inconsistently with a Commonwealth law, such as the
30 Racial Discrimination Act 1975. It may be that
31 your lordships are going to require supplementary
32 submissions on that case.
33 MACFARLANE, J.A.: You're going to supply copies?
34 MR. ARVAY: Yes, as soon as we get them.
35 LAMBERT, J.A.: Do you know the name?
36 MR. ARVAY: No. It has to do with Torres Strait and the
37 name of the band, I think, is called --
38 MR. GRANT: My lords, I'm aware of the case, it's called
39 the Mabo case, M-a-b-o. Mabo is the Appellant and
40 it's a case that's been long outstanding.
41 TAGGART, J.A.: Was the Plaintiff and the Appellant in
42 the appeal proceedings?
43 MR. GRANT: Yes. It was remitted to a trial judge for
44 findings of fact, then it was a specific reference
45 under the Constitution and the Australian High
46 Court.
47 MR. ARVAY: On page 113, paragraph 297 at issue C,

1 again -- this is by way of perhaps a tentative
2 submission because it's not strictly speaking an
3 issue in this case, it might be, I emphasize
4 "might", although there is no remedy for
5 extinguishment per se, it might be that upon
6 extinguishment the Crown assumes an fiduciary
7 obligation. It doesn't necessarily mean that a
8 breach of the fiduciary duty gives rise to a remedy
9 of damages. It may be that the fiduciary duty is to
10 negotiate some form of treaty or co-existence with
11 the Aboriginal people. This case does not allege
12 any fiduciary duty, let alone a breach of fiduciary
13 duty, so it is my submission it would be
14 inappropriate to say any more than that. The only
15 reason I raise it now is to say once we get into the
16 area of damages, if any, compensation, if any, which
17 arises from extinguishment, there may be other
18 avenues to follow than the more traditional routes
19 available in the common law. And it is our strong
20 submission that both pre-1982 and post-1982 remedies
21 and the nature of compensation, if any, should be
22 left to the parties to work out.
23 LAMBERT, J.A.: The Chief Justice in his judgment below
24 dealt at some length with the question of fiduciary
25 duty.
26 MR. ARVAY: Yes.
27 LAMBERT, J.A.: Where would that stand if we didn't deal
28 with it in any way?
29 MR. ARVAY: It probably would go by the way, my lord,
30 because the Chief Justice's articulation of the
31 Crown owing a fiduciary duty to the Aboriginal
32 people is premised on there having been a blanket
33 extinguishment of Aboriginal rights.
34 LAMBERT, J.A.: I don't understand why that should be so,
35 and if I don't understand why it should be so I
36 don't know why it should be left. There's still a
37 possibility in this case that we will decide,
38 notwithstanding the position of the Appellant and
39 Respondent, that there has been a blanket
40 extinguishment, but even if we didn't decide that --
41 I know he says that when there's a blanket
42 extinguishment a fiduciary duty arises, but I don't
43 understand why even if there has been no blanket
44 extinguishment there shouldn't be a fiduciary duty
45 and why it shouldn't run concurrently with every
46 other claim or entitlement that the Appellants have
47 in this case.

1 MR. ARVAY: I suppose I can answer it this way, going
2 back to your first point, if this court found it was
3 to uphold the Chief Justice's finding that there was
4 a blanket extinguishment the Province does not
5 cross-appeal the question of fiduciary duty and that
6 part of the decision of the Chief Justice. My point
7 is if your lordships were to find that there had not
8 been a blanket extinguishment then his lordship's
9 conclusions, at least with respect to there being a
10 fiduciary duty, would not follow because his
11 lordship's conclusion that the Crown bona fide
12 should be premised on there being a blanket
13 extinguishment. Your lordship is saying there may
14 be a fiduciary duty even if there was no blanket
15 extinguishment or extinguishment, that may or may
16 not be true. That's not something that is before
17 your lordships, it's certainly not been put in issue
18 by Appellants or by any of the parties. It would be
19 something that your lordships would be, I think,
20 constructing out of the air, so to speak, because it
21 is not an issue before you on the pleadings or has
22 not been put in issue alleged by the Appellants to
23 be the case.
24 LAMBERT, J.A.: I'll have to think about those
25 submissions, but it's been so extensively dealt with
26 in the court below it's difficult to see that it
27 wasn't an issue there or isn't an issue here.
28 MR. ARVAY: Well, it was an issue there because of the
29 findings of blanket extinguishment. My
30 understanding is it was never pled as such. This
31 was something -- in fact it was my understanding,
32 and everyone else who was there can correct me if
33 I'm wrong, this is something that the Chief Justice
34 decided on his own account without a whole lot of
35 submissions by counsel. Maybe my friends for Canada
36 or the Amicus can enlighten us on that.
37 LAMBERT, J.A,: To the extent that it's regarded as being
38 in the area of remedies, I'm don't suppose that it
39 necessarily has to be pleaded. I'm content to leave
40 it but we may be cast loose without much or any
41 guidance from counsel on an area that we will feel
42 compelled in the end to get into. Maybe I can leave
43 that with you.
44 MR. ARVAY: Thank you. Now, my lords, just a few closing
45 remarks in response to some of the questions from
46 last day, then I propose to sit down and leave
47 anything more substantive to the time left to us to

respond in reply to at least the Appellants' submissions on remedies and hopefully to both Canada and the Amicus and other intervenors' submissions. You'll recall that I asked for that last day and your lordships have ruled on the request, but in my submission my reply would be more helpful to the court if it came after everyone else had made their submission on the question of remedies.

We've handed up another reference book called W-8 which in the first four tabs is in response to Mr. Justice Lambert's request that I provide the court with the references that I refer to in passing on a contextual approach to constitutional interpretations.

At tab 1 is the article by Madame Justice Wilson, and the part of the article in question -- I've handed up the whole article -- the part of the article that deals with interpretation, it starts at page 244. The next tab is the Edmonton Journal case, and the passage in question is at page 1352 -- you might want to mark that in the index to the white book -- and the Pearlman decision is at page 884 and the Wholesale Travel Group case, the passage in question at 209, and the three cases very briefly --

WALLACE, J.A.: What was the page of reference for Pearlman?

MR. ARVAY: 884.

The cases deal very briefly with the idea that the Charter should be and the Constitution at large should be interpreted in the contextual fashion rather than in an abstract sense. That, of course, was important to my point that on the whole issue of specific extinguishment and the question of whether or not a provincial law did or did not invade 91(24) should be done in the context of all the facts in that they are not available to the court in these proceedings.

The cases 5 to 9, particularly 5 to 8, and I'll come to 9 in a moment, pertains to Mr. Justice Lambert's question at the very end of the day where he wanted to know whether a completely different panel would be bound by the rulings of this panel on this appeal. Cases 5 through to 8 I am certain are familiar to your lordships, or at least most of your lordships because you're the authors of some of the cases, and they deal with the question of whether a

1 three-person panel is bound by a three-person panel
2 and whether a five-person panel can overturn a
3 five-person panel, and they leave open the question
4 about what happens when there is a five-person panel
5 in the same position vis-a-vis a five-person panel
6 or a three-person panel. Do you need a three-person
7 panel or do you need a seven-person panel and two
8 more chairs in order to overrule a five-person
9 panel?
10 Let me take you to tab 8 which is the most
11 recent decision of this court, and both Mr. Justice
12 Hutcheon and Mr. Justice Lambert were on the court
13 so I know you're familiar with the case. And
14 specifically, if you'll turn to tab 8 at page 159,
15 Mr. Justice Hutcheon sets out the guidelines that
16 this court follows. At the top of page 159 he says
17 that a three-judge division should not overrule a
18 previous decision of a three-judge division unless
19 the previous division is manifestly wrong, or should
20 no longer be followed, because, for example, the
21 previous decision failed to consider applicable
22 legislation or binding authorities, or, if followed,
23 would result in a severe injustice. Two, that a
24 five-judge division of the court may overrule the
25 decision of a three-judge division if the five-judge
26 division decides either that the earlier decision
27 was wrong, or that for any other reason, the earlier
28 decision ought to be overruled.
29 The other cases from 5 to 8 essentially deal
30 with those points and I'll give you the page
31 references. Bell and Klein is tab 5, page 280;
32 the Bell and Cessna Aircraft case --
33 TAGGART, J.A.: Just a minute, page --
34 MR. ARVAY: 280. Bell and Cessna Aircraft, that is 181
35 and 186, and Varney at page 170. Now, after
36 collecting those cases --
37 TAGGART, J.A.: You gave a page number for the
38 Wholesale Travel Group and I didn't get that.
39 MR. ARVAY: 209.
40 Correct me if I'm wrong, Mr. Justice Lambert,
41 but it occurred to me after I found those cases that
42 that's not the question you were asking because you
43 knew well the answer, and I thought I must have
44 missed the point. In other words, you know that
45 this panel's decision insofar as it is a final
46 decision is going to be followed by certainly a
47 three-person panel and most likely by a five-person

1 panel, because it would be very unlikely that any of
2 the exceptions that are referred to in the
3 Worthington case are going to apply to the
4 decision of this panel, in the sense that it's going
5 to be very unlikely that they are going say that in
6 a matter of such importance where you've given it so
7 much time and heard so many submissions and it's new
8 that anyone is going to feel free to overrule the
9 decision whether or not a five or seven-person panel
10 would have jurisdiction to do so. And it occurred
11 to me that I must have missed the point and I think
12 I did, and when I went back to look at the
13 transcripts you say this:
14
15 "So I'm still interested on the question of how
16 you conceive that our orders made -- the ones
17 you want us to make, could be final rather than
18 merely interlocutory and how that the panel
19 would be bound to continue as if our decisions
20 were locked in stone, when it doesn't seem to
21 me that they would be."
22
23 And it struck me that what you were struggling
24 with was not what the rules are for subsequent
25 panels on final decisions of this court but whether
26 or not your decision was final or interlocutory.
27 LAMBERT, J.A.: That's partly to do with it. My
28 conception in this field is that our oath of office
29 obliges us to decide cases justly and in accordance
30 with law. The rules about three-judge divisions and
31 five-judge divisions are referred to in
32 Worthington as guidelines. I understand that
33 they're based on judicial comments and not on legal
34 principle and that these are a statement of
35 guidelines that we follow in order to have a sense
36 of orderliness and so counsel know what we're doing.
37 But if a previous decision persuaded is unjust, our
38 oath of office obliges us to decide in a way
39 contrary to that. This mixture of law and
40 guidelines then has to be inserted on what seems a
41 very novel suggestion, it's not wrong for that, but
42 a novel conception, so I started to wonder how it
43 would work in relation to the group that came back,
44 whether they were three, five or seven. I don't
45 think that the principles that would apply to them
46 are any different no matter how many there are,
47 although I expect it's likely to be five. If they

1 come back in they're coming back in on the very same
2 case. I don't believe, speaking for myself, that
3 they can be compelled by our decision to decide
4 things in the very same case contrary to the way
5 they believe that they should be decided. So as I
6 see it working, it would -- I would think that the
7 new group of judges, which we're postulating there
8 will be a new group of judges, I think they would
9 try to be consistent, but if they thought in their
10 hearts that we were wrong in law then I do not
11 believe that the principles stair decisis would
12 compel them to reach a decision consistent with ours
13 if they felt that that was wrong. So it seemed to
14 me that the proposal carried with it the grave flaw
15 that the new group of judges might see the matter
16 entirely different than this group of judges, and I
17 don't believe we can embarrass them, as it were, by
18 our previous decision into doing something they
19 think is wrong. So there raises up the possibility
20 of inconsistent decisions, and because it's all the
21 same case there seems to be no reason why they
22 shouldn't do that and feel free to do that. They
23 would be slow I expect to do it to the extent that
24 this involves saying expressly that they reached a
25 different result than us, but just as you have
26 dissenting judges we can have dissenting judges
27 among the five of us, so the new group might all
28 dissent from us and then there you are, you're faced
29 with -- all I've been asking by my questions is how
30 are counsel going to lead us through this and
31 satisfy us that the remedy they're suggesting is
32 going to be not fraught with potential embarrassment
33 for the court and for the parties if it were ever to
34 come back to court?
35 MR. ARVAY: I understand better now your lordship's
36 question. It strikes me that the answer does turn
37 on whether the order that you make is final or
38 interlocutory, because if it is final, if you
39 understand it to be final and it is final, then it's
40 no different as to any other final decision that one
41 panel of this court makes and another panel, albeit
42 in another case, of this court either agrees or
43 disagrees with and there's no -- I don't know of any
44 precedent which can address specifically your
45 lordship's question that would say what we're asking
46 you to do can be done, because it hasn't been done
47 as far as I know. But by way of analogy and by way

1 of principle so long as you are of the view that
2 your decision is final on an issue in litigation,
3 then the fact that the court may have some sort of
4 continuing jurisdiction over the remaining issues
5 should not affect what the subsequent panel does on
6 the remaining issues.
7 Let's suppose you were all on the subsequent
8 panel, it would be my submission that you would be
9 functus insofar as you made a declaration which was
10 considered final. You wouldn't be entitled to go
11 back to it, or you certainly ought not to go back to
12 it, and so if you would be functus on that issue
13 likewise for all intents and purposes it would be --
14 if you were functus on the issue then the second
15 panel should treat it as just any other decision of
16 the Court of Appeal. Yes, they are still going to
17 be hearing submissions and making perhaps orders in
18 the context of the same case, but they will on other
19 issues, and yes, they may be related to some extent
20 but they are also distinct, sufficiently distinct,
21 so as to justify the court in making some final
22 rulings in the course of this litigation. So what
23 we would ask your lordships to do is make a final
24 declaration. There's no such thing as an interim
25 declaration. We would ask the court to make a final
26 declaration on the nature of Aboriginal rights.
27 That doesn't mean it's the most complete and
28 detailed and exhaustive definition, courts rarely do
29 that in any litigation, but we would say that your
30 declaration insofar as the nature of the rights is
31 concerned is final. And what we then would -- we'd
32 also ask you to make a declaration that's final on
33 whether or not there has been blanket
34 extinguishment. We would say you ought not to make
35 a declaration which deals with sort of the
36 on-the-ground application of your legal principles
37 to the Appellants insofar as the scope and content
38 of their rights are concerned.
39 TAGGART, J.A.: You have to remember we have in addition
40 to the case now at bar the earlier cases, the
41 hunting and fishing cases. Without expressing a
42 final opinion on it, there may well be a scope for
43 this panel or its successors to remain seized as you
44 wish the court to do during the progress of
45 negotiations between the parties. A declaration on
46 the part of this court as to some of the important
47 substantive rights that are claimed but there can be

1 no negotiation, as I see it, I've never heard of it
2 in any event, in the earlier appeals. They are
3 criminal in nature and a decision has to be made
4 once and for all with respect to them. Many of
5 these issues in Delgamuukw are common to those
6 cases, and of necessity are going to have to be
7 finally decided in both cases. We are going to say
8 either the conviction is upheld or it's set aside;
9 either the acquittal is upheld or it is set aside.
10 And you have to continually keep in mind the
11 necessity of the court to deal with those cases in a
12 final sense with this case, in the final sense in
13 which you're using the term vis-a-vis declarations,
14 and make certain that what you're proposing to do is
15 beyond the initial judgment in this case. It is
16 possible for the court to do, given the finality of
17 the decision in the other criminal cases.
18 MR. ARVAY: Yes. As I said last day, I don't have any
19 easy answers as to how -- as to what ought to be
20 done with respect to the other cases and whether a
21 similar rule can be followed, and I doubt it. I
22 think your lordship is right, they have to be
23 decided. I would simply urge your lordships to
24 follow the well-known path of deciding only what you
25 have to and no more.
26 Those cases are to a very large extent
27 different than this case. Most of them involve
28 fishing and the federal government, federal
29 regulations, federal legislation. Alfonse and
30 Dick I believe involves the question of provincial
31 legislation and some land-based rights. There's no
32 question that your lordships' decision in these
33 cases will have some precedential effect and some
34 binding effect on the resolution of this case, but
35 this case is still sufficiently different that in my
36 submission we should still leave -- all the things
37 that I've submitted we should leave to another day
38 undecided because the application of the principles
39 in the other case may or may not -- the principles
40 that apply in the other case may or may not apply
41 holus bolus to this case depending on the facts.
42 My friends for the Appellants provided us at
43 the end of the day Friday, as they were required to,
44 a revised position with respect to the issue of
45 remedies. I would prefer, my lords, to leave any
46 response to that revised position to our sur-reply
47 when we've had an opportunity to give it a more

1 considered response. I'd only like to say this in
2 closing, that with respect to their -- I don't know
3 if your lordships have seen it or read it -- with
4 respect to their revised position on remedies, what
5 they asked this court to decide is similar to what
6 we asked the court to decide, although we take a
7 different position on the answers and that's a very
8 significant respect. What they ask the court to
9 leave undecided, as well, it strikes me that it's
10 very similar to what we're asking the court to leave
11 undecided. What's not clear to me, and I'll ask my
12 learned friends to make it clear if they can,
13 precisely what they mean when they say that what
14 should be left undecided is the question of the
15 scope of the Appellants' Aboriginal rights. Does
16 that mean simply the content that the rights would
17 have but for any extinguishment, specific or
18 general, or does it mean the net content of the
19 Aboriginal rights, assuming there has been an
20 extinguishment, particularly specific extinguishment
21 of their rights. At that point I'm not certain I
22 understand what the Appellants' position is.
23 TAGGART, J.E.: Mr. Justice Lambert was just jogging my
24 memory as to how we propose to deal with this
25 matter. The object of the exercise was to get from
26 the Appellants in the first instance a clear
27 statement in writing on the issue of remedies. They
28 completed their submissions on that in a state of,
29 at least so far as I'm concerned, leaving me in a
30 state of some confusion. And it was because of the
31 uncertainties that arose after that submission had
32 been completed that we said, "Look, this has to be
33 put in the proper order and it has to be put in
34 proper order in sufficient time for the remaining
35 parties to be heard in their appeal to deal with."
36 It has now been put in the order in which the
37 Appellants wish it to be. You have already got a
38 query concerning it. You got it only Friday night.
39 We are about to hear Crown in the right of Canada.
40 We can hear them out and presumably in the course of
41 this week and, I believe, a couple of days next
42 week, they will have an opportunity to deal fully
43 with the concept now put forward by the Appellants
44 in their written material on this subject, and, of
45 course, with respect to other matters.
46 I think the best thing we can do to accommodate
47 the Crown in right of the Province is to find some

1 time at the end of the submissions of the Crown in
2 the right of Canada to deal specifically with this
3 aspect and this aspect only, as to say, the material
4 now filed by the Appellants as a part of their
5 original factum and which they will no doubt deal
6 with in due course when they come to reply. That
7 will leave you the intervening time, during the time
8 that Canada is making its submission, to find time
9 to make your response to this material in an orderly
10 fashion and we will have it done before the
11 Appellants finally reach their time for final reply.
12 MR. ARVAY: Yes, I understand that, my lord, and my
13 request to be allowed to continue and complete my
14 submissions after the submission of both Canada and
15 the Amicus is because I understood, I think,
16 incorrectly with respect to Canada, and I'm still
17 not certain what the position of the Amicus is, that
18 they might be opposing the idea of this court having
19 jurisdiction to decide on some of the issues. And
20 because I didn't understand the Appellants to be
21 taking any serious issue with our submissions in
22 that respect, no one was -- you weren't going to
23 have an opporunity to have any answer -- hear any
24 answer from us to the opposing position, and it
25 struck me that we should be entitled to a reply on
26 that issue if there is a contrary position being
27 taken either by the federal goverment or the Amicus.
28 TAGGART, J.A.: I see your point. It's a question of
29 when.
30 MR. ARVAY: You don't want to hear me twice I wouldn't
31 think.
32 TAGGART, J.A.: We'll take that under consideration and
33 sort out the timing of this. If others have some
34 contributions to make to that they can be heard in
35 the course of their presentation, and I'm thinking
36 primarily of Canada and the Amicus. So we'll
37 consider that and let you know in due course when on
38 the basis of sequence you will be heard. At the
39 time it's going to have to be carved out of
40 somebody, somewhere it's going to have to be found.
41 I'll have to leave that to counsel for the time
42 being at any rate to find the time.
43 MR. ARVAY: That's why I'm anxious to sit down so I don't
44 eat into too much of that important reply or
45 sur-reply time. Just two points and then I'll be
46 finished.
47 One point I shouldn't have left unsaid, because

we oppose vehemently the position that the Appellants take in their revised document on remedies, which is that pending the determination of the scope of the proprietary right to the Appellants no grants of land, interest in land or right to use land or resources in the territory shall be made by the Province without the consent of the Appellants.

In the material that I filed this morning in W-7 the final case is Spellman and Spellman which is a case of dealing with whether an order is interlocutory or final. And it was sort of my last minute thought revelation that that was really concerning your lordship Mr. Justice Lambert that caused me to include that in the material. And it essentially says that whether something is interlocutory or final is a very, very confusing question. And Mr. Justice McDonald says:

> "Perhaps no line of decision better justifies the poet's jibe at the 'lawless science of our law' than those that specify what judgments and orders are final and what interlocutory."

I will come back to this if it needs coming back to when I have an opportunity to get back up to say that the orders that we seek from your lordships are not interim, they are not interlocutory, they will substantially decide the issues before you and therefore they are final. And I say therefore they can even be appealed, whether they can or cannot be need not, in my submission, worry the court. The fact that some issues are left undecided doesn't mean that the issues that are decided are any less than final. I think, my lords, that will conclude my submission on the issue of remedies until you hear from me again. Thank you.

I understand, Mr. Macaulay, you'd like a few minutes?

TAGGART, J.A.: That completes your submission?

MR. ARVAY: Yes.

TAGGART, J.A.: And that completes the Province's submission?

MR. ARVAY: Yes.

TAGGART, J.A.: Subject to the remedies problem. Mr. Macaulay, you're next at bat and I think we'll take the morning break and you can organize your affairs.

THE REGISTRAR: Order in court.

(MORNING RECESS)

THE REGISTRAR: Order in court.
TAGGART, J.A.: Yes, Mr. Macaulay?
MR. MACAULAY: If it please your lordships, before I start my submissions on behalf of the Attorney General of Canada I would like to hand up a slightly revised, I emphasize slightly revised, part 1. It's probably more useful to -- I thought it more useful to make a complete new set. They are underlined where these few revisions are. Most of these amendments have to do with either the addition or deletion of some references; that is, some documents that support submissions made in part 1, or summaries, statements, made in part 1. The exception is in paragraphs 190 and 190(a) of part 1. 190 is almost entirely new and 190(a) is new. Because the court showed some interest in what was happening in the Bulkley Valley in 1910 and thereabouts, and particularly some interest in a map described as McDougall's map, I thought that the documentary evidence concerning that time, that is, the time from 1905 to 1910 and beyond, ought to be referred to a little more fully than had been when the factum was first prepared. There is the odd addition of a word or part of a sentence that will be underlined but it doesn't alter in any way the substance of the text of part 1.
LAMBERT, J.A.: This is Volume 1 of 3?
MR. MACAULAY: Yes, tab 1.
LAMBERT, J.A.: We should just take out everything that's in tab one and put this in instead?
MR. MACAULAY: That's right, unless one or other of your lordships have already made notes on tab 1.
LAMBERT, J.A.: Is there any reason we should ever want to look again at the part we've taken out?
MR. MACAULAY: I can't think why you would want to look at that part. There's a bit of an addition. The only deletions are of a word here and there or a name. We've provided also the usual reference books, and at the beginning of each tab appears the appropriate paragraph of part 1, so that in fact you don't need -- when we're dealing with part 1 you don't need the factum at all because Volume 1 of the references, tab 1, is paragraph 1 of the --
LAMBERT, J.A.: And in the references it's the new

1 version?
2 MR. MACAULAY: It's the new version.
3 LAMBERT, J.A.: Thank you.
4 MR. MACAULAY: So that as we're going along unless you
5 want to read ahead only the reference book is needed
6 to follow my submissions. In behind each paragraph
7 is the evidence that's relied on in support of the
8 paragraph. In the reference books we have made
9 transcriptions of some of the more difficult
10 documents, particularly the Hudson Bay documents and
11 the Loring documents. The originals are there and
12 so are the transcriptions. The transcriptions of
13 the Loring documents were used at trial. The
14 transcriptions of the Hudson Bay documents are ones
15 that we prepared for this appeal and, of course, any
16 case where the transcription is challenged by any of
17 my friends, or if the court finds it unsatisfactory,
18 it's the document itself, the exhibit itself, not
19 the transcription we will have to rely on.
20 In following some of the material, especially
21 the material in the first part of part 1 dealing
22 with the Hudson Bay records, it may be useful if you
23 want to know where things are to follow a map. This
24 is an exhibit at trial, it's Exhibit 1243, and there
25 were many overlays. For the most part I will only
26 be referring to overlay D which merely shows where
27 the Indian reserves are, all the Indian reserves are
28 as at the present time. That is the map that the
29 Chief Justice used, a shrunken copy of it, in his
30 judgment. Maps 2 and 5 are this map with this
31 overlay. Unfortunately in printing the law report
32 it had to be shrunk and it's a bit muddy, and so the
33 only reason I suggest that that may be of some
34 assistance --
35 LAMBERT, J.A.: We have this.
36 MR. MACAULAY: Yes, but that's shrunk too.
37 LAMBERT, J.A.: Yes, but it's better than this.
38 MR. MACAULAY: Better than the Western Weekly version.
39 And I will be referring to it mainly to show where
40 places are. My friends the Appellants have produced
41 another useful map which they referred to that's
42 Exhibit 6-47, but most, a great number of the place
43 names in English have been removed and although that
44 is -- I don't quarrel with that at all -- some of
45 the historical material, a lot of historical
46 material deals with the English names on the map,
47 places like Quick, British Columbia and Walcott and

other great centres of culture. On this map, on the right-hand side to the east Babine Lake is shown and the place where the original fort was, Fort Kilmaurs, is shown as Old Fort. Towards the bottom of the map, to the east of Francois Lake, Fraser Lake is identified and that will have some relevance to who was in the southern end of the claim area in the 19th Century. As a matter of interest there was a Hudson Bay fort, the very first one on Fraser Lake, Fort Fraser. Madame Registrar has copies of those maps for any of your lordships who find it convenient.

TAGGART, J.A.: This is overlay D?

MR. MACAULAY: Yes.

LAMBERT, J.A.: How many copies are there like these, two?

MR. MACAULAY: One for each judge. My friends had had them for trial, and there are overlays in the box. The registrar has all the other overlays. The territorial boundaries are the subject of an overlay and the trap lines are the subject of an overlay. All the provincial divisions, the school districts and everything you can think of are the subject of overlays. I won't be referring to most of those in my submission.

LAMBERT, J.A.: Am I right in saying there's a set of overlays?

MR. MACAULAY: Five sets of overlays. All overlays -- my recollection is all overlays but one were marked as exhibits. The one that wasn't was the overlay that showed the overlapping claims and that's not an exhibit and the only way in way the court could look at that particular overlay is as an aide-memoire. There is a map showing overlays that was marked as an exhibit, it's called the Magwood map and I won't be referring to it. That will be referred to in the submission Loryl Russell will be making, but it's not an exhibit. I'll be referring to Exhibit 101 which is the largest of the overlapping claims, that's the Carrier-Sekani. There is an overlay of that, a huge claim covering much of the claim area. The Appellants claim a right to ownership of all lands inside that black line --

TAGGART, J.A.: The Carrier-Sekani claim overlaps that of the Wet'suwet'en?

MR. MACAULAY: Both Gitksan and Wet'suwet'en. And I'll be dealing with the probable historical reason for

that in my submissions.
TAGGART, J.A.: All right.
MR. MACAULAY: In brief, they claim pretty well if you drew a line, an east-west line from Walcott, intersecting Walcott, Walcott is south of Telkwa and north of Houston and the Carrier-Sekani claim includes pretty well all the area south of Walcott. It also includes a very substantial part of Gitksan claim area, pretty well everything east of Kisgegas. And as we'll see the Sicannie and Nahanni were in that latter area certainly well before 1846 in the 1830s and they were there at the turn of the century.
LAMBERT, J.A.: But we don't have an overlay showing those claims?
MR. MACAULAY: Not as an exhibit. There is an overlay but it was not marked as an exhibit for reasons that actually escape me now. The Province that put in that exhibit chose to put in a map drawn by a Mr. Magwood and that doesn't happen to be part of -- it didn't -- it wasn't converted into an overlay. The difference between the Magwood map and our overlay has to do mainly with the Tahltan claim at the top end. For the rest they're fairly close. The claims -- and we'll come to the exhibits -- the overlapping claims weren't usually accompanied by a very useful map but there were written descriptions and so it wasn't easy to transfer -- to depict accurately on a map the full extent of some of the overlaps in the case of the Carrier-Sekani though there was a meeting between the Gitksan and Wet'suwet'en on the one side and the Carrier-Sekani on the other and there were two meetings. And in preparation or during one of those meetings the parties to that conference drew up a map showing what the Carrier's position was and that map is map 101, so that we have that in fairly easily understood form. My recollection is that the Kitwancool overlap involved just straight lines and couldn't possibly represent the fine detail of what they were claiming and what they weren't. All that schematic map shows is there are differences between the Kitwancool and the Gitksan about the north-western boundary, and I'll come back to that in my submissions.

Now, the second part of the Appellants' claim is a right of jurisdiction which is described as an inherent right of self-government exercisable

through their own institutions. The Appellants say that the provincial statutes that impinge on their rights of ownership and jurisdiction have no effect, and at trial they challenged the constitutional validity of the Constitution Act of British Columbia, the Supreme Court Act, the Court of Appeal Act, the Justice Administration Act, the Forestry Act, the Highways Act, the Education Act, and every other act you could think of, and I don't know -- I can't say that it included every act listed in the index to the revised statutes but most of them. These claims were dismissed by the Chief Justice after a very long trial and that's what distinguishes this appeal from the other appeals that this panel, division of the court, has heard.

There were over 300 days of evidence, 20,000 pages of transcript and thousands and thousands of documents. In making his findings effective in law, the Chief Justice considered the evidence of dozens of witnesses, mountains of historical and anthropological documents and treatises were allowed in in large numbers, and much of this evidence is referred to in the judgment, a surprisingly large amount of it is actually referred to. During the trial the Chief Justice had dealt with an application by the Attorney General of Canada. It arose out of an attempt by the Appellants to lead evidence concerning railways, and that's dealt with at page 162 of the judgment, and Chief Justice under the heading, "The Plaintiffs' Claims Against Canada" has this to say:

> "The plaintiffs did not include the Attorney General of Canada as a defendant in this action. He was added as a defendant on the application of the Province largely for the purpose of binding Canada to the result of this trial, possibly for the purpose of proceeding in another court. At the time of the argument if February 1988 ... "

That's when I made an objection to the admissibility of certain evidence that the plaintiff sought to lead --

> " ... the plaintiffs asserted the paramountcy

of their Aboriginal interests over the laws of Canada. After hearing argument on the pleadings I said this: 'But I agree with Mr. Macaulay that the Statement of Claim does not sufficiently allege the paramountcy of the plaintiffs' alleged rights over federal legislation, such as that relating to fisheries and transportation. I do not think in the present state of the pleadings that the plaintiff even if entirely successful against the Province would be entitled to a judgment that would not be subject to federal legislation regarding such matters as fisheries, railways, airports and other activities authorized by federal legislation. No amendment was sought on this question and no argument was made by the plaintiff to the contrary. I now confirm that on the pleadings and the applicable law the plaintiffs are not entitled to any relief against Canada and the action against Canada must be dismissed.'"

In paragraph 27, that's at page 23 of the most recent submission -- I'm sorry, 57, page 23 of submission we received after five o'clock Friday night, the Appellants say, amongst other things, as the Aboriginal right to self-government is now both subject to federal jurisdiction under Section 91(24) and also is an existing Aboriginal right, Section 35, Aboriginal government and the federal government have concurrent powers to make laws regarding the subject matter of the right, i.e. the preservation and enhancement of the Appellants' political, local, cultural, linguistic and spiritual identity.

TAGGART, J.A.: Can you identify that in the material that the Appellants have now filed?

MR. MACAULAY: Paragraph 57 on page 23. We have to take the position right now that is not an issue on this appeal. It was not raised by the pleadings, it was not argued before the Chief Justice and now the question of concurrent jurisdiction is not before your lordships. The counter-claim by the Province which was worded in a manner so as to avoid express claim for or against the Attorney General of Canada was clearly directed at the federal Crown and that counter-claim was dismissed, and more recently the Province and Canada has made an agreement on the

1 basis of which the Province has withdrawn or
2 abandoned, whichever term they prefer, its appeal in
3 that respect, the counter-claim, which took up a
4 certain amount of time.
5 HUTCHEON, J.A.: Have we made any order about that?
6 MR. MACAULAY: No, the court has not made any order that
7 I'm aware of.
8 HUTCHEON, J.A.: Is that something we should do?
9 MR.MACAULAY: Well, I would think at the end of the day
10 the formal order ought to make provision for that,
11 and there is an agreement in behind that that the
12 parties are satisfied with. The Attorney General of
13 Canada has not appealed from the judgment below but
14 we will make some submissions that are at variance
15 with the Chief Justice's findings of law. The only
16 important area of divergence is the departure from
17 the Chief Justice's reasons on the question of
18 whether or not the 13 Colonial ordinances and
19 incidents called the Calder XIII had the effect of
20 extinguishing Aboriginal rights in the claim area.
21 The position of the Attorney General of Canada on
22 the issues before the court are set out in part 2 of
23 our factum and I can just briefly summarize them.
24 We say the findings of fact are correct and we
25 strongly support them, and we say they are strongly
26 supported by the evidence, and this includes the
27 trial judge's findings and conclusions on the
28 admissibility and weight to be given to each
29 category, and there are four categories of evidence
30 and we will be dealing with those four categories.
31 There is the historical recordings; there is the
32 evidence of the lay witnesses, all of them; there
33 were lay witness called by all the parties. The
34 evidence of the experts, and Canada called one
35 expert, a fisheries expert; the Province called
36 expert witnesses; the Appellants, of course, called
37 a great many. And the last category of evidence is
38 the oral history concerning which the Chief Justice
39 made findings and on which we'll make submissions in
40 support of his findings on those.
41 LAMBERT, J.A.: Mr. Macaulay, my understanding is that
42 what you're introducing us essentially to is the
43 Attorney General of Canada's position, and then
44 we're going to come to the factum after that?
45 MR. MACAULAY: In about five minutes.
46 LAMBERT, J.A.: You're reading from notes, and if they're
47 in a form which could be photocopied and given to

1 us, then it would be useful to have that as an
2 outline, so I would ask you if it is possible to do
3 that?
4 MR. MACAULAY: Yes, I will do that, my lord.
5 The conclusions of the trial judge on the law
6 has applied to all that evidence and findings of
7 fact in regard to ownership and jurisdiction, and,
8 we say, with the exception of the Calder XIII
9 question are correct and are strongly supported by
10 an analysis of the authorities. We refer to
11 ownership, the rights in relation to land in Volume
12 1, part 3, section 1 of our factum. And very
13 briefly, our position is that Aboriginal interests
14 in land are not a right akin to a fee simple and
15 those interests are not proprietary. We say an
16 Aboriginal right is a sui generis interest in
17 land and this description will be developed in
18 relation to the law that we say applies in relation
19 to the findings of fact of the trial judge in the
20 evidence that, we say, illuminates the scope and
21 contents of the Gitksan and Wet'suwet'en.
22 On the question of jurisdiction, that is, the
23 rights in relation to land and the people on the
24 land, we say the Appellants did not exercise as a
25 correct matter of historical record jurisdiction
26 over the land or over the people on it beyond the
27 village sites in the immediately surrounding area.
28 We say the facts show that. We say that to the
29 extent jurisdiction was exercised in the substantial
30 extinguishment that took place in 1846, and that the
31 extent of that displacement of the Aboriginal regime
32 is illustrated by the events leading up to and most
33 importantly 1888 when after which there could not
34 possibly be any question in anyone's mind as to the
35 position of the Crown regarding the applicability of
36 Aboriginal law or Aboriginal regime.
37 The process started in 1872, right after
38 Confederation and the culmination was in 1888. In
39 appendix C of Volume 2 of our factum we say that
40 there is a role for what is sometimes called
41 self-government to the extent that it's an
42 expression of the communal nature of Aboriginal
43 rights and we say that that may exist. But there
44 are two essential limitations on this right to a
45 management role in relation to the exercise of
46 substantive rights, Aboriginal rights to fishing or
47 hunting or whatever it may be. The first limitation

is that it's not a legislative power and the second limitation is that it's a right to manage interstate and it is not in relation to people who are not members of the community. I am assuming in that connection that the plaintiffs assert a right of government over anybody in the claim area. The vast majority, of course, don't belong to any association or institution that the Appellants have, but it's inherent in what they say, that they have the right that the Provincial government would have in ruling those people.

On extinguishment which we deal with in Volume 1 of our factum and part 3, section 2, we say that both for the test for extinguishment and its effect on the claim area, we are largely ad idem with the Province, and you've heard the Province's submissions on that. We say that limited extinguishment has taken place in the claim area in relation to land. We say also that if sovereignty -- we say it's not an Aboriginal right but if it were an Aboriginal right that was fully extinguished long ago. Aboriginal rights of their genesis and customs and practices and institutions of each particular Aboriginal society -- and we say that the definition of the nature and scope of Aboriginal rights must be based on an examination of what occurred before sovereignty. The Appellants say that the examination should be of what was in place in the year 1846, that's the year in which Great Britain's sovereignty was fully asserted. We agree that that was the year, for the purposes of this appeal, that that was the year in which British sovereignty was fully asserted, but we do not agree that the Aboriginal structures as they developed in that year, by that year, as the relevant basis for an analysis of the nature and scope of Aboriginal rights, and we deal with that particularly at pages 137 to 142 of part 3 of our factum. We say that the court must look at the evidence of the relevant Aboriginal societal structures at first contact in order to determine what was the probable structure of Aboriginal society then and earlier, that's before contact. We say that pre-contact or proto-historical developments and changes in Aboriginal societies are relevant to the definition of those Aboriginal rights, and in fact the Province led evidence from an expert witness, Dr. Robinson,

on the subject of the proto-historical structure. I think it was either Mr. Rush or Mr. Grant who said quite rightly, that although he doesn't actually mention the name very often the Chief Justice accepted some of the evidence that Dr. Robinson gave about what was going on in effect before the Hudson Bay Company arrived. The assessment of what's Aboriginal and how far back the inquiry ought to go finds support in such decisions as in Calder and Tijani, and we will be referring to those in our argument.

In this case the Appellants assert they had a particular legal regime in place before 1846 and that's what defines their rights today. By this they mean a regime involving ownership and jurisidiction over defined lands, the claim area, and people, certainly their own members and probably everyone who is there. There are many, many houses and there is no one parliament, or there wasn't any central institution for the Gitksan or for the Wet'suwet'en. Their evidence is to the effect that each little group of chiefs of a house was a separate, distinct, totally autonomous group whose authority did not depend on anything, anything else. They were little monarchies or anarchies and they got together from time to time at the feast to discuss matters of common interest. Mr. Rush mentioned that when he was dealing with the Hudson Bay records, the incident involving a chief from Babine Lake going over to Morristown or Hotset, as it was then called, to contend for the name and title and lands of a deceased chief, and he was asked by the court whether the title which apparently he was successful in obtaining, the chief's name was Jack Kee, whether that was conferred at the feast, and Mr. Rush said oh, no. That decision was made within the house and it was ratified or approved at the feast in the sense that it was announced and if anybody quarreled with that decision they would have to stand up then or forever keep their peace. That illustrates the fragmented nature of the sovereignty that's being discussed here. There is no central -- there is now, but there was no central group, no central authority. And they say further than that that this little group of three or four or five people all governed as autocrats discrete territories in the claim area.

And when you come to looking at the map showing the labels of the various houses you will see that, for instance, there is a territory down here and one here and there, and that was the subject of the sole and exclusive jurisdiction and control of that that the Appellants are asking the courts to declare that these are the constitutionally protected rights today, and, of course the map, 9(A) and (B), the map has no gaps in it. There are no areas where these assertions of sovereignty and occupation don't run. They're all contiguous.

Mr. Rush made extensive use of the historical material and Mr. Grant used the same early records to support his submission on the jurisdiction that the Appellants claim as part of their Aboriginal rights. We agree that the written record of the earliest time is helpful in determining what existed before, and the Hudson Bay records, of course, are the only thing that we have by way of historical records. The Hudson Bay records in the 1822, 1826 period are what the Appellants particularly rely on and on Professor Ray's interpretation of some of these records. The Appellants rely on Harmon's memoires of an expedition he made and an encounter in 1812 and his observations at Fort St. James he made a couple of years earlier, and we agree those are relevant.

The Chief Justice's principal findings of fact were that the Appellants' ancestors occupied, on the basis of those historical records and others, particularly the Loring series of records, they occupied and used as an organized society the land near their villages and that the European fur trade caused them to expand their organized use of land. And he concluded that the fur trade expansion was not the subject of Aboriginal rights, and my notes of the reasons for that, that's discussed and dealt with at pages 111 and 112 to page 204, page 390 and 391, 292 and 395. The historical records show the progressive and almost complete withdrawal, shows the withdrawal phase from this fur trade expansion area until the 20th Century as the fur trade itself sort of dwindled to nothing, and that's commented on by the Chief Justice in the reasons at page 455. The expansion isn't recorded in history; it's the subject of comments by anthropologists and archeologists who completed their field work among

the Appellants or their neighbours before the preparation for this litigation got underway in the mid-1970s, and we refer particularly to such authority as Adams and Steward and Jenness. And all of these are referred to in our submissions in Volume 3, tab 7, paragraph 15. Those are the authorities that deal with the expansion of the Gitksan and Wet'suwet'en into areas that they hadn't occupied before in historical times as a result of the fur trade. The period between 1830 and 1865 has virtually no historical record at all. The only thing we know about what was going on in Gitksan or Wet'suwet'en country is reflected in the oral history, and the oral history, of course, the focus of the oral histories wasn't particularly helpful to the inquiry, although there are some very interesting aspects to the oral histories that I will refer to very briefly. The oral histories, the Chief Justice made a considerable list of the oral histories and a bit of a summary of what they covered in schedule 4 to the judgment. I'll now turn to the categories of historical documents that I want to deal with.

The Hudson Bay records that have been placed in evidence, and largely by the Appellents, comprise several elements and they have several authors. They're referred to in the judgment as "Trader Brown's records" but in fact there were more authors than that. First there's the Fort Kilmaurs journal. Fort Kilmaurs, as you'll find on your map is called Old Fort now, which was moved later in the 1830s, like all the other forts kept a daily journal, no matter how tedious the day was. And a lot of this is survived, and they were written up by Mr. Brown, who was the founder and commanding officer from 1822 to 1826, but he was very ill for quite a long time in 1825 and 1826, and the other authors are Charles Ross who commanded a fort himself later up at Bear Lake and P.C. Pambrun, whose name hasn't come down, he's just known as P.C. Pambrun. In addition, there are two very interesting comprehensive reports; one in 1823 and the other in 1826. The author in both cases is Brown and he does a tour of the horizon and he covers the difficulties in trade, the competition at the forts that existed. The Tsimshian, as we'll see, came to trade at the forts regularly and so did the Gitksan and most of the Wet'suwet'en, but he

1 also describes the various groups that he was
2 dealing with, and perhaps I should stop there and
3 explain who he was dealing with. His fort was in
4 what's now called Babine country, it's east of the
5 claim area. Brown made no distinction between the
6 Babines of the lake, and that's the people who lived
7 right near his fort, and the Babines of Simpson's
8 River. And in fact, as we'll see, they moved back
9 and forth, they spoke the same language and still
10 speak the same language, they seem to be the same
11 people, and he refers to them collectively as
12 Babines. And his list of debtors, which is a
13 feature of his second report, he describes the
14 village from which these Babines come from; some are
15 from Hotset, that's now Morristown, others are from
16 the three villages in Babine Lake. There was no
17 division and that I'm going to suggest poses a
18 considerable problem to the Appellants.
19 The other, the second group, the Atnahs, and
20 the Atnahs are no doubt the ancestors of today's
21 Gitksan, they spoke a different language and they
22 were the ones who were in touch with the Tsimshian
23 from the coast. And it's fair to assume they were
24 involved in the fur trade a little earlier than the
25 Wet'suwet'en, but not much earlier. Brown's contact
26 with them was very limited. He was up in Babine
27 country, in Atnah country, twice for brief visits.
28 We have a record only of his second visit, and at
29 that time there were two villages, very substantial
30 villages and five more smaller ones on what must be
31 the Babine River. We can't assume that they're
32 identical with Kisgegas today which is on the Babine
33 Riven, near the forks. Kisgegas originally was, if
34 not right on the Skeena River, very close to it.
35 These are two major villages, each with its chief
36 whose name is identified, and there's a third
37 village whose chief is identified, somewhere on the
38 Babine River and it must have been east of where
39 Wet'suwet'en lived in the 19th Century and --
40 Gitksan lived in the 19th and early 20th Century, so
41 he had a very brief contact with them, just passing
42 contact. The other group that he met in various
43 places were the Sicannies, as he called them, the
44 ancestors presumably of the Sekani, and they roamed
45 around the area near Bear Lake. And if you look on
46 your map that is inside the claim area, it's towards
47 the eastern end of the claim area, and the Hudson

Bay saw fit to establish a fort there called Fort Connelly and they called the lake Connelly Lake. The name survives you'll see in the Connelly Range which is in that direction. The purpose was to trade with Sicannies. Sir James Douglas in his trading days met with the Sicannies at Takla Lake. Sir James Douglas met the Sicannies there and had discussions. The result was that Charles Ross formerly of Fort Kilmaurs established a fort on Bear Lake and the Sicannies from then until the end of the century ranged around Bear Lake and so did another tribe called the Nahannis, although the Nahannis don't appear in the Hudson Bay's records. And you'll see perhaps -- all those reserves, by the way, are not Gitksan reserves, not one of them is a Gitksan reserve around Bear Lake. In addition, I was dealing with the Hudson Bay records in a general way. Fort St. James was the headquarters of New Caledonia which was the district in which these forts were. Fort St. James was on Stuarts Lake and is not shown on the map unfortunately. It's to the south-east of Babine Lake, Lake Babine, and the network of forts, including Fort George, now Prince George, Fort Fraser on Fraser Lake, Fort Kilmaurs on Babine Lake, Fort Connelly on Bear Lake, and I think one other, were controlled by the chief factor at Fort St. James on Stuarts Lake. They kept a post-record which included correspondence from the satellite forts, and you find -- and therefore you find material concerning the claim area and concerning the Babine area right next to it in those records and some of them will be referred to.

Another very important and the last of the Hudson Bay records we'll be dealing with is the very full report of a trip by a man named McGillivry from the fort on Babine Lake which had moved by this time to the top of the lake and was now called Babine Fort. He was apparently the first white man, first European, ever to reach the forks and he has -- he met Atnah there from two different villages.

He was shown where a third village was and those are, I suppose, Kispiox, Kitsegukla, and perhaps Kitwanga, and the Chief Justice referred to these Hudson Bay company reports at pages -- my note is pages 124, 142, 183, 200 to 204, 303, 374 and 432, and he reached certain conclusions, some of which are hotly contested by the Appellants, but the

1 conclusions based on those documents are at 204 and
2 205, 389, 420 and 431. The Hudson Bay records were
3 the records of a trading company. The chief
4 interest of the trader was in getting furs one way
5 or another, and particularly beaver. The various
6 traders made observations about the Indians that
7 they were dealing with, and for that reason it
8 contains a good deal of descriptive material about
9 the Appellants' remote ancestors and their customs
10 and their practices. But the other major series of
11 historical reports are focused solely on Gitksan and
12 Wet'suwet'en and that's the Loring reports. Loring
13 after 1888 -- one of the results of the 1888
14 confrontation and change was that an Indian agent
15 was appointed to deal with all the Gitksan and their
16 villages and all the Wet'suwet'en and others beside
17 the Babines. When he was appointed there was still
18 no line drawn between the Babines and the
19 Wet'suwet'en and his grid ran down down as far as
20 Stuarts Lake in the early days before another agent
21 was appointed to take care of this. They're all in
22 Exhibit 1209 and there was 981 reports in evidence,
23 that's not all the reports by any means. That
24 averages one a week for the 30 years he was there,
25 and a few of his reports were used by the
26 Appellants, relied on by the Appellants in their
27 case. They were introduced in evidence by their
28 expert witness Galois. He made annual reports and
29 he made monthly reports. And in addition, he made a
30 vast number of reports on specific things, the
31 subject for instance of who was at Francois Lake and
32 who was at Ootsa Lake. He didn't make lengthy
33 reports on one activity he was intimately involved
34 in and that was allocation of reserves, both the
35 original allocation in 1891 and '93 and '98 and the
36 McKenna-McBride allocation in 1916. He was there
37 all that time and took a very active part in all
38 those proceedings but he left it to the Indian
39 reserve commissioner to make the reports of those
40 things, although he's there and he does make
41 comments on them in his letters.
42 He was there from 1889 through December 1920
43 and reported the first aircraft that landed at
44 Hazelton. Now, the Chief Justice referred to these
45 reports at many pages of the judgment. He referred
46 to them at page 184 and 315 to 321 and then 323,
47 334, 420 and 432, and his findings that are based,

1 some of them entirely and some of them in part, on
2 these Loring reports are at pages 324, 325 and pages
3 373, 374. And you'll recall that Mr. Grant and Mr.
4 Rush spoke at length about the findings at pages 373
5 and 374.
6 The Loring reports among other things record
7 the transformation of the traditional Gitksan and
8 Wet'suwet'en from a largely Aboriginal society to a
9 distinctive but largely integrated component of
10 modern Canadian society. It's interesting to note
11 that the change came very fast. It was a society
12 that was capable of very rapid change. They were
13 extremely adaptable. The third major component of
14 the historical record I'll be dealing with has to do
15 with the events starting in 1872, when to use the
16 term of those days a 'man-o-war" was sent to the
17 mouth of the Skeena River and certain chiefs from
18 Kitsegukla were summoned to meet with the Lieutenant
19 Governor on the man-o-war, to 1888 when a force of
20 -- it was a sea battery of the embodied militia was
21 sent up to the mouth of the river and a detachment
22 of constables led by a magistrate and the chief
23 constable for British Columbia met most but not all
24 of the chiefs at Hazelton in 1888. And this
25 involves the assertion by officers of the Crown that
26 Canadian law and not Aboriginal law would govern the
27 Gitksan and Wet'suwet'en and the appointment of
28 magistrates, police-officers, the Indian agent and
29 other government agents for the purposes of
30 administering and enforcing law in all of the claim
31 area. I mention that all occurred in August. By
32 the end of 1888 constables had reached as far as
33 Bear Lake on the extreme eastern end of the claim
34 area to execute a warrant and bring people in,
35 witnesses. Now, part of the background to the 1888
36 assertion and enforcement of the laws of Canada and
37 British Columbia is the role played by the
38 missionaries. The missionaries were there so far as
39 we can tell from about 1870. The first white man
40 appeared in Gitksan country in 1866. If you count
41 on Mr. Downie who travelled by canoe up the Skeena
42 River and the Babine he was through there. The
43 missionaries were there from about 1870. They had a
44 mission house by 1871 on the flats at Hazelton and
45 they played a very important part in the development
46 of the land claim expression, the expression, the
47 theory and expression of land claims. But they

1 also, because of the historical background that gave
2 rise to this, which took place just outside the same
3 area as Meklakatla and a quarrel involving a
4 reverand Mr. Duncan and his bishop, they came to a
5 point where they taught the Indians, these were the
6 Gitksan not the Wet'suwet'en, that the government
7 was their enemy, that the surveyors were the
8 instruments of their oppression, that reserves would
9 only be created to be taken away or ultimately the
10 reserves would have to be bought by the Indians and
11 paid for, and the ideaology of that time, that had
12 quite an effect on the reserve creation process and
13 it didn't die down. There was a good deal of
14 trouble as we'll see at Kispiox in 1891. By 1915
15 when the McKenna-McBride commission arrived none of
16 the chiefs of the Gitksan would talk to the
17 commissioners about reserves or additional reserves
18 or anything to do with reserves, insisting the
19 entire land was theirs and they would have nothing
20 to do with the reserve process. That's to some
21 extent referred to in Loring's reports but mostly in
22 other historical material, various officials'
23 reports, the report of a royal commission and some
24 missionaries' notes.
25 An important factual issue raised on this
26 appeal is the question of the external boundaries of
27 the claim area, that is the black line that we see
28 on the map. The Chief Justice found that the
29 evidence failed to prove the internal boundaries,
30 all the internal boundaries, the house territories,
31 the hundred and three little parcels, some not so
32 little parcels of territory, and the Appellants have
33 not appealed from that aspect of the Chief Justice's
34 findings. But as I understand it, they don't resile
35 from the structure that they describe, the house
36 structure, which, of course, necessarily involves
37 all these internal divisions. The internal
38 divisions are still in play in another way. That
39 outside boundary is no more than an accumulation of
40 internal boundaries. This boundary consists of the
41 -- as the case may be -- north, south, east or
42 western boundaries of a whole lot of little parcels,
43 and the Chief Justice noted that and found since he
44 had made that finding that the external boundary
45 was, as he called it, artificial, and that's set out
46 in the reasons for judgments at pages 431 to 452.
47 The Chief Justice held, and I quote him here:

"The evidence in total is so contradictory and inconsistent that it would not be safe to make a declaration of exclusive interest for any of these many territories."

That's the hundred and thirty-three territories.

Mr. Wolf addressed that finding in his submission and the Appellants relied on reputation evidence for these internal boundaries because these boundaries are supposed to have existed for millenia, with this exception that the Appellants say that there are cases where a territory or a part of a territory can be seeded to another house as compensation for a murder or something like that.

So there are variations, but generally speaking they say these boundaries have existed from time immemorial and that they've been occupied and used and governed by the various houses severally. The Chief Justice held that the reputation evidence on the boundaries didn't establish the kind of reputation that the law requires, and Ms. Koenigsberg will address in some detail the evidenciary aspect of that question in her submission. But one of the problems is, of course, overlap, where a boundary -- one seeks to establish a boundary by reputation evidence. If the situation is that on the east side the occupant says, "That's the boundary of my property," but on the west side the occupant says, "Like Hell that is the boundary. I own property for ten miles beyond this boundary," that is the kind of problem addressed by the Chief Justice and will be addressed by Ms. Koenigsberg. He referred to these overlapping claim problems in his reasons at pages 441 and 442. And he referred to Exhibit 101, that's the huge Carrier-Sekani overlap.

Having made those openings submissions, I'd like to turn to paragraph 1 of my --

TAGGART, J.A.: It would be appropriate then to take the luncheon adjournment. Two o'clock.

THE REGISTRAR: Order in court. Court is adjourned until two o'clock.

(NOON RECESS)

I hereby certify the foregoing to be a true and accurate transcript of the proceedings transcribed to the best of my skill and ability.

_____

Margaret M. Wills
Official Reporter
UNITED REPORTING SERVICE LTD.

1 Vancouver, B.C.
2 15 June 1992
3 2:00 p.m.
4
5 TAGGART, J.A.: Yes, Mr. Macaulay.
6 MR. MACAULAY: Before I start with Book 1 of the references, and
7 I might say I can get through Book 1 pretty fast,
8 you'll be glad to hear that, I should say something
9 again about the maps, the map and overlays. If I
10 don't, it may lead to some confusion later. I've
11 asked the Registrar to hand up the overlay that shows
12 the individual territories, the 133 individual
13 territories. And you will see when you put that on
14 that the outline of the exterior boundary isn't the
15 same any more as the base. The Chief Justice used the
16 unaltered base for Maps 2 and 5. But during the trial
17 the -- if I can call it the exterior boundary -- did
18 change. And I'm only mentioning this so that in case
19 any of your lordships actually started using any of
20 these overlays and wonder why the exterior boundary
21 doesn't seem to be the same I just want to say well,
22 it isn't the same. During the trial it changed a
23 little bit.
24 If I can start at the bottom, there is another
25 line too. At the bottom of the base map there is a
26 very dark brown line going along the southern shore of
27 Ootsa Lake and Whitesail Lake. That has nothing to do
28 with this lawsuit. That line is the outline of the
29 provincial park. There is a -- it's very dark brown.
30 It has nothing to do with anything is what I'm saying.
31 There is a claim to the northern portion of the
32 provincial park by two houses, named Goolaht and
33 Samooh, but the changes in the boundaries, except
34 quite apart from tiny ones that don't seem to make
35 much difference, are first on the east side, you will
36 see there are territories called Goolaht Woos, which
37 is much smaller, then Wah tah kwet. It's near Babine
38 Indian Reserve No. 17 and 18 and Moricetown No. 1 and
39 so on, in that area, but over to the east.
40 If you lift your overlay up and place it down
41 again you will see that there is a loss or concession
42 of territory to the Carrier Sekani east of Mt. Cronin.
43 There is a bulge just to the north of that where they
44 take in Babine territory that they hadn't before on
45 behalf of Smogelgem, and there is a retreat or loss of
46 territory in the territory a little further up from
47 that, contiguous to Djogaslee and Luutkudziiwus.

1 That's around Mt. Thoen. So the frontier has
2 retreated now to Mt. Thoen.
3 Farther north, Nii kyap territory on the south of
4 Thutade Lake there is an increase there. It goes now
5 east of Moose Vale Creek. At the very top there is a
6 withdrawal, I'm looking at the north now, the far
7 north, in the area of Mt. Beirens and Jenkins Creek
8 and so on, there is a withdrawal of the boundary in
9 the north end compared to what it was when the claim
10 was originally made and the base map was produced.
11 Then on the northwest where the snow slide range
12 is indicated there is a V-shaped retreat in there.
13 The only other area I want to draw to your
14 attention is on the west side where there is an
15 extension that looks a bit like Wales, around Mt.
16 Priestly there is a withdrawal from the original
17 boundary there.
18 At the moment I'm not making any submissions about
19 those additions and withdrawals, I'm just drawing your
20 lordships' attention to the fact that there were those
21 changes during the trial so that if they --.
22 Now, the Chief Justice, as it turns out, used the
23 old, that is, the original boundaries, for Maps 2 and
24 5. And Maps 2 and 5 also contain that thick brown
25 line marking outlining the park. I repeat, the park
26 is -- park outline is not relevant to anything that I
27 can think of.
28 If I could turn now to Volume 1 of my references,
29 each tab corresponds with the paragraph number in my
30 factum. I have no submission to make about Tab 1.
31 Tabs 2, 3, -- well, up to Tab 6. 2 to 6 deal with
32 Harmon's observations first at Fort St. James in 1811
33 when he first runs across 'Nate-ote-tains', that's the
34 term he uses for Babines of the Lake, and travels to
35 their several villages in the following year.
36 Tab 3 shows the names he uses for the various
37 tribes he identifies, including Atenahs, although he
38 doesn't see any Atenahs.
39 Tab 4 is just a description of the great river in
40 their country and they're talking about the Bulkley
41 River there, then called Simpson's River, and
42 throughout the Hudson Bay documents the Bulkley River
43 is called Simpson's River. It was the theory in those
44 days that the source of the Skeena was at the head of
45 the Bulkley River and that's why -- and that error
46 continued a very long time. It was thought the Skeena
47 turned south at Hazelton and that the river joining it

1 was the Babine, whereas in fact what they called the
2 Babine that you see -- the river coming in from the
3 east at Hazelton, is part of the Skeena. And you have
4 to keep that in mind in reading any Hudson Bay and,
5 indeed, later accounts of this territory.
6 There is mention of the coastal fur trade and in
7 Tab 5 Harmon lists the guns, cloth, blankets, axes and
8 iron pots he found in the hands of the
9 'Nate-ote-tains' that they had bartered from the
10 Atenahs. And there were, he said, 2,000 people in the
11 villages. We know from a much more accurate
12 description of the 'Nate-ote-tains' by Brown that
13 there were three villages. It may be doubted whether
14 there were 2,000 people.
15 HUTCHEON, J.A.: I'm sorry, it may be doubted --
16 MR. MACAULAY: Whether there were 2,000 people. It doesn't
17 sound like it. But he reported that.
18 And in Tab 6 Harmon refers to their dialect, their
19 distinct dialect of the 'Nate-ote-tains', their
20 reliance on salmon. Of course, these 'Nate-ote-tains'
21 are at the source of the Skeena, the Babine Lake, and
22 the fish come up the Skeena and into the Babine Lake
23 and it was just the ideal place to fish. And he saw
24 caribou and he hears reports of bears and other large
25 animals. The experts tell us that there were no moose
26 in the territory at the time. There were deer because
27 they're referred to in the Hudson Bay journals.
28 Paragraph 7, we start with William Brown. The
29 establishment of Fort Kilmaurs was in 1822. He
30 paddled around the lake and chose a site. There was a
31 competition between two of the villages, Ackooshaw's
32 village and Casepin's village, those were the chiefs
33 of those two villages, they were each one of them
34 apparently keen to have the fort near them and
35 Casepin's village won out. That's Nahtelcuss and it
36 was about a quarter mile from the old fort.
37 In 7A I set out the nomenclature. In this part of
38 my factum I'm adhering to Brown's descriptions of
39 Babines, Atenahs and 'Siccanees'. Gitksan is first
40 used -- the first use of the term Gitksan we can find
41 is in a note by the Reverend Duncan of Metlakahtla who
42 records some Gitksan coming to see them. Kitishans
43 was the then version, which is now called Gitksan, and
44 that was in 1869.
45 Paragraph 8. I mention there were two general
46 reports by Brown and they're both reproduced in full
47 at that tab but we will be -- I will be referring to

excerpts from the tab from now on for the next -- many tabs in many cases. And I show there the difference between the Babines of the Lake and the Babines of Simpson's River. There were another Babine, there was another mention of Babines, and they were people living on what we call now Francois Lake, a small number, who traded -- who did their trading at Fort Fraser.

The 'Siccanees', as I mentioned, were around and ranged north of Bear Lake, which is in the claim area.

Paragraph 9. The Babines are described as a society organized in several villages with chiefs and their followers and, in addition, heads of families, each possessing lands to which they claim an exclusive right.

The Hudson Bay record shows that heads of families had exclusive hunting grounds and the reference is there, that's an important point, and the exhibits, the first exhibit is the 1822/23 report at Tab 9 where about the middle of the page -- this is actually legible so we didn't have to do a transcript -- he reports Casepin, that's the chief of the village, is the principal chief of these two villages. After him the following are considered the most respectable, being heads of families and possessors of particular tracts of country which they claim an exclusive right to and then he names them: Oolad of Tachy, Sawbuck, Squee, and the others, all of whom appear -- all those names appear frequently in the records.

Then in 18 -- same 1823 record, the following page, he says near the fourth line, "...there are a great number of strangers who generally resort there..." This is at Nasschick, one of the villages. I want to draw that to your attention because it's -- there are continual references to other Indians, principally Indians from south of the 'Nate-ote-tain' or Babine area, who are around and they sometimes play a part in the action. But he refers -- again he's talking about Nasschick, one of the three villages on Babine Lake, he names some -- the principal chief, Ackooshaw, and then some other chiefs and he says "and several others who are possessors of lands and heads of families."

And then on the next page he lists and in this case he is talking about Hotset, this is a place he had never been to until well after this report was made. But he has enough information about them to

list the chiefs according to their rank and as they are placed at the feast and he starts with Oss, the head, Snuggletrum, who we're told is Smogelgem today. Oss is Woos today, Oos, Quiltno, who oddly enough as we'll see had his hunting grounds in Babine country, although he's the chief, the third chief at Hotset. Well, it's not oddly enough, the fact is there was no difference between these two groups. He had his exclusive hunting grounds near Tachy, which is one of the villages on Babine Lake, and many other names.

Because of the exclusive claim by certain heads of families to hunting grounds, Brown reports that many Babines couldn't hunt because they had no land and he says this was detrimental to the fur trade so he met with the heads of the families. The context shows that it's at Nahtelcuss, the village a quarter mile from the fort, and he made a proposal that "All the residents of the village should have the liberty to hunt upon any lands they thought proper, the skins they procured to be their own but the meat to be given to whoever was to make the first feast of their deceased relations". That was the principal reason for the feast, was the deceased relations. And Brown reported he expected he'd be able to secure agreement about that.

He had another proposal too, and that is that they hunt as teams. As he pointed out, one would have a chisel, an ice chisel, which you need for beaver hunting, another a net, another a gun and so on, and he proposed that people join forces to hunt but he reported that that second suggestion was not well received.

HUTCHEON, J.A.: Just going back to 9, as I understood you this morning you indicated that these families were not really connected at all. Did I get the wrong impression of you?

MR. MACAULAY: How do you mean, my lord?

HUTCHEON, J.A.: You said there would be a family under a house and that would be it, as though there was no organization amongst the families, amongst the houses.

MR. MACAULAY: I'm talking about the plaintiffs as they present their case. They have the unit, the sovereign unit is the house. Houses are connected in clans, the Frog clan, for instance. There is no mention of that kind of connection in the Hudson Bay records, nor is there a mention of the house as such. I'll come to that in a minute.

1 HUTCHEON, J.A.: But this --
2 MR. MACAULAY: There are chiefdoms. There are villages with
3 chiefs.
4 HUTCHEON, J.A.: Well, principal chiefs.
5 MR. MACAULAY: Well, there is a principal chief then there are
6 subchiefs and then there are heads of families. And
7 all those three, each would have his, or in one case
8 her, because there is a lady chief at this time,
9 hunting grounds, exclusive hunting grounds. That's
10 what's reported there. Today it's not an absolute and
11 I don't think the appellants would contend that it's
12 an absolute dead on fit. They say that this is
13 evidence -- well, we agree that it's evidence of an
14 organized society and evidence of a good deal more.
15 What we're saying, what we're leading up to at the end
16 of the review of the Hudson Bay records, is that it
17 does not support the kind of jurisdiction or ownership
18 of the whole claim area that they contend for.
19 HUTCHEON, J.A.: But I'm just looking at this from -- keeping in
20 mind what the trial judge -- and I think you said he
21 was right in this, said it's simply a matter of
22 villages and some surrounding land. Brown's report
23 doesn't reflect that at all.
24 MR. MACAULAY: Well, my lord, I submit that it does. There are
25 villages, there are heads of villages, there are
26 subchiefs of villages, and it so happens that their
27 individual hunting grounds are separately held. I
28 don't think the Chief Justice said anything different.
29 HUTCHEON, J.A.: Well, Brown talks about them being possessors
30 of land.
31 MR. MACAULAY: Oh, yeah.
32 HUTCHEON, J.A.: Not just in the villages, not just around the
33 village.
34 MR. MACAULAY: Well, it's impossible to tell from the Hudson Bay
35 records how far, except in the case of Quiltno. We
36 know in Quiltno's case, the third chief of Hotset, we
37 know that his hunting grounds are near the fort. Now,
38 it may be that he was a Babine who had gone to live in
39 Hotset. We see another example of that later. They
40 were all the same people. That may be the
41 explanation.
42 HUTCHEON, J.A.: All right.
43 MR. MACAULAY: Except for Quiltno there is no description of
44 where the hunting ground is. And, of course, it was
45 an organized society and you can't have everybody
46 hunting in the same beaver pond.
47 Paragraph 11. The chiefs and heads of families

were described by Brown as having little control over their relations and followers. And the observation he made was, "...as everyone as far as I can judge considers himself his own master."

Perhaps I should refer to where you find that, it's at the very beginning of the report of 1823 where he says -- he names certain people of the -- these are, of course, Babines of the Lake and he says the others, and names certain principal men or chiefs. He says, "The others are more or less related to some of those eight..." He has named eight people starting with Oolad, "...and may be considered as their followers but they have little or no control over them. As everyone as far as I can judge considers himself his own master." That's at the bottom of the first paragraph of the first page of that report.

And then if you go past the yellow divider is the comments of a similar character in his second report of 1826 where he says at the bottom of page 3, which is the only page that's attached here, he's referring to the village of Nahtelcuss at that page and he's talking about Casepin, the chief of that village and he says, "His following are few, he not being the principal chief of his tribe, and over these he has but little control." Casepin was, although the head of the two villages, was in seniority second to Ackooshaw, who is the head of a village a little farther to the north on the lake.

And then over in the same report under this tab just a couple of pages over I have added a middle page to show what the context is. He is describing now -- he's giving a description of several chiefs from Hotset and,

> "Choled-soap, the tenth chief according to seniority. This man appears to be of a quiet study and peacable disposition and possesses considerable influence amongst his countrymen. He generally trades at the fort. What he kills for himself and receives from his followers commonly amounts to between 20 and 30 skins in the course of the year."

Then he goes on about the other 15 leaders at Hotset. He says,

> "Of the other 15 who are considered chiefs, none

1 of them seem to me to be of any great
2 consequence or possessed of much influence
3 further than amongst those of their own family
4 and even with them their authority appeared to
5 be very limited."
6
7 So I submit what's being described is a kind of
8 chiefdom, a village with a recognizable chief and
9 influential subchiefs.
10 The Babine villages, as you may have gathered by
11 now, are Tachy in the south of the lake, Nahtelcuss at
12 the fort, and Nasschick, where Ackooshaw lived, near
13 the top of the lake. Then there is Hotset, the most
14 populace, which was estimated to be a village -- I
15 have 700 but I believe the correct figure is 750 -- of
16 which 20 are chiefs and 67 are heads of families. The
17 chiefs are given as I mentioned and each one has a
18 principal chief at that time in that state of
19 organization. The Hotset had a principal chief. The
20 appellants say -- they don't say that now, there isn't
21 a principal chief. That's the difference, my lord.
22 They say there are a lot of equal chiefs and they
23 are -- if there are, say, nine houses, three would be
24 Frog, three Fireweed, three Wolf, connected, but no
25 one dominant or superior than the other. And that's
26 not quite what is being described here.
27 In 1839 the Hudson Bay Company -- and it's not the
28 only time they did this, but this seems to be the
29 earliest time -- made a census, like Caesar, of all
30 the people in the New Caledonia division. The
31 relevant parts of that census are mentioned in Dr.
32 Ray's paper dated January 16th, 1985 and it was marked
33 Exhibit 962. And next to this paragraph 13 at this
34 tab I have his typewritten list but it may be useful,
35 and I have to say I have to hand this up as an
36 aide-memoire because it wasn't itself, other than this
37 typewritten version, marked as an exhibit. The
38 original document -- and I'm making only one point,
39 there were many more pages than this because it
40 covered the whole division. The top reads, "List of
41 Indian Population of the Babine Post." It was called
42 Fort Babine by this time and had moved farther north
43 on the lake, "Belonging to the Honourable Hudson Bay
44 Company in New Caledonia", which was the division.
45 There you will see the head of family, the person
46 named as head of family, and what the Hudson Bay
47 Company considered was the family. It included wives,

almost unvariably one wife; sons; daughters; followers and strangers is the next category, and then the total. Oddly enough, as you will see on the third page, for the Hagwilget, because by this time the Babines of Simpson River had moved up to Hagwilget after a rock slide had blocked their fish supply. In 1824 -- we know the year from the Hudson Bay reports -- in 1824 an enormous rock or series of rocks fell into the river near the Forks, forcing the Hotset population to go up and make a deal with the Atenahs at the Forks under the terms of which they could establish their -- re-establish their fishing grounds, and they've been fishing there ever since. That's why they're called 'Aucette' Indians. They are still called 'Aucette' Indians but they are up there now. And they list certain heads of family but don't fill in any detail about the wives, sons, daughters, followers and strangers, et cetera. But we do have it for their compatriots living nearer the fort.

The only point I make here is that that will show what's meant by heads of families. It was suggested by the appellants that heads of families meant houses. That doesn't seem to be the case that the Hudson Bay used that term in that way.

Paragraph 14. Feasts are referred to often in the report and the reason for that was they interfered in hunting and the focus of the whole thing was getting furs in. And occasionally they described the feast. Most of the descriptions were of feasts on the occasion of the death of a prominent person in the village, but one was obviously described as one where several tribes were represented for the purpose of making a general peace and that was the one to which Brown was invited. They were anxious to have him go to that feast, that wasn't -- he was never, so far as the record shows, invited to the general -- the feasts, but that one was a special one and of a different character.

Other feasts were on the occasion of the cremation of a body or, in the case of the Carrier, including the Babines, the "deposit" of the bones and ashes. Those were done at separate intervals. The anthropologists tell us the interval was either one year or two years, the widow carried the bones for a year or two years then there was the deposit of the bones.

One feast related to a bid by a Babine Lake chief

for the title and lands of a Simpson's River chief who died. And perhaps I should -- I think my friend Mr. Rush mentioned that, it was either him or Mr. Grant. There are about three entries beginning with the entry for April 4th of 1826. That is several yellow sheets in. After the third yellow sheet and on one side is the transcription of the relevant part and the other side is the original document. Tuesday the 4th is at the bottom of the page of the original and it reads in part, "It appears Jack Kay, one of the chiefs of Hotset, died this morning at Nasschick. Ash Shaw --" I was wrong in saying that Jack Kay was the man who sought the title, it was Ash Shaw. "Ash Shaw started for there with all his moose skins in hopes of getting his place, about which I rather suppose there will be some disputes."

Then the next -- just turn one page over to Wednesday the 5th. There is another reference to this.

> "The death of the Indian mentioned yesterday I am doubtful will prevent all those in the neighbourhood for sometime from hunting as I understand messengers have been dispatched all over to assemble them for the burning of the body."

That's the first stage.

Next page is about Jack Kay and Ash Shaw again. Monday the 10th. And the reference is to an Indian, he's named.

> "...arrived from below to invite the Indians to the burning of the body of Jack Kay which will stop them from going off as I expected. It appears that Ash Shaw is determined to burn the fellow and take his place, to which design it would seem the gods are propitious, for two days ago when on his way from the Big Island to Nasschick he met a she-bear with two cubs, which he attacked and killed, which will tend greatly to forward his purpose as the meat will serve for the feast."

And then the last entry reports that,

> "The Indians arrived from below from the burning

1 of the body, which took place this morning. By
2 them Ackooshaw sent me a message intimating
3 that --" and I can't make out the next words
4 "-- and his band would be at the fort in five
5 days with what furs they have. Ash Shaw --"
6 that's the man who was contending for the
7 title, "-- has been made a chief to supply the
8 place of the defunct whose lands he is to take
9 possession of. Yai ben elk tak got the place
10 of Ash shaw. There were six large moose skins
11 cut up on the occasion with plenty of bear
12 meat, oil, berries, salmon, et cetera, which
13 has given all the Indians a high opinion of Mr.
14 Ash shaw's generosity."
15
16 Now, it was at this point and in this connection
17 that Mr. Rush told your lordships that the decision
18 was not made at the feast. It sounds as if it was
19 made at the feast but the appellant says no, those
20 decisions aren't. Well, my submission there is that
21 this is a record which doesn't purport to be an
22 anthropological research. It's all we have. It's not
23 particularly directed at the customs of the people
24 there, but -- and it's reporting on the Babines who
25 are -- whose customs must have -- may have, I
26 shouldn't say must have, changed over time. But it
27 suggests that there was some competitive element to
28 the feasting, which is not at all unknown on the
29 Coast. It doesn't suggest that a decision was made
30 beforehand and simply ratified at the feast.
31 Competitive potlatching was something that, as I say,
32 was not unknown at all.
33 HUTCHEON, J.A.: I think the trial judge put the feast system as
34 a non-decision, no decisions. You're suggesting it
35 must have been made here.
36 MR. MACAULAY: Not of a legislative character. There was
37 obviously some system of devolution of rights, as
38 there had to be.
39 HUTCHEON, J.A.: Yes.
40 MR. MACAULAY: Jack Kay and Ackooshaw's example is the only one
41 we have that goes into any detail.
42 HUTCHEON, J.A.: And it's not an automatic devolution.
43 MR. MACAULAY: It doesn't sound like it. But that's a good deal
44 more detail than we get in the case of most
45 transactions and my friend referred to it and I
46 thought it was important too.
47 The next paragraph we can move along with pretty

quickly, it merely says the Babines were addicted to gambling and the Hudson Bay Company was distressed because it affected trapping in various ways; people would gamble away their trapping equipment.

The following paragraph there is, from the reports, a fairly high incidence of killing and revenge among the Babines at that time and with their neighbours and that was of interest to the Hudson Bay Company because it destabilized and damaged trade. The one example is the report by P.C. Pambrun in 1829, he was then the commander at Fort Kilmaurs, describing the Babines of the Lake as being so apprehensive about an attack by the Simpson's River Indians, their fellow countrymen on Simpson's River, that they deserted their fishing stations in September and couldn't be persuaded to hunt in the winter.

There are many references, the first of the references has to do with the murder of a man named Livingstone. Some Simpson's River Indians shot him and that destabilized the Indians. And, as Mr. Pambrun reports, "The Indians in consequence taking the alarm desisted from hunting and during the summer it has been impossible to remove their apprehensions so far as to prevail on them to hunt." They thought that the Hudson Bay Company would take revenge on them and in a sense they were right, the Hudson's Bay company had no -- didn't pretend to enforce law. One of the three who were involved in the killing was shot by Hudson Bay Company men. Another was shot by -- killed by a Fort St. James Indian who apparently was in the Hudson Bay Company's employ. The Hudson Bay Company at that stage in a sense joined the aboriginal system.

But whenever -- in the next example, April 1828, the report is by Pambrun again,

> "The Indians from Simpson's River are arriving daily on this lake but none of them have any furs. They are running away from their villages, being apprehensive that the Indians of Fraser's Lake will go to war upon them."

We don't know the cause of that. The Fraser's Lake Indians were Carriers, now I think known as the Stellaco Indians.

And then in September, I believe that's still 1828, I can't make out the date, it's Pambrun though,

reporting to Mr. Connolly at Fort St. James. This has to do with the killing of one of Duncan Livingstone's assassins. And he reports, "The Indians of Simpson's River are to have their revenge upon us", that is, the Hudson Bay Company, but he didn't take it seriously.

In February of 1829 he reports a siege of the man who killed Matt. Matt was one of the 20 chiefs listed in that 1823 report, so a large party of -- there were 80, a war party of 80, that wasn't one family, came to the fort and the man who had done the deed had barricaded himself so well that they weren't able to winkle him out. He was a Fort St. James Indian living near the fort. Casepin intervened after this had started and the chiefs, that is, these are the Simpson's River chiefs, wanted to see Pambrun, and Casepin arranged that and then they came and explained why they hadn't been at the fort. And they thought they'd be punished for the death of Duncan Livingstone because that's the way the system worked, that anyone, that is, any Simpson's River Indian, was liable to be killed by the Hudson Bay Company for the killing of Duncan Livingstone. The Hudson Bay Company never carried things that far.

In the following page, after a little scuffle at the fort, Pambrun counted 70 men returning. He said some had returned, that is, gone home earlier, and the party, he thought, was 80 and he says, "They have stripped most of the Stuart Lake Indians naked and plundered them of the provisions that they had traded."

Now, the man they had been trying to take to punish was a Stuart's Lake Indian, a Fort St. James Indian, that is. In February, 1829 there is another report on the same incident, that is, the Simpson's River attack by a war party of 80 following the killing of Matt by an Indian name Who kuch.

The next entry is an earlier one, it's a Fort Kilmaurs journal entry, Sunday the 2nd of October 1825 where, amongst other things, it's reported that:

> "These Indians, that is, Chim bin ya and Chim clue, were on their way to meet a Hotset Indian on the lake from whom they learned that Changcoost, whose son as has already been stated was killed by Indians last spring had not long since set out from the Upper Forks with the resolution of revenging the said

> murder upon the Hotset Indians, but on his way, having fallen in with Tawse (a Hotset Indian frequenting Fraser's Lake) and his family he glutted his revenge upon them, butchered the whole, and then returned to his place."

Then the editorial comment is that "This report, however true, will have a very injurious effect upon our Indians as they will thereby be afraid to budge from their lodges."

That's an illustration of the character of the law, if you want to call it that, regarding a killing. A killing warranted revenge being taken on any member of the assassin's tribe. Could make life very precarious on the highway.

The next is October 1825, Friday, the 28th of October. They name an Indian and say, "The latter comes from Fraser's Lake where he informs us he has killed an Indian to avenge the death of the grand --" and I can't make out the next word "-- a relative of his killed by the same Indian. Arrived from below Tin nee well."

In February 1823, and this is in Brown's handwriting, he reports,

> "The Indians of Simpson's River have all been fighting and quarreling among themselves. There were two brothers either killed or severely wounded and the wife of Quiltno's brother is killed dead. At least this is the report which we have received. The Indians were all in a bustle about it for a day or two but are now mostly gone below to a feast."

And in Sunday, the 23rd of February, 1823 Brown reports that it appeared, and I quote, "It appears the Indians here and the Atnahs had a quarrel."

The context of that, and I haven't got a transcription of it but I can supply one, a couple of days earlier -- no, the day before on Saturday the 22nd, he reports that certain Indians came to the fort for moose skins to make presents to some Atnah that had arrived from below. And he says, "I understand there are about 30 Atnah in all who are mostly armed with muskets --" and I think that's "spears".

That's the context of the report of a quarrel between the Atnah and the Babines. And March, 1823,

Tuesday the 4th of March, he reports as follows:

> "Had a report today by some Indians from below 'That the Frenchmen (as they call them) have come up to the river and killed a number of the Atnahs.' If there is any truth in the report it must either have been the Indians of the seacoast or the Siccanies of the Prairies who have done as - most probably the last as they are at war with the Atnahs."

Then on Thursday the 6th he comments, this is on a visit by Quiltno,

> "Spoke to Echelle --" he was a colleague of Quiltno, "-- to proceed to St. James but he positively refused to go. I have requested him to go a hunting, which he was willing to do providing I would give him a gun but stated that without it he did not consider himself safe on account of some disputes he had with the Indians below."

In June 1825, the report is Sunday, June the 5th, 1825, "We hear from below that Oss's band --" that's -- Oss is the head chief of the Hotset, have murdered an Indian of the Atnah tribe in the vicinity of Hotset and have fled to Nasschick." That is, Simpson's River Indians have gone over to Babine Lake as a result of this trouble with the Atnah.

Thursday the 9th of June, 1825, Oss arrives, the head chief, "Arrived from below Oss and band" and also some others and he describes the trading and then says, "The fact is these fellows would wish to swagger on account of the noble exploit they performed at Hotset in killing the poor Atnah." This is after they have removed themselves from Hotset to come over to Babine Lake.

Then Friday the 10th, Oss threatened that -- told the Indians that if Brown should go to Hotset he would procure his death. That's a result of a trading dispute.

On Friday the 10th, 1825 he reports, "We understand that Quiltno, Matt and some other Hotset Indians have arrived at Tachy --" Tachy is the southern village on the Babine Lake, "-- after killing in their turn an Indian of the Upper Forks of Fraser's

River."

And there is also a report on the 12th that Detual, who was one of the Indians who came with Brown to found Fort Kilmaurs, has been murdered by the 'Siccanees'.

On Sunday the 12th there is a continuation, and that's an account of the reason for which Detual met his death.

Now, he describes the reason as follows:

> "The death of Detual may be partly attributed to his having quarrelled with his destroyer at play sometime before and in a great measure also to a wish to avenge the death of a number of 'Siccanees' who have died lately at Fort Simpson and whose exit was ascribed to the influence of Carrier Medicines. We anticipate much trouble here from this unfortunate occurrence for the deceased, having met his death while in the company's employ, his relations will look upon us as in some measure accessories to the fact."

And that will come back again in the 1880's as a problem.

And at the bottom of the page and the top of the following page, still for Sunday the 12th, the note is, "Mr. Brown sent --" this is a Charles Ross writing, by the way, at this point, "Mr. Brown sent an information of the murder of Detual to his relations and intimates, at the same time a wish of seeing them at the fort." The Hudson Bay Company knew the Indians well enough, they knew the protocol that had to be followed in circumstances like this. And there was a man named Yeomans in 1884 who, if he knew it didn't follow it, and was killed.

And on the 13th he reports,

> "Squee, one of the relations of Detual, was here today. He said very little regarding the murder but merely observed that he did not suppose his relations would take any steps to avenge it as the actors were at too great a distance."

That was the 'Siccanees'.

And on Monday the 20th, 1825, still about Detual,

"Arrived Casepin --" that's the chief of the village "-- and band including the relations of Detual. During their stay they behaved in a very orderly manner and employed no other threats nor demands. The old father, Clah-mah, wore a most rueful countenance and appeared really aggrieved for the loss of his son. Mr. Brown, partly through pity and partly to prevent the relations of the deceased from harbouring any revengeful feelings against the company's servants, presented the old man with a Three Point blanket to soothe his sorrows and in full of all demands."

Apparently the present was received and you hear no more about that.

On Friday the 24th, 1825 still, the report is,

"A number of Indians of this village are gone down to Nasschick to celebrate a feast and among the rest, Hoolchah, with the intention of avenging the death of his father who was killed some years ago by a Hotset Indian by the name of Radissay."

TAGGART, J.A.: Mr. Macaulay, it's well past 3:00. Would this be an appropriate point to break here for about five minutes?

MR. MACAULAY: Yes.

THE REGISTRAR: Order in court.

(AFTERNOON RECESS)

THE REGISTRAR: Order in court.

TAGGART, J.A.: Yes, Mr. Macaulay.

MR. MACAULAY: To finish off with Tab 16, the next excerpt from the journal is June 28th, 1825 where the journal reports:

"Arrived the Indians belonging to St. James. Learnt from them that a strong party of Chilcootins and Indians of the Upper Forks of Fraser's River are sent out on a war excursion against the Indians of Hotset and of this lake in order to avenge the death of the Indians of the latter tribe already stated to have been

1 killed by the Hotset Indians."
2
3 Also reports that Hoolchah returned from the feast
4 without attempting anything against Radissay.
5 And the 1st of July 1825, the report says,
6
7 "Indians have begun to arrive from the feast and
8 are taking up their quarters within gunshot of
9 the fort in order to have an asylum at hand in
10 case of being attacked by enemies."
11
12 That's the Indians to the south.
13 On July 31st the journal reads:
14
15 "Reports that the Indians of Tachy --" that's
16 the southern village, "-- have made no hunt
17 since they were here in the spring. We hear
18 also that Chimbinyai, an Indian who owes a
19 considerable debt here, has gone to St. James
20 with the intention of remaining there as the
21 Indians of this quarter are always threatening
22 to kill him."
23
24 In the first of the reports, the general reports
25 made by Brown, he reports at page 7, I think it is, of
26 his report in the first paragraph, he's talking now
27 about the Atnah. And he says,
28
29 "Besides knives, they're possessed with a great
30 many muskets, bayonets and spears. When the
31 Indians of this place were on their way there
32 they were met by a party of 12, who had each a
33 musket and a spear, coming up to the lake to
34 avenge the death of a relation who had either
35 died or was killed there a considerable time
36 past."
37
38 Part of a description of the Atnah.
39 In 1826 -- sorry, back to 1823, it seems. After
40 describing Friday the 10th of January, describing what
41 the men in the fort were doing, he says,
42
43 "The Siccanee who accompanied me from Fort St.
44 James came to the fort and informed me that 'an
45 Indian belonging to Simpson's River wanted to
46 kill him, in consequence of a female relation
47 of his having been killed here some time ago by

the Indians of this place.' This fellow, I understand, came here sometime since for the avowed purpose of avenging the death of the above woman by killing someone. And the Siccanee, being a stranger, he has selected him for his victim. Made him sleep in my room to be out of his way."

On the 28th of January 1823 the report is,

"A little before sunset Sawbuck and Tahhan both arrived at the fort armed, the first with his war coat on and seeming in a great passion. Not knowing what their intentions were I would not allow them to enter but ordered them to be off immediately. This they complied with and sometime later I learned that Kiss lad au had killed Sawbuck's dog in one of his marten or fox traps and he was in search of the poor lad to kill him in revenge for the accident. I do not know whether he has found him or not but there has been a great noise in the camp."

And on the following day,

"At daylight the chief came to the fort armed and all bloody. When I understood from him that Kiss lad au gave Sawbuck a blanket for the killing of his dog but he still persisted in having more or he would kill him, Casepin interfered and informed Sawbuck that he had been paid sufficiently, considering the circumstance was altogether accidental. This induced a dispute between them which ended in blows, in the course of which Casepin received a stab in the arm but it is not bad. In consequence of these disturbances, the Indians are all in a bustle."

That is a quarrel between members of the same -- chiefs in the same village.

LAMBERT, J.A.: I'm not quite sure where the point to which all these extracts are directed.

MR. MACAULAY: I'll come to that, my lord, but they're directed to both the issue of sovereignty or self-government, and ownership of the whole territory. This describes the condition in which society was then there and it

1 describes what the appellants have urged on your
2 lordships were a part of their law. That was the
3 regime.
4 LAMBERT, J.A.: The greatest flowering of art in the history of
5 mankind is probably in the Renaissance in Italy from
6 1200 to 1400 and at the same time the wars between the
7 Guelphs and the Ghibbelines were going on and the
8 soldiers were marching backwards and forwards across
9 the country killing everyone, artists included. So
10 there was dreadful carnage and wonderful art and a
11 very sophisticated legal system all existing together.
12 MR. MACAULAY: Coming closer to home, I can't help but recall
13 the Haidas where --
14 LAMBERT, J.A.: That's not closer to home, Mr. Macaulay.
15 MR. MACAULAY: To my home.
16 TAGGART, J.A.: Well, Mr. Macaulay --
17 MR. MACAULAY: Where these conditions prevailed. No, the point
18 I'm making --
19 TAGGART, J.A.: I have no doubt that in the province or in the
20 colony of British Columbia, at least, and perhaps to
21 some extent on Vancouver's Island, but especially in
22 the gold fields of British Columbia at this selfsame
23 time you would have just as much, proportionately,
24 having regard to the numbers involved, mayhem and
25 backing and forthing as you have among these various
26 aboriginal people.
27 MR. MACAULAY: I'll come to the gold fields. We'll see the gold
28 fields a little later. They were regulated by a
29 justice of the peace, and the most remote gold fields
30 were, and a magistrate, a gold commissioner. And any
31 killing was reported and there was -- at any rate, and
32 there was a law that dealt with it. My submission --
33 part of my submission will be that there was no law
34 and that there was no sovereignty, as asserted, and
35 there was no control, occupation of the whole claim
36 area as described here. And I can make that point
37 better perhaps in the two tabs over.
38 TAGGART, J.A.: Well, mayhem, let's take it from what you've
39 read us so far, clearly there was. There were
40 killings, there were revenges, there were
41 counter-killings, more revenges and incessant uproar
42 of that kind.
43 MR. MACAULAY: And nobody could travel from one place to another
44 without the fear that he might be the object of a
45 revenge killing, because one of his clan had done
46 something to another tribe or group.
47 The next paragraph, 17, makes the point that

Babine village chiefs engaged in hostilities one against the other and the contending groups appeared to have included substantial numbers, if not entire villages. The quarrel between Ackooshaw and Casepin in September 1825 is another illustration and that arose and, again, this is within a single society, if you want to consider the Babines of the Lake a single society, and I can tell you briefly what that was about. There was a visit by a joint party to the Atnah country to the north. On entering an Atnah lodge, one of the Babines' musket went off, killing a Babine of another family. The two families were Ackooshaw's and Casepin's, the head chiefs. They soon had daggers drawn and threatened to kill each other. Another we just saw, and that is the dust up involving Casepin being stabbed in the arm by Sawbuck, who was one of his fellow chiefs. And the killing of Matt, a Simpson's River chief, is another.

Paragraph 18, the lands of the Babines of the Lake, that's Lake Babine, were described by Brown as being well stocked with beaver. The lands of the Simpson's River Babines were also said to be well stocked but after Brown's departure the Hudson Bay assessment of the beaver supply was very different and it has to do with one of the allegations concerning the governance and this directly concerns whether or not there was any sort of control over hunting. And the author says this, this is from the New Caledonia district journal, that is, head office:

> "The importance which Governor Simpson seems to attach to that part of the country must have arisen from exaggerated accounts of its value and resources. This impression he received from the late Mr. Brown whose opinion and support of it is adduced. But I think that this gentleman's opinion on that subject would be more worthy of attention had his success during the four years he was in the Babine country been calculated to maintain their correctness. During the period of Mr. Brown's residence in that quarter he was supplied with all the means requisite to ascertain the extent of its resources and to draw from them every advantage of which they were susceptible. Notwithstanding this, the expectations he had raised were not realized. With a few of the

> best hunters belonging to Stuart's Lake and pushing the Babines to extraordinary exertions by which the few beaver on their lands were nearly extirpated, he continued to raise the returns sufficiently to impose a belief on those who were unacquainted with the facts I have just stated, that it was a promising place and that with proper management it could be made to yield much greater advantages but, as might be expected, the state of prosperity was of short duration and before Mr. Brown quitted the district it was on the decline in which it continued to the present year when its produce amounted to only 67 packs of varying different furs."

Now, we'll return to that in my submission at the end.

Now, 19, the Simpson's River Babines came in considerable numbers to live at Babine Lake on several occasions during Brown's tenure as commander at Fort Kilmaurs. And this has to do with the allegation that the Simpson's River Babine, now the Wet'suwet'en, controlled and occupied, or vice versa, the Babines of the Lake controlled or occupied their own lands exclusively. On one occasion in the winter of 1822/23, the reason for the move en masse was the shortage of salmon at Simpson's River. In other instances, the fear of an attack by their neighbours caused the Simpson's River Indians, or many of them, to leave their villages and seek refuge at Nasschick and elsewhere around Babine Lake.

And the order shows that when they came to Babine Lake they settled down and hunted there in the winter. That is, the village of Hotset came over to Babine Lake and that's where they hunted. That doesn't imply a seamless web of exclusive hunting grounds, it implies just the opposite.

An example of that is the March 6th, 1828 letter to Mr. Connolly from Fort Kilmaurs where Mr. Pambrun, the author of the letter, says "Indians of Stuart's Lake and Simpson's River have been collecting about the establishment in numbers all in quest of salmon." And he reports they're prepared to pay a very high price for it. Then he goes on,

> "I have been visited by Quiltno, Snuggletrum and

Matt --", those are three of the principal chiefs of Simpson's River, "-- three chiefs of Simpson's River with several of their followers. I had expected some furs from these people but have received none, excepting from Quiltno, who gave 30 martens. They have traded their fall hunts with the Atenahs, which they say were but trifling, having left their hunting grounds early, being apprehensive of an attack from the Fraser's Lake Indians and from the same cause intend to remain in the vicinity of this lake where they say they will hunt cats and martens."

And then in February 1829 the report is:

"Last spring, from the number of Simpson's River Indians who were hunting in this neighbourhood --" that is, around the fort, "-- and the Babines being apparently well inclined to hunt, and given the prospect of making a good summer trade, but the unfortunate murder of Duncan balked all my expectations, the Indians in consequence taking alarm, desisted from their hunting."

Now, earlier in June 1825 the same thing had happened where the report is:

"The Indians of Simpson's River are completely alarmed on account of it --" This is the murder of Changcoost's son which has been referred to earlier "-- and expect a severe retaliation, so that at present not an Indian remains at Hotset. Those who dare have gone to the country of the Atenahs and those who dare not go there are now at Nasschick, they having killed an Indian of the Atnah tribe lately."

All that I submit, my lords, goes to both the principal issues of sovereignty and ownership.

If I may, I'll turn to Volume 2 of the references, paragraph 20 to 49, and go through them as fast as I may.

Starting with paragraph 20. I say here the Hudson Bay Company supplied Babines with beaver trapping equipment after hearing from a lot of them that they

were -- their hunting ability was inhibited by the lack of such equipment.

At 21 there is a reference in the Fort St. James journal that during William Brown's tenure hunters from Stuart's Lake had been employed at Fort Kilmaurs in hunting beaver in Babine country.

At 22, the Simpson's River Indians, by reason of their inability to put up enough fish to last the winter, depended on game for food to a greater extent than the Babines and so that they would be expected to have more hunting areas than their -- the Babines of the Lake.

23. The Simpson's River Indians were obliged to move to Hagwilget after a rock slide and thereafter the fish supply was sufficient to last the winter. And that's reported by Brown in 1826. Hunting presumably wouldn't be such a matter of survival after that.

24. The Babines of the Lake and the Simpson's River Babines are reported to be hunting, trapping in each other's territory. We've seen that one of the principal Simpson's River chiefs, Quiltno, had his hunting grounds near Tachy, which is towards the southern end of Babine Lake.

25. The Babines traded furs in several directions with the Hudson Bay Company, with the Carriers at Stellah, at the Portage and Fond du lac. Stellah, Portage, and Fond du lac are in Carrier country to the south, with the Atnahs at the Forks and with the Coastal Indians who came up to the Forks, the so-called salt-water Indians and to the Atnah villages.

26. Babines who lived or camped at Francois Lake traded both at Fort St. James and at Simpson's River, presumably at Hotset. And I'll come back to that in 1905 about who may have been living, what kind of Babine, or who may have been living at Francois Lake but there were Babines there.

27 deals with the question of the difficulties the company had in competing with the trade at the Forks.

28 deals with the repurcussions of the want of leather on the debts owed by individual Babines to the Hudson Bay Company. There appears an interesting portion of the 1826 report, the debt list. Starting with Ackooshaw, who is the head chief of the Babines of the Lake. Number 3 is Ash shaw, who we heard about before. He is now listed as living at Hotset. The

places of where they live are all listed, and there are 107 of them.

At 29 I say that in 1823, 47 Babines owed 210 skins but in 1826, 107 Babines owed 730 skins. That was a result of the exigencies of the market.

30 comments on that again and sheds some light on the society we were dealing with. The Hudson Bay Company journals and the Brown reports refer to individual Babines trading with the company each for their own account. Each had his own line of credit and on one occasion the chief took the position that his debt to the company wasn't to be confused with his wife's debt and declined to pay that. And the reports are full of discussions, lively discussions sometimes, of matters of trade and credit between individual Indians. Mention is made of Clikiss only because when approached by Brown to trade his furs he refused for a long time. Finally Brown persuaded him to trade. His chief, Clikiss' chief, who was Casepin, had no authority to force him to do that.

In paragraph 31 Brown visited -- and here is where he comes to the Atnah villages, the only recorded time he goes to Atnah villages. He notes that first in his 1826 report that he had been misinformed by the Babines earlier and his comments in his 1823 report have to be, in effect, taken as not being accurate.

At paragraph 32 I outline what he found concerning the Atnah. And that is the only record of the early Atnah that we have. Whatever is there is the result of a brief visit and there is nothing else. He describes the village as five miles apart, as Weepsim and Childocall. He names the chiefs and he mentions three chiefs, each with their own villages. He's told about five more villages downstream and where they are in relation to the Forks, that is, the Forks what's now Hazelton. They refer to the Kees pa lotes, that's Legiac's, Simpson's, who had finally reached them, presumably in 1825. And the Atenahs refer to the Nishgas as well, they are called Ute sin nah, but the description is such that it's fairly certain it's the Nishga.

He reports the Atnah chiefs were very much attached to the coastal traders. This would be trading from ships at that time, there wasn't a fort on the coast until 1831. And he reports that the traders used to travel no farther than the Forks but they had reached the Upper Atnah villages, that's

Weepsim and Childocall, in 1825 and had taken furs and siffleux robes that the Atenahs had to offer.

It appears that beaver was either scarce or not sought after aboriginally by the Atnah. One chief said his territory didn't have any beaver or much beaver, the other two said their territories had beaver but they didn't know how to take them. I should add to that that Brown had reported in 1823 that the Atnah didn't eat beaver meat, very much unlike all varieties of Carrier for whom beaver meat was the preferred delicacy at the feast. That suggests that hunting beaver arose as a result of the coastal fur trade.

The last comment he has about the Atenahs is that they resemble the Carriers in their ideas about medicine and in being bad friends amongst themselves which kept them in a constant state of anxiety. And they resembled the Carriers in their hospitality and gambling and gift-making.

At 34 there is a transcription, full transcription of the Simon McGillivray trip to the Forks in 1833. He met Atnahs from what he described as the first and second villages and many of them hadn't seen Europeans before. He was shown a mountain 15 miles away and he was told that was the site of another Atnah village.

In 35 it's McGillivray again. It's the same report I keep referring to for the next two tabs. McGillivray was told that traders from the coast had been at the Forks just before he got there and some of the Atenahs told him that they had beaver to trade. But he said, 'I'm sorry, I have no trade goods. This is an exploration visit' so there was no trade. He noted the Atenahs had muskets and some other European goods, including what McGillivray thought to be American goods. This was, of course, at the time of the -- this was just after the establishment of the Hudson Bay Company fort on the Nass. It was first on the Nass. There was a message from the Nass from Ogden who was on the Nass in the possession of one of the Indians to deliver to McGillivray at that time. McGillivray met an Atnah who had been taken as a slave by Coastal Indians who made war on the Atenahs and this man spoke a little English. He was recruited as an interpreter and he returned with McGillivray to Babine country, although his companions insisted he stay because he had to be redeemed from his slavery.

We're back to Harmon. He describes also the role

the Atenahs played in the distribution of trade goods to the Babines before Fort Kilmaurs was established. Still with the Atenahs, they are reported to be trading fish oil and leather with the Simpson's River Indians for furs. The fish oil would come from the Nass and leather probably came from the coast because there was -- the problem -- what was wanted was moose skins and that was used at the feast, they were cut up and handed out. There were no moose in either Gitksan or Wet'suwet'en or Babine territory at that time, so that the leather that the Atenahs had to trade would have to come from the coast.

Now I come to the 'Siccanees' and this, of course, is relevant to the overlap. The 'Siccanees' were described in Brown's report of 1826 as living mainly in the mountain country between the Babine River and Bear Lake. If you look at the map, that goes some way to explain the overlap. Kisgegas is on the Babine and Bear Lake is a considerable distance to the east.

Harmon had met the 'Siccanees' in 1811 and 1812. That's paragraph 39.

In paragraph 40 I set out the reason for which Fort Connolly was finally established on Bear Lake and it had nothing to do with Gitksan or Atenahs. Sir James Douglas, then James Douglas, met with them at Takla Lake and after the meeting Douglas reported that the Siccannee country, extending from the Peace River to Takla Lake, was well stocked with beaver and he said that after the Rocky Mountain House had closed, that was a post in the rocky mountains, the 'Siccanees' had no convenient place to trade furs. And he then recommended an establishment at Bear Lake and Fort Connolly was duly established in 1828.

Charles Ross was the first commander and he gives an account, an interesting account, of rescuing an Atnah woman from slavery from the local Indians and later she returned with a party of 17 men, appearing to be intent on avenging an earlier outrage, but Ross smoothed things over. And they then promised to return occasionally to trade. It suggests that the Atnah were not often at Bear Lake.

The 'Siccanees' had a lodge at Bear Lake in 1865. The reason we know that is the Collins Overland Telegraph, which was the first white presence in the claim area, had in mind a route through Bulkley House, you see on the right-hand side of the map, up through Bear Lake. And there is an account by a man named

Rothrock much later in 1913 in which he describes vividly a feast by a band of 'Siccanees' who had a lodge there then. That's in Paragraph 42. Rothrock is writing to the Provincial Librarian and Archivist from his home in Pennsylvania in 1913 about the events he remembered vividly at Connolly's Lake, that's Bear Lake, in 1865. And he was part of the exploring expedition that actually built Bulkley House then went north to Bear Lake. He also mentions that there were Atnah there by that time.

In 43 I mention that the journals, the Hudson Bay journals don't record any significant information. There are reports of a different kind of conflict, that is, between people in the claim area and their neighbours. One is mentioned here, a report by Kneadebeas, one of the principal chiefs of the Wet'suwet'en, his ancestor, to Robert Brown in 1874 about the salt-water Indians.

In 44 there is an account of Legiac. Legiac had a trading monopoly on the Skeena. The Hudson Bay Company never went up the Skeena River. Legiac was a very powerful chief of the Tsimshian. Legiac both traded and raided up and down the Skeena. The oral histories are full of accounts of it.

The only thing I have attached is an excerpt from "Potlatch to Pulpit" by the Reverend Pierce, who we will see later. Pierce was a missionary and very active in the claim area in the 1890's, 1880's and 90's, around 1900, and he gives an account of the famous umbrella incident. There must be ten versions of the umbrella incident in the oral histories. It was said to be the last raid by Legiac on Kispiox, that particular village, for the purpose of taking slaves.

The other versions of what's set out here are in Exhibit 1046, and there are at least six versions of that story in the oral histories, and Exhibit 1054. And they're mentioned in Schedule 4 to the Reasons for Judgment. They are all versions of a slave raid that must have occurred quite late because there appear to have been people in the 1890's and thereabouts who remember it. And that goes, my lords, to the question of sovereignty and government or control. The Tsimshian appear to have been able to travel where they might and to besiege the villages and take slaves from them for sale on the coast or use on the coast.

TAGGART, J.A.: Well, it's five past 4:00, Mr. Macaulay. Would

it be convenient to break now?
MR. MACAULAY: Yes.
TAGGART, J.A.: Ten o'clock tomorrow.
THE REGISTRAR: Order in court.

(PROCEEDINGS ADJOURNED AT 4:05 p.m.)

I hereby certify the foregoing to be a true and accurate transcript of the proceedings transcribed to the best of my skill and ability.

_____
Rodney D. Mort,
Official Reporter,
UNITED REPORTING SERVICE LTD.