Vancouver, B.C.
June 4, 1992.

THE REGISTRAR: In the Court of Appeal for British Columbia, Thursday, June 4th, 1992. Delgamuukw versus Her Majesty the Queen at bar, my lords.

TAGGART, J.A.: Mr. Taylor, before you begin, my colleague, Mr. Justice Lambert has developed a new category of inquiry. He says it's not a question but an observation.

LAMBERT, J.A.: I was heartened to learn that the appellants are going to be making a further submission about the remedies issue by next Friday, a week tomorrow. I just wanted to say that I feel sure that it will cover the question of what exactly was the scope of the concession that was made about sovereignty, both in relation to title to land and in relation to self-government. And the only reason I wanted to make this observation was that I wasn't so 100 percent sure that I thought -- so I thought it would be better to raise it now rather than to wait and see whether it was truly in the submission when we receive it. Thank you.

MR. TAYLOR: Thank you, my lords.

The Chief Justice was right, it is a vast area and somewhat unexplored area, and to try and compress it, and I am afraid I wasn't perhaps as clear as I could have been yesterday.

I have prepared some summaries, which might be useful and I have handed one up and I will hand the other one up later. This can go at some point in the front of the speaking notes or the back of the speaking notes. Perhaps at the back of the speaking notes in this section.

TAGGART, J.A.: That's the set we are working on now?

MR. TAYLOR: Yes, and it would be, the speaking notes would be between pages 96 and 97.

And my Lord Mr. Justice Lambert and My Lord Justice Hutcheon raised yesterday this question of if it's distinctive to the culture, how can't it be part of the core? And I would like to address that by comparing our characterization or understanding or submissions on what makes a right or practice an aboriginal right. And those are, those rights -- only occupation rights. Obviously section 35 encompasses other rights as well, treaty rights, that sort of thing. We are just here talking about these

occupation category of rights, and then Indians. And the definition which Mr. Williams gave and which I tried to deal with yesterday, and adopt fully, is that aboriginal rights include those matters that are integral to the native groups distinctive culture as at the date of sovereignty. Now, the two things I think worth noting is that it's distinctive culture, it's a cultural matter, in the main, but includes more than culture in some instances, and I will develop that. And the assessment is made at the date of sovereignty.

And the source of protection for these rights is section 35 of the Constitution Act. Now, my lord Justice Lambert yesterday made the comment that although section 35 now exists, isn't it true that from the period 1871 through to 1982 the source of protection for "Indianness" had come from 91(24) and, that is true. Section 35 wasn't available. But just as that is true, there is a corrollary to that proposition. In analyzing what the core set of interests under 91 (24) is, one has to divorce oneself from the concepts of section 35. If you're going to say it's only 91 (24) during that 100 or so year period prior to section 35 (1), then it's not right to adopt the tests where the expanded concept of Indianness, which arose after 1982, as exemplified in Sparrow, for example, one has to look to the jurisprudence dealing with this core set of interests during the period 1871 to 1982 and the limitations, necessary limitations imposed by the courts during that period, in keeping with the distribution of legislative powers, and keeping in mind that section 35 was not yet in existence, there had been no amendments to the constitution.

Now, in that vein as well, I was -- there has to be a purpose for section 35. And if the appellants and supporting intervenors are correct, that 91(24) makes property and civil rights of Indians immune from provincial legislation, in our submission section 35 was not necessary as a constitutional amendment. If the federal government wished to recognize -- had exclusive jurisdiction over all matters concerning Indians and lands reserved for Indians, property and civil rights of Indians, then it could have, by itself, recognized and affirmed aboriginal rights and there would be no necessity for the provinces to be involved in that process. Section 35 as a

constitutional amendment I think is a recognition that the province has jurisdiction, an overlapping jurisdiction, with the 91(24) jurisdiction.

Now, dealing with the 91(24), I have set out the language used in a number of cases. From the Irwin Toy case, it's matters which are vital and essential elements of the federal jurisdiction. From the Four B, it's matters which are an integral part of federal jurisdiction over Indians and lands reserved for Indian. And Canard, it's matters which are intimately connected with Indian status and capacity.

Now, those tests are not easy to comprehend and it involves drawing lines. But as soon as one passes, as the province says it is appropriate to pass, from the concept of all aboriginal rights having been extinguished during the Confederation period, one then has to start drawing lines, and one has to draw lines around Indian rights and Indianness and section 88, section 35 (1), and that whole process is nothing but a judicial drawing of lines. Under 91(24) those lines have been drawn. And in our submission, as a rule, cultural matters, per se, are not included in the core set of interests, not being matters which on the authorities are intimately or integrally connected with Indian status and capacity. And as authority for that, I think there can be no higher authority than the Natural Parents case. And I just -- I haven't got an extract of the argument made by the appellants in that case, but if I can put it to your lordships, it was argued on behalf the natural parents, as follows, the submission -- this is from Chief Justice Laskin's decision:

> "The submissions of the appellants against the validity of the adoption order are based on a series of related propositions which I may summarize as follows: The Indian Act, which is an act in its present form, makes the original family tie the essence of Indian status and keeps the child in that status, at least until enfranchisement."

And Chief Justice Laskin, together with Messrs. Justice Judson, Spence and Dickson, accepted that argument, that this tie of family was at the core. It had to be at the core. There is nothing more critical to one's Indianness than the ability to grow up as

part of that group and learn the culture. Notwithstanding that, the minority in that case -- the decision was all the same, the Adoption Act applied and the children can be taken from their natural parents. The only defence in the minority was that and then they applied section 88. However, the majority, and there is a number -- there is four decisions -- all came to the opposite conclusion, that that tie to the family was not vital and essential, was not an integral part of Indianness and did not strike at the core. So, in effect, the provincial legislation, the Adoption Act applied ex proprio vigore. In terms of this cultural interest distinction, nothing can be clearer than this case, because there is nothing more central, I would submit, to one's cultural identity than the ability to be brought up amongst one's peer group or group and learn the institutions and learn the culture.

Now, I would also submit that if the Natural Parents case were to be decided today under section 35, different considerations would apply. Because section 35 is directed to that cultural aspect of being an Indian.

Now, the other distinction, if I can --

LAMBERT, J.A.: So you're saying Natural Parents isn't the law now?

MR. TAYLOR: No, I am not saying that. I would say that different considerations would apply. You would get into the balancing, the justification process. It still may be justified, or it may be justified in a particular situation, but it's the Sparrow test that would apply to the concept of community.

LAMBERT, J.A.: The Natural Parents --

MR. TAYLOR: The Natural Parents.

LAMBERT, J.A.: -- case may not represent the law on the very issue in that case now because there is one more consideration that has to be taken into account that wasn't taken into account at the time it was decided?

MR. TAYLOR: That's section 35, yes. And that has to do with the dates of assessment and questions of assessment of the dates.

And a similar effect, are Jack and Charlie, and Kruger. And we say, in the next paragraph, arguably, and if the evidence supports the core group of interests may include matters which are -- and this is essentially a quote "at the centre of what Indians do and what Indians are." That's a quote from My Lord

Justice Lambert's decision in the Dick case. We say that's culture plus. It has to be culture plus. And the facts in that were that, yes, hunting was done from time immemorial, it was very important, but we were dealing with the Alkali Band of Indians in a very remote part of British Columbia, who depended on hunting to put food on the table, and the rigorous application of the Wildlife Act in that case could hamper that. And if that's the situation, that goes to those core group of interests, the very survival of Indians would go to the core group of interests. But, if you contrast that with Kruger, where the evidence was that the Penticton band had hunted from time immemorial, but in the assessment of the evidence on that case in the modern context it was not held in that case to go to the question of the core. And so that the other question that arises is when do you look at this?

LAMBERT, J.A.: In Kruger there was no evidence. That's the essential aspect of Kruger.

MR. TAYLOR: I understand that, my lord. But the same theoretical considerations, I would submit, applied in both cases. If I can just develop the thought, when one's assessing whether the provincial legislation invades the core, the assessment is made at the time that the challenge is made, at the time you're testing the legislation or the grant. You look to what did the Indians do now? Whereas under section -- under aboriginal rights, and under the authority of Sparrow, you say, what did the Indians do at the date of sovereignty? And it's two different things, two very different things. And I would submit, my lord, that the Penticton Indian Band has the same aboriginal right claims as at the date of sovereignty, to hunting as an aspect of their distinctive culture as does the Alkali Band. And similarly, and arguably, in Jack and Charlie, that band as at the date of sovereignty had those claims to culture as did the Alkali Band in the Dick case. The distinction was, under the 91(24) analysis you don't look to the date of sovereignty, what was the original right, you look to its practice at the time in determining whether the legislation was valid.

And in Dick, and I, with the greatest respect to my lord Justice Lambert, it was not decided that those facts were sufficient to put it into the core, there was only an assumption. And insofar as your finding,

Lord Justice Lambert's finding was to the effect that we are dealing with culture plus, culture plus the very right to survival, putting meat on the family table is involved. That's one thing. But if it's a finding simply that it's culture, it's like the Penticton Band's right, historic right, or it's like the hunting for religious purposes right, and we would would say that case does not go that far, the Supreme Court of Canada's acceptance of that as an arguable proposition does not go that far, and there is no case that treats a purely cultural aspect as being part of the core. And on the authorities, and as a matter of principle, we submit it should not be part of the core, as culture is a matter that develops fluidly over time and it's impacted by a number of factors. And the Chief Justice in the decision in this case dealt with a lot of those factors and the inter-relationships.

HUTCHEON, J.A.: Is culture or would culture include the choice of the chief? Doesn't that go to the core? Wouldn't -- and would the province be able to say how the chief is to be chosen? I wouldn't think so. But that's culture, or tradition.

MR. TAYLOR: Well, that's --

HUTCHEON, J.A.: It's a different aspect of it --

MR. TAYLOR: The choice of the chief is perhaps a good example. It's hard to imagine why the province would be particularly concerned about the choice of a chief.

HUTCHEON, J.A.: Well, some province might say we are not going to have this kind of -- we are going to have a democratic election here.

MR. TAYLOR: I would submit, my lord, if forced into that, in deciding that issue, I would say that no, yes that is not a matter of core, the choice of the chief. In fact, the reality of the situation --

HUTCHEON, J.A.: Not a matter of core?

MR. TAYLOR: As an example, and that brings a good distinction between aboriginal rights and core. One of the things that is particularly of the core under 91(24), is the right to elect a chief. The Indian Act sets out provisions, and the right of band members to elect a band council and the band council to then nominate the chief. That's a 91(24) interest. The traditional or historic or aboriginal right to select a chief through another process, is a section 35 interest.

HUTCHEON, J.A.: But the test is if the province were to pass the same legislation as the federal people did, I

don't think it could stand up.

MR. TAYLOR: It would have to be a law of general application, first of all. It couldn't be directed at Indians.

HUTCHEON, J.A.: Yes.

MR. TAYLOR: But if there was a law, and again it's hard to think of an example, but if there was a law that had an incidental effect on the traditional choosing of chiefs, it may well stand up ex proprio vigore.

HUTCHEON, J.A.: It would have to get in through section 88 first before you start to talk about it.

MR. TAYLOR: Not necessarily. I think it could be applied ex proprio vigore, as, for instance, in one of the earliest cases on this, the Medicine Act applied to an Indian who is purporting to practise medicine.

HUTCHEON, J.A.: That's Harold case?

MR. TAYLOR: Yes. That may be said to be part of one's culture, traditional medicine, but that's not to say that the province can't, in its proper sphere, say nobody can do it, including Indians. And presumably if there is some aspect of chiefdom that fit within the provincial, a proper head of provincial power, that was affected by that, it would be valid. You couldn't single out a chief and say, these people can't be chiefs. That clearly would be a clear invasion of the 91(24). Because you're talking about Indians as Indians at that point.

LAMBERT, J.A.: Is there any case -- I am sorry I don't know these cases but we have gone through just little bits of them -- but is there any case in which it was decided that the matter of the legislation affected a core value of Indianness, and as as a result the legislation did not apply to Indians?

MR. TAYLOR: Yes, my lord. At 228 (O), the Derrickson case that I have cited there, held that. That was the case involving whether or not the Family Relations Act applied to a moveable property of Indians on a reserve.

Although in that case as well there was a clear conflict with the provisions of the Indian Act. But, again, in that case, property of Indians off reserve would be -- would fall under the purview of the Family Relations Act. But on the reserve, because of the Indian Act and the way it's dealt with in the Indian Act for possession and rights and that sort of thing, it could not apply. But that has been held to be a core interest, the interest of the natives in the statutory reserve. And it's specifically dealt with

by federal legislation so the paramouncy doctrine would apply anyway. But in terms of this cultural component that I am talking about, other than the --

LAMBERT, J.A.: I am sorry, what was the legislation in question in Derrickson? It was British Columbia legislation in relation to family law?

MR. TAYLOR: Yes, the Family Relations Act.

LAMBERT, J.A.: Right. Was it decided that section 88 applied?

MR. TAYLOR: No, it couldn't apply because there was a conflict with the provisions of the Indian Act dealing with ownership of property on the reserve. The Indian Act dealt specifically with certificates of interest and that sort of thing.

LAMBERT, J.A.: If there was a conflict why is the question of core interest, of the core values, part of ratio decidendi?

MR. TAYLOR: Because it works on two levels, my lord. First of all, on the authority of Dick and Derrickson as well, the first level of his inquiry is, has the provincial legislation affected the core interests? If the answer to that is yes, it cannot apply ex proprio vigore. If the answer is no, it can -- it does apply ex proprio vigore, provided it's a law of general application. But if it -- if it doesn't apply ex proprio vigore, then one goes to section 88 and under the authority of Dick and Derrickson and the settled law in that area, it's been held that section 88 is necessary only when the provincial legislation touches upon these core interests, and if that happens it can be referentially incorporated, provided, one, it's a law of general application; and, two, it doesn't conflict with any federal legislation.

Now, some of the cases deal with it less circuitously simply by saying, if it conflicts with federal, valid federal legislation, then the paramouncy doctrine applies, we don't have to go through this analysis.

LAMBERT, J.A.: We don't have to go through the core analysis? But in Derrickson you say they followed the different route, they went through the core analysis and their actual train of reasoning makes their decision ratio decidendi that this was a core interest in the Derrickson case?

MR. TAYLOR: Yes, there is a discussion of the Indian interest under the Indian Act in statutory reserves as being part of this core. And then it talks about the section 88. There was a finding it was core. I can't

say that they went through the same analysis I just did but there was a finding there was a core and then section 88 held and the decision was no.

LAMBERT, J.A.: In that case, then, there would effectively have been a reading down of the Family Relations Act of British Columbia to preserve its constitutionality by saying it doesn't apply to Indians?

MR. TAYLOR: No, there was a reading down to say it doesn't apply to a moveable property of Indians on Indian reserves. It doesn't apply off reserve.

LAMBERT, J.A.: I beg your pardon. Of course that's so. But there was a reading down involved?

MR. TAYLOR: Yes.

LAMBERT, J.A.: To preserve constitutionality in relation to the core area?

MR. TAYLOR: Yes, there was.

Now, my lords, if I could just go back to where I was yesterday and then develop from that summary, and I hope that clarified things. It's the Dick case, which is at tab Q, 228 Q, and we were at page 330. And Mr. Justice Beetz recited the ultimate conclusion on the evidence by My Lord Mr. Justice Lambert:

> "In my opinion it is impossible to read the evidence without realizing that killing fish and animals for food and other uses gives shape and meaning to the lives of the members of the Alkali Lake band. It is at the centre of what they do."

Now --

TAGGART, J.A.: Was that at 330?

MR. TAYLOR: That's at page 320.

TAGGART, J.A.: 320.

MR. TAYLOR: It's the second full paragraph.

TAGGART, J.A.: Yes. Okay.

MR. TAYLOR: But that as My lord Mr. Justice Lambert points out was on the basis of evidence. As we say, before going into this analysis, it's our position that culture alone is not sufficient, and there is no authority saying that culture alone is sufficient to make it a core interest. And on the authority of the Natural Parents, and the thrust, the whole thrust of that case says it cannot stand, there can be nothing more cultural than raising children in a community.

But, if we can at least accept the same assumption accepted by Mr. Justice Beetz, with our understanding

that what we are talking about is culture plus something else, then some other propositions follow. And I am at 228 R. And I will back to Dick to develop section 88 because it's fairly clearly laid out in Dick what the tests are in section 88. But if I can go to 228 R and just develop this thought of the core and assessing the core at the date of the assessment of the constitutional validity of the legislation. At 228 R in Simon, the Supreme Court of Canada stated that the question of whether rights had been extinguished cannot be determined without an analysis of facts. And that goes back to the -- and that also was stated in Kruger, the comment about aboriginal rights being wrapped up in tradition and history and morality, and you have to look at specific lands and specific facts.

Now, although it is for the province to prove extinguishment, the appellants must demonstrate that their interests we say are within the core under section 91(24). That was the effect in Simon. As you will recall, there was no evidence as to use of the road or what the road was for or what regime, legal regime attached to the road. And then in Kruger, the burden, the assumption under 91(24), this is another distinction between 91(24) and section 31(5). Or 35(1). In 91(24) the cases have consistently held there is a presumption of constitutional validity. The burden is on the party challenging that validity to show it to be unconstitutional. In the native law area that is to show that the legislation goes to the core, and if it does, then section 88 can't apply because it's not a law of general application or it's colourable or whatever. So the burden there is on the native group. And if you contrast that with section 35 and the decision of Mr. Justice Dickson in the Sparrow case, he says, there is no presumption under section 35 of legislative validity because section 35 is a constitutional right. There is a burden on the natives to show prima facie interference and there is a burden to show justification on the Crown after that. But there is no presumption of legislative validity. Again, another distinction between 91(24), the narrow scope of section 91(24) and the broad scope of section 35.

At 220 S, we make the obvious observation that the case at bar does not appear to have been presented at trial in a manner that would enable the trial judge to

assess whether any or all aboriginal rights of the appellants fell within the core group of interest. In fact, it appears that the case was not even advanced initially as a claim for common law aboriginal rights. And that I think has been discussed in the past before your lordships.

The trial judge did not find it necessary to assess the evidence in light of the constitutional issues that we have been discussing over the last day or so. It is submitted that this court should not attempt to determine whether or not any of the alleged rights fall within the core group of interests because to do so would be to determine this complex factual and legal matter as a matter of first impression. And I should point out, as is stated by the Chief Justice in the decision, there was 318 days of evidence, and an equivalent or more number of days devoted to argument. And a lot of it dealt with what the condition was on the ground at the time of the trial, and that is the point in time that is valid for an assessment of what issue is a core issue.

Now, at 228 U we set out the ultimate finding of the trial judge with respect to aboriginal rights, apart from the question of extinguishment. And I have quoted from it.

> "Subject to what follows, the plaintiffs have established as of the date of British sovereignty the requirements for continued residence in their villages and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define. These aboriginal rights do not include commercial practices."

Now, that is a finding on the evidence, and it involves the drawing of a line. What did the evidence say about the aboriginal right as practised at the date of sovereignty? And if I could take your lordships to tab U at page 395, the ultimate conclusion is set out that I have quoted from. But if I could take your lordships to pages 111 and 112, which was from the summary at the beginning of the judgment, it ties in.

At paragraph 12, the Chief Justice set out the historic use of the early ancestors. "These early ancestors lived mainly in or near villages..." et

cetera. Going down at about two-thirds of the way through:

> "Further, these early ancestors also used some other parts of the territory surrounding and between the villages and rivers and further away as circumstances required for hunting and gathering the products of the lands and waters of the territory for sustenance and ceremonial purposes."

And then the Chief Justice, having looked at the historical, the ancient history, looks at the more recent history, but not that recent, the date of sovereignty, and that's dealt with in paragraph 22 on page 112.

> "The aboriginal interests of the post-contact ancestors of the plaintiffs at the date of sovereignty were those exercised by their own more remote ancestors for an uncertain long time. Basically, these were rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes."

And as the ultimate conclusion makes clear, that is a very intensive use, that is an exclusive use as found by the trial judge, the villages and surrounding lands, but the territory beyond that was non-exclusive, even at the date of sovereignty. And as I will turn to in a moment, at the date, the critical date that one would have to look at those uses in terms of trying to assess whether or not it was a core interest, it was a much different situation. Things had changed to the point where great areas of the territory had not been used in some cases on the evidence, ever, because nobody could recall it being used, and sometimes not for 40 years or so.

So that the conclusion, and we support both, there is no ownership, and with respect to that extended territory, whatever uses were at the time of sovereignty were not exclusive as a matter of fact.

Now, I would like to deal with a number of specific findings taken from different areas of the judgment. And I should state that the province does not

necessarily adopt the characterizations used by the trial judge but we accept the findings of fact. We may disagree with the language but the findings of fact are accepted.

And it's useful to analyze the assessment of the trial judge's assessment of the evidence of these matters from the various sources, both as to the quality of the evidence before him, the extent or scope of the alleged right, and the issue, the importance of these alleged rights to the appellants as Indians. In other words, relating to their Indianness at the time of the relevant assessment under 91(24). And also what the impact of various governmental actions was on their Indianness.

Now, as I have stated before, it wasn't necessary for the trial judge to consider the tests appropriate to the 91(24) core, or in fact section 35(1), to analyze the evidence in relation to those tests, but I have extracted findings from a number of sources from -- in the judgment, and they relate to areas such as social organization, jurisdiction and ownership, the assessment of the weight to be given to evidence, and in particular expert evidence, boundaries, the fiduciary duty as found by the Chief Justice, and that sort of thing. If I could just take you through it, and I will try to be as brief as I can, but I think it's important to get a flavour of the evidence and the findings of the Chief Justice with respect to, although he did not do the analysis, it sheds light on what that evidence would be if that analysis were done.

With respect to the issue of R, the aboriginal rights as found core interests. And I should say that, as will become clear, there could well be a distinction between village sites and surrounding areas, occupied fields, where there is that exclusive and intensive use as opposed to aboriginal rights exercised over the extended territory.

The first, and I have set out the extracts at tab V. And before getting -- the above conclusion is not sufficient to enable one to determine which rights and we say particularly those rights which fall outside the villages and surrounding lands, fall within the core group of interests. This becomes even clearer when one examines the findings of the trial judge based on the evidence before him. The first finding is at the first extract in tab V, where it was stated,

the second paragraph:

> "The most striking thing that one notices in the territory away from the Skeena-Bulkley corridor is its emptiness. I generally accept the evidence of witnesses such as Dr. Steciw, Mrs. Peden and others that very few Indians are to be seen anywhere except in the large river corridors. As I have mentioned, the territory is, indeed, a vast emptiness."

Then the Chief Justice goes on to discuss the effect of economics, not governmental action, which caused from the time of sovereignty, when one looks to see what are those aboriginal rights, a disuse in the territory as a whole, not because of governmental action, but because natives were drawn to a better life in the townsites.

And over at 126, the full, first full paragraph:

> "It is common when one thinks of Indian land claims to think of Indians living off the land in pristine wilderness. Such would not be an accurate representation of the present lifestyle of the great majority of the Gitksan and Wet'suwet'en people who, while possibly maintaining minimal contact with individual territories, have largely moved into the villages. Many of the few who still trap are usually able to drive to their traplines and return home each night."

Now, with respect to these outlying territories, that word "minimal contact" comes up again and again and again. And I think it's well established on the facts before the Chief Justice, and we are going to go through some of those facts as I say, but keep in mind My Lord Justice Lambert's assessment of the Alkali band situation, the very core of Indianness, sustenance at its greatest, to put food on one's table, not minimal contact, not minimal use.

At sub B there is an assessment of the quality of the evidence presented. I would submit it's quality of evidence, and partly credibility. And it's at 148, the next extract in, starting at the second full paragraph.

"The picture painted by the Indian witnesses and their anthropological experts suggested that all aboriginal life revolves around the chief, clan and house system, and around aboriginal use of, and connection with, house territories.

I do not question the social importance of these institutions but I regret to say that I believe that the plaintiffs' evidence in this connection was overstated."

And then he goes on to discuss characterizations, et cetera.

Over on page --

LAMBERT, J.A.: In the Dick case, it wasn't a high degree of occupancy of the land that was in issue, and in saying that there isn't a great degree of occupancy in the sense of being present on the land in this case doesn't meet the point of core values. In the Dick case, a group of four or five or six members of the band were going to fish when the spawning run was taking place of the trout out of a stream on the lake, and, as I understood the evidence, as far as I remember now, they would make that visit for two days in May and hoick out all the spawning trout they wanted, consistent with conservation, one supposes, and no one would visit that lake or that spot again for another year. So isn't constant presence on the ground, that is the essence of it, if Dick is right in saying that what they were doing to that case -- of course they shot a deer on the way.

MR. TAYLOR: That's what brought the case --

LAMBERT, J.A.: That's what brought the case -- but it's an illustration that -- as far as I know they may have shot the deer in a place they never go to, other than two days a year either.

MR. TAYLOR: My lord, but my point on this is not that -- perhaps I should explain. Our, in our submission, in looking at extinguishment one looks at specific acts of extinguishment relating to specific parcels of land. We are not suggesting that the granting of a fee simple over one acre in 22,000 square miles of territory, extinguishes the right to hunt over 22,000 square miles of territory. We say if extinguishes the right to hunt on that one acre.

Now, the question in Dick was is this an improper affecting of the "native right to hunt" as a core

interest? The legislation as a whole, the restriction on time. But what we are saying with extinguishment on this on-the-ground analysis, is that in looking at whether or not the core interest that is extinguished is in fact a core interest, you have to look at the acre, you have to look at gray acre and what the present use is. And if the evidence is that it's not used, or hardly used, and that around that one acre, there is many, many, many acres where one can hunt and fish and do whatever one wants, that can't be said to be a core interest. It just doesn't have that intimate connection with status and capacities that would be required, assuming that it could be on the authorities. And, as I say, Dick doesn't go quite that far. But I am proceeding on the assumption that it may if it's culture plus. But it's that one acre we are looking at. And the assessment has to be at the date of the challenge, or at the date of the grant of the extinguishment, was there undue or was there something that affected the interest proven to be a core interest?

LAMBERT, J.A.: And you're looking at this in relation to fee simple grants?

MR. TAYLOR: Fee simple grants, yes.

LAMBERT, J.A.: As well as perhaps other forms of grants.

MR. TAYLOR: There could be other interests that could affect hunting, although hunting, other than the Wildlife Act, hunting generally is not interfered with by other grants. The two can be compatible, as long as there is no hunting signs or no trespass, the property isn't posted in any way.

LAMBERT, J.A.: You're essentially, I understand then, accepting that this law about reading down and core values, though it's only been propounded recently, must have been in effect since 1871 or represents the law since 1871?

MR. TAYLOR: I think that's the effect of the authorities, yes. That even though it's of recent origin it must be seen to go back in time.

LAMBERT, J.A.: It's an explanation of the law that's always been in effect, yes.

MR. TAYLOR: Yes. Yes. Now, going on with the analysis at sub C, I won't take your lordships to the actual passage, but it was held the customs of the appellants' ancestors relating to land outside the villages were not universally practised or uniform in nature, although these ancestors may have developed a priority

system for the principal fishing sites at village locations. Again, there is a distinction in the judgments between the village, surrounding lands and the broader outlying territory.

Sub D, you could skip that next extract at 372 and go to the next extract, which is 373. This has to do with the quality of evidence. Starting at sub F, and this extract comes from the passage dealing with self -- the evidence relating to self-government and the institutions.

> "The plaintiffs have indeed maintained institutions but I am not persuaded all their present institutions were recognized by their ancestors. The evidence in this connection was quite unsatisfactory because it was stated in such positive universal terms, which did..."

And I would submit there is a typographical error, there should be a "not" inserted in there, "...which did not correspond to actual practice."

HUTCHEON, J.A.: You think there is a not missing?

MR. TAYLOR: If there wasn't a not I don't think it would -- the two parts of the sentence would stand together. And I have looked at the green book version and it has -- it's the same language, so it's not just a transposition error to the Western Weeklies. It seems to -- I would submit that the not has been left out.

> "I do not accept the ancestors 'on the ground' behaved as they did because of 'institutions.' Rather I find they more likely acted as they did because of survival instincts which varied from village to village."

Now, in the abstract one can say well, he is right or wrong and anthropologists can debate that, but in dealing with this constitutional question, you have to accept, there has to be evidence, somebody has to analyze the evidence and that's the analysis undertaken by the trial judge.

And at the bottom --

HUTCHEON, J.A.: Well, he doesn't point to any evidence. That's what bothers me. Throughout we have, in this area we have conclusions but no evidence that he points to.

MR. TAYLOR: Well, there are passages later where he actually

discusses evidence of particular witnesses and, in particular, with respect to the question of abandonment and the use of the land. But the way --

HUTCHEON, J.A.: They more likely acted as they did because of survival instincts. I would have thought all the evidence is that they acted in accordance with tradition not survival instincts.

MR. TAYLOR: Well, I can't comment on that, my lord. That's what I am --

HUTCHEON, J.A.: The disturbing part of this case is to be met with these conclusions of the trial judge without him pointing to what he is relying on when he -- "I find they more likely acted as they did because of survival instincts." I would have thought they more likely acted as they did because of tradition.

MR. TAYLOR: My lord, that's what I was saying, there is a distinction between the abstract conception of aboriginal rights and how native people acted at various times, and the evidence. The trial judge is a very experienced judge, he said "I find..." --

HUTCHEON, J.A.: He finds it but it's against all the evidence he had in front of him. That's the part that disturbs me, all the witnesses were at the other end of this conclusion. It's a disturbing part of the case. It just seems to me -- he said "I don't need the anthropologists, I don't need them" and as to the people who came and gave evidence, well, they may have believed it but it's not fact. Well, I want to see what the fact is that he bases his conclusion on. At least, I would like to see it. I just don't see it. I haven't -- we haven't heard, of course, from all of the respondents yet.

MR. TAYLOR: Yes, my lord. As I said at the outset, we don't necessarily agree with the characterization or conclusions. And insofar as --

HUTCHEON, J.A.: You said you accept the findings --

MR. TAYLOR: We accept the findings.

HUTCHEON, J.A.: -- even if the language may not be exact. I think you said something like that.

MR. TAYLOR: Yes. Unfortunately, we are not in a position, not having been at trial, to do that kind of analysis that would satisfy your lordship as to whether or not that's true or not.

HUTCHEON, J.A.: That's a startling conclusion, to me, at any rate.

MR. TAYLOR: I would think that the -- either the federal government or the amicus in supporting the judgment

may be able to shed more light on that issue.

HUTCHEON, J.A.: All right.

MR. TAYLOR: The next extract is from page 384, and this has to do with the finding at the date of British sovereignty.

> "I am satisfied that at the date of British sovereignty the plaintiffs' ancestors were living in their villages on the great rivers in a form of communal society, occupying or using fishing sites and adjacent lands as their ancestors had done for the purpose of hunting and gathering whatever they required for sustenance. They governed themselves in their villages and immediately surrounding areas to the extent necessary for communal living, but it cannot be said that they owned or governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. In no sense could it be said that the Gitksan or Wet'suwet'en law or title followed or governed these people except possibly in a social sense to the far reaches of the territory."

Now, what I take from that finding and that conclusion, is that in the village sites there was this intense occupation and control, but in the more extended territory, there was a non-exclusive use with competing users and, as well, there was not that level of control by the Gitksan and Wet'suwet'en as has been suggested by the appellant, but the trial judge is accepting that with respect to the movement into the outer areas, the internal regulations for self-governance amongst Gitksan and Wet'suwet'en themselves, had some application. And that's how I would interpret that statement. But it gives the thrust, it gives again the finding that there is a big distinction on the evidence between village sites and surrounding areas and the territory. And that as well goes to section 35, the section 35(1) analysis, that type of evidence, that's not the analysis, but that type of evidence that gave rise to that finding would be relevant in the section 35(1) analysis and also relevant in a 91(24) analysis.

The next extract, at 395, deals with the interplay between the aboriginal right at the date of

sovereignty and modern activities. And it's the first full paragraph.

> "In the face of this, and in view of the fact that Indians have always had access to all vacant Crown lands, it is difficult to understand how, apart from the question of priorities and aboriginal sustenance right in such a remote land could be an exclusive right. If it was exclusive originally, it has been changed throughout history in the same way the Fraser River fishery is no longer exclusively an aboriginal fishery."

Now, at G, at page 170, there is an assessment of the evidence of one of the expert witnesses, Mr. Daly, and a criticism of Mr. Daly's evidence. But I am looking not so much for the criticism, although that goes to the trial judge's assessment of the quality of the evidence, but to the actual assessment by the trial judge, who heard not only Mr. Daly and other experts, but heard elders of the community and witnesses who were living in that community then, talk about modern day customs, and how important or not important modern day culture or the traditional culture was to the modern day Indian. And it's stated in the second full paragraph:

> "First, he placed far more..."

Referring to Dr. Daly,

> "...far more weight on continuing aboriginal activities than I would from the evidence, although he recognized the substantial participation of the Indians in the cash economy. For example, at page 95, he mentioned that Gitksan and Wet'suwet'en persons regarded their land as 'their food box and their treasury' and young persons going hunting often saying, 'we are going to the Indian supermarket, to our land'",

And that's Mr. Daly's interpretation of events and the lifestyle,

> "...but many witnesses said the young people are

not interested in aboriginal activities. At page 118 he recognized 'Country food may not at all times be a major source of food for all families.'"

And the trial judge concludes, and I submit as a matter of fact:

"I find it is seldom a major source."

Now, contrast that with the recitation of facts relating to the Alkali band, and even if culture plus, as I have called it, can be a core interest, that's certainly nowhere near that vital an integral matter relating to Indians, Indianness, that was discussed in the Dick case.

There was a further or other findings at H, that British Columbia policy in the territory did not usually interfere seriously with Indian land use. If I can turn that up, it's at page 419. Perhaps this may, My Lord Justice Hutcheon, the Chief Justice makes a comment on page 419 that may be some answer to your observation a moment ago, at the third full paragraph.

"In considering what the law expects in the circumstances of this case, it is necessary to remember was has really happened in the territory and what is happening now."

The Chief Justice here is talking about the fiduciary duty. Then he goes on:

"I do not pretend that I have precisely captured all the social and economic dynamics which are operating within the Gitksan and Wet'suwet'en and non-Indian communities, nor do I expect that every observer would necessarily reach the same conclusions as I do. I also recognize that a trial may not always be the best way to investigate these matters but the evidence is the only information I have."

And keeping in mind the scope of this case and the fact that the evidence, the presentation of the evidence took some 318 days, it's not surprising that someone -- the scope of this case is such that the human mind cannot grasp every facet of it with the

precision you might like. One can only do as well as one can. And I think the Chief Justice is acknowledging that in that passage.

But going on with respect to this question of the effect of governmental action, and again this has to be taken in context of the 91(24) core for the period 1871 to 1982, it's stated in the last paragraph:

> "In British Columbia the responsibility of the Crown has always been a difficult one to discharge with actual conflicts between settlers and Indians not as obvious as in other parts of North America, even though the potential for conflict was always present because of limited agricultural land. Compared with other jurisdictions where Indians were confined to reserves, or their rights were purchased for a pittance, British Columbia land policy in the territory did not usually interfere seriously with Indian land use. Settlement, which did not begin in the territory until the beginning of this century, was initially confined to the Bulkley and Kispiox valleys, where land cultivation had not been pursued vigorously by many Indians. There were no large railway land grants in the territory, and even the pre-emption of most agricultural land did not impinge seriously on many aspects of aboriginal life."

Now that finding, although not directed to 1924, is the type of finding that would arise from an inquiry as to whether or not a matter was a core matter.

And at page 420, again it deals with the effect of governmental intrusion on this question of Indianness, and it was held, at page 420, the third full paragraph:

> "The evidence suggests that the land was seldom able to provide the Indians with anything more than a primitive existence. There was no massive physical interference with Indian access to non-reserve land sustenance in the territory and there was no forced or encouraged migration away from the land towards the villages. Migration away from the land has

been an Indian initiative and it started before there was any substantial settlement in the territory."

And that's just a recognition that culture changes. Indians themselves, I submit, should be entitled in a modern context to say what makes them an Indian. And an Indian does not have to live by traditional ways to be an Indian, he can live in a village, he can take the advantages of the modern economy for himself and his family, and he is no less an Indian. So that's why I say, core matters do not necessarily include culture. And on the evidence, the governmental interference that we would be examining with respect to section 91(24), does not seem, does not on the trial judge's view of the evidence, seem to have impacted seriously on the Indian as Indian. They chose to move to the villages and pursue the modern economy.

Would this be a convenient time, my lord?

TAGGART, J.A.: Yes. Take the morning break

MORNING BREAK

TAGGART, J.A.: Mr. Taylor?

MR. TAYLOR: Yes, my lords. If I could next deal with subparagraph J at page seven. And this is an instructive passage from the judgment, because it deals with areas that -- of evidence that would be looked at for a number of these tests. The 91(24) test, the section 35(1) test, that the trial judge did not find it necessary to analyze. And I am not suggesting that that analysis is a complete answer, but it's the type of issues that one would direct their minds to.

If I could ask your lordships to turn to the next tab, and it's 421 to 22 that I am going to be referring to specifically.

It was stated:

"I cannot find lack of access to aboriginal land has seriously harmed the identity of these peoples."

Now that, I would submit, my lords, is a finding that goes to this question of the core, the central core under 91(24). The Chief Justice then went on:

> "There is a further dimension to this question, however, which must also be considered. I refer to the obvious spiritual connection some Indians have with the land. I accept this as a real concern to the plaintiffs worthy of as much consideration as actual sustenance use. At the same time, this important feature cannot completely be separated from sustenance because the products of the land and waters of the territory are an integral part of spiritual attachment."

Then goes and, he deals with spiritual attachment later to say it occurred, and I will deal with it, it occurred at the loss of sovereignty, so that -- but that isn't because of governmental action, that's just a fact of history, a legal fact of history. But goes on in the next area, and this area has to do with both, I would submit, 91(24), core, with respect to the custom aspect, and section 35, the competing uses test.

> "Except in rare cases, there should be no difficulty obtaining sufficient fish, game and other products from most areas of the territory not just for desired level of sustenance but also for spiritual purposes. In this respect I pause to mention that the salmon of the great rivers pass right alongside the principal villages and one need not travel far from the villages to reach wilderness areas where game can usually be taken. There is much wood left in the territory and it can be obtained far more easily with chain saws, snowmobiles and 4 x 4s than in earlier days. Anyone can now travel with much greater ease to whatever parts of the territory he or she may wish for the purpose of gathering what is required for sustenance or ceremonial purposes."

Again, on a site specific analysis, with respect to 91(24), extinguishment, the findings were that, okay, gray acre, that one gray acre may not be available for hunting or fishing, but there are many, many areas where game and fish are just as abundant as they were on gray acre. That's a 91(24) core issue I would say, and it's also a section 35(1) issue in

terms of balancing competing uses.

The Chief Justice went on:

> "I appreciate that it may be difficult or impossible to obtain game and other resources at every exact place from where they were formerly obtained, particularly in built-up areas such as New Hazelton, Smithers" et cetera, "...which are occupied principally by non-Indians and which were not prominently the sites of natives villages. This is unfortunate, but the same applies, I am sure, near the Indians' own villages, particularly as Indian populations increased. Fortunately, it is a very large country with enormous wilderness areas."

And in keeping with the province's approach to extinguishment, it should be kept in mind that roughly in the province some 95, some -- only five percent of the province is under fee simple tenure. 95 percent of the province is Crown land under various licences, et cetera. I don't know what the analysis is in this particular territory, but it's probably -- would be the same statistically or roughly the same statistically. Am I incorrect, my lord?

LAMBERT, J.A.: I would think so. Yes, I would think it would be less than five percent. Five percent of the whole province that's in fee simple title, and you think of Victoria, Vancouver and Kelowna and their big land masses, I would think it would be less than five percent.

MR. TAYLOR: You're quite right. That's probably correct, given the terrain and that sort of thing.

TAGGART, J.A.: A lot of mountain peaks in there that nobody climbs.

MR. TAYLOR: As is pointed out in the judgment, they make nice viewing for natives and non-natives.

Then the Chief Justice went over to dealing with this question of spiritual attachment:

> "What has been lost, perhaps, is the spiritual connection not with the land, but with control or belief in ownership of land. I say this because access to land has usually been available to the Indians, and much of it still is or will be again. For this purpose, the

> loss of ownership or belief in ownership includes the spiritual connection these people have with the land. This loss occurred at the time of sovereignty. For the reasons I have already given, and it is not a matter for which the court can provide a remedy. It is, however, a matter the Crown should take into consideration in deciding how it will proceed with the development of the province and its resources."

This speaks of this fiduciary duty.

So, the concept of loss of ownership is something that happened at the time of sovereignty, and that's not in any way, shape or form part of the constitutional inquiry that is necessary either under 91(24) or 35(1). That's just a legal, historical fact.

And going over the page, it's stated:

> "I recognize that some Indians greatly regret that they no longer live off the land. Most of them, however, particularly the young people, no longer wish to do that. When the price of furs dropped in 1950, those still on the land moved to the villages. Most Indian sustenance and ceremonial requirements are almost as conveniently available as they ever were. In addition, they have access to a great many advantages which were not formerly available to them."

Leaving out that last sentence, the previous comments go to the question of the core, what's in the core, and also to the question of 35(1) in terms of competing users.

I won't -- in K we summarize a finding that the evidence was overwhelmingly against the validity of internal boundaries. It is not sufficiently specific and convincing to permit a declaration that the appellants have exclusive user rights to the territory. Again, the conclusion on exclusive or the finding on exclusive user rights was based on the evidence.

Over at L, which is the next tab over, the quote at page 462, I say this goes to this question of assessing what's -- which of these aboriginal rights

are core interests under 91(24).

"I think the foregoing describes this case."

He is talking about the 1951 crash in fur prices, and the second full paragraph:

> "...for I believe the Indians were probably using the lands I have identified for aboriginal purposes both before and after the start of the fur trade. Perhaps they stayed on the land for non-aboriginal purposes after the start of the fur trade, or gradually used the lands less and less for aboriginal purposes. But there is no way of establishing precise categories of land abandoned and 'other'. I doubt if it is possible to consider the category as closed.
>
> Gradually the Indians of this territory have been leaving the land and migrating into the villages for upwards of 90 years or more. Some of them have continued to use the land, some much more and some much less than others. I do not think I should be quick to treat aboriginal use as abandoned but common sense dictates that abandoned rights are no longer valid and land must be lost or used."

I am not so much concerned about abandonment. We accept the conclusions of the trial judge about abandonment. The evidence was not sufficient enough to satisfy him it would be safe to find abandonment. But with respect to this core interest, the conclusion is that the Indians themselves left the land. And then over at the next page, I have set out a long extract dealing with the precise questions of abandonment and various issues. And I don't propose to take your lordships through them all, but a sampling, perhaps, just to get a flavour of it. At page 463, number two, that territory, it is stated:

> "This small territory is across the Skeena River from the one just mentioned. There is no evidence that this territory had been used except for one occasion when Mr. Muldoe shot one moose on it prior to 1954."

And the Mount Horetsky territory:

> "This is a small territory which includes only the magnificent Mount Horetsky, which rises in solitary splendour out of broad, verdant valleys and is a landmark visible for great distances. There is no specific evidence it has ever been used for aboriginal purposes."
>
> Number four:
>
> "This is another territory in the Kuldo area which was described by Mr. Muldoe, who says he hunted and trapped on this territory with Abel Tait who died in 1946."

And there is a number of them set out there and I needn't go through it. Perhaps if I could take your lordships to 465, with respect to number 15, which has to do with aboriginal use, and also has to do with the flavour of the evidence and how the case was presented.

> "This huge territory stretches about 70 miles from east of Kisgegas to well north of the Sustat River. There is evidence of hunting and trapping prior to the mid-1930s and hardly anything since then, except for the apparent revival of interest since the commencement of this action. Mr. Sterritt gave evidence about the northern part of this territory but said he had not been on it between 1930 and 1984. Thomas Wright said he had been on the territory when he was 12 years old, and that old houses there had all 'rotted down.'"

I believe Mr. Wright was really old at the time of the trial. I am not sure of that.

But there is a listing of all the various territories and the lack of any intensive use or really even occasional use for periods of history. That doesn't go to whether -- we don't say short of abandonment and we accept what the learned trial judge had to say about abandonment, but that doesn't go to whether or not there are aboriginal rights relating to that territory. But it's certainly a critical factor in assessing whether any of these alleged rights to specific acres, or in some instances very large tracts

of land, are core interests. Because for Indians, at the time of trial, they were not a significant part of their life. They cannot be said to to have that intimate connection with Indians.

And also these comments I think all go to the question of justification of competing uses under section 35(1), as explained in the Sparrow decision. The findings, as I have said before, the analysis wasn't done, but that type of evidence and that type of analysis, would be appropriate.

The final conclusion on abandonment, which I say we agree with, is set out at 473, and the second paragraph at the conclusions on abandonment, the trial judge stated:

> "While this case is very close to the line, and I do not think there is very much aboriginal activity in the territory..."

TAGGART, J.A.: I am sorry, what page is this again?

MR. TAYLOR: It's at 473. It's the second page in from the very end of that tab. It's stated in the second paragraph:

> "While this case is very close to the line, and I do not think there is very much aboriginal activity in the territory..."

And this is the extended territory beyond the villages and cultivated fields,

> "...I do not think I can safely conclude that the intention to use these lands for aboriginal purposes has been abandoned, even though many Indians have not used them for many years."

And then there is further discussion in that vein. And at the bottom in connection with the fiduciary duty as suggested by the trial judge, a statement is made, and I would submit that that statement bears in the analysis, if it has to be done under section 35, at the very last paragraph:

> "In my view it would be unsafe and contrary to principle, to apply the principle of abandonment to such an uncertain body of evidence. It may be noted, however, that limited use of the territories bears on the

question of honourable reconciliation which I have already mentioned."

I submit that that comment is in keeping with the approach or the test enunciated in the Sparrow decision in terms of -- for the reconciliation of competing interests.

And again arising from My lord Justice Hutcheon's comment or question, I say that again we are not in a position to challenge the trial judge on the findings of facts, but again we do not agree with the language or some of the conclusions arising from those findings.

Now, going back to the speaking notes at 228 W, we state that what is clear from the reasons is that not all matters which could be argued to be aboriginal rights -- in other words, what was done in 1846 -- on the evidence, fall within the core group of interests. And at 228 we make the point that again that they must be intimately connected with Indian status and capacity, and that the burden is on the appellants to prove that particular interest falls within the core group, and that flows out of the Kruger decision.

We state that if any particular aboriginal right does not fall within the core group of interests under section 91(24), then provincial laws of general application which diminish or extinguish, are valid by reason of their application ex proprio vigore, even if an aboriginal right falls within the core group of interest pursuant to section 88 of the Indian Act, provincial legislation may apply to diminish and in some cases we say extinguish that right.

LAMBERT, J.A.: I have great difficulty in accepting that last proposition.

MR. TAYLOR: The extinguishment under 88?

LAMBERT, J.A.: No, diminish or extinguish. Because you need clear and plain intention, and if it takes both the provincial legislation and the federal section 88 to create the legislative scheme that extinguishes or diminishes, then I say that there is not in section 88 a clear and plain intention, and it doesn't arise by necessary implication. Section 88 bears all the hallmarks of something that was not put in with the specific thought of every specific thing that it's going to do. So I have a great difficulty accepting that final part.

MR. TAYLOR: If I can just understand, I think your lordship was

making a similar point yesterday --

LAMBERT, J.A.: I was.

MR. TAYLOR: -- and just to make sure I understand it, you're saying that in analyzing whether or not, or in trying to determine whether or not there is the appropriate intention to extinguish, and if federal referential incorporation under 88 is necessary, it can't be said that section 88 supplies that requisite intention, because it can't be said that the sovereign ever turned her mind to extinguishment by looking at section 88.

LAMBERT, J.A.: I think you need the clear and plain intention of both the province and parliament of Canada in order to make an extinguishment on core values, core interests. You need both. And it isn't there in section 88.

MR. TAYLOR: My lord, I understand the question, and perhaps one way to look at it is the Crown is indivisible. There is really one Crown. And the federal Crown may be the right hand of the Crown and the provincial Crown may be the left hand of the Crown, but it's only one Crown. And it's the Crown's intention that's significant. 91(24) sets up a legislative division of power, but it's still the intention of the Crown that should be looked at. And under the referential incorporation test, the relevant policy has been held to be the policy of the provincial Crown behind the legislation that's referentially incorporated. And I would submit that it would be impossible to treat the Crown, for instance with respect to that issue, as two separate entities, and that both Crowns have -- the intention has to be examined. Because section 88 excludes provincial legislation that conflicts with federal legislation. So where the intention of the federal Crown can be said, the Crown in right of the federal government can be said to be different, there is an exclusion, but if the intention of the federal Crown on a particular matter is not stated, then the Crown, the indivisible Crown concept would say the intense that's relevant would be in the province.

LAMBERT, J.A.: I thank you for that submission. That helps me to understand your position.

MR. TAYLOR: But you're still troubled with the concept?

LAMBERT, J.A.: I am still troubled.

MR. TAYLOR: My lord, if I can just deal with 228 Z, then I am going to turn to section 228, and I don't know if it will satisfy you any more, but I can at least lay out

the test that comes out of the Dick case, which may assist.

In 228 Z we say that the existing aboriginal rights extending beyond the core group of interest, we don't say that they don't receive constitutional recognition, but the recognition flows from section 35, not 91(24). And I again I think that's consistent with the fact that the two levels of Crown, or two levels of government, all of the provinces and the federal government, felt they needed to have a constitutional amendment to affirm and recognize aboriginal rights. They recognized that provincial authority with respect to Indians and lands reserved for the Indians, was as intrusive as federal regulatory power, and that was the reason. Otherwise it would simply have been a matter of the federal government, as it did with the Bill of Rights, saying we recognize aboriginal rights.

Now, if I can go back to the Dick case and just deal with section 88. And it's at tab Q at page 317, My Lord Justice Lambert in his decision in Dick --

TAGGART, J.A.: Kruger and Manuel is first.

MR. TAYLOR: I am sorry, Q, it's the second case in, my lord.

TAGGART, J.A.: Case number two. All right.

MR. TAYLOR: Page 317. My Lord Justice Lambert ruled in the Court of Appeal, on dissent:

> "...it seems to me that the same tests as are applied to determine whether the application of a provincial law to a particular group of Indians and a particular activity is the application of a law of general application, should also be applied to determine whether the application of a provincial law to a particular group of Indians in a particular activity is legislation in relation to Indians and their Indianness."

And the Supreme Court of Canada held, with the greatest respect, that Mr. Justice Lambert was wrong in so setting out the test. And that ruling -- I am just tying to -- it's the second issue, at page 321, starting under four, the second issue. And this is on the assumption that the legislation affected Indians qua Indians, so that it was affecting the core. Mr. Justice Beetz stated:

"In holding that the test adopted by this court in Kruger to determine whether a law is one of general application are the same tests which should be applied to determine whether the application of the Wildlife Act to appellant would regulate him in his Indianness, Mr. Justice Lambert fell into error, in my respectful opinion. And this error resulted from a misapprehension of what was decided in Kruger as to the nature of a law of general application. The test which Mr. Justice Lambert applied in reviewing the evidence in his above quoted reasons are perfectly suitable to determine whether the application of the Wildlife Act to the appellant would have the effect of regulating him qua Indian..."

And this is the core concept.

"...with the consequential necessity of reading down if it did. But apart from legislative intent and colourability, they have nothing to do with the question whether the Wildlife Act is a law of general application. On the contrary, it is precisely because the Wildlife Act is a law of general application that it would have to be read down were it not for section 88 of the Indian Act."

The the statement there is if the law were specifically directed at Indians, it would not be a law of general application. So that would be a colourable incursion into the federal area.

"If the special impact of the Wildlife Act on Indians had been the very result contemplated by the legislature and pursued by it as a matter of policy, the act could not be read down because it would be in relation to Indians and clearly ultra vires."

And then if I could take your lordships to page 323, on -- the basis is before section 88 even comes into play, there has to be an affecting of interests of Indians qua Indians. And at the bottom of page 323 it was stated:

"With all due deference, it seems to me that the correct view is the reverse one..."

Quoting from -- perhaps I should put the quote from Mr. Justice Lambert before you, and it's right above the last paragraph.

"'...evidence about the motives of individual members of the Legislature or even about the more abstract "intention of the legislature" or "legislative purpose of the enactment" is not relevant. What is relevant is evidence about the effect of the legislation. In fact, evidence about its "application".'"

Mr. Justice Beetz stated with respect to that statement:

"With all due deference, it seems to me the correct view is the reverse one and that what Mr. Justice Dickson, as he then was, referred to in Kruger which he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Mr. Justice Dickson meant when he quoted the above passage. 'It would have to be shown that the policy of such an act was to impair the status and capacities of Indians.'"

And that's the conclusion. So that may perhaps answer my lord Justice Lambert's question. Section 88 does not involve an analysis of the intention of both arms of the sovereign. It's directed to and analyzing the policy of the act, the provincial act, and if that is, as the cases term it, a colourable intrusion into the federal area, in other words it singles out Indians, then section 88 cannot apply so as to

incorporate it, and if that doesn't happen it will be read down if it can be read down. But the intention that's relevant is the intent of the provincial arm of the Crown and not the federal arm of the Crown.

LAMBERT, J.A.: As to whether it's law of general application, I can understand that. As to whether it evidences a clear and plain intention on the part of that legislative body that has the power to carry out the extinguishment, then it seems to me that section 88 doesn't evidence it. Because it's -- after all, it's parliament that has to show the clear and plain intention because it's parliament that's extinguishing it, not the legislature.

MR. TAYLOR: By referential incorporation, yes.

LAMBERT, J.A.: Yes.

MR. TAYLOR: But we would submit, my lord, that with respect to that issue, really there is no difference because on the facts -- on the assumption in Dick, the Wildlife Act, although it did not extinguish, it regulated, the Wildlife Act had a policy of regulating wildlife. It affected Indians qua Indians. In theory, since that was the assumption on which the case proceeded, only the parliament of Canada could pass regulatory legislation with respect to Indians qua Indians and their hunting rights. Notwithstanding that, in Dick, the Wildlife Act applied not because the parliament of Canada's intention was analyzed, but because it was a law of general application. That was the -- that is the only inquiry that is necessary. If the province goes beyond its legislative competence, although acting within a proper head in 92, and colourably intrudes, then it's not a law of general application and it doesn't apply. But that's a different thing than saying one must be able to say that parliament must have intended, or somehow the legislative intent or parliament or policy of parliament, is an issue in it. Parliament's or the federal government's policy and legislative intent only comes into bear if it is legislated in the area.

LAMBERT, J.A.: Well, I think when it comes to extinguishment it must be shown by clear intention. The analysis is rather different than it is in relation to Dick. But I think we have explored that.

MR. TAYLOR: Yes, and I will come back to that because I have another just brief summary that I have tried to outline some of these tests, and maybe that will become clear as to what our position is.

Then the rest of the case is an analysis of that but -- and I could take your lordships through it, but, in essence, under section 88, section 88 only becomes applicable when provincial legislation affects the core so as to legislate with respect to Indians qua Indians, and it will be referentially incorporated, we submit on the authorities, if it's a law of general application and it doesn't conflict with federal legislation. And one of the concerns that arose and was explored in the Dick case, is that if it's a colourable intrusion into the federal area, so as to single out Indians for special treatment as a matter of policy, then it will not be a law of general application.

Now, my lords, I prepared another summary, which hopefully will bring some of these matters, make them clearer, if I haven't expressed them as clearly as I should have. And it's a three page document which summarizes what I call the tests.

TAGGART, J.A.: Should we add this at the end of the speaking notes?

MR. TAYLOR: That could be added at the end of the speaking notes, my lord.

And I have, on the basis of the authorities, analyzed four different tests to compare them so that you can look down and see what the differences are and what they are going towards. But it's basically extinguish, extinguishment, the provincial legislative competence, the Indianness question, section 88 and section 35(1). And with respect to extinguishment, it's the province's position, we accept the intent to extinguish must be plain and clear, however that intent may need not be express. If the effect of legislation and government acts is completely adverse to the continued exercise of aboriginal rights, and that in our conception is both site and right specific, in other words the acre and what portion of the global aboriginal right affected that acre, then it can be inferred that there was intent to extinguish by necessary implication. However, this implied intent need only be to extinguish any competing, potential competing claim or interest. If it need not be expressly stated, we hereby extinguish aboriginal rights, then by necessary implication the legislative effect that extinguishes all potential competing claims does it as well.

The assessment that's undertaken is what was the

aboriginal right existing at the date of sovereignty and the effect of the governmental action on that right? In other words, the historic right. The burden, the native group -- the burden is on the native group to establish the right and it's on the Crown to prove extinguishment.

Now, with respect to Indianness, this core group, the test is stated by us as does provincial legislation affect a matter which is a vital and essential element of, and I have taken language from other cases, intimately, integrally, associated with status and capacity of Indians and lands reserved for Indians.

Now, what is being assessed on that test is whether the legislation affects the interest, and we say it's the current interest, not the historic interest, not at the time of sovereignty, alleged to be within the core group of interests. And I have taken your lordships through the Kruger and Jack and Charlie cases with respect to that, or analyzed them. And the burden, the burden is on the Indians to prove legislation affects them in their Indianness. And that comes out of the Dick case and the Kruger case.

With respect to section 88, we summarize the test as follows: If provincial legislation affects Indians in their Indianness, status and capacity, the legislation will apply by referential incorporation if, and the first if, it's not inconsistent with a treaty or federal legislation; and the second if is that it has to be a law of general application, which has been defined in the authorities to mean it extends uniformly throughout the jurisdiction. And the second branch of it, it must not be in relation to one class of persons in object and purpose, and that's taken from the Kruger decision. And it's been stated, restated in Dick, interpreting Kruger as that the policy of the legislation must not overtly or colourably impair the status and capacity of Indians. And what is to be assessed there is the conflict with the federal legislation, and whether or not it is a law of general application.

The burden in this case is as well on the native group to prove conflict with federal legislation or the law, the law is not a law of general application. That's derived from the Kruger case.

Now, dealing with section 35(1), this is derived from Mr. Justice Dickson's discussion of the

justification process in Sparrow, and it seems general in nature but non-fishing rights may have different considerations, but it contains a very good shopping list of considerations. The test in the first instance is, does legislation have the effect of interfering with an existing aboriginal right? It's described as prima facie infringment. And the burden is on native group to prove that, and factors to be taken into account is whether or not the limitation is unreasonable, whether or not it imposes undue hardship, whether or not it denies the preferred means of the native group of exercising the right.

Two, if there is a prima facie interference then the legislation is justified -- is the legislation justified, and the burden is on the Crown to justify it. And the various factors are set out, there has to be a valid legislative object, and that's not a constitutional issue, that's what's being done here, the examples are given, does it go to conservation, does it go to resource management? The honour of the Crown with respect to Indian priorities and allocation. There should be as little infringment as possible. If a situation amounts to an expropriation, and we say on the basis of Sparrow we say there are situations where legislative action can, we say, effect an extinguishment, even with section 35, but all these factors have to be taken into account.

Under section 35, it would be very difficult to extinguish, we acknowledge that, but in the right case if all the factors have been met it may be possible. And we certainly wouldn't want to foreclose the possibility of that.

Has the aboriginal group being consulted? And then generally an admonition that the government be sensitive to and respect rights of aboriginal peoples.

Now, what is assessed is the historic right in its modern context and the effect of legislation thereon. And that's what was done in Sparrow. The historic right, from time immemorial, fishing in this branch of the Fraser, but in setting out how these factors might be looked at, you have to look at that right in the modern context. Other people share the fishery, there is conservation issues to be examined. None of that was a consideration in 1846, we submit, but that's what has to be done when looking at section 35 rights. And I have stated what the burden, the various burdens are on that. And I hope that will be helpful.

HUTCHEON, J.A.: Could I just ask, the first page under provincial legislative competence, where you say what assessed, and you use the word current, not historic. Does current mean the date of the legislation? If we have a statute of 1891, is that what you mean by current?

MR. TAYLOR: I think there is two elements to it. Certainly if you're looking at extinguishment by a grant of something, I think you would assess it at the date of the grant in the main. Because that's the -- that's the current use to which --

HUTCHEON, J.A.: Let's take a Water Act of 1921, does current mean 1921?

MR. TAYLOR: With respect to legislation, I think you would look at the date of the challenge. Because presumably the legislation would change as it went along. You would look at it whenever the challenge came up, but with respect to a grant, it has to be a combination of when the grant was made, coupled with what is the current legislation. The more appropriate time would be the date of the challenge, and most of -- all of cases that I am aware of that deal with these issues, look at the facts on the ground as at the date of the challenge.

HUTCHEON, J.A.: I see. Thank you.

MR. TAYLOR: My lords, if I could go back to the factum at page 96, which is the page just before we start the speaking notes, I would like to deal with the concept of lands reserved for the Indians.

TAGGART, J.A.: I have at the end of that most recent addition to the speaking notes, a page headed comparison, aboriginal rights versus Indian rights.

MR. TAYLOR: That was the earlier -- that was the earlier insertion.

HUTCHEON, J.A.: We dealt with that.

TAGGART, J.A.: All right. We dealt with that.

MR. TAYLOR: Now, going back to the factum, and we have covered the main concepts with the speaking notes, and I think I can go through the balance of the factum fairly quickly. There is just a few things to point out in particular. One is this question of lands reserved for the Indians. The St. Catherine's case stands for the proposition of lands reserved for the Indians is not restricted to Indian reserves. In other words, statutory Indian reserves. In fact, that argument was made for counsel for Ontario in the case and was rejected. And we accept that, that the lands reserved

for Indian concept goes beyond Indian Act reserves. It can be broader than that. However, Lord Watson went on to say that the words actually used are according to the their natural meaning sufficient to include all lands reserved upon any terms or conditions for Indian occupation. And reserve has been defined as being retained, kept aside for a purpose or a person. So, in our submission, lands reserved for the Indians must involve some governmental action, it doesn't have to be an official transfer or the staking out of metes and bounds under the Indian Act to make it a reserve. But there has to be some governmental action by the appropriate authority, and in this case it's the province, being the owner of the land, to set it aside on whatever terms and conditions. And as I indicated yesterday, in fact Calder III itself makes reference to reserves, and in fact, as early as Calder III lands had been set aside for Indian purposes, and we would say those are lands reserved for Indians at least at the time when B.C. joined Confederation, and as well Calder did not allow settlers to take liberties with lands in the village sites and surrounding cultivated fields, the areas of high intensity.

Now, accordingly, for lands to be reserved for Indians, they must be set aside or designated for Indian occupation. And this was the conclusion reached in 1917 by the Exchequer Court of Canada, appeal was taken from that to the Supreme Court of Canada, and that appeal was dismissed. I have quoted from the decision there:

> "And while not desirous of repeating here what was so clearly stated in St. Catherine's case in respect to the Indian title, yet I wish to draw attention to the fact that it was decided beyond cavel in that case, that only land specifically set apart and reserved for the use of Indians are lands reserved for Indians within the meaning of section 91(24)."

Now the appellants and some of the supporting intervenors have suggested that the mere fact that there was historic occupation of those lands, through a number of international law concepts, historical analysis of cases from other jurisdictions, means that all lands for which there was historic occupation are

lands reserved for the Indians, and again we say that those are interesting, the analysis in the historical cases in another jurisdiction is interesting, but the law of Canada, approved by the Supreme Court of Canada in the Bonhomme case, is that there must be a specific setting aside and apart and reservation of lands for the use of the Indians to make them lands reserved for the Indians.

Now, after Confederation, only the province can designate lands reserved for the Indians, and we refer there to the decision of Madam Justice Southin in the Mount Currie Indian Band case. She was dissenting in that case but the point that we have referred to the judgment for is not at odds with the decision of the majority. And I should point out as well, if you could make a note, that the very early case out of Ontario, the Ontario Court of Appeal decision in Ontario Mining and Seybold, was to the same effect.

TAGGART, J.A.: S-e-y --

MR. TAYLOR: S-e-y-b-o-l-d. And I can probably give you the A book reference to that, my lords.

TAGGART, J.A.: Maybe we can find it.

Mr. Taylor, we are going to have to adjourn right on time because one of the judges has an appointment. So perhaps it would be appropriate to do that now.

MR. TAYLOR: Thank you, my lord.

MR. WILLIAMS: Perhaps I could just say it looks as though on the schedule that we will be into tomorrow, and probably until noon in any event.

TAGGART, J.A.: All right. Thank you.

LUNCH RECESS

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

Wilf Roy
Official Reporter
United Reporting Service Ltd.

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LUNCH BREAK

TAGGART, J.A.: Yes, Mr. Taylor.
MR. TAYLOR: Yes, my lord. I was at paragraph 233 dealing with the question of lands reserved for Indians and what are lands reserved for Indians and I misspoke myself. The Ontario Mining and Seybold case in fact is a decision of Privy Council and it's the A book, reference is A-11 T312.
TAGGART, J.A.: 312?
MR. TAYLOR: 312, tab 312. And at page 79 the ratio of that case which is reflected in Madam Justice Southin's judgment as well is to this effect:

> "Their Lordships think that it should be added that the right of disposing of the land --"

And this is for the setting who can set aside a reserve,

> "Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the Ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province."

And that authority, my lords, I say is unchallenged and flows from the St. Catherine's principle that the entire beneficial interest of the lands within the province is in the province. It belongs to the province subject to a burden, but not -- the burden does not take anything away from the province. The province is the owner of the lands.

Now, at 234 we go on to say, and I think Mr. Bell addressed this, that if the Royal Proclamation were to apply in British Columbia there is an argument that lands in British Columbia would be lands reserved for the Indians under the Royal Proclamation. It's our position that the Royal Proclamation does not apply for the reasons stated by Mr. Bell and presumably to be addressd a little later today.

And at 236 it's the province's position that aside from statutory reserves, there are no "lands reserved for the Indians" in the territory of the claim. Hence

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section 91(24) does not operate as a bar to Provincial legislation from operating so as to extinguish or diminish aboriginal rights with respect to the lands and resources of the territory.

Now, there was a comment by Mr. Justice Dickson in Guerin where Justice Dickson stated that "the interest of an Indian band in a reserve" is the same as "an unrecognized aboriginal title in traditional tribal lands." And that -- I would ask you to turn that up. It's at tab 237. And we say with respect to that quote, quite clearly Justice Dickson was not addressing his mind to the question of whether or not traditional tribal lands would be lands reserved for the Indians, and I think on a proper reading of the case the analysis was undertaken to establish the fact that since traditional tribal -- the interest of Indians in traditional tribal lands was not a trust, you then did not have to worry about the trust doctrine under consideration, but the traditional interest was sufficient to give rise to a fiduciary duty. And if I could just develop that from the case itself at page 378, the very bottom:

> "For this reason Kinloch v. Secretary of State for India in Council"

and another case, the Tito and Waddell case,

> "and the other 'political trust' decisions are inapplicable to the present case."

So the analysis was undertaken to oust this political trust doctrine.

> "The 'political trust' cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision."

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And then the quote that I have already referred to is there:

> "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: .... It is worth noting, however, that"

it was traditional tribal lands. And then later on in the analysis Justice Dickson held that upon a surrender of what happened to be a reserve lands a fiduciary obligation arose, but the analysis certainly wasn't directed towards whether or not traditional tribal lands or lands reserved for the Indians. And in fact we submit it could not be read into that decision, because to so read it in would be contrary to well established authority.

Now, going on as an alternative argument, that even if some of the lands within the territory are "lands reserved for Indians," this does not mean that they constitute "enclaves" entirely shielded from provincial law. I have covered that area in the speaking notes. But it's quite clear that even on statutory reserves some provincial legislation is applicable provided it doesn't pierce the core which we discussed this morning or is in conflict with the provisions of federal legislation.

And that thought is developed at paragraph 242. However, not all provincial acts of extinguishment will invade federal jurisdiction. In the Province's submission, acts of extinguishment of aboriginal rights with respect to land will not be ultra vires the Province unless the right or rights in question are sterilized to such an extent that the interests that those rights are designed to protect are thwarted. Such may be the case where an act of extinguishment occurs in relation to land where aboriginal people can claim extensive and exclusive use. And this is his core concept. And remember this is an alternative argument. Such may not be the case where extinguishment occurs in relation to land less often used and where there is neighbouring land that can be used for the same purpose.

Moreover, where the aboriginal right in question

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is non-possessory, its extinguishment would not extinguish any right of possession of land and therefore would not interfere with the exclusive federal jurisdiction over "lands reserved for the Indians." And I developed those concepts this morning in relation to the evidence.

The next subheading (c) deals with Indians, most of which I've dealt with through the speaking notes, but I would draw your lordships' attention to paragraphs 244, 245 and 246 whereby the courts have recognized the distinction between Indians and land reserved for Indians. It's been recognized by learned authors and those texts are set out at 245, and in fact has been recognized by the Supreme Court Canada, the Four B case being one, and as you recall the comment was it's Indians and land reserved for Indians, not Indians on reserves, and you don't get greater force if you are on a reverse and you don't get less force if you are not on a reverse. And Derrickson and Derrickson is to the same effect, whereby, because of the clash with the Indian Act, Family Relations Act could not apply under section 88, but it was clear that the Family Relations Act applied to other property of Indians not on reserves.

My lords, I have dealt with status and capacity at length and I won't deal with that again, and that's set out in the Factum at 248 through to 253. And at 254 I wish to make it clear we have been addressing -- I have been addressing in argument the concept of extinguishment, but in many cases, as I hope I have made clear, the legislation may not extinguish the global right or the whole right. It may extinguish a part of that right and so -- and thereby diminish the right or in fact in many, many cases there is no extinguishment at all, but there is diminishment. Whereas, post-1982 as referred to in Sparrow there is interference. And in our submissions the province is fully entitled to do that under the authorities in the constitutional regime. Clearly, if it can extinguish it can diminish. Section 88 I have dealt with at length, again, and I won't dwell on it. If I could ask your lordships to turn to paragraph 261.

LAMBERT, J.A.: Well, if you say clearly it can extinguish it can diminish, I am not sure that that is so self-evident as you say it is, that if there is a diminishment the right, the essential right is still in existence, part of which is perhaps dormant. That

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is, a diminution is not necessarily an extinguishment of that part that is diminished for the time being. It might just move it into dormancy, because the fundamental right continues and in that respect it's different than extinguishment where what seems to happen is that the right is completely gone forever and cannot revive.

MR. TAYLOR: Yes, my lord, it would depend again on you how you define the right. If the right, for example, with respect to the extended territory is non-exclusive user rights in general without further definition, then arguably the extinguishment, for instance of the right to hunt elk, or the right to hunt elk on one square acre because of a fee simple has been diminished, the total right has been diminished and you needn't talk necessarily of extinguishment of that particular aspect of the right. But I submit when you are looking at extinguishment with respect to particular aspects, it would be -- it is necessary to look at the particular acre and say the whole -- it's true the whole right continues, but with respect to that acre it is forever gone because of the fee simple, and that might be different than the situation where you have a relatively short-term lease as an example. Whereas, because you have granted a lease, say, for ten years and somebody has put a fence around it, it can't be said necessarily that that particular right to hunt on that acre has been extinguished. And in that context it probably does lie dormant. In other words, when the lease removes itself and the fences are taken down, that particular aspect of the right can be revived as it had been in the past.

LAMBERT, J.A.: Yes. However, every aspect of diminishment, every case of diminishment must be looked at separately to see whether there is an extinguishment on the part of the right involved or whether there is just a dormancy.

MR. TAYLOR: That's correct, yes. And I don't mean to imply that we approach it on a global basis. We really -- I think it is necessary to do a very site-specific analysis and right-specific analysis to be able to say whether there has been an extinguishment and the province does not advocate, and I hope that's clear as well, that you take extinguishment lightly. It must be -- it must be by necessary implication there being no other alternative, no co-existence of the rights.

Going to 261, there is an area of law that is

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unsettled and that is whether or not section 88 contemplates referential incorporation with respect to lands reserved for Indians. That was mentioned in the Derrickson case and it has not yet been settled.

And at 262 the respondents submit that it does and we respectfully adopt the submission of the Attorney General for Ontario in the Derrickson case. And I have set out the arguments, and if I could I'd leave that for your lordships if it's a troublesome point with you. And it's further support of that argument at 263 we quoted from the Kruger case, as follows:

> "However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection --"

That's the paramountcy doctrine,

> "-- Indians are brought within provincial regulatory legislation."

And in keeping with Derrickson with respect to the enclave theory several years before that, we say that there is no policy reason or legislative reason why section 88 should not apply to lands reserved for Indians.

And at 441, again, citing from the Kruger decision:

> "It has been urged in argument that Indians having historic hunting rights which they have not surrendered should not be placed in a more invidious position than those who entered into treaties, the terms of which preserved those rights. However receptive one may be to such an argument on compassionate grounds, the plain fact is that s. 88 of the Indian Act, enacted by the Parliament of Canada, provides that 'subject to the terms of any treaty' all laws of general application from time to time in force in any Province are applicable to and in respect of Indians in the Province, except as stated. The terms of the treaty are paramount;

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> in the absence of a treaty provincial laws of general application apply."

And again, Justice Dickson was referring to treaties but as well the paramountcy doctrine would exclude some laws of general application.

If I could next turn to section 109 and I'll spend some time on 109. In our submission it's well settled, as I have indicated before with respect to the St. Catherine's case and the Ontario Mining and Seybold case, that the interest of the province in its lands is entire notwithstanding there may be an interest other than that of the province. And it's fundamental to understand that concept of the entire title, because we have, for instance, the Carrier-Sekani as an attempt to create to revive the enclave theory saying because of section 109 with respect to traditional aboriginal lands, there has been created a third class of property in Canada, not provincial, not federal, but Indian. And I don't know how far it goes and I'll have to hear oral argument on it, but the implication is that with respect to that third class of property neither the federal government nor the provincial government could legislate. And that is a radical departure from the constitutional law that is developed over the last 130 or so years. And I have to spend some time to negative that I think and explain on the authorities that that kind of a conception is just not available.

Now, in paragraph 265 we've set out the provisions of 109 and I think referred to it before, but it said:

> "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces ..."

etc.,

> "... and all Sums then due..."

etc,

> "... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia ..."

etc,

> " ... in which the same are situate or arise,"

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and it says,

> "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same ..."

Now, the use of the word "subject" is instructive because "subject" means, we say implies there is a burden, a trust burden as an example or a sui generis burden arising out of previous aboriginal occupation, but that is a much different matter than something taken out of the chain of title or a piece taken out of the pie. If the British parliament had intended to suggest or mean that something was left out of the transfer, surely they would have used instead of "subject," "with the exception of" any trust, etc. If they had used those words inarguably you could say the province didn't get everything. But all they did was say "subject to" and the courts consistently have interpreted that language as creating a burden, a bar to free dealing with the property perhaps, but certainly not as any whole in the entire beneficial ownership or lessening of the entire beneficial ownership of the province.

At 266 we say section 109 is declaratory and provides that all lands within the province belong to the province. And I referred your lordships the other day to the policy behind the B.N.A. Act and the distribution of property between the federal government and the provincial government. The purpose of section 109 is to vest in the province the same property entitlements that the colony enjoyed prior to Union. Section 109 ensures that the bifurcation of legislative jurisdiction that occurred at Confederation would not result in any diminution of or accretion to the province's land holdings from that held by the colony. However, "interests" or "trusts" that burden Crown land that existed prior to Union continue to exist as of the Union.

At 267 I have set out the quote from St. Catherine's that's been referred to many times. And the underlining is the critical passage:

> "The enactments of s. 109 are, in the opinion of their Lordships, sufficient to give to each Province subject to the administration and

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> control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries,"

And then at 268 I point out that this principle has been accepted in Attorney General -- the Star Chrome case, the Smith case. I have referred to others. It's a well established and settled principle of law and we submit that to attack that principle as the appellants appear to have been attempting to do and some of the supporting intervenors are attempting to do is to ignore 150 or so years of British -- or Canadian constitutional law and it's just not supported by authority and would be a very radical change in the proper way the B.N.A. Act was understood to operate.

I have set out at 269 that aboriginal rights have been held not to be a trust within the meaning of section 109. And that at 270, even assuming that aboriginal rights are an "interest" within section 109, the Crown's inherent right to deal with its lands, including the power to extinguish the "interest", is not fettered by section 109. And I have made the point before and I will make it again and I'll refer to the Smith case at this point, but the -- 109 does not bar the province from dealing with its property in the province in any way. If there is any bar it's a section 91(24) bar. And after 1982 section 35(1) may have some impact on freedom to freely alienate and use the land without considering the Indians or the native's rights, the aboriginal rights protected by 35(1). But at 109 itself is not a bar.

And if your lordships could turn to tab 270 I have set out an extract at the second case. 271, I am sorry. It would be tab 271, the Smith case. The decision of Mr. Justice Estey speaking for the court. And this would be at -- in the A series, Volume A2 tab 26. And this case deals with a statutory reserve. The band had attempted to transfer its interest to the federal government directly so that some of the lands could be sold and used and the proceeds used for the support of the band. The fact situation is somewhat complicated, but an attempt was made to do that, but Mr. -- the predecessors of Mr. Smith happened to be -- have made a -- had squatter's rights in the middle of this band and there was a competition between who

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owned the lands: Mr. Smith who had been there for some hundred and -- hundred years or so or the federal government on behalf of the band. So this was an attempt, again, before -- at the time when the transfer was done it was in 1895, before the St. Catherine's principle was understood, that as soon as there was a surrender, or in this case a transfer, the burden disappeared. It wasn't understood when the transfer was made and this case examines again in a modern context, 1983, the same principles that were considered in the St. Catherine's case, and the nature of the Indian burden as it's been called and the distinction between the Indian burden being a 91(24) issue as opposed to the taking away of something from the title.

At page 561 of the case starting at letter "f" Mr. Justice Estey reviewed the law with respect to the consequences of the surrender, and you recall in this case it wasn't just a surrender, it was actually an attempt to transfer the land to the federal government directly.

> "The consequences of a surrender by the occupying Indians of Indian lands under s. 91(24) of the Constituion Act were examined in St. Catherine's."

Now, in Mr. Justice Estey's mind, and it will come up again and again, the issue is 91(24), it's not 109 with respect to the entire beneficial interest. The burden is encompassed within 91(24). For example, in St. Catherine's, and its quote is there:

> "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to 'an interest other than that of the province in the same,' within the meaning of sect. 109, and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some [other] provision of the Act."

And then 91 -- I have already referred your lordships to the statement in St. Catherine's regarding 91(24) and it doesn't just apply to statutory reserves but it

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must be land set aside. And at letter "b" on page 562:

> "The authority of that decision -- "

being a St. Catherine's decision,

> " -- has never been challenged or indeed varied by interpretations and application. Neither the parties to that proceeding nor the Privy Council appear to have had any doubt about the efficacy in law of a surrender by the Indians of their interests in a particular part of the land theretofore set aside for their benefit. There had been challenges to the surrender process where the procedure or the evidence of the process had left some doubt as to whether a surrender was indeed intended."

And that's a fact situation whether or not there was a surrender, and in some cases what was called a Hedendum clause was included. In other words, it's going to the federal government but not to use at its full discretion or not to use fully. Not to sell, for instance.

> "The law therefore came to recognize the right and ability of the benefitted Indians to give up their relationship to lands theretofore devoted to their use and occupation, and the result of such a process is the revival or restoration of the complete beneficial ownership in the Province without further burden by reason of -- "

not 109,

> " -- s. 91(24)."

Going over to the next at page 564, Mr. Justice Estey reviewed the terms "reserve" and "surrender" as used in the Indian Act and related it to the issues in this case in the following terms, starting at letter "b":

> "There may be some confusion by reason of the use in the Act of the terms 'reserve' and 'surrender' on a defined basis, whereas in some

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> of the documents now before the Court the terms are used in their ordinary sense of the language. The lands 'reserved' for the benefit of the Indians --"

and this was a statutory reserve I recall,

> "-- on being released by the Indians for whose benefit the lands had been set aside, cease thereby in law to be within the legislative reach of Parliament under the Constitution. The Federal Government never had a proprietary interest in such lands as were set aside for the use of Indians in the circumstances of the said lands. These 'reserves' were set up in the earliest days of the colony of New Brunswick and the title has never been transferred to the Government of Canada. The effect of the complete release, therefore, would be the withdrawal of these lands from Indian use within the contemplation of s. 91(24) of the Constitution Act. As found in St. Catherine's, the title of the Province would be unencumbered by any operation of s. 91(24)."

Again, 109 is not the encumbrance, is not the burden, 91(24) is. And carrying on to the bottom of the page there is a reference to the Ontario Mining Company and Seybold case which I have already referred your lordships to and again, it's worth repeating in the context of this case at the very bottom in the quote which I have already referred you to:

> "The Dominion Government, in fact, in selling the land in question was not selling lands reserved for Indians, but was selling lands belonging to the Province of British -- "

sorry,

> " -- the Province of Ontario."

And finally, my lords, if I could take you to page 568 and 569. Right at the bottom beginning with the letter "j" at 568:

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> "The right of the Indians to the lands in question was described by Lord Watson in St. Catherine's at p. 54 as 'a personal usufructuary right'."

And then a definition was given by Mr. Justice Estey. Now, you should note that this definition used by Mr. Justice Estey is much different than the definition of usufruct given to your lordships by Mr. Jackson which was taken from, I believe, the Civil Code of Quebec or that regime. It's defined as follows:

> "Law. The right of temporary possession, use or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it."

And then:

> "Use, enjoyment, or profitable possession."

So Mr. Jackson suggested or tried to make the point that usufruct was a very full estate indeed and in fact the usufruct left the Crown with really nothing but a bare title underneath. And I would submit on the definition of usufruct used by Mr. Justice Estey in fact the opposite is the effect. The Crown has the full title, but the usufruct is really a temporary possession. And then going on beyond the definition:

> "The release, therefore, is of a personal right which by law must disappear upon surrender by the person holding it; such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual. The right disappears in the process..."

So it's clear in terms of the right arising because of Indian occupation, prior Indian occupation as well, that it is in the nature of a personal right. It is not really a proprietary interest and it certainly does not detract from the whole and entire beneficial title of the Crown in right of the province with respect to its public lands. Now --

HUTCHEON, J.A.: I don't remember the Smith case being discussed in Guerin or Calder. Well, it would be after Calder, wouldn't it?

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MR. TAYLOR: I am told by Ms. Koenigsberg that it's adopted in Guerin. I'd have to look at a copy of Guerin.
HUTCHEON, J.A.: All right. We can get it as we go.
MR. TAYLOR: I can check that at the break.
HUTCHEON, J.A.: All right.
MR. TAYLOR: Now, if I could go to the next topic -- I am told it's at page 356 of Guerin where it's discussed, my lord.
HUTCHEON, J.A.: Thank you.
MR. TAYLOR: Now, the next section of the Factum, hopefully I can deal with it briefly, is again an alternative argument and it's a fall-back, a fall-back position quite clearly. But clearly the province is interested and concerned that all citizens, native and non-native, have justified expectations with respect to the grants received from the province and the governmental action that has taken place for the last -- well, since 1871. And if this attack on the legislative jurisdiction of the province in any -- in any element is accepted, the province is concerned that the rights acquired during that period, and as I say both rights for natives and non-natives, be recognized and be treated as valid or as valid as possible.

Now, at 272 we set out that the power of the province flows from those sections of Constitution Act, 1867. However, even if the government act that effected the extinguishment of an aboriginal right is ultra vires, the act authorizing the extinguishment would not thereby be, per se, invalidated. Rather it would be construed or "read down" so that the grant would be valid. In other words, if your lordships were to say this particular legislation or this grant strikes at the core as I have discussed it would still be possible to read it down so that with respect to the rest of the world it's valid but it just doesn't apply to Indians perhaps or some aspect of Indianness. Now, we are not saying that that should be done. We are saying it shouldn't be done. But the reading down would still leave the legislation as valid. And I have included at tab 272, the second green tab, an extract from Hogg. On the question of reading down it arose from the discussion which ensued between some of your lordships and Mr. Gouge with respect to the topic of reading down. And I thought it would be instructive. It's the second material in on 272. And the province accepts the statement with respect to

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reading down in Hogg as being a more accurate description of the process than the approach taken by Mr. Gouge. It's at page 327.

> "The 'reading down' doctrine requires that, whenever possible, a statute is to be interpreted as being within power. What this means in practice is that general language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation). It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning; it then stipulates that the limited meaning be selected. Reading down is like severance in that both techniques mitigate the impact of judicial review; but reading down achieves its remedial purpose solely by the interpretation of the challenged statute, whereas severance involves holding part of the statute to be invalid."

Now, in saying that, my lords, it's our position that reading down should not lightly be undertaken and in fact reading down should only occur when the first question is answered, without reading down it would be a question that the legislation was ultra vires. And that point is made at 328 in the article by Professor Hogg: "The general idea -- " this is the last paragraph:

> "The general idea that a law should not be held to be wholly invalid just because it overreaches the limits of jurisdiction in certain respects is obviously in accord with a properly restrained role for the courts. Reading down allows the bulk of the legislative policy to be accomplished, while trimming off those applications which are constitutionally bad. But, as the difference of opinion in McKay demonstrates --"

And that was, I believe, a sign by-law case.

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> " -- it is not easy to tell when a law which is valid in most of its applications has trespassed outside its proper field. It must be recalled that the pith and substance doctrine, exemplified by Bank of Toronto v. Lambe, is that a law which is in relation to a matter within jurisdiction (in that case taxation) is not objectionable just because it affects a matter outside jurisdiction (in that case banking)."

And then there is a reference to the McKay case dealing with an impunged sign by-law which was held inapplicable to the federal election -- to the federal elections. And the discussion that ensues is interesting and it points out that the court just because the reading down doctrine is available shouldn't take it as the first -- as the first alternative. It should readily be one of the last alternatives, once it's -- once the conclusion is that the legislation is beyond -- beyond competence of the appropriate government.

Now, in the same vein at 273, we have made reference to the de facto doctrine, and the de facto doctrine was applied in the Manitoba Language case and Mr. Arvay will be developing or speaking at length about the Manitoba Language case with respect to the question of remedies. But in that case in a nutshell, and the extract is set out at tab 273. I won't read all of it and I probably won't read any of it, but it is -- if your lordships take the trouble to read it, it becomes very apparent that this is an old doctrine. It's been applied in many, many instances, and it's a doctrine of great integrity. And that doctrine, while it does not give effect to unconstitutional laws, does recognize and give effect to "the justified expectations of those who have relied upon the acts of those administering invalid laws." And the ultimate conclusion in the Manitoba Language case is set out there:

> "Thus the de facto doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts,

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> judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and always will be enforceable and unassailable."

The validity of the Acts and the grants does not flow from the impunged legislation as is made clear in the discussion of the doctrine in the case that I have included. It flows from the fact that the law recognizes that a third party is entitled to deal with government officials on the assumption that they have proper authority to do what they are doing. And if they in fact don't have that authority and people have relied in good faith upon the acts on the belief that they do have that authority notwithstanding the absence of authority or the invalidity of the legislation, all grants and other acts of public officials are nonetheless valid and not open to attack. The de facto doctrine, as I say it has a long history in law and it's not -- its application is not limited to the extreme situation as prevailed in Manitoba, being the invalidity of the laws of the province. The remedy that the court used to address that particular issue is in fact the delay period or the supervision period. But it's quite clear that those grants are nonetheless valid and will remain valid forever -- for all time because of the application of this de facto doctrine. And again, of course this is an alternative argument of the province, but it is imperative in our submission with respect to the rule of law that those grants be recognized under that doctrine.

And at 274 we set out our position and some authority that section 35 of the Constitution Act, 1982 does not have retrospective or retroactive effect with respect to grants and statutory activity prior to that date. Certainly after that date it would have application, but it would not be open in our submission for anyone to say this interest which may have extinguished, diminished or somehow impaired an aboriginal right recognized in 1982 has to be set aside. Clearly after 1982 the test set out in Sparrow has to be looked to with respect to future grants, etc., but there is no authority flowing from section 35 to set aside existing grants and the like.

At page 275 I set out the -- we deal with the Sparrow decision and authority as of 1982. I have

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dealt with it in essence in the summary and it's very difficult to really say more about it than I have said in the summary, because there was no analysis of the facts in this case using the section 35 test where you can say that's how it should be done, that's how it shouldn't be done. And as I have already pointed out to your lordships, it's our submission that this court shouldn't be undertaking that task as a matter of first impression.

I would, however, just like to deal with the concept and leave it with your lordships that, on the authority of Sparrow, there still is a possibility that government action can extinguish an aboriginal right. It is a matter that I would submit have a pretty heavy onus on the government, but in our submissions it should be held open on the authority of Sparrow and the balancing test suggested in Sparrow that that could be the result.

And if I could just take your lordships to paragraph 278 of the Factum. The province concedes that some laws, grants in fee simple and lesser interests, and other Crown instruments that would have extinguished aboriginal rights prior to 1982 may well constitute undue interference with the exercise of aboriginal rights after 1982, after the passage of section 35(1).

We submit, however, that not all laws, grants and fee simple and lesser interests, and other Crown instruments that would have extinguished are constitutionally unjustified exercises of legislative or executive power if passed or made after 1982. And fundamentally this is because the test in the two things is different. With respect to extinguishment, extinguishment by necessary implication one looks to whether or not Dominion and control has been vested by the Crown in third parties so as to exclude the continuation of the aboriginal right. Now, prior to '82, if that happened the right no longer exists so 35(1) does not become a problem. After 1982, really the question of intent to extinguish becomes less of an issue, because if there is an act that goes to -- that extinguishes, clearly there has been interference. And if it even goes a long way to extinguishment but not quite all the way, clearly there has been interference, so really the court would be engaged in the process of looking at the justification process under section 35 in most cases.

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And it wouldn't matter so much about extinguishment other than that extinguishment, because of its radical consequences after 1982, might place a heavier onus on the Crown.

Now, continuing on at 283, rather than the complete adverse Dominion test with respect to extinguishment, we have contrasted -- and that summary I handed out I think contrasted it well as well. In determining whether there has been a primary interference with an aboriginal right, the Supreme Court of Canada has declared that a number of factors, totally unrelated to the intent of the Sovereign, are to be assessed. And really you are looking at effect with respect to section 35 and undue effect, not intention.

> "First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising their right?... "

And ultimately the test as to whether or not there has been a prima facie infringement boils down to:

> "asking whether either the purpose or the effect of the restriction... unnecessarily... infringes the interests protected by the fishing right,"

or any aboriginal right which we would say. And as we point out in 284, the test for determining whether there has been a prima facie infringement of an aboriginal right after 1982, is not directed in any way to intent, but instead to the ability of the aboriginal person or group to exercise the aboriginal rights, having been recognized and affirmed under section 35.

285, we point out that whether or not undue hardship would occur depends on a number of factors. And I will leave that -- those passages for your lordships. It flows from the summary of the test which I handed out this morning, and there is examples and instances of how that would work, but there is enough language we submit in the Sparrow decision to leave open whether or not extinguishment could take place. For instance, at 289 the court in Sparrow

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acknowledged that other governmental objectives would not be constitutionally permissible.

> "Also valid would be an objective purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to the aboriginal peoples themselves, or other objectives found to be compelling and substantial."

A law, grant or colonial instrument that prima facie interferes with the exercise of aboriginal rights that has as its purpose the prevention of harm to the general populace or to aboriginal peoples themselves would also therefore possess a valid governmental objective.

With respect to the responsibility of the government vis-a-vis aboriginal people, the court in Sparrow held that for the prima facie infringements to be justified, such infringements must "treat aboriginal peoples in a way ensuring that their rights are taken seriously." And it's part of that, at 292, the court stated:

> "Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the... measures being implemented."

And we state that in light of the above, it is not difficult to conceive of situations where a law, grant or Crown instrument that would have extinguished prior to '82 would be nonetheless justified after 1982.

And just looking at a site-specific example. If you're on a river and the traditional fishing grounds are at the junction of the river and 20 miles away the government wishes for economic development to grant a fee simple to a company to put in a pulp mill, non-polluting variety, with respect to five acres, the Indians are consulted and all of that process, the proper consultative process and the respect for the

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rights is adhered to, I would submit that either the first test wouldn't be made out, in other words undue interference, for instance, some of the territories we looked at today in terms of the use the aboriginals had put them to, or else it could be justified especially if there were spin-off benefits to the native groups and that sort of thing. So there are situations where even after 1982 we say extinguishment could happen, but without the facts it's difficult to do any more than speculate. My lords, I am just about finished, but I see it's at 3 o'clock.

TAGGART, J.A.: All right. We will take a five minute break.

AFTERNOON RECESS

MR. TAYLOR: Yes, my lord. Just -- sorry.

TAGGART, J.A.: Yes.

MR. TAYLOR: My lords, just to conclude, Lord Justice Hutcheon asked if Smith had been referred to in the Guerin case and I gave you the wrong page cite. It's in the joint book. It's Volume 1, tab 9, and the proper page cite, the cite I gave was with respect to Madam Justice Wilson's decision. Mr. Justice Dickson considered it at page 342 at the D.L.R. report. It's not long and I have it here and I can read it to your lordship.

HUTCHEON, J.A.: Yes.

MR. TAYLOR:

> "As the Smith decision (supra) makes clear upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust res so that even if the other indicia of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender nor does surrender give rise to a constructive trust."

And I think that's clear that Mr. Justice Dickson -- I think it's a clear acknowledgement that there is no property interest per se. That's what is meant by there would be no res to constitute the trust. My

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lord, just finishing off, it's I think worth making the point in conclusion that the province --

TAGGART, J.A.: Where is that Smith -- oh, there it is. I have got it now. Okay.

MR. TAYLOR: -- that the province -- one of the principle concerns of the approach taken by the appellants and the supporting intervenors is this enclave theory, and if the result in any way with respect to any aspect of heads of power under section 92 is such that only the federal government can legislate with respect to Indians or extinguish aboriginal rights, for example, if a fee simple grant doesn't do it, then the effect would be that British Columbia cannot deal properly with its own land and resources. And the consequences of that are grave. There is just no doubt about it.

TAGGART, J.A.: What was the page reference in Guerin to Smith?

MR. TAYLOR: I believe it was 346.

TAGGART, J.A.: 346.

HUTCHEON, J.A.: 342.

MR. TAYLOR: 342?

TAGGART, J.A.: 342?

MR. TAYLOR: Yes, my lords. Just very briefly, as Mr. Williams advised, I would be dealing with tab 11, issue 7, Other Defences Raised At Trial, which is only one page, but not unlike a lot of things in this appeal refers to something which opens up into a larger issue, although this isn't very extensive. The situation essentially is that the respondent advanced certain defences at trial including defences entitled equitable defences, the Crown Proceeding Act damages pre-1974. Now, as Mr. Arvay will address, it's our suggestion that those sorts of damage issues and compensation and the specific resolution of the particular on-the-ground disputes at least be left to the parties for negotiations, and further it's our position that because an analysis hasn't been done of damages, that that should be referred -- if there is any -- to be any damages, that would go back to the trial court. And if it went back to the trial court, then we would seek to raise these defences. However, if your lordships feel necessary to deal with it, then the written argument of the province at trial can be found in Appendix C. I would refer your lordships to Appendix C if it becomes an issue which you feel you have to deal with. And I should point out that with respect to the appendix and tab C, we are only pursuing the defence under tab two, which is the

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application of the Crown Proceeding Act and its predecessor the Crown Procedure Act, which would exclude the award of damages until 19 -- for anything that occurred up to 1974. And the argument is set out at -- over some eight pages at tab two. Now, tab one raised some equitable defences --

LAMBERT, J.A.: I am sorry, I am lost.

MR. TAYLOR: I am sorry, my lord.

TAGGART, J.A.: This is in Appendix C, I take it.

MR. TAYLOR: Appendix C.

TAGGART, J.A.: Tab two, Crown Proceeding Act and its predecessor.

MR. TAYLOR: Yes.

TAGGART, J.A.: And then there is another tab in Appendix C?

MR. TAYLOR: Yes, there is. There is tab one, which material we will not be pursuing. Our defence is we will not be pursuing. I am just going to explain briefly why briefly, but my lord Mr. Justice Lambert --

LAMBERT, J.A.: Yes, I know it's in Appendix C and I haven't been able to locate Appendix C yet. So --

MR. TAYLOR: Oh, it would be in Volume 2 of the Revised Factum. There should be a large Volume 2 just labelled Revised Factum, which has the Royal Proclamation material in it I believe.

LAMBERT, J.A.: It's Appendix C, tab two in this Volume 2?

MR. TAYLOR: That's correct, my lord.

LAMBERT, J.A.: Thank you.

MR. TAYLOR: Now, with respect to tab one there were some defences raised, some equitable defences raised and when we put the Factum together that was taken from the Russell and DuMoulin Factum. However, we have subsequently on a closer reading of the judgment come across page 474 of the judgment dealing with other defences. And in the very last sentence in that section the learned trial judge held as follows:

> "In my view, the Indians' claims have not been discharged by any conduct on their part."

And we have interpreted that to be a dismissal of these, quote, "equitable defences" set out at tab one and no appeal, no cross-appeal was taken with respect to that finding. However, with respect to the Crown Procedure Act there was no ruling made because it was not necessary for the learned trial judge to get into the issue of damages. But we will be pursuing tab two, the Crown Procedure Act defence. Thank you, my

lords.

TAGGART, J.A.: Now, Mr. Bell, is it proposed now to deal with the questions that were advanced --

MR. BELL: Yes, my lord.

THE COURT: -- yesterday?

MR. BELL: Yes, my lord. Before I begin, I'd ask your lordships to arm yourselves with Volume W-3 again, please. Now, my lords, there were two questions raised. The first one had to deal with the issue of consent under the Royal Proclamation and the second one had to deal with the question of the impact of the Sikyea. And I will deal with the Royal Proclamation first. I'd ask your lordships to turn to tab 11. I want to refer particularly to part four of the Royal Proclamation as set out on page 489 and following.

TAGGART, J.A.: I can't find your Royal Proclamation in the Factum.

MR. BELL: In the Factum it's at paragraph 70 of the Revised Factum, which is just a brief paragraph referring to the appendix.

TAGGART, J.A.: Paragraph 70, that's right.

MR. BELL: Yes. The full argument is contained in the appendix.

TAGGART, J.A.: Yes. Okay.

MR. BELL: Now, referring to the Royal Proclamation itself at tab 11, I just want to direct your lordships' attention to the --

TAGGART, J.A.: It's W-3?

MR. BELL: Yes, that's correct, my lord. I direct your lordships' attention to the preamble of part four. It says:

> "And whereas it is just unreasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed --"

And I want to emphasize that phrase:

> "-- should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds."

Now, the preamble sets out the purpose of these

provisions of the Royal Proclamation, which is to prevent the molestation or disturbance of the Indians in the occupation of their hunting grounds. And it's directed against -- or towards, rather, the incursions of settlers that had been taking place around the time of the Royal Proclamation and before. And it sets out a number of measures to deal with this particular problem and to provide this protection. And you will recall -- if we could move down to paragraph -- well, first of all paragraphs T and U briefly prohibit the governors of colonies from granting patents of land beyond the bounds of the colonies of which they are the authorities, and then in paragraph V we have the creation of what I refer to as the hundred per cent reserve and that carries over into paragraph W and X. And then in paragraph Y we have what I referred to as the partial reserve. And I'd like to deal with the hundred per cent reserve first. Paragraph V, of course it describes the geographic limits of the hundred per cent reserve and then in paragraph W it says:

> "and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained."

And I emphasize the last phrase, "without Our especial Leave and Licence for that Purpose first obtained," because in my respectful submission, my lords, this is a clear reservation by the Crown to itself of the power to authorize settlements, purchases and taking of possession of any lands in the reserve. There is no mention of consent on the part of the Indians with respect to the hundred per cent reserve, and in my respectful position nor can anybody infer. Therefore, even if the hundred per cent reserve can be taken as encompassing British Columbia, no consent is required for the Crown to take the Indian interest in those lands.

Now, paragraph X is the direction to the squatters to remove themselves from these lands and we come to paragraph Y, which requires a little bit more attention. Paragraph Y itself has a preamble. And I'd like to just go through it in some detail. It

says:

> "And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all Reasonable Cause of Discontent,"

etc. So here we have the mischief to which the provisions of paragraph Y is directed. That is the prevention of the so-called frauds and abuses that had been committed in the purchasing the lands of the Indians. And I don't know where your lordships have read that part of the evidence, but there was evidence as to the rather sharp practices that were used by some of the settlers in obtaining lands from the Indians. So we have a specific situation to which these provisions of the Royal Proclamation are directed. It then goes on to say:

> "We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement;"

And my respectful submission here is the command to the settlers not to make any purchases from the Indians and it's restricted to those colonies where we have thought proper to allow settlement. And in my respectful submission that means the colonies existing at the time the proclamation was issued. And that's not only because of the language, that is have thought proper to allow, which suggests action completed in the past, it is also because of the mischief towards which this particular provision is directed. That is the frauds and abuses that had taken place.

HUTCHEON, J.A.: I thought we were just dealing with consent.

MR. BELL: Yes, my lord. We are coming down to consent in a moment.

HUTCHEON, J.A.: All right. You are repeating what we had

yesterday.

MR. BELL: Now, following the command, it goes on to say: "but" and it's part of the same sentence:

> "but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie:"

And then it goes on to make a similar provision with respect to proprietory governments. In my respectful submission, my lords, there is a possibility that an inference could be drawn from this wording that consent of the Indians is required to the acquisition of their lands. I submit, my lords, that it is a weak inference and that indeed it's not an inference that can be upheld. In the first place, we're dealing here with restrictions on the settlers in acquiring lands. It says that "no private person do presume to make any purchase." Fine. We're trying to protect the encroachment of settlement and to control settlement on Indians lands. And it's directed towards the actions of the settlers. And the policy obviously is so that the Crown can gain more control over settlement. And this is different from the regime that exists in the hundred per cent reserve where we have direct rule by the -- by London. There is no need for such a provision in the hundred per cent reserve, because the Crown controls settlement there directly. Whereas, in the colonies it's up to the local colonial government to issue the patents. Therefore, there is no need for such a restriction in the hundred per cent reserve.

Now, dealing with the inference for a moment, focusing in on the language "but that if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us," etc. In my respectful submission this deals with a situation where the Indians are inclined to sell the lands. It does not deal with the situation where the Crown is inclined to dispose of the lands and to grant patents on its own. It doesn't say that the Crown cannot take the Indians' interest without

the Indians' consent. It just says if the Indians are inclined to dispose of the said lands, then this is the procedure that has to be followed. There is no -- no suggestion of any fettering of the Crown's authority to take aboriginal interest without consent. In my respectful submission, my lords --

TAGGART, J.A.: The object of the exercise here is to get -- being to get title into the name of the Crown.

MR. BELL: Well, that's right. So that it can control --

TAGGART, J.A.: Instead of directly into the settler.

MR. BELL: That's right, my lord, so that it can control the pace and the direction of settlement.

It's interesting to note the situation that -- the difference in the situation that existed in the colonies at this time and the situation and the procedure that was followed in British Columbia. In British Columbia in the mid-1850s there is little or no evidence that the so-called frauds and abuses were taking place in the purchasing of Indians lands. There is evidence that attempts were being made to purchase Indians lands by private settlers. And what happened in British Columbia, well, first of all the Act of 1858 was passed giving authority to the Crown to deal with the situation and through the diligence -- the vigilance, rather, of Governor Douglas steps were taken to prevent private purchases of lands from the Indians. And I'm speaking specifically here of the Calder II Proclamation, which declared that all lands in the colony belonged to the Crown in fee. This was in my respectful submission at least in part a message to the settlers that the Crown owned the land and only -- and that purchases of land could only be made from the Crown. And that was how the Crown interposed itself between the settlers and the Indians in British Columbia. Again, this is another reason for concluding that this particular provision was designed to apply only to the colonies that existed at the time of the Royal Proclamation and not to British Columbia. That's essentially the argument on that point, my lords.

A number of subsidiary points have been made in the Factum and I'll just refer your lordships to them. I don't intend to repeat them here. Our argument on this point is in the appendix Volume 2 of our Factum, tab A-1 paragraphs 11 to 21.

TAGGART, J.A.: Could I have that latter part, please?

Defendants' Volume 2.

MR. BELL: Yes. It's appendix Volume 2, tab A-1, paragraphs 11 to 21. So unless there are any further questions I will move on to the second question. Now, I would like to deal with the question of the impact of the Sikyea and in particular the passage from it that refers to the Royal Proclamation. Perhaps it would be useful for me to just review it briefly. It's not very long. This was a judgment of the Northwest Territories Court of Appeal given by Mr. Justice Johnson, and it concerned a case of a charge under the Migratory Birds Convention Act. And Mr. Justice Johnson says at page 66 of the Western Weekly Reports at about the third paragraph:

> "The right of Indians to hunt and fish for food on unoccupied crown lands has always been recognized in Canada - in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up their ownership right to these lands."

And then he refers to another authority, and he says:

> "It is sufficient to say that these rights had their origin in the royal proclamation that followed the Treaty of Paris in 1763. By that proclamation it was declared that the Indians
>
> > '... should not be molested or disturbed in the possession of such parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them or any of them as their hunting grounds.'
>
> The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of proclamation, and it is doubtful, to say the least, if the Indians of at least the western part of the Northwest Territories could claim any rights under the proclamation, for these lands at the time were terra incognita and lay to the north and not 'to the westward of the sources of the river which fall into the sea from the west or northwest,' (from the 1763 proclamation describing the area to which the proclamation applied)."

And stopping there for a moment, my lords. The province takes the position that that's essentially the correct statement. It recognizes the geographic limits of the hundred per cent reserve and it is essentially a statement that the Royal Proclamation did not follow the flag, at least into the Northwest Territories. Then he goes on to say, and I believe this is the point of controversy:

> "That fact is not important because the government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender."

And I think the concern was that this implies that the federal government may have bound itself to a treaty process for taking the surrender of Indian lands, a process that would have legal effect. It would be a legal requirement and therefore the consent requirement would be part of the law. And my comment on that is this. First of all we have to bear in mind the context in which this case arose. This was dealing with the offence that took place within the confines of Treaty No. 11 which is entirely north of the 60th parallel and is entirely federal lands. Now, the province takes no position as to whether the federal government has bound itself by its conduct in relation to entering into treaties with Indians. I am sure that the Attorney General of Canada would have something to say about that. Nevertheless, even if it has, our submission is that federal policy and conduct in relation to the taking of Indian interest in lands that are owned by the federal government cannot have any effect of binding the province in relation to provincial lands. The federal government is dealing with its own lands in the Northwest Territories and it really doesn't have anything to do with provincial obligations in respect of provincial lands. And that's essentially the answer.

Now, there was a question that was raised concerning whether the endorsement of the Supreme Court of this particular judgment meant that this court was bound by this statement, and the question was raised as to therefore whether this statement

might be obiter. Before I deal with that I'll just refer to the passage of the Supreme Court judgment that deals with this. It's a judgment written by Mr. Justice Hall and in the Supreme Court Reports at page 646 he says:

> "On the substantive question involved, I agree with the reasons for judgment and with the conclusions of Johnson J.A. in the Court of Appeal. He has dealt with the important issues fully and correctly in their historical and legal settings, and there is nothing which I can usefully add to what he has written."

Now, this would seem to be a blanket endorsement of the entire judgment. In my respectful submission, my lords, however, the passage that I quoted earlier must be obiter, and I say that with the utmost of respect to Mr. Berger who is very knowledgeable in these matters. Nevertheless I feel obliged to disagree with him. The issue in this case concerned the validity of a charge under the Migratory Birds Convention Act and this required an examination of the relationship between Treaty No. 11 and the rights acquired by the accused under it and the Migratory Birds Convention Act. And for the purpose of that inquiry the court only needed to know that Treaty No. 11 was valid, that is whether, among other things, the federal government had the authority to enter into the treaty. If it did then --

HUTCHEON, J.A.: The migratory treaty, not treaty --

MR. BELL: No, I am talking about Treaty No. 11.

HUTCHEON, J.A.: Go ahead.

MR. BELL: The Migratory Birds Convention Act was obviously valid and the question was whether or not the Treaty No. 11 as a valid treaty would have given the accused rights as against the application of the Migratory Birds Convention Act. And so for the purpose of this judgment all the court needed to decide was whether Treaty No. 11 was a valid treaty and was in force. And in order to decide that all the court had to decide was whether the federal government was authorized to enter into the treaty. It did not have to decide whether the federal government was required to enter into the treaty. The two different ideas there. Now, I don't think there is any dispute that the federal government was authorized to enter into

the treaty, but that's as far as the court needed to go in order to make the judgment in the case. And therefore, the statement concerning the legal effect of the federal government's practice of entering into the treaty and whether or not it implied a requirement of consent is obiter.

Another problem, another issue that I see involved in this case concerns the blanket nature of the endorsement of the judgment, of the reasons for judgment. You will recall the earlier part of the quote dealt with the fact that Hudson's Bay Company lands had been excluded from the benefit of the proclamation and that these lands were terra incognita and lay to the north and not to the westward of the sources of the rivers. And I say that this effectively says that the Royal Proclamation did not follow the flag. Now, you will remember, my lords, that in the later judgment in Calder Mr. Justice Hall says that the Royal Proclamation did follow the flag and yet here if he's endorsing in a blanket way the judgment of Mr. Justice Johnson, there seems to be some conflict between the two statements. And it raises the question in my mind which in my respectful submission ought to give the court pause in applying this judgment as if it were binding on this court. That concludes my submission on that point, my lords.

LAMBERT, J.A.: Thank you, Mr. Bell.

MR. BELL: It's Mr. Arvay's turn now.

TAGGART, J.A.: Thank you, Mr. Bell. Mr. Arvay.

MR. ARVAY: Do you really want to hear from me?

TAGGART, J.A.: Mr. Arvay, would you prefer to begin in the morning?

MR. ARVAY: I will tell you what I was going to do if I was -- if I was to start now what I was going to do was attempt to answer Mr. Justice Lambert's other question, the question, and I could probably make some headway in ten minutes if you want me to use it now and then I can start tomorrow on the remedies. But I am in your lordships' hands.

LAMBERT, J.A.: It's the question that is said to have taken ten minutes to ask and if you can answer it in ten minutes it wasn't worth asking.

MR. ARVAY: I don't know if I can answer it in short of two years, my lord. But I'm going to do my very best to answer it in a shorter frame as possible.

LAMBERT, J.A.: I would prefer to have a clear mind when you answer and to start in the morning if that's up to me.

TAGGART, J.A.: I would also like to have a look at the question again.

MR. ARVAY: Do you have a copy of the question or should I get a copy?

LAMBERT, J.A.: We will get the copies, yes. But the essence of it is what makes aboriginal rights rights and what makes them aboriginal.

MR. ARVAY: I got the question. It's the answer which is a little bit more difficult. But shall I deal with it in the morning then?

TAGGART, J.A.: Yes. I think perhaps we'll pack it in for the day and deal with it at 10 o'clock tomorrow morning.

PROCEEDINGS ADJOURNED

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

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Laara Yardley,
Official Reporter,
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