

Submissions by Mr. Willms

June 24, 1992.

CORAM: Taggart, Lambert, Hutcheon, Macfarlane, Wallace, JJA.

THE REGISTRAR: In the Court of Appeal for British Columbia,
Wednesday, June 24th, 1992, Delgamuukw versus Her
Majesty the Queen at bar, my lords.

TAGGART, J.A.: Yes, Mr. Willms?

MR. WILLMS: Thank you, my lord.

My lord, in accordance with the reasons of this court of April 29th, the submissions of the amicus will relate to two issues: The first issue is support for the trial judgment and those aspects formerly supported by the province but no longer supported; the second aspect will be submissions relating to the issue of this court's power to grant the remedies that have been proposed by the province and the appellants.

Arguments in the support of the judgment will be advanced in two parts. I will today deal with the Chief Justice's conclusions on beaver trapping territoriality and the village-based society of the Gitksan and the Wet'suwet'en. And I will also today, time permitting, make brief reference to the Chief Justice's conclusions that the American authorities are not particularly helpful in deciding this case.

Tomorrow Mr. Plant will address the question of extinguishment, and that will take, I think, the whole day, and he will also make reference to the judgment of the Australian high court in Mabo. And on Friday I will address the question of remedies.

I will be advancing arguments this morning from tab 7 of the R & D factum, volume one, and you should all have three volumes of references that say R & D one, two and three. I will be starting with the volume entitled R & D 1 on the spine and the factum. So if my lords could have those two, there should be a document that just says factum of Russell & DuMoulin, amicus curiae, that's the factum I will be advancing argument from this morning, and I will also be asking your lordships to turn to the references that say R & D-1 on the spine.

If I could ask the court to turn to tab 7 of the factum. Tab 7 should say at the start that the learned trial judge did not err in holding that beaver trapping territories arose as a result of the fur trade. That's where I will start my submission. The importance of this point is this: The territorial

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1 claim advanced by the appellants at trial bore a
2 remarkable similarity to the traplines of the
3 appellants. In other words, the traplines in the area
4 held by the appellants was, except for some minor
5 changes here and there, very, very close to the
6 territorial claim advanced on behalf of the houses by
7 the appellants. And, my lords, you may wish to make a
8 note beside paragraph one in your factum that the
9 Chief Justice deals with this remarkable concordance
10 at pages 434 to 435 of his judgment.

11 WALLACE, J.A.: 434 to 435?

12 MR. WILLMS: 434 to 435.

13 The factual background for the issue that the Chief
14 Justice had to decide is set out in his judgment, and
15 I have quoted from it starting in paragraph 2, where
16 the Chief Justice said:

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18 "While none of the wildlife evidence is
19 unequivocal, I understood Dr. Ray to say that
20 early historic records that 'game was really
21 never very plentiful' in the territory and that
22 fishing was the mainstay of the economy. He
23 also said that the exploitation of animals was
24 pretty minimal 'in terms of food' and trader
25 Brown of the Hudson's Bay Company reported in
26 the 1820s that is Atnahs (any non-Carrier)
27 regarding beaver as unclean. Also, according
28 to Dr. Hatler, moose and deer came into the
29 territory relatively recently, replacing
30 caribou which, in response to a warming trend
31 which commenced about 1850, moved away from the
32 territory into other areas which they found
33 more hospitable."

34
35 I point out in my factum that these findings
36 of fact were based on the appellants' own evidence. I
37 say that at the top of page 2, after quoting from the
38 Chief Justice.

39 HUTCHEON, J.A.: The statement that the beaver were regarded as
40 unclean is contrary to some reading I did of a feast
41 in 1810, I think it was, where beaver was the food.

42 MR. WILLMS: That was Harmon, my lord and that was the Carrier.
43 Harmon was among the Carrier and there was no question
44 that among the Carrier, beaver was eaten. But Brown
45 observed when he came into the area that the Atnahs,
46 who we now know were the Gitksan, regarded the beaver
47 as unclean. And that's from Brown's records. And

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1 that's why Dr. Ray pointed that out in his opinion
2 report.

3 I would like to carry on at paragraph 3. Again, at
4 a different part of his judgment the Chief Justice
5 repeats his finding about fishing and game and then
6 says this, and I am at line 24 of my factum at page 2:

7
8 "First, moose and deer came into the claim area
9 relatively recently.

10 Secondly, there are references in the
11 journals and reports of Brown that suggests the
12 Chief's control of territories was not
13 exclusive but was limited in some cases to
14 beaver exploitation which was used for
15 ceremonial purposes by the Carrier, but was not
16 really so well regarded by the Gitksan in whose
17 country that animal was not nearly so
18 plentiful. In fact, Stuart, writing in the New
19 Caledonia in the early 1800s, said that the
20 Carriers did not eat meat in nine out of ten
21 years, except at feasts for the dead."

22
23 Then Dr. Ray said this at his -- page 24 of his
24 report:

25
26 "'In contrast to beaver, some other resources
27 were not as carefully husbanded and the nobles
28 do not appear to have had first claim on them.
29 For example, men who did not have what Brown
30 referred to as a "land stake" were allowed to
31 trap marten, the other fur that was in strong
32 demand in the area by Europeans. No mention is
33 made about prohibitions concerning the hunting
34 of large game or the taking of fish."

35
36 Again, as I say in my factum, this is based on the
37 appellants' own evidence. What there was at the time
38 of Brown was some territoriality in respect of beaver,
39 but in respect of other animals there appeared to be
40 none. And especially marten, which was another
41 important part of the fur trade. Beaver and marten
42 were both very important but it did not appear there
43 was any territoriality whatsoever with respect to
44 marten.

45 Carrying on at page four -- sorry, paragraph 4 of
46 my factum.

47

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1 "In my judgment, what happened on the ground
2 before British sovereignty was equally
3 consistent with many forms of occupation or
4 possession for aboriginal use as for ownership.
5 It is true that trader Brown referred to some
6 Indians as men of property and other similar
7 terms but that is equivocal. He also suggested
8 the exclusive use of some undefined land was
9 restricted to trapping for beaver."

10

11 And then finally, reading from paragraph five:

12

13 "Apart from Kitsequecla, where fishing seems to
14 be good, the other villages are strategically
15 located at canyons where fishing is easiest, or
16 at important river forks. There seem to be
17 good reason for villages to be situated at
18 these locations.

19

20 I am constrained to conclude that there
21 probably were villages at most of these sites
22 for a long, long time before the arrival of
23 European influences in the territory but I wish
24 to make a few comments. First, I do not find
25 it necessary to review the conflicting evidence
26 about Hazelton. It is so close to the canyon
27 at Hagwilget that Indians may well have
28 preferred the latter as a fishing site. Its
29 proximity to such a proven location makes a
30 specific finding unnecessary.

31

32 Secondly, it appears that the main reasons
33 for these villages, except possible for
34 defensive or strategic reasons, was probably
35 easy access to a principal food resource which
36 was salmon. Neither people were particularly
37 fond of game and animals for food and beaver
38 was not plentiful."

39

40 And I say, once again in my factum, the findings
41 are amply supported by the evidence given on behalf of
42 the appellants. So that what it came down to, as the
43 issue before the Chief Justice in respect of
44 territoriality and exploitation of resources, was
45 whether or not the beaver trapping territoriality that
46 existed at the time, and fed into the commercial fur
47 trade, was a product of the fur trade, and whether the
48 fur trade materially changed aboriginal life. The
49 Chief Justice found that the fur trade materially

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1 change aboriginal life. He made that finding at page
2 203 of his judgment, among other points, and I have
3 already referred your lordships to the assessment of
4 the remarkable concordance between the traplines and
5 the house territory claims advanced by the appellants
6 at trial.

7 On paragraph 7, I point out that Dr. Ray at one
8 point thought that the fur trade had radically altered
9 the local economy. And that's the point that I would
10 like to take your lordships to right now, and it's in
11 R & D-1 at tab 7. I would ask your lordships to turn
12 to page -- the pages are numbered at the bottom right
13 hand corner at each tab, and you will see that there
14 is a Roman numeral and then a slash and then an arabic
15 number. That tells you what part of the factum it
16 relates to. So that it's Roman numeral VII tells you
17 it's tab 7 of the factum, arabic 7 tells you it's
18 paragraph 7 of the factum. And I would ask my lords
19 to turn to page 2. Sorry, page 3. Page 3 is a
20 document that's entitled Comments On Skip Ray's Kemano
21 Paper by S. Clark and J. Cove.

22 TAGGART, J.A.: Is this appendices volume one?

23 MR. WILLMS: No, it should be a document -- it's a book that
24 says R & D-1 on the spine.

25 TAGGART, J.A.: All right.

26 MR. WILLMS: It's R & D-1, tab 7, page 3.

27 TAGGART, J.A.: Yes.

28 MR. WILLMS: Now, in Dr. Ray's cross-examination, Dr. Ray -- he
29 was asked whether or not he had, still had a copy of
30 this Kemano paper. He said he didn't have the copy of
31 the paper but he acknowledged that he did -- that
32 these are comments on a paper that he had written in
33 the past. The comments are by S. Clark --

34 WALLACE, J.A.: That he had written?

35 MR. WILLMS: He had written a paper.

36 WALLACE, J.A.: Ray?

37 MR. WILLMS: Dr. Ray had written a paper and received comments
38 by S. Clark and S. Cove. Now, John Cove, who was an
39 anthropologist who was on the plaintiffs' witness list
40 but was never called to give evidence and his report
41 was never marked. And you might have recalled early
42 in the appellants' argument they referred to extracts
43 from Mr. Cove's book, which was not marked as an
44 exhibit. Mr. Grant did. S. Clark, we understand, was
45 Mr. Cove's student, or Dr. Ray thought S. Clark was
46 Dr. Cove's student.

47 On the first page:

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1
2 "We believe that the paper contains much useful
3 material derived from the Hudson's Bay
4 archives. However, we see two overall problems
5 that are potentially harmful to the Tribal
6 Council's case regarding Kemano Hearings and
7 the court action. First, Ray has made certain
8 assumptions and has drawn certain conclusions
9 about pre-contact and early post-contact
10 Wet'suwet'en social organization and
11 territoriality that are not substantiated by
12 the evidence he presents. From an
13 anthropological perspective there are
14 inaccurate interpretations of data that
15 contradict the argument the Tribal Council
16 wants to make. We believe that a re-
17 interpretation of the data collected by Ray,
18 together with other material from various
19 sources, will give a more accurate picture of
20 Wet'suwet'en social organization and
21 territoriality. These anthropological problems
22 exist primarily in the first 21 pages of Ray's
23 paper and most especially on pages eight to
24 nine and 19 to 21. The second overall problem
25 is one of tone. In certain places throughout
26 the paper Ray's wording imparts a tone that
27 leaves an inaccurate impression of Wet'suwet'en
28 realities. Again, these instances are
29 potentially harmful and should be corrected.
30 Our critique of Ray's paper is based on our
31 understanding of pre-contact and post-contact
32 Wet'suwet'en and Gitksan societies and the
33 differences between the two. Our data sources
34 include discussions with Wet'suwet'en and
35 Gitksan people, the interviews taken by the
36 researchers and Tribal Council, the Barbeau-
37 Beynon material, Diamond Jenness's material and
38 other anthropological works."

39
40 So they explain to Dr. Ray the basis for their
41 criticisms of Dr. Ray's Kemano paper. The first
42 criticism I would like to ask your lordships to turn
43 to is page five. When I give you page numbers it will
44 be the page number in the lower right hand corner.

45 Now, you will see here they were referring to Mr.
46 Ray's Kemano paper at page six at the middle of the
47 page, right above the three-hole punch. And it starts

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1 off, the paragraph starts off at page six:

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off, the paragraph starts off at page six:

"A problem with tone -- that the fur trade
'radically altered' the local economic
situation. It may have had an impact but
radically altered is too strong. As well,
European goods, including metal tools, may have
been used initially as feast items rather than
as trade or productive items. This needs more
study. Studies by various scholars, George
MacDonald at the coast and Brian Given, a
student of Cove, in New England suggest that
the introduction of European tools, including
guns, which were not much, if any, improvement
over existing tools. Regarding hunting, the
Gitksan and the Wet'suwet'en used primarily the
deadfall technique -- a technique that would
not necessarily be improved by the use of guns.
The argument that guns had a major impact on
the productive activities of the Algonkians has
also been questioned recently."

I will just pause there, my lords, because I will
come back to the Algonkian, it's called the Algonkian
Hunting debate, and it's a debate that arises in
eastern Canada but it figured prominently in
anthropological works, and the debate is simply this:
Did the fur trade cause territoriality? Did it
intensify existing territoriality? Or did it have no
impact whatsoever on territoriality of the aboriginal
people when the traders came in? And that is the
Algonkian hunting debate, and I will turn to that in a
moment, because it's set out in a little bit more
detail. Carrying on:

"Incidentally, the Algonkian hunting territory
debate continued among
anthropologists/historians for many years, one
camp claiming the Algonkian economy and
territoriality were radically altered by the
fur trade and the other camp claiming that they
were not. In that debate at least the latter
seemed to have won."

Then:

"Page 6: tone -- that the Coast Tsimshian were

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1 forced to find alternate furs for fur trade
2 after the sea otter decline. 'Forced' is too
3 strong since the Tsimshians' degree of
4 dependence on the commercial fur trade is
5 questionable anyway.
6 Pages 6-7: Ray implies a radical change in the
7 native economy in 1821 -- not so. While the
8 fur trade may have intensified around that time
9 the Indian economy changed very little,
10 especially from the point of view of production
11 and productive relations. Hunting and berry
12 picking continued in order to meet dietary and
13 clothing requirements. Fishing continued and
14 perhaps increased in order to meet dietary
15 requirements and to supply the Hudson's Bay
16 post with salmon. Trapping continued in order
17 to meet the trade requirements with the coastal
18 people and now with the HBC."

19
20 Which is the Hudson's Bay Company.

21
22 "Thus it might be said the only real change as a
23 result of the fur trade was an increase in
24 direct trade with the HBC."

25
26 The last extract that I would like to refer to is
27 at page ten, and once again I am referring to the
28 numbers in the lower right hand corner. And you will
29 see a reference above, beside page 19, just above the
30 three-hole punch in the middle of the page. Again,
31 they are commenting on Dr. Ray's page 19 and they say
32 again:

33
34 "It is not clear from the data that pre-contact
35 Carrier society had been radically transformed
36 by the 1820s."

37
38 So they are criticizing Dr. Ray's opinion that
39 that was -- that there was a radical change.

40 LAMBERT, J.A.: I am just a little behind on understanding.
41 This material seems in itself to be very interesting
42 and helpful, but is the -- is Dr. Ray's paper itself
43 in evidence?

44 MR. WILLMS: No, we couldn't find it. He didn't have it, no one
45 had it. We couldn't find the paper at the time.

46 LAMBERT, J.A.: But Dr. Ray was a witness and he was examined?

47 MR. WILLMS: Yes, I am going to take your lordship's to the

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1 cross-examination on this paper in a moment, where he
2 acknowledges that at one time he held that view but he
3 says he changed his mind.

4 LAMBERT, J.A.: Obviously you have to put the whole picture
5 together of Dr. Ray's views, his changed views and
6 these criticisms of his views as one package to
7 understand it together.

8 MR. WILLMS: Yes, my lord. And so I thought I would go to this
9 first and then go to the comments, his cross-
10 examination makes more sense after I have taken your
11 lordships to this first.

12 LAMBERT, J.A.: Thank you.

13 MR. WILLMS: And then the next extract.

14 TAGGART, J.A.: You were at page ten.

15 MR. WILLMS: I was at page ten and I just read those two
16 sentences:

17
18 "It is not clear from the data that pre-contact
19 Carrier society had been radically transformed
20 by the 1820s."
21

22 A comment, I say, and I suggested at trial, that
23 that was an opinion that Dr. Ray once held, not an
24 opinion he held by the time of trial.

25 So if I can ask your lordships now to turn to page
26 13, this is the cross-examination of Dr. Ray at page
27 13 in the lower right hand corner, and it's his
28 cross-examination on this paper, on these comments on
29 his paper. And if you look down to line 39 at page
30 13, I say this:

31
32 "On page four now, and they say about your
33 Kemano paper:
34 'Ray implies a radical change in the native
35 economy in 1821 -- not so. While the fur trade
36 may have intensified around that time, the
37 Indian economy changed very little especially
38 from the point of view of production and
39 productive relations.'.
40 Just pausing there, is -- do you recall ever
41 writing a paper implying a radical change in
42 the native economy in 1821?

43 A Well, we have been around that several times
44 now. As I say I can't recall but they are
45 referring to it so presumably I had an opinion
46 at that point. What opinion I had five years
47 ago and what opinion I have now, having

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1 thoroughly immersed myself in the stuff, you
2 know what my opinion is now and I stand by it.
3 I have no trouble with it.

4 Q And perhaps with a more thorough immersion over
5 another five years you could change your
6 opinions again?

7 A It's very possible. I hope I don't suffer from
8 mental hardening of the arteries. I would say
9 the weight of the evidence is more in favour of
10 the direction I have taken it."
11
12

13 Now, just pausing there, my lords, later on I will
14 will be directing your lordships' attention to the
15 opinion evidence of Dr. Robinson, who disagreed with
16 Dr. Ray on this particular point. But the point that
17 I am making right here is that on the evidence of Dr.
18 Ray himself, at one point he was of the view that the
19 fur trade radically changed the economy of the
20 Wet'suwet'en as early as 1821. Now, the next point I
21 am going to refer to, which is at tab 7 in the
22 evidence, is that at trial Dr. Ray stuck to his
23 opinion that in 1831 and on, the fur trade radically
24 changed the economy. So he doesn't say in his
25 evidence that the fur trade never radically changed
26 the economy of the Gitksan and the Wet'suwet'en. The
27 difference in his evidence at trial from an opinion
28 that he held earlier, was he moved the date, and the
29 date was now 1831. And that evidentiary extract is at
30 the very beginning of tab 7, page 1, in the lower
31 right hand corner, and at line 38, and I will start
32 reading from his answer because his answer --

33 TAGGART, J.A.: This is in the reference book?

34 MR. WILLMS: I am still in the reference book, my lord.

35 TAGGART, J.A.: Tab?

36 MR. WILLMS: Still at tab 7 but I have gone back to page 1, at
37 line 38. And this is Dr. Ray answering a question by
38 Mr. Macaulay:
39

40 "A Well, if you're talking -- precisely, the
41 lower, if you are talking about the impact of
42 building the trading post..."
43

44 And there they are talking about the trading post
45 at Fort Simpson,
46

47 "...yes, that's the whole point of my longer

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1 report was once that post is built at the mouth
 2 of the river, it changes the whole political
 3 economy and political and trading strategies of
 4 this area. So when we get into what's
 5 happening after 1831 we are not dealing with
 6 the situation Brown described.

7 Q And it was -- you have agreed already it was
 8 rapid?

9 A Yes. In that period it was rapid because
 10 remember what's happened now is that trade
 11 ceased to be a predominant sea otter trade to a
 12 predominantly inland trade. So the volume in
 13 the inland connections had now assumed a
 14 paramount importance in native politics,
 15 whereas previously they would have been an
 16 adjunct to the maritime fur trade which was the
 17 dominant trade.

18 Q And it changed not only one aspect of the
 19 Gitksan or Wet'suwet'en system but it had an
 20 impact on almost every aspect?

21 A After 1831."

22
 23 So his evidence at trial, which was slightly
 24 different than the Kemano paper, was that he shifted
 25 the date. Now I am going to be referring to other
 26 anthropological opinion that supported Dr. Robinson's
 27 opinion that the fur trade radically changed
 28 everything in this whole area. But the point, the
 29 only point I want to make here, and I make it in
 30 paragraph 7 of my factum --

31 LAMBERT, J.A.: The trade he is talking about in this passage
 32 you have read us is the Hudson's Bay Company trade and
 33 not the Gitksan trade, not the Gitksan with the coast
 34 or the Gitksan with the Tsimshian, for example, it's
 35 the Hudson's Bay Company that's trading in sea otters.

36 MR. WILLMS: That's what I am calling -- my lord, when I talk
 37 about the fur trade I am talking about the commercial
 38 fur trade. That's what I am talking about.

39 LAMBERT, J.A.: Yes, yes. But I was just confirming that when
 40 Dr. Ray was talking about it he was using the same
 41 terminology and concepts. He is a student, his field
 42 of interest is the Hudson's Bay Company.

43 MR. WILLMS: The Bay, yes.

44 LAMBERT, J.A.: That's right. So naturally when he talks about
 45 the trade throughout this area was such and such, he
 46 means the trade the Hudson's Bay Company was engaged
 47 in was such and such.

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1 MR. WILLMS: That's a good point, my lord, because Dr. Robinson,
2 who did her dissertation study on the maritime fur
3 trade on the coast, her evidence, and Dr. Ray later on
4 acknowledged that the fur trade from the coast into
5 the interior didn't start in 1831. The fur trade --
6 Dr. Ray eventually acknowledged that he thought it was
7 about the 1780s, the fur trade from the coast to the
8 interior. That is the furs coming from the interior
9 down to the coast to be traded out to the ships was
10 1780. It preceded the Hudson's Bay. Dr. Robinson
11 gave the same evidence, and there is really no
12 dispute, it's in all of the anthropological literature
13 up and down the coast that as soon as the traders
14 started coming in the 1780s, that the trade was
15 regular and had a dramatic impact on the economy of
16 the coast. So that when Dr. Ray is talking here about
17 trade to the coast, you're quite right, because he is
18 a Hudson's Bay person, he is focusing on The Bay.

19 Now Dr. Robinson, who looked at the maritime fur
20 trade as well, she was the one that pointed out, and
21 Dr. Ray accepted it, that there was a fur trade down
22 to the coast during the maritime fur trade as well.
23 In fact, the oral histories of the Gitksan support
24 this because Legaic was coming up the river before The
25 Bay to trade furs. And Legaic was trading furs to the
26 people who were coming to the coast. Legaic was a
27 Tsimshian chief at the mouth of the Skeena. So that
28 evidence really wasn't in dispute.

29 HUTCHEON, J.A.: The 1750 map showed that, the map of 1750.

30 MR. WILLMS: Yes. I don't know which map that is but I know
31 that some of the --

32 HUTCHEON, J.A.: I have got it very much in mind. It's in that
33 book of maps, and it was the one to which Mr. Macaulay
34 told us the sideline notes were not to be taken as
35 evidence. But it showed the --

36 MR. WILLMS: Right, that's the map from the Historical Atlas of
37 Canada.

38 HUTCHEON, J.A.: Yes.

39 MR. WILLMS: Yes. So there is -- in this area there is trade
40 coming from two directions, there is trade coming from
41 the coast and then as The Bay and the Northwest
42 Company come across from the interior, there is trade
43 going that way as well.

44 Now, if I can ask your lordships to turn to -- back
45 to the factum, paragraph 8, which is on page five. I
46 point out something there that I just alluded to
47 there, there is a considerable academic debate in

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1 Canada which is sometimes called the Algonkian hunting
2 debate about the importance of trapping and
3 territoriality and the effect of the fur trade on the
4 aboriginal populations of Canada. On the one hand
5 some scholars asserted that the fur trade merely
6 intensified existing subsistence economies and
7 resource use, others argue that the fur trade
8 radically changed resource use in aboriginal
9 societies.

10 Well, during the course of the trial a document,
11 and this is -- if you can turn back to the yellow book
12 at tab 8 -- I will call it the reference book, my
13 colleagues have explained that that might alleviate
14 some confusion. The reference book at tab 8, and,
15 first of all, page eight. At page eight there is --
16 and, once again, when I refer to page numbers, my
17 lords, it will be in the lower right hand corner.
18 This is an extract from the opinion report of Dr.
19 Robinson. And in this section of the report what Dr.
20 Robinson is dealing with is a writing by a Dr.
21 Kobrinsky, who spent 12 months at Fort Babine, I think
22 in the early '70s, and three months at Moricetown at
23 the same time. Dr. Kobrinsky is an anthropologist and
24 I think it's -- he spent three months at Moricetown
25 and four months at Fort Babine. But paragraph 42, Dr.
26 Robinson refers to Dr. Kobrinsky and says that his
27 viewpoint is important for two reasons:

28
29 "First, his assertion that significant
30 socioeconomic changes occurred during the
31 protohistoric period supports claims that
32 European influence was a major factor in
33 disrupting 'traditional' native lifestyles
34 before direct contact between Indians and
35 Europeans. Second, much of the ethnographic
36 evidence he assembles related to changes in
37 styles of resource control. Specifically,
38 Kobrinsky asserts that precise delineation of
39 territorial boundaries relating to the
40 allocation of rights to fine-fur species was a
41 by-product of the fur trade."

42
43 Now, later on in her report, I have the whole
44 section discussing Kobrinsky in here, but I would like
45 your lordships to turn to page 12 in the lower right
46 hand corner, because it's at this point that Dr.
47 Robinson points out that Dr. Kobrinsky is not alone in

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1 his views about what the fur trade did.

2 At paragraph 48 of this extract, Dr. Robinson said
3 in a report:

4
5 "Analyses of proto-historic developments similar
6 to those presented in points 42 to 49
7 pertaining to other Carrier populations, have
8 been presented several writers, notably Julian
9 H. Steward for the Stuart Lake and Babine Lake
10 Carrier, and Irving Goldman for the Alkatcho
11 Carrier. Somewhat further afield, but still
12 pertinent to any study of trade-related
13 Northwest Coast Indians' influence on
14 Athabaskan populations, are works by Catharine
15 McClellan about the Tagish, Tutchone and Inland
16 Tlingit of southwestern Yukon territory.

17 Steward, for instance, considers nobility,
18 'phratries', and the potlatching complex have
19 been recently introduced among Carrier Indians
20 living in the vicinity of Stuart Lake and
21 Babine Lake. According to his interpretation,
22 these traits were derived from Northwest Coast
23 cultures -- specifically, from neighbouring
24 groups on the upper Skeena River and were in
25 place in the early 19th century. Steward
26 relates their adoption to the stimulus
27 furnished by the European fur trade prior to
28 the presence of white traders in this area.
29 Introduction of the Northwest Coast social and
30 economic patterns to the Carrier probably took
31 place two or three decades before the whites
32 entered their country and without any change
33 whatever in exploitative technology or local
34 resources. What triggered adoption of coastal
35 trades was that the Carriers suddenly had a
36 negotiable surplus."

37
38 Now, I am going to refer in more detail to
39 something that a writer named Dr. Bishop wrote later,
40 a more recent paper. But if you turn to page 15 at
41 this tab, page 15 at tab o. Now these are the
42 footnotes to Dr. Robinson's report, and footnote o.,
43 she quotes from Dr. Bishop. And Dr. Bishop, I will be
44 referring to him later because Dr. Bishop and Dr. Ray
45 co-authored a very important paper. And also Dr.
46 Bishop wrote again after 1979 about this same issue,
47 and I will take you to that later on. But here is

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1 what Dr. Bishop said in 1979:

2
3 "Most scholars argue that the Carriers obtained
4 the rank system from the Northwest coast as the
5 European fur trade stimulated trade and
6 contact. While there must have been
7 prehistoric trade between the coast and the
8 interior, the fur trade altered the nature of
9 exchange relationships and led to an increase
10 in volume and regularity. Since maintaining
11 rank positions over time required gaining
12 permanent control over the fur resources, we
13 can speculate that changes in the land tenure
14 system were also occurring during the early
15 19th century. Whatever the nature of the
16 aboriginal land tenure system, it would appear
17 that during the early 19th century leaders
18 belonging to particular matrilineages in each
19 village were in control of tracts of land where
20 beaver could be found. This is suggested by
21 William Connolly's 1825 statement that 'the
22 country is shared amongst a certain number of
23 families who will not permit others to work
24 upon the lots which respectively belong to
25 them.'"

26
27 So Dr. Robinson pointed out in her report other
28 writers who had come to the conclusion that the fur
29 trade had a dramatic influence on the Carrier, the
30 Gitksan and the Wet'suwet'en.

31 Now the last item I would like to address, ask your
32 lordships to turn to at this tab, is a work that came
33 out during the course of trial, and it's at page 30.
34 LAMBERT, J.A.: I just don't understand that last passage. Are
35 you saying that we should be -- that what Charles
36 Bishop says might well be taken to be a correct
37 assessment of what's happening, and what he says is
38 happening is that he adopts William Connolly's 1825
39 statement that "the country is shared amongst a
40 certain number of families who will not permit others
41 to work upon the lots which respectively belong to
42 them"?

43 MR. WILLMS: Yes.

44 LAMBERT, J.A.: If that's correct, then the adoption of those
45 lots must have happened extremely speedily, if it
46 wasn't before contact, and yet was in effect by 1825.

47 MR. WILLMS: Oh, yes, my lord, the point that I am going to be

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1 making, which is what Dr. Ray observed from reading
2 Brown, when he read Brown, Brown said that there were
3 men of property who had beaver territories that they
4 wouldn't let anyone else trap on. Marten could be
5 trapped anywhere, no restriction on big game, it was
6 beaver. So that I -- that's the evidence. The
7 evidence is that at the time of contact --

8 LAMBERT, J.A.: The Hudson's Bay Company wasn't interested in
9 big game?

10 MR. WILLMS: The Hudson's Bay -- well, that's not quite correct,
11 my lord. When you read the records --

12 LAMBERT, J.A.: It's a question.

13 MR. WILLMS: When you read the records of what it was like to
14 live at Fort Kilmaurs, and how miserable it was to
15 live through a winter at Fort Kilmaurs and eat salmon
16 every day, one of the things you read when you read
17 through that diary that was kept by Brown, I mean it's
18 like salmon again. If they could get any kind of
19 meat, any kind of meat, it was a very valuable
20 commodity at that time. They would trade their goods
21 for dogs to eat dogs. I mean, they were that
22 desperate for meat. And this is from their own
23 records, from the Hudson's Bay records. So it's not
24 quite right to say they weren't interested in big
25 game. If they could have traded for big game, they
26 would have. The other reason why it's not quite right
27 to say that they weren't interested in big game is
28 that one of the most valuable trade items that The Bay
29 had to trade with the people in this area, was
30 leather. And they had to import vast quantities of
31 leather, moose skins, deer skins, into the area, and
32 they found that that was a very valuable item to
33 trade. And that's in Brown, Connolly and other
34 references in the historical record. So big game was
35 an important issue for The Bay as well. But Marten,
36 getting back to Marten, my lord, The Bay was very
37 interested in Marten. When you look at the fur
38 returns from Fort Kilmaurs, the beaver and the Marten
39 returns for many years were virtually identical.
40 Very, very close in terms of the returns from the
41 coast. Yet it was beaver that was related to the
42 land. And I hope to explain in a moment why there was
43 no territoriality with respect to Marten.

44 LAMBERT, J.A.: I just don't know, I still don't know what to
45 make of this passage that you referred us to. I mean,
46 Charles Bishop is saying that there was -- whatever
47 the nature of the aboriginal land tenure system during

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1 the early 19th century leaders belonging to particular
 2 matrilineages in each village were in control of
 3 tracts of land where beaver could be found. Now, he
 4 is not saying that the allocation is beaver.

5 MR. WILLMS: He does later. He does in a later paper. He makes
 6 it clear in a later paper that it's beaver.

7 LAMBERT, J.A.: Then he says: "This is suggested by William
 8 Connolly's 1825 statement 'the country is shared
 9 amongst a certain number of families who will not
 10 permit others to work upon the lots which respectively
 11 belong to them.'" Now Mr. Connolly in 1825 is not
 12 saying the beaver are divided up, or the beaver
 13 trapping areas are divided up, he is saying the
 14 country is shared amongst a certain number of
 15 families.

16 MR. WILLMS: That's why the evidence of Dr. Ray, which on this
 17 point was accepted by the Chief Justice, is so
 18 important. Dr. Ray gave evidence that from the
 19 perspective of The Bay, when you read about working
 20 various lands, you would read about working them for
 21 the beaver and then, in addition, trader Brown -- now
 22 Connolly I think is at Bear Lake when he writes this.
 23 He is either at Bear Lake or he may be at Fort
 24 Alexandra, I can't remember where Connolly was when
 25 this was written. But wherever he was when this was
 26 written, trader Brown, when he got to Babine Lake,
 27 noticed that it was beaver only. Now, that's why I
 28 wanted to get to this next paper, my lord. It's not
 29 unusual in this country to find that relating to
 30 beaver and not relating to other resources. In fact,
 31 the anthropological debate across the country appears
 32 to be resource-specific. So that it varied from
 33 resource to resource. And for some resources there
 34 was territoriality for that resource, for other
 35 resources there was no territoriality whatsoever, for
 36 others there was territoriality which didn't match the
 37 territoriality for another resource. And that's why I
 38 wanted to take the court, take my lords to an issue in
 39 an anthropological text that came out during the
 40 course of the trial and was marked as an exhibit, and
 41 sets out relatively succinctly the different views
 42 that anthropologists have across this country as to
 43 land tenure, aboriginal land tenure, which fit right
 44 in with most of what Dr. Ray said.

45 And that was at page 30, my lord, and it was a
 46 special issue of Anthropologica, I think it was marked
 47 by my friend in cross-examining Dr. Robinson, but I

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1 might be incorrect. I think it was Mr. Grant
2 cross-examining Dr. Robinson and this was marked then.
3 But you will see the special issue that -- what's
4 being discussed in this special issue is "Who owns the
5 beaver? Northern Algonquian Land Tenure
6 Reconsidered." And there is a succinct summary of
7 where the debate is at today, at page 35 in the lower
8 right hand corner. And you will have to turn to
9 sideways, my lords, but I want to read from paragraph
10 14 in the lower left hand corner.

11
12 "Ethnocentric viewpoints have often appeared in
13 many studies of Indian land tenure to date. If
14 the concept of Indian land tenure existed at
15 all in the minds of non-Indian scholars, it
16 tended to be modelled after western European
17 concepts. Do we believe what we want to
18 believe? The answer is often yes thus we must
19 also be on guard especially in the stage of
20 litigation over Indian land claims. Both
21 comprehensive claims, i.e. regarding land and
22 specific claims, i.e. regarding treaty
23 obligations, hunting and fishing rights, et
24 cetera, are now before the courts or in
25 preparation for adjudication. More and more
26 expert witnesses are being called upon by
27 plaintiffs, usually Indians, and defendants,
28 usually the federal or provincial governments,
29 to testify on behalf of clients, although
30 academics have traditionally debated the views
31 through the medium of publication and scholarly
32 journals. The issues are no longer the
33 innocent disagreements that once occurred in
34 these journals, although they may at times be
35 equally vitriolic. Claims made by native
36 people for what they believe to be past wrongs
37 and the millions of dollars sought for
38 compensation for such wrongs are also under
39 scrutiny. The historic and academic validity
40 or evidence for the conclusions drawn by
41 Indians are being tested in the courts.
42 Accordingly, expert witnesses called upon to
43 testify were under oath 'to tell the truth.'

44 But what is 'the truth' regarding land
45 tenure among sub-arctic Algonquians and others?
46 As we have seen, anthropologists have held
47 varying views over time about the antiquity of

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1 hunting territories. Which one of the three
2 views on sub-arctic Algonquian land tenure does
3 an expert witness advocate? First, there was
4 the 'classic' view where scholars argued that
5 family hunting territories existed in
6 pre-contact times. This was followed by the
7 post-classic view which argued that family
8 hunting territories arose after the arrival of
9 Europeans primarily as a result of the fur
10 trade. Finally, there is the modified view
11 which might be termed 'neo-classic' and which
12 contains the conceptual refinements expressed
13 in papers of this volume. Scholars have
14 recently focussed on how Indians now use the
15 land. In so doing, they imply, not
16 categorically state, that systems of game
17 management and use which are today associated
18 with family hunting territories have
19 considerable antiquity. Does this viewpoint
20 support pre-contact land tenure as argued in
21 the classic period? Through an examination of
22 archival documents other scholars suggest that
23 family hunting territories existed earlier than
24 was previously thought."

25
26 So in that paragraph they set out where the debate
27 is in Canada today on this question. And although
28 it's called the Algonquian hunting debate, as I hope
29 to illustrate from reading you the Kemano paper or the
30 comments on the Kemano paper, because it's Algonquian
31 doesn't mean it's limited in area. It is a debate
32 that has ranged right across the country in terms of
33 land tenure.

34 But what this sets out, my lords, I submit, is what
35 the Chief Justice had before him in terms of deciding.
36 And, I say at paragraph 9 of my factum that when faced
37 with two conflicting -- and really the neo-classic
38 view wasn't really advanced before his lordship, and
39 the neo-classic view is probably, probably closer to
40 the right one, that there are more documents that I am
41 going to refer to that were marked in evidence, that
42 demonstrate that resource use and territoriality
43 depends on many more factors than just what was the
44 resource. It depends on abundance of the resource.
45 It really depends on is the cost of defending the
46 resource worth more than the resource itself? Is
47 there some value to defend the resource? If the

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1 resource is super abundant, most of the literature is
2 clear, there is no territoriality for a super abundant
3 resource, no benefit to be gained. So that that's why
4 when you see through these records about fishing, you
5 see communal fishing in the records. And I will refer
6 again later on to Dr. Adams, who noted the same thing
7 about fishing.

8 I now turn, my lords, to the other evidence that,
9 in my submission, amply tilted the scale in favour of
10 the finding of the Chief Justice. And that is the
11 evidence of the population dislocation as a result of
12 the fur trade. And I set out the first part of that
13 evidence at paragraph 11 of page six, at tab 7 of my
14 factum. And at page six and paragraph 11, my lord, I
15 quote from an exhibit that was marked by the
16 plaintiffs. It's called the "Epic of Nekt." It's --
17 Dr. MacDonald uses archaeology to put a little bit of
18 meat on an oral history. But it was an exhibit marked
19 by the plaintiffs and Dr. MacDonald said this in that
20 document:

21
22 "From these times..."

23
24 And he is talking about times pre-1700,

25
26 "...a situation of relative stability appears to
27 have prevailed until the early 1700s. By that
28 time there is evidence for a wide-spread de-
29 stabilization of population throughout much of
30 the northwest coast. In the interior it
31 appears that the Kitwancool and other Gitksan
32 tribes were pushing north at the expense of the
33 Tsetsaut and other Athapaskan neighbours to
34 secure the trading trails that ultimately
35 connected through to southeast Alaska and the
36 new sources of wealth."

37
38 Now, the new sources of wealth in southeast Alaska
39 is Russian trading, according to Dr. MacDonald anyway.
40 But carrying on, I point out in paragraph 12 that Dr.
41 MacDonald's conclusion is consistent with what Dr.
42 Rigsby, one of the appellants' experts, said:

43
44 "The Gitksan, remaining behind in the middle
45 Skeena Valley, then began expansion in the
46 Upper Skeena Valley. We imagine that peaceful
47 intermarriage, sociocultural absorption and

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1 replacive bilingualism initially characterized
2 their upriver movement. Moving into a slightly
3 different environment, they borrowed Athabaskan
4 words for some new fauna. Many small
5 Athabaskan-speaking hamlets and local groups,
6 such as the [Gitxsigjahl]..."

7

8 I can't pronounce that, my lords.

9

10 "...of Caribou Creek, must have been gradually
11 and peacefully Gitksanized in socioculture and
12 speech. The fur trade seems to have spurred
13 Gitksan occupation of the middle Nass and
14 especially the upper Nass and upper Skeena
15 territories. As many oral traditions testify,
16 this was not a peaceful gradual process, but
17 some Athabaskan place names were retained. It
18 is interesting to note that there were no
19 Gitksan permanent winter villages on the middle
20 or upper Nass, nor on the far upper Skeena.
21 There were summer fishing camps and hunting
22 trapping grounds in these territories but the
23 real bases of operation were the large winter
24 villages at Kitwancool, Kispiox, Kisgegas and
25 Kuldo. It was during the same period of the
26 fur trade that the children Nisga'a and the
27 Tlingit, along with epidemic disease, reduced
28 the Tsetsaut Athabaskans of Portland Canal to a
29 handful of survivors by the turn of the
30 century."

31

32 Now, I don't know if my lords have heard about
33 Tsetsaut before, but there is an exhibit that was
34 marked by the plaintiffs which provides some rough
35 approximation of where everybody was at contact. It's
36 at tab 12 of the reference book, and it's a map. This
37 map, tab 12 of the reference book, and there should be
38 a plastic pocket.

39

40 Now the map is entitled Native Languages of the
41 Northwest Coast. The map was prepared, you will see
42 in the right hand corner, the text and language
43 boundaries were prepared by Wayne Suttles. That's Dr.
44 Suttles, he is the witness whose evidence was accepted
45 in Sparrow on behalf of the Musqueam. And the map
46 purports to depict the territory of languages as Dr.
47 Suttles believed them to be at the time of European
exploration. But if you look at the middle of the

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1 map, it's not the way that people make maps these
 2 days, but you will see that if you come in from the
 3 Queen Charlottes, you will see the territory that is
 4 called Tsimshian Territory, and then you will see in
 5 the interior Nass-Gitksan, you will see to the right
 6 Babine, and then to the left, which is to the north of
 7 Nass-Gitksan, you will see Tsetsaut. Now the Tsetsaut
 8 were Athabaskan, and as Dr. Rigsby pointed out, that a
 9 combination of the Nisga'a, the Tlingit and epidemic
 10 disease reduced the Tsetsaut people to a handful of
 11 people by the turn of the century.

12 You will also note that Kuldo and Kisgegas are
 13 marked on the map, along with Kispiox, Kitanmaks,
 14 Kitsegukla, Kitwancool and Kitwanga, in the Nass-
 15 Gitksan. Now this map, and I am not suggesting that
 16 these boundaries are specific or precise boundaries,
 17 they just let your lordships know generally where the
 18 anthropologists thought various language speakers were
 19 at the time of contact. But the important point here,
 20 which is completely consistent with what Dr. MacDonald
 21 says, and what Dr. Rigsby said, one of the plaintiffs'
 22 experts, is that the fur trade appears to have spurred
 23 the Gitksan into the Upper Nass and the Upper Skeena
 24 at the expense of the Tsetsaut. Because Kuldo is the
 25 northernmost Gitksan village at the time of contact.

26 Whoever invents a map that folds itself will
 27 become rich overnight.

28 TAGGART, J.A.: They take on a life of their own, don't they?

29 MR. WILLMS: Now, after your lordships have had that put away I
 30 would like to return back to my factum at paragraph
 31 13.

32 At paragraph 13 I note that there was -- what
 33 happened was we obtained copies of Dr. Rigsby's draft
 34 report, and then the final report that was filed in
 35 court contained a deletion -- there was a part that
 36 was deleted from it. But I put that deleted part to
 37 Dr. Kari, who did give evidence, and you will see the
 38 result in a moment. I have set out the result of
 39 that. Here is the part that was deleted:

40
 41 "There is also some tantalizing evidence for
 42 transitional bilingualism involving language
 43 shift from Athabaskan to Gitksan. Adams..."
 44

45 And this is John Adams who you heard about from
 46 Ms. Koenigsberg, says:
 47

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1 "'...as recently as perhaps the 1830s, half the
2 inhabitants of Gitsegyukla spoke the Hagwilget
3 language and the village of Kitwancool was half
4 Stikine.'"

5

6

And then quoting Jenness:

7

8

9

10

"'... Some Wet'suwet'en assert indeed that the
inhabitants of Kitwancool itself once spoke the
Tsetsaut [Athabaskan] tongue.'"

11

12

13

14

15

Athabaskan-speakers rather than vice versa."

16

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I point out in paragraph 14 that when this
extract was put to Dr. Kari, the appellants' other
linguistic expert in cross-examination, he expressed
some surprise that it had been deleted from Dr.
Rigsby's portion of the report and said "Can we add
it?" and we added it. But the point here is that --
and I just, if I can -- Dr. Rigsby and Dr. Kari co-
authored a written report that was marked as an
exhibit at trial. Only Dr. Kari gave evidence at
trial, Dr. Rigsby didn't give evidence, but they co-
authored the linguistic report. And what it appeared
was someone had decided that a portion of Dr. Rigsby's
report shouldn't be in, but Dr. Kari, during the
course of his testimony, I guess overruled that and
said that it should go in. The important point about
that is the dating, according to Dr. Rigsby, the
linguistic expert, because what we have is a period of
time when the fur trade is just starting, and you have
people in Kitwancool and Gitsegyukla, they are very
close together, Kitwancool and Gitsegyukla,
Gitsegyukla is on the Skeena River and Kitwancool is
just north of Kitwanga. But you have them speaking
either the Tsetsaut tongue, this is consistent with
what Dr. MacDonald said in the Epic of Nekt, and
consistent with what Dr. Rigsby said about the Gitksan
moving in great rapidity up the Skeena and into the
upper Nass, as a result of the fur trade. That has
some importance later when I point out once again the
remarkable concordance between the traplines and the
territories that were claimed. So that the
territories that are claimed in this case extend into
the far upper reaches of the Nass and the Skeena. But

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1 according to Dr. Rigsby and Dr. MacDonald, that
2 movement is a fur trade movement into that area.

3 Now, turning to paragraph 15, my lords, in there --
4 and I haven't listed each one of the experts, but this
5 is what Dr. Robinson said. Dr. Ray and Dr. Kari were
6 consistent, Dr. Ray not quite on this point about
7 territoriality, but certainly Dr. Kari, and Dr.
8 Robinson and the writing of other scholars in the
9 area, including Dr. Jenness, Cranny, McLellan, De
10 Laguna, Oberg, Garfield, Tobey, Stuart, Krause,
11 Goldman, Hudson, Kobrinsky, should be Kobrinsky with a
12 Y, not an I, my lords, MacDonald, Ames, Adams, Yerbury
13 and Bishop and Father Morice.

14 Now, I am only going to turn at tab 15 of the
15 reference book to two of those. I am just going to
16 turn to John Adams and to Dr. Kobrinsky. And at tab
17 15, starting at page -- once again, in the lower right
18 hand corner -- page 17, what I have put in from page
19 17 on is all of Dr. Adams' work called The Gitksan
20 Potlatch. And you may recall that Miss Koenigsberg
21 directed you to extracts from this report, or this
22 paper before, but that Dr. Adams and his wife, Dr.
23 Kasakoff, spent 13 months living with the Gitksan
24 between July, 1965 and May, 1967. So they lived in
25 the area, and they described what they did, and I
26 won't re-read that, I understand that Ms. Koenigsberg
27 has already read what they did. But I would like you
28 to turn to page 17 -- sorry, page 19. I am sorry,
29 just to make a note that what Ms. Koenigsberg read to
30 you, I think what she read to you earlier was from
31 page 19 here, to make a cross reference, starting at
32 page 19, and I am not going to read the same parts
33 that she read. But if you turn the next page to page
34 20, I am going to read something I don't think she
35 read at the lower left hand corner of the page. "We",
36 and Dr. Adams is speaking about himself and his wife,
37 Dr. Kasakoff:

38
39 "We collected all the trapline registrations
40 current for the Gitksan in the spring of 1967
41 from the game wardens of Smithers, Terrace and
42 Prince Rupert, who share jurisdiction over the
43 lines held by the Gitksan. I also collected
44 information about changes and deletions in
45 registration from the files going back to the
46 beginnings in the late 1920s. In addition, my
47 wife drew copies of the official maps of all

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1 the registered lines. Chris Harris of Kispiox
2 arranged for me to record descriptions of
3 trapline holdings on maps published by the
4 government. He served as informant for Kuldoe,
5 Simon Wright for Kisgagas, and Jonathan Johnson
6 and Moses Morrison for Kispiox."
7

8 I pause there to note those were all hereditary
9 chiefs.
10

11 "At the same time these men gave me the names of
12 the houses in each of these villages, together
13 with the principal Indian names within them
14 ranked as well as the English names of the
15 people currently holding them. I would include
16 all this documentation here but I was asked by
17 the Fish and Game Branch not to publish it as a
18 condition of my being allowed to make the
19 copies. The map collected from Chris Harris,
20 et al, is now apparently being accepted by the
21 game warden as the correct map of the holdings
22 of those villages."
23

24 Now, in evidence, and it's not clear that it's this
25 map, but in evidence, Neil Sterritt, who on behalf of
26 the Gitksan -- I could probably put it this way --
27 supervised the mapping project for the Gitksan. He
28 certainly had a very large hand in the mapping project
29 for the Gitksan. One of his very first maps was a
30 tracing from what was called the Chris Harris map.
31 Now, there isn't any evidence that says that that
32 Chris Harris map is this Chris Harris map. But it's
33 not a large leap, in my submission, to go from the
34 Chris Harris map that Dr. Adams talks about here, to
35 the original starting point of, really the basic
36 starting point for Neil Sterritt's mapping project.

37 Now, I would ask you then to turn to page 27 of the
38 reference at the same tab, page 27, I am still in the
39 Gitksan potlatch. And on the right-hand side, the
40 paragraph, the second full paragraph "from
41 information...":
42

43 "From information about where a sample of the
44 women get their fish nowadays it appears that
45 everyone who lives regularly in a village has
46 access to a spot for fish. There was no hint
47 given that anyone who wanted fish could not get

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1 all she wanted when she wanted. It was never
2 mentioned as a source of contention, whereas
3 several stories of trouble revolved around
4 traplines.

5 Traplines were put under the jurisdiction
6 first of the Indian agent then, about 1926, of
7 the Fish and Game Branch which began to
8 register the lines. Many lines were issued to
9 whites so that the integral nature of the
10 Indians' territories was modified. But
11 disputes about these lines have been so
12 frequent that it is now the unwritten policy of
13 game wardens to reserve the lines of whites as
14 they fall into disuse and fail to be
15 re-registered for the appropriate house of the
16 appropriate Indian village. Whites and Indians
17 cannot be registered on the same line. And
18 though white laws of partilineal inheritance
19 have frequently caused lines to pass from one
20 house to another, the wardens are increasingly
21 apt to let village councils decide inheritance
22 rights as well as to settle disputes which
23 arise between Indian claimants."

24
25 I don't know -- I have one more reference to the
26 Gitksan potlatch and I don't know whether your
27 lordships want me to take you to that before the
28 break.

29 TAGGART, J.A.: Well, perhaps to finish this aspect.

30 MR. WILLMS: Thank you, my lord. It's at page 29.

31 At page 29, on the left-hand side, the first full
32 paragraph on the page which says:

33
34 "The Indians of British Columbia have signed
35 away very little territory over the years --
36 mostly to the railroad or to the highway
37 department -- and have never signed a general
38 treaty with the government. They are now
39 claiming practically the whole extent of
40 British Columbia of which the Gitksan claim
41 approximately the area registered with the game
42 warden together with whatever land within that
43 general area still registered to white
44 trappers. As sources of revenue today the
45 lines are almost worthless but the land values
46 they symbolize, especially timber and mineral
47 rights, is considerable. Interest in these

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1 rights is intense and provides more than
2 sufficient reasons for the Indians to continue
3 feasting to maintain their rights among
4 themselves. That the potlatch survives today in
5 a state of considerable complexity is
6 undoubtedly due to its value in the natives'
7 eyes as a means of furthering their land claims
8 against the government, but it is also a
9 touchstone of Indian identity in a world
10 increasingly dominated by the white man's
11 values."
12

13 Those conclusions, my lords, were reached by
14 someone who spent 13 months --

15 HUTCHEON, J.A.: The puzzling thing to me is that if that was so
16 why didn't the people in the feast constantly refer to
17 boundaries? If it was to advance their claim, why
18 wouldn't they constantly refer to boundaries?

19 MR. WILLMS: Well, my lords, I think the appellants say that
20 boundaries are decided at the feasts. I know the
21 evidence was --

22 HUTCHEON, J.A.: I understand that, but the evidence was, one
23 lady, for example, hadn't heard of it mentioned for 20
24 years or so. But if Adams is right, I would have
25 expected -- he seems to indicate there is a motive
26 behind these feasts, that is to advance the claims.
27 If that was right, I would have expected that at every
28 feast someone would stand up and describe the claim,
29 if that's all it was about. But they didn't.

30 MR. WILLMS: Well, the first answer to that, my lord, is we
31 don't have transcripts of all of the feasts. We do
32 know that some of the witnesses --

33 HUTCHEON, J.A.: Ms. Koenigsberg, or someone, took us through the
34 evidence the other day about the feasts, and what it
35 didn't contain was a constant reference to boundaries.

36 MR. WILLMS: No, but your lordship has hit a second reason why
37 the appellants' theory fails. The appellants' theory
38 is based on their -- the appellants' theory of
39 reputation evidence is based on that.

40 HUTCHEON, J.A.: I understand that. All I am saying is that
41 there is something wrong with this motive that Adams
42 is attributing to the feasts. He says it's to advance
43 the claims. I would have thought if it was to advance
44 it, if that was the motive, you would have the
45 boundaries every time you spoke.

46 MR. WILLMS: Well, I don't know whether Dr. Adams is making that
47 statement based on someone explaining to him the

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1 theory --
2 HUTCHEON, J.A.: He doesn't say anything. Just a conclusion he
3 has drawn that doesn't seem to accord with what we
4 have heard about the feasts. It doesn't accord with
5 what we have heard about the feasts.
6 MR. WILLMS: His conclusion in the '60s --
7 HUTCHEON, J.A.: Yes.
8 MR. WILLMS: -- doesn't accord with what your lordships have
9 heard about the feasts. Yes. All right. I can't
10 explain that, my lord.
11 HUTCHEON, J.A.: That's why I --
12 MR. WILLMS: Dr. Adams talked to people who didn't give evidence
13 at this trial. Dr. Adams talked to the chiefs who
14 preceded the chiefs who gave evidence at this trial in
15 many cases. Whether there has been a difference over
16 the last generation, I don't know. I just point to
17 this as an observation of Dr. Adams, who isn't
18 anybody's expert, that came from 13 months of living
19 with these people. Now, I can't explain how that
20 relates to the evidence that the Chief Justice heard,
21 my lord. I don't know how it could relate to the
22 evidence that the Chief Justice heard because he heard
23 from different people than Dr. Adams heard from.
24 TAGGART, J.A.: All right. We will take the morning break.

25
26 (PROCEEDINGS ADJOURNED AND RESUMED FOLLOWING RECESS)
27

28 TAGGART, J.A.: Yes, Mr. Willms.
29 MR. WILLMS: My lords, I would like to make one further comment
30 in respect to Mr. Justice Hutcheon's observation. At
31 the opening of the trial, the appellants said this,
32 they said:

33
34 "My lord, the boundaries of the Gitksan and
35 Wet'suwet'en territories are not to be found by
36 reference to the survey limits of their
37 reserves. Those boundaries for many
38 generations have been and are still being
39 proclaimed and validated in the feast hall."
40

41 That was the opening of the appellants at trial.
42 The explanation, the only explanation I have is
43 perhaps Dr. Adams was told exactly that by the
44 appellants but never attended the feasts to validate,
45 to see whether or not that in fact happened. So it
46 may well be that Dr. Adams was told by the appellants
47 exactly what the Chief Justice was told in the opening

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1 at trial, and he relied on that statement and didn't
2 go through and validate it and see if it was in fact
3 what was happening.

4 The next reference is at page 142 of the reference
5 book at tab 15, and this was to Dr. Kobrinsky, who I
6 already mentioned spent 12 months at Fort Babine and
7 three months at Moricetown.

8 And I put in the whole article of Dr. Kobrinsky but
9 it's just the extract at page 142 that I would like
10 your lordships to turn to. And it's starting at the
11 second full paragraph, Dr. Kobrinsky says:

12
13 "I am convinced by further evidence that these,
14 a complex of territory-owning matrilineal crest
15 divisions led by a class of potlatching
16 divisional chiefs are manifestations of the fur
17 trade period."

18
19 And I won't read the next paragraph because he is
20 discussing in there crests and septs. But if you go
21 down to the paragraph underneath the three-hole punch,
22 "The system of phratry territories..."

23
24 "The system of phratry territories is
25 essentially a system of fur trapping areas
26 adopted to regulate access to fur resources,
27 probably with a view to checking hostility in
28 the heat of the competition for claims and
29 possibly, too, with a view to administering
30 problems of conservation. This is reminiscent
31 of Helm's and Leacock's conclusion about the
32 (primarily) Algonkian territories that 'in
33 fact, the "territories" are, properly speaking,
34 not hunting grounds, but areas surrounding
35 traplines'.

36 The diffusion of the coast complex of
37 territorial crest divisions was probably
38 triggered by the proprietary claims of
39 important hunters over specific beaver lodges
40 within their customary hunting areas. Personal
41 ownership of beaver lodges in the early contact
42 traditional period has been widely reported by
43 Osgood for the Satudene and Slave and by
44 Honigmann for the Lower Post Kaska and Lower
45 Laird Indians as well as by Morice for the
46 Stuart Lake Carrier. On the other hand, since
47 the fine-fur species other than beaver and

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1 muskrat -- marten, fox, weasel, mink, etc., are
 2 'nomadic', in Morice's parlance, they could not
 3 be claimed with reference to conspicuous and
 4 specific nest-sites."

5
 6 That is a point, and if I have time later there is
 7 another article I could direct your attention to. But
 8 I mentioned earlier that territoriality might be be
 9 resource-specific. And there is quite a bit of
 10 discussion in the anthropological literature about
 11 the fact that beaver are relatively immobile, beaver
 12 have lodges, beaver have nests, they have areas where
 13 territoriality can make some sense, whereas the other
 14 game, which is nomadic, territoriality is meaningless,
 15 with respect to the other game. The game travels, you
 16 don't know whether it's in your territory or not. Now
 17 that is a -- that fits precisely within what Brown
 18 observed. Brown observed that there was
 19 territoriality with beaver, but people with no land
 20 stake, according to Brown, could trap marten anywhere
 21 they wanted to.

22 LAMBERT, J.A.: This passage you have read doesn't say what you
 23 say it says, I don't think. At the bottom of the
 24 page: "On the other hand, the fine-fur species other
 25 than beaver and muskrat, marten, fox, weasel, mink, et
 26 cetera are nomadic in Morice's parlance they could not
 27 be claimed by reference to conspicuous and specific
 28 nest sites. It is therefore with respect to these..."
 29 that's the other species, "...that ownership would
 30 need ultimately to be limited to the stipulation of
 31 physiographically identified areas." I am not a -- I
 32 didn't mean to sound accusatory, but I just don't
 33 understand your point in relation to what's actually
 34 said there. He says -- what he says is, you don't
 35 identify your beaver by -- you identify beaver by just
 36 a beaver dam, but if the species moves around you have
 37 to have a whole area geographically delineated in
 38 order to assert the claim to the ability to trap those
 39 species in that area.

40 MR. WILLMS: Well, I took it the other way, my lord, and I think
 41 that the Chief Justice must have as well. But, I took
 42 it --

43 LAMBERT, J.A.: Well, he reached a conclusion contrary to this.
 44 But it doesn't mean he just rejected it.

45 MR. WILLMS: In my submission, it isn't contrary to this, my
 46 lord. In my submission what Dr. Kobrinsky is saying
 47 here is that with respect to marten, fox, weasel,

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1 mink, being nomadic, they could not be claimed with
2 reference to conspicuous and specific nest sites, that
3 is geographic areas.

4 LAMBERT, J.A.: I don't think nest sites could mean geographic
5 area.

6 MR. WILLMS: Well, that, my lord, is what Dr. Ray, his evidence
7 about what was -- about the beaver, in contrast to the
8 marten, which could be hunted anywhere, and the other,
9 the other academic debate, which is in the evidence,
10 about territoriality and resources, makes a specific
11 point about the immobility and predictability of
12 location of a resource being linked to territoriality.
13 And that when you had a nomadic resource,
14 territoriality made no sense.

15 LAMBERT, J.A.: But, of course, that proposition is just not
16 self-evident. Because one would certainly have
17 thought with a nomadic resource, territoriality makes
18 a lot of sense. When the deer are in your territory
19 or the marten are in your territory, you can take
20 them. But you can't follow them out to anyone else's
21 territory. That's quite a logical way of dividing up
22 the right to take marten.

23 MR. WILLMS: My lord, on the assessment that would be quite
24 wrong. Because one of the major factors for deciding
25 territoriality in the anthropological literature is
26 whether the cost of defending is worth it, and if the
27 only food source travels across a boundary line, the
28 cost of defending that food source is your life or the
29 deer's, and the deer loses, not you. There is an
30 article, and I will try to take your lordships to it
31 after lunch, which describes in some detail the logic
32 of territoriality and why it is illogical to have
33 territoriality where you have nomadic, unpredictable
34 game.

35 LAMBERT, J.A.: I haven't heard that yet so I will wait.

36 MR. WILLMS: I will try to get it for the afternoon. It's an
37 article by Fikret Berkes. But just finishing up on
38 this point in the factum, before I turn to the
39 appendix --

40 TAGGART, J.A.: Before you turn to that, in that final sentence
41 on page 143, the word "ultimately" is used. I assume
42 that it's in respect of the species other than beaver.
43 It takes some considerable time, first to identify
44 their existence in any given area; and secondly, to
45 identify their quantities and qualities. And it's not
46 until you have a sufficient number and of sufficient
47 quality that they become worth fighting over. And

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1 only then, ultimately, as the author seems to say,
2 only then would you resort to some method of saying
3 this is allocated to A and this to X.

4 MR. WILLMS: Yes. The article that I am going to refer to later
5 shows that if you have super abundance of a particular
6 resource, there is rarely territoriality. And the
7 evidence on fishing that Dr. Adams observed is quite
8 consistent with that. When there is super abundance
9 there is no territoriality. When there is a lack of
10 the particular resource, there is no territoriality,
11 if it's very, very scarce. It's only when it falls
12 within somewhere between those two ranges, and it's
13 predictable, that territoriality makes any sense.

14 LAMBERT, J.A.: We heard evidence about specific fishing sites
15 at Moricetown in one of the fishing cases. That is,
16 it seems there is abundant resource of salmon,
17 specific family crest house units had specific rocks
18 and places which they fished and no one else fished.

19 MR. WILLMS: For the evidence about specific fishing sites, my
20 lord, I think Adams' observation -- I mean, it's a big
21 river and there is a lot of rocks on the river. And
22 the other point that isn't developed at all with
23 respect to that, it is developed in Brown, it appeared
24 that quite a bit of the fishing that Brown described
25 was weir fishing, where a weir would be put across the
26 river, and the weir fishing also continued after
27 contact as well in some areas, and it turned into
28 quite a problem. But weir fishing was communal
29 fishing for a large group. There is also evidence in
30 Brown's journals at a time when the fishery completely
31 failed, and I think it completely failed for the
32 Wet'suwet'en and they moved en masse to Babine Lake to
33 fish on Babine Lake when their fishery failed. And I
34 think that probably was the year that the rocks fell
35 into the river at Hagwilget, which caused them to move
36 from Moricetown to Hagwilget to get the fish, because
37 the fish weren't getting past the rocks. I don't know
38 what happened to the fishing sites in Moricetown when
39 they moved to Hagwilget, or whether ownership of those
40 sites made any difference. All I am suggesting is
41 that for super abundant resource, there is no reason
42 to have fishing spots, and there is no dispute over
43 them. Unlike traplines, as Dr. Adams pointed out, and
44 there was quite a bit of evidence at trial about
45 disputes about traplines and traplines boundaries.

46 WALLACE, J.A.: Where are you in your factum?

47 MR. WILLMS: I am just responding to a question.

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- 1 WALLACE, J.A.: I thought perhaps.
- 2 HUTCHEON, J.A.: He is still on paragraph 15.
- 3 MR. WILLMS: I am just finishing tab 7, page 15.
- 4 HUTCHEON, J.A.: Could I just ask you something, Mr. Willms, for
- 5 clarification on 141? Who is Kobrinsky talking about
- 6 in this --
- 7 MR. WILLMS: In this paper?
- 8 HUTCHEON, J.A.: Yes.
- 9 MR. WILLMS: Dr. Kobrinsky is talking about --
- 10 HUTCHEON, J.A.: He is not talking about the Gitksan.
- 11 MR. WILLMS: No, he is talking about the Wet'suwet'en.
- 12 HUTCHEON, J.A.: I thought this was the northwest area.
- 13 MR. WILLMS: No. If you go back, my lord, to the introduction
- 14 to the paper at page 136, the first paragraph, what he
- 15 is doing is offering "...a conjectural reconstruction
- 16 of salient features of the social history of several
- 17 peoples of the northwest boundary of the Carrier
- 18 domain, the Hwits'o hwideyniy..." now that's phonetic
- 19 but that's the Wet'suwet'en of Bulkley River, "...and
- 20 the Nado hwideyney of Lake Babine."
- 21 HUTCHEON, J.A.: So when he talks about Carrier he is talking
- 22 about the Wet'suwet'en?
- 23 MR. WILLMS: Yes, he is talking about these two groups in his
- 24 paper. That's why I am saying that of all of the
- 25 people who did research prior to the commencement of
- 26 this litigation, Dr. Adams and Dr. Kobrinsky are very
- 27 important, because they both spent a great deal of
- 28 time, Dr. Adams a great deal of time with the Gitksan,
- 29 and all of the Gitksan, including the Kitwancool, and
- 30 Dr. Kobrinsky with the Babine Wet'suwet'en, that is
- 31 the Wet'suwet'en not only of Bulkley River but the
- 32 Wet'suwet'en or Babine Wet'suwet'en of Babine Lake.
- 33 HUTCHEON, J.A.: Thank you.
- 34 MR. WILLMS: Now, I am going to leave the factum and go to the
- 35 appendix now, my lords, because I -- that was just a
- 36 highlight of some of the evidence which I say amply
- 37 supports the conclusions of the Chief Justice on
- 38 beaver trapping territoriality.
- 39 I will be referring to some more as I go through
- 40 appendix one. So I would ask you take out appendix
- 41 volume one of the factum. And what I will be -- the
- 42 references that I will be going through, to start
- 43 with, are in the reference book that says R & D number
- 44 two on the spine.
- 45 TAGGART, J.A.: R & D number two.
- 46 MR. WILLMS: You should have -- the reference book R & D number
- 47 two. The factum that I will be going to will say

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1 appendices volume one on it. We should have those two
2 books, and I am at tab 1 of the appendices. The first
3 note that my lords may wish to make in appendix one
4 beside paragraph one, is that the references for this
5 whole tab are found -- and I haven't put every one of
6 them in, I have put in a sample of them -- but they
7 are found in the R & D reference books number two and
8 three, and the tabs correspond to the paragraphs.

9 Now, I say in paragraph one on page one of appendix
10 one that the appellants in their factum are extremely
11 critical of the Chief Justice's assessment of the
12 expert evidence proffered by them at trial. In the
13 factum, the amicus has already pointed out that
14 significant portions of the expert evidence,
15 especially that of Dr. Ray, were accepted by the Chief
16 Justice. It has also been pointed out, and I haven't
17 pointed that out so I will point it out the first
18 time, the argument that my lords heard from the
19 appellants was not -- was a re-argument of the trial
20 argument, and we say that the appellants don't appear
21 to be suggesting that there is any palpable and over-
22 riding error which affected the Chief Justice in his
23 assessment of the evidence. But I say that in the
24 sections that follow, the paragraphs that follow, that
25 evidence is set out, much of it tendered by the
26 appellants, which amply supports the conclusions of
27 the Chief Justice.

28 And as a -- I have a general description in
29 paragraph 2 of what kinds of evidence indicate that
30 people lived in a particular area at a particular
31 time. And I have two documents that I have put at tab
32 2 of the reference book which aren't referred to in
33 the references to paragraph 2, but they are very
34 important. And at tab 2 of the reference book, the
35 very first part of the reference book is Dr.
36 Robinson's report.

37 TAGGART, J.A.: Tab 2?

38 MR. WILLMS: Tab 2, the report is entitled Protohistoric
39 Development in Gitksan and Wet'suwet'en Territories.
40 And starting at page 2 I would like to review the
41 first part of Dr. Robinson's report.

42
43 "This report investigates the argument that
44 indirect contact with Europeans during the
45 proto-historic and early historic periods
46 provoked significant changes in patterns of
47 Gitksan and Wet'suwet'en land use. By proto-

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1 historic I mean the time prior to European
2 presence in the area claimed by the plaintiffs
3 but when European influence was felt through
4 native intermediaries. Roughly speaking, the
5 proto-historic period spans the mid-17th
6 century to the early 19th century. Historic
7 references to times when Europeans were
8 present, even if intermittently, pre-historic
9 applies to all time prior to the proto-historic
10 era. Most modern scholars engaged in North
11 American ethnohistoric research agree that
12 indigenous populations were profoundly affected
13 by indirect contact with Europeans before they
14 experienced direct contact with them. Although
15 the nature, timing and intensity and
16 repercussions of proto-historic European
17 influence varied considerably from region to
18 region, research indicates that no native
19 groups in what is now known as British Columbia
20 were isolated from stimulus stemming from
21 European presence in the new world.
22 Recognition that proto-historic European
23 influence developments took place and were
24 significant has one very important implication:
25 It casts suspicion on any portrayal of a
26 pristine or truly aboriginal way of life based
27 on contemporary knowledge. Most of our
28 contemporary knowledge is untainted by European
29 influence -- none of our contemporary
30 knowledge --"

31
32 Sorry, that's a very important change in the sense.

33
34 "None of our contemporary knowledge is untainted
35 by European influence which was manifested long
36 before relevant written records were kept.
37 More to the point, reconstructions of
38 traditional native socioeconomies which failed
39 to account for indirect European influence deny
40 the dynamic dimensions of ongoing cultural
41 adaptations and resign their subjects to an
42 untenable, however romantic, snapshot stasis.
43 In this context, Gitksan and Wet'suwet'en
44 claims about traditionally having owned and
45 managed certain territories are questionable.

46 This report is based on a review and
47 interpretation of existing information, largely

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1 contained in secondary sources, both published
2 and unpublished, concerning the Gitksan and
3 Carrier as well as other northwest coast and
4 interior native groups. I have not carried out
5 field work among the Gitksan or Carrier, nor
6 have I conducted archival research in
7 connection with this report. Although I am
8 familiar with many of the archival sources, my
9 general understanding of the consequences of
10 European influence is shaped by the research I
11 carried out for my doctoral dissertation.

12 In connection with the study of Indian
13 agriculture on the northwest coast, which will
14 be referred to here as Robinson, 1983, I
15 investigated ethnographic and early historic
16 records pertaining the Tlingit, Haida, Coast
17 Tsimshian and neighbouring native populations.
18 Tracing the connection between European fur
19 traders and adoption of agricultural practices
20 by some coastal native groups required that I
21 develop an understanding of changes in regional
22 economies stemming from direct and indirect
23 contact with Europeans which is applicable to
24 the study of the Gitksan and Wet'suwet'en.
25 Although my analysis in the present report
26 borrows from the work of others, the
27 conclusions are my own. The report is divided
28 into several sections."

29
30 I don't think I need to that read that, my lords.

31
32 "A note about terminology is required. The term
33 Gitksan is well-established in the
34 anthropological literature and is generally
35 used to describe the inhabitants of seven
36 tribal villages of the Upper Skeena River in
37 north-central British Columbia: Villages now
38 known as Kitwancool, Kitwanga, Kispiox,
39 Gitanmax, Kitsegucla, Kuldo and Kisgegas. The
40 term Wet'suwet'en, which is used by the
41 plaintiffs in this case is of very recent
42 origin and appears to be intended to refer to
43 those Carrier Indians who inhabited the
44 villages now known as Hagwilget and Moricetown
45 on the Bulkley River. They are described by
46 Diamond Jenness as the 'Hwitsowitenne'. While
47 there are some similarities between the two

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1 groups in terms of their social, economic and
2 political organization, there are also
3 important differences. For this reason they
4 are treated differently in some sections of
5 this report.

6 It is important to emphasize the
7 limitations inherent in any theory of
8 aboriginal land use which attempts to
9 reconstruct a reality that existed before any
10 relevant written records were kept and long
11 before the memory of living man. In my
12 research I have discovered no conclusive
13 evidence that suggests that prior to the advent
14 of European influence in the claim area, the
15 Gitksan and Wet'suwet'en lineages and families
16 identified ownership rights to large and
17 precisely defined tracts of hunting
18 territories. Such evidence as exists, which
19 varies in its reliability, may support more
20 than one theory of pre-contact land and
21 resource use. Speaking generally, one may
22 expect that some form of organized control
23 would have been exercised over access to the
24 fisheries and other resources which are
25 necessary for survival and over the local
26 trails and bridges which facilitated
27 pre-historic trade networks. But prior to the
28 intensifications of pressure on interior fur
29 resources sparked by European demands for furs,
30 there would appear to have been no need for a
31 sophisticated and elaborate body of rules
32 governing access to resources or for extensive
33 and defined areas of land for their
34 exploitation. In the absence of competition
35 over scarce resources, there is no reason for
36 the rules to exist."

37
38 Dr. Robinson was a cultural geographer, which
39 meant -- Dr. Ray was a historical geographer. They
40 both acknowledged in the evidence that there was very
41 little difference, really, in what both of them did,
42 save to this extent: A cultural geographer, while
43 using historical references, emphasizes more cultural
44 references, ethnography, ethnology, and the historical
45 geographer's viewpoint is more towards the historical.
46 But other than the emphasis, there is very little
47 difference in the kinds of things that they look at.

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1 And so -- and also, the other important point to make
2 is Dr. Robinson came to this project after doing a
3 dissertation on the northwest coast. So she already
4 had, before writing this report, before writing the
5 expert's report, a great deal of information about
6 northwest coast culture, territoriality, arising out
7 of the research that she did on her dissertation, and
8 especially related to the maritime fur trade. And you
9 will see in the evidence Dr. Ray acknowledged, or
10 acknowledges that the maritime fur trade isn't his
11 primary focus, it's The Bay fur trade, and Dr.
12 Robinson's primary focus was the maritime fur trade.
13 That doesn't mean they ignored each other's primary
14 sources of reference. Dr. Robinson considered The Bay
15 material, not to the extent of Dr. Ray; Dr. Ray
16 considered the maritime material, but not to the
17 extent of Dr. Robinson.

18 Now, the next document, and I say it's important,
19 my lords, not only because it sets the framework for
20 what does proto-historic, prehistoric and historic
21 mean, but because it's a document co-authored by Dr.
22 Ray, and it starts at page 31. And, once again, I put
23 the whole article in. And this is where Dr. Bishop,
24 and I referred your lordships to Dr. Bishop in the
25 morning, Dr. Bishop's investigation of the Carrier.
26 Dr. Bishop and Dr. Ray wrote a general paper about
27 ethnohistoric research, and the part of the paper that
28 I think is particularly important starts at page 39 in
29 the lower right hand corner.

30 Now, this has relevance, my lords, because the
31 Chief Justice did an assessment of what was happening
32 during the proto-historic period in the claim area,
33 and he has a section of his judgment where he
34 discusses the proto-historic period and how long it
35 was. But for definitional purposes, what Drs. Ray and
36 Bishop set out here is quite apropos, and is basically
37 what the Chief Justice used as the definitional basis
38 and also Dr. Robinson.

39 If you start at the middle of page 39, Drs. Bishop
40 and Ray said this:

41
42 "With respect to linking the historic records
43 with those relating to the pre-historic period,
44 it must be stressed that the chronological unit
45 designated is the pre-historic, proto-historic
46 and historic periods have to be clearly defined
47 and employed in a consistent fashion by

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1 archaeologists, ethnologists and
2 ethnohistorians. The prehistoric period is
3 said to end when trade goods or other
4 Euro-Canadian influences, such as disease,
5 first reach a region. Obviously, changes can
6 occur before direct, first-hand contact with
7 Europeans takes place locally. The initial
8 influx of trade wares or disease served to make
9 the beginning of the protohistoric period if
10 these goods are obtained through Indian
11 middlemen."
12

13 Then they give an example about the plains tribes
14 who adopted the horse during the 18th century but had
15 no direct contact with the Europeans, after adopting
16 the horse which was introduced to North America by the
17 Europeans.
18

19 "The proto-historic period also includes the
20 time during which Indians travelled beyond the
21 limits of their territories to visit
22 missionaries or to obtain trade goods to be
23 used by themselves and to be exchanged, often
24 after they were worn out, for furs obtained by
25 other usually remote Indians. It might be
26 argued that since these middlemen had
27 established direct links with Europeans, the
28 historic period had begun. However, since
29 these Indians rarely kept the objects exchanged
30 for more than a few seasons, and since they did
31 little or no trapping, the placing of the
32 Indian middlemen within the protohistoric
33 period has implications for archaeological
34 analyses to be discussed shortly. The historic
35 period begins when Indians experience direct
36 contact with Europeans and when they themselves
37 trap the fur bearers needed to obtain the trade
38 wares. In a sense, those Indians who trapped
39 furs to receive goods through Indian middlemen
40 resemble those who trapped furs for direct
41 exchange at the post. However, those nearer
42 the post almost always became much more
43 dependent than those at a distance. They had
44 considerably less bargaining power than the
45 middlemen who could mark up the value of goods
46 obtained when trading with the less dependent
47 Indians of the hinterland. Furthermore,

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1 Indians who trapped furs to be exchanged
2 directly at the store often provided first-hand
3 information on their behaviour in the bush
4 being nearer at hand, whereas data on the
5 behaviour of middlemen and distant groups had
6 to be obtained indirectly or secondhand."

7

8 And then they carry on:

9

10 "It is necessary to stress that these two
11 periods, the protohistoric and historic,
12 overlapped considerably in time depending upon
13 the geographical region involved, and in this
14 sense they reflect conjunctive or interactive
15 relations rather than absolute chronology."

16

17 I will skip the description of the protohistoric
18 period in the region southwest of the Hudson's Bay,
19 but if I can pick up after figure one in that
20 paragraph:

21

22 "The assumption is often made that the
23 protohistoric period was generally short and
24 that the amount of change that could have taken
25 place would have been necessarily slight.
26 Since documents are almost always scanty for
27 this period, prehistorians frequently connect
28 archaeological records directly to what is
29 designated as the historic period while
30 ethnologists working backward through the
31 historic period assume that data pertaining to
32 the latter period provide us with a reasonably
33 accurate picture of aboriginal cultural
34 conditions."

35

36 And this is really important:

37

38 "Such mental jumps have caused a great deal of
39 confusion since changes that took place during
40 the protohistoric period are rarely considered
41 adequate."

42

43 Now, the reason why that has importance here is
44 because the Chief Justice did consider in his judgment
45 what happened during the proto-historic period and how
46 long the proto-historic period existed for these
47 people. The reference to that is at pages 138 to 142

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- 1 of the judgment.
2 HUTCHEON, J.A.: Adequate for what? I am still trying to pick
3 up this sentence.
4 LAMBERT, J.A.: I think it must mean are rarely considered
5 adequately.
6 MR. WILLMS: It must be adequately, my lord.
7 HUTCHEON, J.A.: Adequately.
8 MR. WILLMS: I think I have always read that as being adequately
9 and --
10 HUTCHEON, J.A.: Yes.
11 MR. WILLMS: The point in respect of this, and I am going to
12 develop it later on here, is that before Brown got to
13 Babine Lake the people at Babine Lake were already
14 trading with the Hudson's Bay Company. They were
15 trading with The Bay at Fort St. James starting in
16 1805. They were also trading down to the coast,
17 according to Dr. Ray, the late 18 -- late 1700s. I
18 think Dr. Ray acknowledged that it would be about 40
19 years before Brown got to Fort Kilmaurs, which was in
20 the 1820s. And that's consistent with the evidence
21 from the coast of the fur trade, the coastal fur trade
22 accelerating dramatically in the 1780s. So that what
23 you have before Brown even gets to Babine Lake and
24 makes his observations, you have fur trading going to
25 the coast, since about the beginning of the 1780s,
26 about 40 years, and you also had fur trading going to
27 Fort St. James since 1805. So that by the time Brown
28 got there, Brown wasn't even observing uninfluenced an
29 uninfluenced culture. Now the extent of the influence
30 is the -- was the matter of the evidence before the
31 Chief Justice, and especially focused on trapping.
32 Now, I -- returning to --
33 TAGGART, J.A.: I take it the 1780 figure, that would be trading
34 with Europeans at the coast.
35 MR. WILLMS: At the coast.
36 TAGGART, J.A.: Russians?
37 MR. WILLMS: There was some Russian trading -- the Russians I
38 think had a fort at Wrangel in 1740, further up the
39 panhandle, and you will recall Dr. MacDonald -- there
40 was a debate. Dr. Robinson said she thought the
41 protohistoric period was 100 years before Brown got
42 there. She pushed it back to around 1720. As the
43 Chief Justice noted, the range of when it started
44 coming from the coast was somewhere between 1720 and
45 1780. But the maritime fur trade really got going,
46 according to all of the evidence, in the 1780s. And
47 Wilson Duff said by 1785 the coast was glutted with

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1 trade goods, and that's a reference in the Chief
2 Justice's judgment.

3 But the trade was mostly -- with the British and
4 the Americans the trade was to the ships, and that's
5 where Legaic was coming up the river to trade, the
6 Tsimshian chief was coming up the river to get furs,
7 and the fort didn't go in until 1831, Fort Simpson.

8 Now, I am not going to read or refer to -- back in
9 my factum at page 2 of appendix one, the sum and
10 substance of everything that I have set out in
11 paragraphs 3 through 24, which is a discussion of the
12 archaeological evidence, can actually be made in two
13 points: The first point is archaeology doesn't tell
14 you anything about boundaries, so that's what all of
15 that evidence supports, you can't tell boundaries from
16 archaeology. And the second thing is archaeology
17 doesn't tell you who was there. Archaeology tells you
18 someone was there but it doesn't say who. And so
19 that's a short summary of those paragraphs.

20 Now, if your lordships could turn to page 17 of the
21 argument -- sorry, I am in appendix one at tab 1 of
22 the argument, page 17, and the paragraph there is
23 paragraph 25.

24 TAGGART, J.A.: All of preceding material, except for the
25 introduction, has to do with archaeology?

26 MR. WILLMS: Archaeology, yes. Once again, in the paragraphs
27 beginning at paragraph 25, and they run all the way
28 through to paragraph 40, there is a discussion of
29 historical evidence. And in paragraph 26, and this is
30 the -- because I know that doctor -- I am sorry, I
31 know that Mr. Macaulay referred your lordships to
32 quite a bit of the Hudson's Bay evidence, and I don't
33 intend to do that again, but I am going to ask you --
34 I am going to refer to one point from Harmon. And in
35 paragraph 26 I refer to Daniel Harmon, who probably
36 provided the first written record of the people at
37 Babine Lake. Harmon spent six years living with the
38 Carrier and wrote a book called 16 Years In Indian
39 Country. And if you turn in the reference book to tab
40 26, starting at page 17 of the -- once again, in the
41 lower right hand corner.

42 LAMBERT, J.A.: Tab 26.

43 MR. WILLMS: Tab 26, page 17.

44 This is a book that was prepared by Kaye Lamb.
45 Kaye Lamb also was the one who prepared the book on
46 Simon Fraser. Very well respected historian, and --
47 tab 26, page 17. And I haven't included the whole of

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1 the book, obviously, but I will just point out at page
 2 19, lower right hand corner, page 19, it's the index
 3 of the book carrying on. And the period that Harmon
 4 spent in the area is entitled New Caledonia, 1810 to
 5 1816. And it's a period of time around Stuart's Lake
 6 and Fraser's Lake, but he also did travel to Babine
 7 Lake. He didn't -- he wasn't posted at Babine Lake,
 8 there was no fort there at the time, but he did travel
 9 to Babine Lake. He spent six years in the area. The
 10 part that I commend to your lordships to read, I am
 11 not going to read it all because it's too long, but it
 12 starts at page 28 in the lower right hand corner.
 13 What starts at page 28 is Daniel Harmon's account
 14 based on his six years of the Indians living west of
 15 the Rocky Mountains. And extracts of that have been
 16 referred to your lordships, I think by the appellants,
 17 certainly most of the experts, most of the
 18 anthropologists referred to Harmon. But these are
 19 Harmon's observations, based on living for six years,
 20 1810 to 1816, in New Caledonia.

21 LAMBERT, J.A.: It seems he lived another three years after
 22 that, because it goes on.

23 MR. WILLMS: Yes, my lord, thank you very much. You know, you
 24 can be with a case for a long time and you can learn
 25 something for the first time many years later. But I
 26 had always thought of it as six years. But you're
 27 quite right, there is a journal of another three
 28 years, so there is nine years.

29 I don't know whether those years were voyages back
 30 into New Caledonia from outside or whether he was
 31 still posted there. He was posted there for a
 32 considerable period of time.

33 The one part that I would like to direct your
 34 lordships to is at page 37, lower right hand corner,
 35 page 37. This is an account of someone who lived in
 36 the area for six years at least. And it's the last
 37 full paragraph. Harmon said this:

38
 39 "The Carriers have little that can be
 40 denominated civil government in the regulation
 41 of their concerns. There are some persons among
 42 them who are called Mi-u-ties or chiefs and for
 43 whom they appear to have a little more respect
 44 than for the others. But these chiefs have not
 45 much authority or influence over the rest of
 46 the community. Anyone is dubbed a Mi-u-ty who
 47 is able and willing occasionally to provide a

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1 feast for the people of his village."
2

3 And Harmon attended feasts while he was in the
4 area, there is a description in this book of feasts
5 that he attended, this is his observation from living
6 with the Carrier for six years.

7 Now, you will see by the time Brown -- and Harmon
8 does describe a feast at which he ate beaver and a
9 feast at which the chief described where the beaver
10 was obtained. But this sets the context for a
11 consideration of Brown's observations when he finally
12 gets to Fort Babine.

13 The other document, and I am going to spend some
14 time with it, my lord, so I might want to turn to it
15 in the afternoon, but it is at the very beginning of
16 tab 26 and it is Dr. Bishop's -- Dr. Bishop returned
17 to write about the area in 1987. And that's what I
18 want to turn to after the adjournment. I could take
19 some extracts, my lord, but there are a number of
20 them.

21 TAGGART, J.A.: That's right at the beginning of it, is it?

22 MR. WILLMS: It's right at the beginning of tab 26 in the
23 reference book.

24 TAGGART, J.A.: All right. 2 o'clock.
25

26
27 I hereby certify the foregoing to be
28 a true and accurate transcript of the
29 proceedings herein to the best of my
30 skill and ability.
31

32
33
34 Wilf Roy
35 Official Reporter
36 United Reporting Service Ltd.
37
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47

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(PROCEEDINGS RESUMED PURSUANT TO LUNCHEON BREAK)

THE REGISTRAR: Order in court.

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

MR. WILLMS: Thank you, my lord. My lord, I was at the reference book, tab 26 and the 1987 article of Dr. Bishop and just to set the framework for what the article addresses, on page 2, once again in the lower right-hand corner, Dr. Bishop midway down the paragraph on the left-hand side says:

"I argued (Bishop 1983) that:

(1) exchange between the Northwest Coast and interior British Columbia generated ranking among interior groups during the protohistoric period; and (2) the processes of development among interior peoples, although accelerated by the European fur trade, were essentially the same as those that had generated ranking pre-historically on the coast."

And then he says:

"Additional evidence to support this view will be given here."

The next page is a sketch map and it might be helpful to fit what your lordships have already heard about the various forts on this map. The forts are numbered and I think if you want to perhaps make a note besides the fort, I will tell you when the fort was established so on page 3, the fort on the right with the number four is McLeod Lake and it was established in 1805. The fort number one which is the one at Stuart Lake was 1806 and you will see right underneath it number two which is Fraser Lake is 1806. Number three is Fort George which was established in 1808 and Harmon was primarily at one and two. He was primarily at Stuart Lake and Fraser's Lake although he was a bit at McLeod Lake and I think he was also at Fort Fraser but that was the area where Harmon lived for that period of time. There is a slight mistake on this map in respect of Fort Kilmaurs which is the number five on the left-hand side. Now that is where the second Fort Kilmaurs was. The second Fort Kilmaurs was at the north end of Babine Lake and the second one was established in 1836 but the first Fort Kilmaurs and

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1 the one that Brown was at --
2 TAGGART, J.A.: Excuse me. 1836?
3 MR. WILLMS: 1836 is the one at number five at that location. A
4 little lower down you will just see where the lake
5 makes a U. It's still at the top of the lake but it's
6 a U. That's where the original Fort Kilmaurs was,
7 down in the U at the top of the lake, about a
8 centimetre to the south and that's where Brown was.
9 TAGGART, J.A.: And that was established in?
10 MR. WILLMS: The winter of 1821, 1822 or maybe '22/'23.
11 '22/'23, I am sorry, my lord. But that gives you a
12 geographic context to where Harmon was and then where
13 Brown was.
14 TAGGART, J.A.: What was number six?
15 MR. WILLMS: Six, my lord, is just described as being -- there
16 was ultimately a Hudson's Bay post there but it wasn't
17 until the 1860s.
18 Now, over onto page 4 of Dr. Bishop's article in
19 1987 he -- and he is referring to not only
20 anthropological material but also Hudson's Bay
21 material in this discussion. At the bottom of the
22 page on the left-hand side, the protohistoric Carrier:
23
24 "At the time of earliest European observation in
25 the early nineteenth century, the
26 Athapaskan-speaking Carrier occupied over 20
27 village sites in interior British Columbia. Three
28 divisions based upon dialect differences can be
29 distinguished; the Lower Carrier, the Upper
30 Carrier and the Babines, so named because of their
31 use of lip plugs. The name 'Carrier' is derived
32 from the practice whereby mourning widows carried
33 the ashes of their cremated husbands for two or
34 three years. The Carrier lived a semisedentary
35 existence, relying primarily upon river salmon for
36 subsistence. Dried salmon were supplemented by
37 other species of fish, waterfowl, berries, tubers,
38 caribou, bear, hare and other small game depending
39 upon the season. Although hunting was subordinate
40 to fishing, beaver flesh was an important food
41 consumed at feasts, especially feasts for the
42 dead. Within each village was a chief or mi-u-ty
43 who seems to have had little power. Daniel
44 Harmon, the North West Company trader, writing at
45 Stuart Lake about 1815, indicates that anybody
46 'who is able and willing, occasionally, to provide
47 a feast, for the people of his village' could be

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1 considered a chief. In addition to these chiefs,
2 there were usually one or two persons who were
3 referred to as 'men of note'. Such data suggest
4 that hereditary offices similar to those on the
5 Northwest Coast had not yet been firmly entrenched
6 at Stuart Lake, a view generally accepted by
7 others."

8
9 The next point and what I am reading, my lords, is
10 the opinions that are consistent with what Dr.
11 Kobrinisky said and also consistent with what Dr.
12 Robinson said. If you turn the page to the page with
13 five at the bottom, on the right-hand side, the
14 paragraph:

15
16 "Both the archaeological and historical evidence
17 suggest that the tempo of coast-interior trade
18 increased between the 1780s and the early
19 nineteenth century. The year 1805 marked the
20 beginning of continuous direct trade between
21 Europeans and Carrier, when the North West Company
22 built a post on McLeod's Lake. Fort St. James on
23 Stuart Lake and the Fraser Lake post were
24 established the following year, while Fort George
25 on the Fraser River was opened in 1808. In 1821
26 these posts were transferred to the Hudson's Bay
27 Company, and the same summer Fort Alexandria was
28 established near the southern edge of Carrier
29 territory. Fort Kilmaurs, situated in what was
30 then known as New Caledonia, was the last major
31 post built in the region. It was constructed the
32 following year on Babine Lake. Despite the
33 presence of Europeans, some Carrier continued to
34 trade with coastal Indians. The Upper Carrier and
35 Babines exchanged beaver pelts and moose hides
36 with the Gitksan for European goods and also
37 copper, eulachon oil, and dentalium shells that
38 had become a sort of special purpose money. The
39 Gitksan, in turn, got their European wares from
40 the Tsimshian, who traded them directly from
41 European ships. Peter Skene Ogden, who visited
42 the Carrier village of Hotset in the 1820s --"

43
44 Now that's another mistake. He didn't visit the
45 village until 1837, 1836 or 1837. It wasn't in the
46 1820s but that he visited Hagwilget or Hotset:
47

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1 "-- stated that there was 'a constant barter of
2 furs in exchange for articles of European
3 merchandise procured from the traders by the
4 Tsimshian.' According to Morice, the Babines met
5 with coastal peoples at Hagwilget at the junction
6 of the Bulkley and Skeena Rivers."
7

8 So that the protohistoric period for this area, that
9 is the Wet'suwet'en area would have been from the
10 coast, according to Dr. Robinson and even according to
11 Dr. Ray, from the 1780s and confirmed by Dr. Bishop
12 and from the North West Company, the first post is
13 1805 and then the two very close posts at Fraser Lake
14 and Stuart's Lake are 1806. This is all taking place
15 before Harmon even gets there to make his
16 observations. Some -- according to Dr. Bishop,
17 Harmon's observations about mi-u-ties and chiefs is
18 made in -- about nine years later, 1815.

19 Now over to the next page, page 6, he talks about
20 borrowing and I don't intend to take much time on this
21 but there is a lot of anthropological evidence of
22 cultural borrowing by the interior people from the
23 coast, that is borrowing of various societal or
24 cultural traits but I think this is important. In the
25 right-hand side on page 6:
26

27 "Although 'borrowing' from coastal societies
28 accounts for the presence of many Carrier cultural
29 traits, the manner in which this occurred is
30 significant for understanding the emergent rank
31 system. As noted, the trade in luxury items was
32 in the hands of the nobles. Among Carrier
33 villages that originally lacked such status
34 positions, it would have been convenient to adopt
35 the emblems, paraphernalia, and titles of one's
36 high ranking partners in order to avoid the
37 appearance of inferiority. Likewise, to gain
38 control over the right to trade in luxury or
39 prestige goods, it would be necessary to extend
40 control over the exchange resources. This the
41 emergent Carrier nobility did by establishing
42 territorial claims to beaver lodges. While a
43 noble's kinsmen might help to kill beaver, the
44 noble, nevertheless, had the exclusive right to
45 trade the pelts either at the newly founded
46 European trading posts or with other Indians."
47

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1 So once again, the consistent theme of the fur trade
2 being the generating factor in respect of and related
3 to beaver.

4 Now I would like to return to the factum, my lord,
5 and I am not going to deal with anything more on the
6 historical evidence, sorry, I am in the -- I called it
7 my factum. I am in appendix one. I am still where I
8 was before lunch but at paragraph 41 on page 24. Now
9 between paragraphs 41 and 48 I deal with the
10 anthropological evidence and I don't intend to spend
11 much time but I would like to direct the Court's
12 attention to a point which I think is quite
13 significant and I have quoted at paragraph 41 from
14 Appendix P of the -- Appendix E of the appellants'
15 factum where they point out that other courts have
16 found anthropological evidence on these kinds of
17 questions necessary and helpful and then they refer to
18 Calder where anthropologists Wilson Duff testified as
19 to the nature of the Nishga civilization and culture
20 in detail and Mr. Justice Hall quoted from this
21 evidence extensively and this is important:

22
23 "Duff concluded that the Nishga had occupied their
24 territory since 'time immemorial...and...were
25 owners of that territory."
26

27 So this is taken from the appellants' factum. I do
28 point out in paragraph 42 that Calder was litigated on
29 an Agreed Statement of Facts but in this case, a
30 Kitwancool chief, that means before the Chief Justice,
31 a Kitwancool chief gave some evidence about the Calder
32 case and that evidence is quoted starting at the top
33 of page 25. This is in the cross-examination of
34 Solomon Marsden, a witness who was called by the
35 plaintiffs:
36

37 "Q Some years ago the Kitwancool were aware
38 that the Nishga were bringing a court
39 action in connection with their land claims.
40 Do you recall that?

41 A Yes, I remember.

42 Q And the Kitwancool, in order to help the
43 Nishga, did not speak out when the Nishga
44 claimed in the court case, lands which the
45 Kitwancool, said they owned; is that
46 correct?

47 A Yes.

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1 Q And in exhibit 439 which is the Kitwancool
2 Comprehensive Land Claim, I find at page 22,
3 and I'm going to read it to you. Perhaps
4 you might tell him what I'm going to do.
5 It's at the bottom of page 22 and I quote:

6
7 'For some years now the Nishga Tribal
8 Council has claimed that their people lay
9 ownership to the land which drains into the
10 Nass River, from the watershed which divides
11 the Skeena and the Nass drainage.'

12
13 Now just pausing there, does that refer to
14 the Kiteen River area?

15 A Yes."

16
17 Now that's important because the Kiteen River area was
18 claimed by Kitwancool.

19
20 "Q All right, thank you. Now I'm returning to
21 page 22 and the Kitwancool land claim
22 statement at this point goes on to say, and
23 I quote:

24
25 'The Kitwancool, cautious to prevent any
26 injury to the Nishga case which went before
27 the Supreme Court of this country, did not
28 speak out.'

29
30 And this is correct, is it not, Mr. Marsden,
31 that the Kitwancool did not speak out when
32 the Nishga went before the Supreme Court of
33 the country?

34 A Yes, yes. That's what it was said, because
35 there is a way to settle this. The Nishga
36 have their way to settle this and we have
37 our ways to settle this, and we did not want
38 to get involved while their land claims was
39 going on.

40 Q And --

41 A The Kitwancool people did not let their
42 territory go just because they never spoke
43 out, it's just that they have respect for
44 these people while they are in front of the
45 courts.

46 Q Yeah. And what was it that the Nishga,
47 according to Mr. Marsden's understanding,

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1 were seeking in the courts?

2 A The Nishga people want it made clear that
3 they were -- that they owned the territory
4 that they were claiming.

5 Q And is that -- is that the same thing that
6 the Gitksan is seeking here?

7 A Yes, it is.

8 Q Same thing that the Nishga were looking for
9 in the Calder case?

10 A Yes."

11

12 Over to the next page I have evidence from Stanley
13 Williams, a Gitksan hereditary chief who gave evidence
14 about a statement that Mr. Calder had made to him
15 while discussing territorial boundaries and this is
16 from a quote from Stanley Williams:

17

18 "After I told him this, then Frank Calder jumped
19 up and he said, 'All the waters that are -- that
20 are going into -- all the waters that are flowing
21 from that mountain into Nass River, these are our
22 territories.' Frank Calder was sitting about ten
23 feet from where I was, and after he had said this,
24 I told him, I said, 'Frank, why are you talking
25 about the Nishga territories? Your territory is
26 in Gitsequkla, you are in the house of Guksan,
27 this is where your territory is.' I told him, 'If
28 you want to go on your territory, then you would
29 have to come and talk to your house members and to
30 your chief in Gitsequkla.' Frank never answered
31 back. He -- he took off out through the door and
32 he never returned again."

33

34 The point that I make in paragraph 44 is that the
35 Supreme Court of Canada didn't know about the
36 suppression of the Kitwancool claim and it appears
37 neither did Dr. Duff because Dr. Duff's evidence was
38 that they owned this territory and I am sure that if
39 Dr. Duff had known about the Kitwancool land claim he
40 would have never said that.

41

42 Now in this case the Chief Justice had evidence
43 before him about the significant overlapping claims
44 and you have already been referred to that but that's
45 a significant difference and it may also have caused
46 the Chief Justice some pause in deciding whether
47 anthropological evidence proves ownership of land or
exactly what does anthropological evidence prove in

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1 relation to ownership of land but certainly Dr. Duff
2 and the Calder case is no authority for the absolute
3 necessity of anthropological evidence in circumstances
4 like this.

5 Now the next paragraph I ask your lordships to
6 turn to is at page 29 and it's paragraph 48 and this
7 is more of the evidence that the Chief Justice had
8 before him and I say that the constant -- the
9 consistent interpretational thread to prehistoric,
10 protohistoric and historic occupation in the Claim
11 Area, is that, and here I am quoting from Dr. Riggsby:

12
13 "-- 'the fur trade seems to have spurred the
14 Gitksan occupation of the Middle Nass and
15 especially the Upper Nass and Upper Skeena.' The
16 Gitksan also appear to have 'lodged between [the
17 Kitimat and the Wet'suwet'en] like a wedge'."

18
19 And I believe that's Dr. Jenness:

20
21 "-- in the last few centuries. The Wet'suwet'en
22 moved south around Eutsuk Lake in the 1830s."

23
24 And that's from Dr. Borden who is I think referring to
25 Dr. Jenness. And then I also point out:

26
27 "-- as has already been observed, the Wet'suwet'en
28 at Moricetown moved to Hagwilget in historic
29 times."

30
31 In fact Hagwilget is in an area claimed by the
32 Gitksan.

33 The next portion -- I don't intend to refer to the
34 oral history section of the factum or, sorry, this
35 appendix to the factum. It runs from paragraphs 49 to
36 53 and deals with oral histories but I would like
37 to -- there is a point where some criticism has been
38 levelled at the Chief Justice and I will come to it
39 later but it's the Chief Justice's focus on villages,
40 on village based society and I will come a little bit
41 later to what Dr. Duff said about that but at tab 51
42 of R & D 2, the reference book number two, there is a
43 reference there. The second page at that tab is a
44 letter from Sim-a-deeks, the First Chief of Kitwangah
45 to Mr. Vowell, the Superintendent of the Indian
46 Department, August 14th, 1903, and here's what he
47 said:

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1
2 "When Judge O'Reilley surveyed our reservation he
3 told us that these lands were kept for our tribes
4 and that the reserve at Andamahi was for the
5 Kitwangah people. Now a number of the Kitzequola
6 people are coming on to the reserve and we do not
7 like it. We have spoken to Mr. Loring about it
8 and he has told them they must go back to
9 Kitzequola, but still they do not go, and we hear
10 that more are coming. They have two reserves of
11 their own, and we ask that they be made to keep to
12 their own reserves and not trouble us. We fear
13 that it may lead to more trouble if they are
14 permitted to encroach on us in this way. Please
15 let me know if the reservation is not intended for
16 strangers as well as our own people; and will you
17 please make these people do what is right in this
18 matter."
19

20 Now if you turn to the tab, the next tab over
21 which is page 3, at page 3 there is a transcript of
22 the exchange between the Commissioner and I think it's
23 Commissioner O'Reilley in 1893 in laying out the
24 reserve at Kitwangar and you will see in the left-hand
25 side "K-a-w-k" partway down and he is described as one
26 of the chiefs, I suppose the third ranking chief up
27 top and he says to Commissioner O'Reilley:
28

29 "I am glad to see you, you have come to do us
30 good. My grandfather told me what you did before.
31 He did not want strangers here."
32

33 And I think when you look at the transcript, the
34 actual handwriting, the "long ago" refers to this next
35 sentence:
36

37 "Long ago. Then we fought for the land now we
38 don't. That is why we are glad to see you, it
39 will settle all disputes."
40

41 So that what you have in exchange at least from the
42 Kitwangar reserve to the Indian commission is a claim
43 that the Kitsequecla people are strangers and we don't
44 want them here. Now there isn't any allegation of
45 some pan Gitksan nationalism. There is something
46 completely consistent with this being village based
47 and as I said, I will come a little later to what

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1 Wilson Duff said which has really been accepted by
2 almost everyone that the Gitksan were seven villages.
3 Now I was -- the next portion of the appendix I
4 will not deal with. From page 34 on, I -- the factum
5 deals with resources in the claim area looking at
6 historical, archaeological and anthropological
7 evidence and that discussion carries through to page
8 63. I would like to point out something though that I
9 don't know has been emphasized in the evidence yet and
10 that's at paragraph 58 on page 36 and this is once
11 again from the evidence of the appellants, primarily
12 from the evidence of the appellants. At paragraph 58:

13
14 The appellants' expert biological evidence
15 indicates two things. First, moose and deer came
16 into the Claim Area relatively recently and the
17 caribou population has declined, probably in
18 response to climatic changes. Second, the climate
19 in the Claim Area was colder during the period
20 known as the Little Ice Age which extended into
21 the mid-19th century with glaciers in the area
22 descending as low as 1,200 metres. The climate
23 would have been hard on everything including the
24 vegetation --

25
26 According to the appellants' evidence and I say that
27 aboriginal exploitation, carrying on at line 34:

28
29 "-- of Alpine and subalpine resources diminished
30 in the last few thousand years of pre-history up
31 to the culmination of the Little Ice Age."

32
33 And this is important I think because the early
34 historic observations of the relative scarcity of game
35 and Dr. Ray's conclusion that salmon was the mainstay
36 of the economy is supported and explained by the
37 different climate and the -- you can't even go to this
38 territory today at a particular time of the year to
39 try to get an impression of what it was like 200 years
40 ago because 200 years ago the climate was dramatically
41 different and it was colder, much colder.

42 I do want to make another point on the
43 anthropological evidence and I make it at paragraphs
44 85 and 86 on page 52 and, my lords, you don't need to
45 turn to the reference book but I have put in the
46 extracts from the cross-examination of the reference
47 book, the cross-examination of Dr. Daly. Dr. Daly did

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1 agree, for example, that other people who worked in
2 the area had come to consistent conclusions. They
3 were different from Dr. Daly's but he admitted that
4 each of these other people had come to a conclusion
5 that within themselves was consistent but different
6 from Dr. Daly's.

7 That is essentially the same for Dr. Mills because
8 the anthropologists that she relied on for the most
9 part came to different conclusions than she did too so
10 that although they all agreed that the anthropologists
11 were well respected people and had done research in
12 the field, the experts at trial came -- the
13 plaintiffs' experts at trial came to different
14 conclusions. Now Dr. Robinson didn't. Dr.
15 Robinson --

16 HUTCHEON, J.A.: Excuse me. I thought the only one was Dr.
17 Adams because they --

18 MR. WILLMS: Oh. Dr. Adams, Dr. MacDonald, George MacDonald is
19 different from Dr. Daly. Dr. Rigsby who was one of
20 the plaintiffs' experts is different than Dr. Daly.
21 That's -- those are the main people from the west. In
22 respect of Dr. Mills, Father Morice, Dr. Jenness, Dr.
23 Steward, Dr. Goldman, Dr. Kobrinsky, for this area,
24 all different opinions and with Dr. Mills, she changed
25 her opinion from her draft in '86 to her final 180
26 degrees. Her draft opinion was consistent with
27 important respects with Dr. Steward, Dr. Kobrinsky,
28 Dr. Jenness, Father Morice but it changed by the time
29 she gave evidence and by the time the final report was
30 put in so that what you have with the two main
31 anthropologists who gave evidence on behalf of the
32 appellants is they are kind of -- kind of like the
33 Maytag repairman in that particular area. They were
34 really mostly alone in their opinions and inconsistent
35 with other work that people had done in that area. My
36 lord, Mr. Justice Hutcheon, I referred to Adams and
37 Kobrinsky primarily because they did work in the area
38 for a period of time before the lawsuit started and
39 came to different conclusions.

40 HUTCHEON, J.A.: What bothers me is in this way then it would
41 have been, it seems to me, the trial judge would have
42 simply said that Dr. Daly stands by himself on this
43 and I have on this other side these -- this evidence.
44 He didn't do that. He said, if I remember the
45 passage, I don't need these anthropologists.

46 MR. WILLMS: For the history of these people. That's the
47 passage. That's what he said; for the history of

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1 these people.

2 HUTCHEON, J.A.: That's what we have been talking about;
3 history.

4 MR. WILLMS: Oh, no. My lord, I am going beyond history here.
5 Later on in the --

6 HUTCHEON, J.A.: Well we have been dealing with history, haven't
7 we, since early this morning?

8 MR. WILLMS: Later on --

9 HUTCHEON, J.A.: See, Dr. Bishop is all history.

10 MR. WILLMS: It's page 434 of the judgment where he summarizes
11 what he has already discussed in the judgment. At
12 page 434, and this is when he is going through and
13 coming to some conclusions about the appellants'
14 evidence generally. He says:

15
16 Fifthly, as I have already mentioned, there is a
17 strong but not unanimous body of anthropological
18 opinion including Goldman, Steward, Kobrinsky,
19 Jenness, Robinson and Father Morice --
20

21 That's Dr. Robinson who gave evidence at the trial:
22

23 -- that the social and economic organization of
24 these peoples was likely a response to the fur
25 trade which I have already discussed. Earlier I
26 mentioned the opinion of Dr. MacDonald that there
27 was much destabilization in the area of the 1700s.
28 Even Dr. Ray at one time agreed with this expert
29 but changed his opinion because of the information
30 he gained from the Hudson's Bay Company records.
31 That there are differing opinions is not
32 surprising. While I am happy to leave these
33 fascinating questions to the academic community, I
34 conclude the evidence raises serious doubts about
35 the time depth of particular Indian presence in
36 distant territories, that is away from the
37 villages. It is unlikely that the plaintiffs'
38 ancestors prior to the fur trade would occupy
39 territory so far from the villages, particularly
40 in fierce Canadian winters and even fiercer 200
41 years ago. This theory is well supported by a
42 large number of reputable experts and casts doubts
43 upon the plaintiffs' position that many of the far
44 north and far south territories claimed by many
45 chiefs were used for as long as they allege.
46

47 Now, the earlier portion of the judgment where he

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1 first assesses Dr. Mills and Dr. Daly, there is two
2 parts going on in that assessment. In the first part
3 of the assessment he is saying I don't find these
4 people particularly credible. I find them to be
5 basically advocates for the appellants. He then goes
6 on to say: I didn't find their evidence very helpful
7 in determining the history of the people. Now you
8 have to go through the evidence of Dr. Daly and Dr.
9 Mills and read it to see why it's no help in
10 determining the history of the people. They're
11 primarily aimed at showing what Gitksan's social and
12 political organization is today. That's what Dr. Daly
13 and Dr. Mills are primarily aimed at; what the social
14 organization is today. The Chief Justice said after
15 his findings on credibility that he didn't find them
16 very helpful in assessing the history of the people so
17 I think that that has been blown out of proportion by
18 the appellants as being an absolute rejection of the
19 anthropological evidence in the case. He didn't
20 reject all the anthropological evidence in the case.
21 He makes a very specific comment there related to the
22 history of the people.

23 Now if I could ask your lordships, back in the
24 appendix and I promised, my lords, that the Berk's
25 article, the article on resource use and when you
26 might have territoriality. At paragraph 107 of the
27 factum, I am sorry, I said factum, I meant appendix
28 one, page 67, paragraph 107, and, my lords, you are
29 now going to need Russell & DuMoulin's, the R & D
30 references number three and if you turn to tab 107 of
31 the references you hopefully should find an article,
32 you can't see his whole name, by Fikret Berk. This is
33 an article where the author discusses concepts of
34 territoriality. Now on the right-hand side where the
35 English begins the author says:

36
37 "Territoriality is related to the intensity of use
38 of an area and its resources, and territories are
39 possible only when the benefit of holding a
40 territory exceeds the cost of defending it. Thus
41 an explanatory model of hunting territories needs
42 to be dynamic to accommodate changes in the
43 intensity of resource use and common property
44 institutions such as those governing
45 territoriality."

46
47 He then on the next page sets out his model. Now on

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1 the right-hand side under "Pre-conditions for
2 territoriality":
3

4 "In general, it is held that territoriality is
5 possible only when the benefits from holding a
6 territory exceed the cost of defending it. The
7 concept was originally borrowed from cost benefit
8 studies in economics and used in ecology for
9 analyzing the feeding territories of birds. It
10 was adapted for use in ecological anthropology by
11 Dyson-Hudson and Smith. These authors considered
12 that a resource must be sufficiently predictable
13 and abundant to permit the development of a
14 geographically stable territorial system for its
15 use. However, ongoing work in ecology suggests at
16 least one additional condition. It has been found
17 that territoriality occurs within certain maximal
18 and minimal limits in the abundance of the
19 resource in question. It does not occur if the
20 resource is very scarce, relative to demand, or
21 superabundant."
22

23 So that in Figure 1 he sets out the three conditions
24 that generate territoriality:
25

26 "Resource productivity and predictability must be
27 relatively high, and the resource must be
28 limiting."
29

30 Now he gives an example of that on page 3 of the
31 appendix -- four of the appendix, two pages in. Here
32 the appendix pages are in the middle of the page but
33 it's appendix page 4 and on the top left-hand side he
34 says:
35

36 "The beaver has a special place in the resource
37 use system; it is an important species, for both
38 meat and fur, and is easier than other species to
39 manage by territories. By contrast, the otter,
40 another important fur species, is not a sedentary
41 animal and cannot be managed by territories."
42

43 That was what led me to say earlier in response to Mr.
44 Justice Lambert's question that territoriality may
45 depend and vary species by species and it would depend
46 on what the demand for the resource was and what the
47 competition for the resource was. Now what becomes

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1 clear from the historical records is that there was
2 some sort of beaver territoriality. We know that
3 there was a great demand for beaver for the fur trade,
4 we know that there was no marten territoriality but
5 marten lacked the predictability that the beaver do
6 because the marten are not stationary; the marten
7 are -- is an animal that is nomadic as Dr. Kobrinsky
8 said in his article so that the point which explains,
9 in my submission, why the beaver and beaver trapping
10 territoriality as seen by Brown is because the fur
11 trade increases the demand for beaver and
12 territoriality with respect to beaver makes sense.
13 It's possible. It's not possible with respect to the
14 other animals which are nomadic and so that, in my
15 submission, is why it fits into all of the -- prior to
16 this case, all of the opinions in the area and why the
17 Chief Justice was perfectly entitled -- it's not only
18 some evidence upon which the Chief Justice had come to
19 his conclusions about fur trading and fur trapping and
20 beaver but it's overwhelming evidence in the absence
21 of the three people who gave evidence on behalf of the
22 plaintiffs who the Chief Justice didn't accept.

23 HUTCHEON, J.A.: I haven't looked at it since we were referred
24 to it the other day but I thought in Baker Lake that
25 was the situation of a very sparse -- nomadic people
26 in very sparsely settled areas so far as animals were
27 concerned but the rights were recognized. I am
28 speaking of Baker Lake.

29 MR. WILLMS: Well I don't know whether there was an allegation
30 of house territoriality or anything like that at Baker
31 Lake. My recollection was it was much broader than
32 that.

33 HUTCHEON, J.A.: No, no, not house. It was --

34 MR. WILLMS: I want to -- yeah, my lord. I want to make a
35 distinction here because the appellants' case is based
36 on house territoriality which is like the traplines.
37 The Chief Justice later on said in his judgment: I
38 don't doubt that aboriginally areas around the
39 villages were used for resource use. I just don't
40 accept that -- this concept of house territoriality.
41 Now I don't find that the Chief Justice is far off in
42 his conclusions from what Mr. Justice Mahoney
43 concluded in the Arctic because that's a group of
44 people, a large group of people and not --

45 HUTCHEON, J.A.: Not closely tied --

46 MR. WILLMS: Yeah. Now --

47 HUTCHEON, J.A.: -- if I remember it correctly. They weren't in

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- 1 the sense of a tribe in Baker Lake.
- 2 MR. WILLMS: I would have to go back and refresh my memory, my
3 lord, on the facts of Baker Lake but I do not recall
4 that it was advanced in the very complicated way that
5 the appellants advanced their claim to territoriality
6 in this case.
- 7 LAMBERT, J.A.: The internal boundaries question has not been
8 pressed on the appeal, the internal boundaries
9 question has not been pressed on the appeal and the
10 Chief Justice found the area in the middle to be the
11 area of aboriginal rights though he had confined the
12 true aboriginal rights to village sites in the
13 originally contiguous areas but it may be that when we
14 come to grips with the actual issues in this appeal
15 that what we are asking ourselves is have aboriginal
16 rights been established over all or a part of this
17 territory without asking ourselves -- well asking
18 ourselves independently of the question of house
19 boundaries have aboriginal rights been established
20 over this area and we need then be dealing with an
21 entirely different question than the one you are
22 addressing.
- 23 MR. WILLMS: I appreciate that. In fact, my lord, I am
24 advancing this argument in support of the Chief
25 Justice's conclusion.
- 26 LAMBERT, J.A.: Yes. And in relation to internal boundaries.
- 27 MR. WILLMS: Oh. And then what he ultimately concluded with
28 respect to the area that they did use.
- 29 LAMBERT, J.A.: And you don't understand that it's any part of
30 the function that we have asked you to undertake to
31 attack the concept that are aboriginal claims over
32 that whole central area or perhaps the whole part of
33 the claimed area independent of house boundaries.
- 34 MR. WILLMS: Well, no. What I understand our function is is
35 that the Chief Justice made a finding about where the
36 appellants had aboriginal rights should he be wrong --
- 37 LAMBERT, J.A.: Yes.
- 38 MR. WILLMS: -- on the extinguishment point --
- 39 LAMBERT, J.A.: Yes.
- 40 MR. WILLMS: -- and we are advancing arguments in support of
41 that finding but the big difference between that
42 finding and the case that the appellants advance is
43 that finding is based on villages and not house
44 territoriality and houses so that's the critical
45 difference between the two.
- 46 LAMBERT, J.A.: It's based on villages but doesn't it extend
47 over that whole central area --

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- 1 MR. WILLMS: Well it doesn't --
2 LAMBERT, J.A.: -- along -- in accordance with the --
3 MR. WILLMS: Yes. It takes off the top --
4 LAMBERT, J.A.: And the bottom.
5 MR. WILLMS: -- and the bottom and a little bit I think on
6 the -- I can't remember whether Bear Lake was in or
7 out.
8 LAMBERT, J.A.: Yes.
9 MR. WILLMS: It probably should have been out because everybody
10 claims Bear Lake but no, it's in, but, yes. You will
11 see the top -- the bottom part and it's --
12 LAMBERT, J.A.: And if -- and you are arguing a blanket
13 extinguishmet but if that argument is not upheld and
14 sustained then you are content as far as your argument
15 goes to have the Chief Justice's finding as shown on
16 that map upheld?
17 MR. WILLMS: Yes. Oh, yes, my lord. No. I didn't understand
18 we were --
19 LAMBERT, J.A.: No, no. All right. I just want to be sure I
20 understand that position.
21 MR. WILLMS: Oh, yes.
22 MACFARLANE, J.A.: I want to make sure I understand it as well
23 in another sense. I understood you to be arguing in
24 support of the finding of the trial judge that land
25 ownership was confined to villages.
26 MR. WILLMS: Yes.
27 MACFARLANE, J.A.: And I understand that the appellants'
28 contention is that land ownership extended to the
29 whole of the territory and I understand that the
30 fall-back position adopted by the Chief Justice was
31 that insofar as there were rights with respect to the
32 balance of the territories outside villages that there
33 may be -- there are aboriginal rights but they are not
34 land based rights as such; they are, I am using my own
35 language, rights such as hunting rights over
36 unoccupied Crown land, fishing rights, although most
37 of those are associated with villages or close by
38 villages and they are more land based and relate more
39 to land ownership and use of land and other rights and
40 then there are berry picking rights and such over the
41 whole of the territory but there are the two things.
42 There is a difference. One relates to land ownership.
43 MR. WILLMS: Yes.
44 MACFARLANE, J.A.: That's what you are dealing with and the
45 other, other aboriginal rights.
46 MR. WILLMS: Yes.
47 MACFARLANE, J.A.: And although they -- you know, obviously they

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1 relate to the land. They don't relate to the
2 ownership of the land but the use of the land.

3 MR. WILLMS: Yes.

4 MACFARLANE, J.A.: Is that --

5 MR. WILLMS: That's correct, my lord.

6 MACFARLANE, J.A.: That's how I saw the thing breaking down.

7 MR. WILLMS: That's the point of this. The appellants' case on
8 ownership is all of it. The Chief Justice said for
9 ownership if -- if ownership, it was the village's and
10 that there were -- and then he drew the broader area
11 where aboriginal rights were exercised like hunting,
12 fishing, berry collecting, timber evidence. I mean
13 they had houses, plank houses. All of those what he
14 called subsistence rights, subsistence practices I
15 think is what the Chief Justice called them and I
16 don't -- I support that. I don't challenge that. I
17 challenge the appellants' theory of ownership and
18 point out that when the Chief Justice went through all
19 of the evidence on theories of ownership as they
20 related to territories and discreet territories he
21 rejected that and I say he properly rejected it.

22 I note I skipped a paragraph that I should have
23 read to you back at page 62 in paragraph 100, just at
24 line 47 and I don't think I need to take you to the
25 tab in the book but --

26 TAGGART, J.A.: The paragraph number again please.

27 MR. WILLMS: It's paragraph 100 at page 62 and it's at line --
28 it starts at line 47 in that paragraph where I say:

29
30 "Furthermore, as Dr. Barbeau said, and Dr. Duff
31 accepted, Gitksan 'tribes were nothing but
32 villages, or casual geographic units, seven in
33 all.'"

34
35 So that -- and the references are at -- in the
36 reference book but that was the conclusion of Barbeau
37 and of Duff about the Gitksan and that was evidence
38 that the Chief Justice could accept in determining,
39 rather than there being this house theory of ownership
40 that there could indeed be a village theory of
41 ownership because that was what was consistent with
42 some of the work that had been done in the past and
43 also the evidence of Dr. Robinson.

44 Now, the last portion on the -- on this particular
45 point, my lord, is paragraph 117 and I have just -- I
46 set out in paragraphs 117 the submission that
47 "trapline" and "territory" were used interchangeably

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1 by the Gitksan and the Wet'suwet'en, a point that Dr.
2 Adams noted as well. When he looked for
3 territoriality he looked for the trapline map. One
4 point though that should be noted with respect to Dr.
5 Mills and I refer to her in paragraph 117 and this --
6 the Chief Justice didn't -- I don't think he said this
7 in his judgment but it's an interesting comment on Dr.
8 Mills. She quoted in her report from an All Clans
9 Feast and the All Clans Feast contained a discussion
10 of what went on at the feast. It was a feast of the
11 Wet'suwet'en. I think it may have been neighbouring
12 people as well but the Wet'suwet'en were there and
13 statements were made at that feast about traplines so
14 what you see throughout the feast these notes, the
15 notes made at the feast are trapline, trapline,
16 trapline. When Dr. Mills quoted from those notes in
17 her report she changed the word "trapline" to
18 "territory." Now she didn't put square brackets
19 around it. She didn't put anything to indicate that
20 she had changed "trapline" to "territory" but, of
21 course, reading "territory" is much more effective
22 than reading "trapline" and she acknowledged and the
23 Chief Justice asked her during her cross-examination
24 if that's what she did; change the words. Well she
25 did change the words from "trapline" to "territory"
26 and I -- it is just further support for the submission
27 or for the finding of the Chief Justice that the
28 anthropologists were advocates, not independent
29 scientists.

30 HUTCHEON, J.A.: Did she understand the language though?

31 MR. WILLMS: No. It's in English. The transcript was in
32 English so she took --

33 HUTCHEON, J.A.: Well she says or your item says that -- the
34 words in the sense of trapline and territory are the
35 same.

36 MR. WILLMS: Oh, no. Yeah. She said the words in Wet'suwet'en
37 were the same but the transcript is in English and the
38 transcript says "trapline." Now what she does is she
39 purports to quote from a transcript but changes
40 "trapline" to "territory."

41 HUTCHEON, J.A.: The speaker then has used the word "trapline."

42 MR. WILLMS: According to the text, yes.

43 HUTCHEON, J.A.: I follow you.

44 MR. WILLMS: Now, my lords, I am going to say a few words about
45 another section if my lords wanted to take the
46 afternoon break.

47 TAGGART, J.A.: All right. Five minutes.

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1 THE REGISTRAR: Order in court. Court stands adjourned.

2

3 (PROCEEDINGS ADJOURNED)

4 (PROCEEDINGS RESUMED)

5

6 THE REGISTRAR: Order in court.

7 TAGGART, J.A.: Yes, Mr. Willms.

8 MR. WILLMS: My lord. Just before the break, my lord, Mr.

9 Justice Hutcheon pointed out the comment in paragraph

10 117 about Dr. Mills saying the words were the same.

11 The actual transcript -- the authenticity of the

12 transcript was confirmed by plaintiffs' witness Alfred

13 Joseph and I will give you the transcript reference.

14 It's volume -- transcript 35, page 2274, lines five to

15 21 where he agreed that the transcript was the written

16 record of what went on.

17 WALLACE, J.A.: Would you give me that reference again.

18 MR. WILLMS: It's transcript 35 at page 2274, lines five to 21.

19 The last part of the argument advanced at appendix tab

20 one starts at page 84 in paragraph 137 and it deals

21 with another bit of evidence, quite a bit of evidence

22 that was before the Chief Justice about the missionary

23 influence and I do not intend to go through the

24 section but the section shows quite clearly that early

25 land claim agitation at the time appears to have been

26 missionary instigated or at least many people

27 suggested that it was missionary instigated including,

28 and this is at paragraph 139, Dr. Drucker who I think

29 you may have heard about and if you could turn to tab

30 139 in references three. At tab 139 I have enclosed

31 an extract from Philip Drucker, "Cultures of the North

32 Pacific Coast" and at page 2 of the tab, Dr. Drucker

33 discusses culture change in British Columbia and on

34 the right-hand side of that page he was discussing the

35 Duncan-Ridley feud at Metlakatla. Ridley was the

36 bishop, Duncan was the reverend, Ridley -- there was a

37 dispute between Duncan and the church missionary

38 society which eventually led Duncan to take a large

39 group of people from Metlakatla into Alaska and form a

40 new community called New Metlakatla but the Metlakatla

41 controversy led to two investigations, two commissions

42 of inquiry but Dr. Drucker summarized the missionary

43 influence quite succinctly. On the right-hand side

44 near the bottom where he talks -- he says, "This sort

45 of control." It's about ten lines up from the bottom

46 on the right-hand side:

47

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1 "This sort of control led the missionaries to
2 insist that their charges lead well-ordered,
3 civilized lives, and hence needed no Dominion
4 interference, that is, legal and secular control
5 by Indian Agents. Therefore, the missionaries did
6 not want reserves of any size for their
7 congregations. They wanted their charges to be
8 given title in fee simple to plots comparable to
9 those given white settlers, so that they, the
10 missionaries, could continue unmolested to guide
11 their Indians to complete Christian civilization.
12 It must be recognized that the missionaries
13 believed they were acting in the best interests of
14 their native charges. They did not regard
15 themselves as rebels against constituted authority
16 but believed sincerely that no one else could
17 guide the Indians along the path of righteousness
18 as well as they could. There is direct evidence,
19 not only from Indian informants of recent times
20 but from sources of that day, including a
21 Provincial Commission of Enquiry, that certain
22 missionaries openly advised their congregations to
23 demand the return of the lands that had been taken
24 from them."

25
26 Now, Dr. Drucker concludes at the next page and here
27 he is including more than just missionary influence on
28 the next page on the right-hand side where Dr. Drucker
29 says:

30
31 "The story of the land claims --"

32
33 It's the last -- the paragraph at the foot of the
34 page:

35
36 "The story of the land claims by the Indians is an
37 important part of their recent history. Its
38 significance in regard to acculturation remains to
39 be considered. One fact shows through very
40 clearly; the inspiration throughout was
41 non-Indian, or by sophisticated Indians long
42 removed from the native way of life and thought.
43 The techniques used were non-Indian - petitions
44 drafted by attorneys, attempts to utilize British
45 legal procedure, fund-raising campaigns to
46 implement the legal contest, and the like. The
47 obvious conclusion is that Indian interest in

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1 land, outside the few heavily settled areas, was
2 largely artificial. Although the land was
3 technically no longer the Indian's, as long as it
4 was not settled or logged off, he had use of most
5 of it, and hence did not feel that his economic
6 plight resulted from loss of it."

7
8 Now, later on in this tab and I don't want to take
9 your lordships to it but each of the plaintiffs'
10 experts; Dr. Daly, Dr. Mills and Mr. Brody
11 acknowledged that Dr. Drucker is one of the foremost
12 anthropologists, a leading anthropologist well
13 respected. Each one of them relied on Dr. Drucker in
14 part in coming to their conclusions and I refer to Dr.
15 Drucker not to say that that's the only opinion along
16 those lines in this case but it succinctly sets out
17 the evidence that was before the Chief Justice in
18 respect of land claims and you will hear a little more
19 tomorrow from my colleague, Mr. Plant about Lord
20 Dufferin and some of the statements that Lord Dufferin
21 make -- made that provide or the appellants say
22 provides some support for their case. Now I --

23 HUTCHEON, J.A.: Sorry. I don't quite understand the
24 significance of what you are --

25 MR. WILLMS: The significance, my lord, of this whole section
26 and I am sorry that I -- if you read through the
27 section --

28 HUTCHEON, J.A.: Yes, I see.

29 MR. WILLMS: -- of the factum it makes sense but the section of
30 the factum points out that the inspiration for land
31 claims originally appears to have been from
32 missionaries in this area, specifically Dr. --
33 Reverend Duncan and Reverend Duncan's disciple,
34 Reverend Tomlinson who was the one who went into the
35 Skeena area. There were two commissions of inquiry at
36 Metlakatla that came to the same conclusion at the
37 time in the 1800s, went up and heard evidence and came
38 to the same conclusion and Dr. Drucker, applying an
39 anthropological perspective, came to the same
40 conclusion at the end of his book or his work,
41 Cultures of the North Pacific which is a well regarded
42 anthropological work in British Columbia for Northwest
43 coast cultures so that's the point that is set out in
44 that whole section.

45 HUTCHEON, J.A.: Where does it take us? I don't understand it.

46 MR. WILLMS: Where it takes you, my lord, is that when you are
47 considering the evidence that the appellants have

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1 referred to, they have referred you to the allied
2 petition as some support for their case.
3 HUTCHEON, J.A.: Yes, certainly.
4 MR. WILLMS: They referred you to the Nishga petition as some
5 support for their case. I think they have referred to
6 some statements drafted by Reverend Tomlinson on the
7 Skeena in the 1880s as support for their case. The
8 point in this whole section is -- the question is what
9 is the motivating force for the claims. Now Dr.
10 Drucker thinks that it was the missionaries trying to
11 get his charges to lead a well-ordered life. That's
12 the extract I read from Dr. Drucker two pages before
13 and then Dr. Drucker concludes that most of what was
14 going on appears to be non-aboriginally instigated and
15 he concludes that the interest in land is largely
16 artificial land claims.
17 HUTCHEON, J.A.: I don't understand the circumference of it.
18 Firstly, there seems to be a contradiction between 125
19 and -- some of the missionaries only wanted fee
20 simple, some of them.
21 MR. WILLMS: Yes. If --
22 HUTCHEON, J.A.: Others wanted the whole of the land to be given
23 back.
24 MR. WILLMS: No. Others wanted reserves, some of them wanted
25 reserves and so where you have got -- this is one
26 thing that the Cornwall -- I think it was the
27 Cornwall-Planta Commission noticed when it went up to
28 Metlakatla. It noticed the differing views village by
29 village as to land entitlement. Where there were
30 Duncan's followers in the village, the Indians -- the
31 aboriginal people say they owned the land. They
32 didn't want a reserve. The land was their's. All
33 right. Where it was another religious group, a
34 different religious group, they wanted a reserve and
35 it varied depending on the religious group that
36 appeared to be influencing -- it wasn't consistent so
37 that's why the commission came to the conclusion that
38 it did which Dr. Drucker refers to.
39 HUTCHEON, J.A.: Well there must be some significance that I am
40 missing. You have people speaking to the government
41 saying that these people haven't been dealt with
42 properly. Now how does that -- how does it change if
43 the people themselves, as Dr. Drucker said, did not
44 feel that his economic plight resulted from the loss
45 of the land? I mean, how does that change the matter
46 if you have one group saying -- who is looking at the
47 situation saying: Look. These people have had their

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1 land taken or will be taken unless they do something
2 about it, and some of the people themselves saying:
3 Well we are not too concerned because as long as it
4 was not settled and not logged off then we are all
5 right. I don't see any significance in that.

6 MR. WILLMS: I don't think -- no. I don't think -- that's not
7 what Dr. Drucker is saying there. What Dr. Drucker is
8 saying there is that as a source for problems you
9 couldn't point to the loss of a land base as the
10 source of problems because there was no loss of the
11 land base and that's something that the Chief Justice
12 noted.

13 HUTCHEON, J.A.: Because the land was not then settled or logged
14 off.

15 MR. WILLMS: No. It's not that there weren't complaints
16 throughout the whole piece; it's just that the
17 complaints weren't about land but, my lord, I don't
18 advance this anything -- for anything further than --

19 HUTCHEON, J.A.: He had the use of most of it is what Dr.
20 Drucker said. As long as it was not settled or logged
21 off he had the use of most of it.

22 MR. WILLMS: Yes.

23 HUTCHEON, J.A.: So they were fine. We don't have to bother
24 because we are -- our plight is all right.

25 MR. WILLMS: Yes.

26 HUTCHEON, J.A.: Or at least we are not in bad straits. The
27 other people, the missionaries were saying you are in
28 bad straits even if you don't know it.

29 MR. WILLMS: But, my lord --

30 HUTCHEON, J.A.: I don't see that it takes us anywhere.

31 MR. WILLMS: My lord, I think the point and I will leave it with
32 this because it really sets the context but if there
33 is a true belief in ownership, your plights are
34 relevant; okay. The plight -- if you --

35 HUTCHEON, J.A.: They thought they had most -- they had the use
36 of most of it.

37 MR. WILLMS: Exactly, but, my lord, you have hit the nail right
38 on the head; they had the use of most of it, not
39 ownership and here Dr. Drucker is talking about
40 missionary inspired, we own it. As long as they had
41 the use of it even when other people used it.

42 HUTCHEON, J.A.: He doesn't say that. As long as it was not
43 settled or logged off.

44 MR. WILLMS: That's the difficulty, my lord, from putting
45 forward extracts and the Chief Justice of course had a
46 mountain of information in this area to go through.
47 The only point I want to make here is that if you

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- 1 truly own something you don't wait -- it's the first
2 person that comes in that you tell --
3 HUTCHEON, J.A.: Somebody in the City of Vancouver in 1992
4 doesn't believe but we are talking about 1884.
5 MR. WILLMS: Yes. We are talking about for example --
6 HUTCHEON, J.A.: People whose notion of ownership is quite
7 different. It's use and occupation. Use and
8 occupation.
9 MR. WILLMS: But, my lord, that's the point; all right. I don't
10 need to take it any further than that, my lord.
11 HUTCHEON, J.A.: Then they are told later use and occupation
12 won't get you very far because you can be wiped out.
13 MR. WILLMS: I don't need to take this point any further than an
14 answer to ownership, my lord. The point on use and
15 occupation isn't addressed by what Dr. Drucker is
16 talking about. He is talking about --
17 HUTCHEON, J.A.: Well I may just be quibbling with you but I
18 couldn't see the sense of this. We have got people
19 who are living in the area complaining to the
20 government, you haven't treated these people properly.
21 That's what they were saying to them. Isn't that
22 right?
23 MR. WILLMS: Well no. Some of them were saying we own this
24 land. Other peoples were saying we weren't -- we are
25 not being treated fairly.
26 HUTCHEON, J.A.: Yes.
27 MR. WILLMS: There is a difference and the only point of Drucker
28 and it just sets the context that what people said
29 appears to depend on who their missionary was in a
30 large sense.
31 HUTCHEON, J.A.: Well I am not sure --
32 MR. WILLMS: My lords, I am going to end -- I am not going to go
33 through any more of appendix tab one but I do say that
34 in respect of the Chief Justice's conclusions on
35 ownership and, of course, the conclusion that flowed
36 out of his rejection of the appellants' ownership, his
37 conclusions on use, aboriginal use, that the evidence
38 amply supports his conclusions and in fact I say that
39 the evidence goes further than what would be the
40 normal test for a finding of fact, that is some
41 evidence to support -- the preponderance of the
42 evidence supports the conclusions of the trial judge
43 on ownership and as Mr. Justice Lambert pointed out,
44 his findings on aboriginal rights are there and they
45 are mapped out.
46 The last point that I want to turn to today is in
47 appendix volume two of the factum and you don't need a

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1 reference book for this, you just need appendix volume
2 two and it's tab 8, the Marshall decisions. The
3 submissions that I will finish with today, you will
4 recall that the Chief Justice in his judgment said
5 that insofar as American decisions have been
6 incorporated into Canadian law he was of course bound
7 by that incorporation but he also said that and I am
8 just -- it's at page 339 and 340 of the judgment where
9 he discusses his reasons for declining to accept what
10 the appellants were suggesting in respect of the
11 American decisions and at page 340 of the judgment he
12 says -- he begins the top of the page referring to
13 diminished sovereign nations or domestic dependent
14 nations and I will refer to the case that he is
15 referring to there but he also says:

16
17 "The authority of American cases is weakened by
18 statutory provisions such as the act to Regulate
19 Trade and Intercourse with the Indians, 1790, and
20 the statutory substitution of compensation for
21 land claims. In a case such as this I am
22 reluctant to rely upon American cases except to
23 the extent they have been adopted by binding
24 authority in this country."
25

26 And he then carries on to say that he is going to
27 confine himself to the Canadian authorities. And the
28 argument that I am going to advance from appendix tab
29 8 was that when you look at especially the Marshall
30 decisions that the appellants put so much reliance on,
31 the Chief Justice was quite right to feel constrained
32 to keep to the Canadian authorities and what I have
33 done at this part of the appendix is set out some
34 background for the opinions of the Court that you have
35 heard quoted to you many times by the appellants and
36 the intervenors in support of the appellants from the
37 Marshall decisions and I start at paragraph 1 at
38 appendix 8, tab 1:
39

40 "The appellants and some intervenors have invoked
41 the later decisions of Chief Justice Marshall of
42 the U.S. Supreme Court as though they represent
43 unwavering statements of immutable truths."
44

45 And the appellants suggest that you must understand
46 the legal and historical matrix of the Marshall
47 decisions and we say that when you do that they don't

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1 support the propositions advanced by the appellants
2 and the intervenors.

3 TAGGART, J.A.: Which tab is this?

4 MR. WILLMS: Sorry. I am at tab 8, my lord, of appendix two and
5 I have just read paragraph one and I point out in
6 paragraph two that:

7
8 "The cases were decided against a patchwork of
9 different treaties and statutes. The settlement
10 of the United States and the manner in which
11 problems with the various tribes were resolved
12 differed dramatically from the situation in
13 colonial British Columbia. State and federal
14 authorities in the U.S. adopted policies that have
15 no parallel in Canadian history."

16
17 In paragraph 3 I point out that his own opinions
18 were not consistent. His reasons didn't express the
19 philosophies now attributed to them and also, and this
20 is the subject of comment by the Chief Justice in his
21 judgment, he did seize opportunities to promote
22 federalist policies and validate the precarious
23 position of the fledgling Supreme Court but more
24 importantly, and this is the point I am going to
25 highlight with respect to each case, none of the
26 decisions actually determined the nature or effect of
27 Indian interests in the sense of there being two
28 parties there; government, aboriginal litigating the
29 extent of Indian interests so the first case is -- the
30 discussion starts at page 4, paragraph 5, Fletcher
31 and Peck and the points in respect of Fletcher and
32 Peck, Fletcher and Peck -- neither Fletcher nor Peck
33 were aboriginal. They were claiming an interest in
34 land through a purchase, an aboriginal purchase but
35 the -- one of the issues in the case was whether or
36 not -- and it's always Georgia, Georgia was the state
37 that was getting into trouble in most of these
38 decisions but I set out in paragraph 7:

39
40 The case arose out of what was called the Yazoo
41 land scandal where the Georgia legislature
42 attempted to invalidate land grants on the ground
43 that the legislators who had made the grants had
44 been bribed. The central issue was whether or not
45 Georgia could, by subsequent legislation, divest
46 landowners of their property.
47

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1 "Peck's predecessor in title was the recipient of
2 one of the impugned grants. Fletcher challenged
3 Peck's title on several grounds. At the time of
4 the grant, the land in question was occupied by
5 several Indian tribes. Fletcher made a subsidiary
6 argument that the Indian interests rendered
7 Georgia incapable of transferring the land."
8

9 And the Court went on to strike down the State's
10 statute not on the basis that -- argued but the
11 essence of the argument is at page 10, the argument
12 that Georgia, sorry, paragraph 10, my lords, that
13 Georgia was not free to convey the land. Chief
14 Justice Marshall said:

15
16 "Some difficulty was produced by the language of
17 the covenant, and of the pleadings. It was
18 doubted whether a stake can be seized in fee of
19 lands, subject to the Indian title and whether a
20 decision that they were seized in fee, might not
21 be construed to amount to a decision that their
22 grantee might maintain an ejectment for them,
23 notwithstanding that title.
24

25 The majority of the court is of opinion that the
26 nature of the Indian title, which is certainly to
27 be respected by all courts, until it be
28 legitimately extinguished, is not such as to be
29 absolutely repugnant to seizin in fee on the part
30 of the state."
31

32 Now this is the first case of the Marshall decisions
33 that deals with Indian title but it deals with it --
34 it was raised in a secondary way and he made that
35 statement but the Court as I say later on, didn't
36 decide any issue of Indian entitlement; it made it
37 clear that Indian title did not prevent Georgia from
38 conveying a fee simple. That's what the case actually
39 stood for.

40 An interesting feature of the decision I set out
41 in paragraph 11 because the Chief Justice commented on
42 the Royal Proclamation and said -- made some
43 observations about the Royal Proclamation which were
44 made very close to the time of it. He said:

45
46 "The court does not understand the proclamation as
47 it is understood by the counsel for the plaintiff.

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1 The reservation for the use of the Indians appears
2 to be a temporary arrangement suspending for a
3 time, the settlement of the country reserved, and
4 the powers of the royal governor within the
5 territory reserved, but is not conceived to amount
6 to an alteration of the boundaries of the colony."

7
8 And then what followed, of course, in the United
9 States was subsequent Indian removal from where they
10 lived but the first point and the really important
11 point about Fletcher and Peck is the starting point
12 and it's consistent through the Marshall decisions.
13 There was no aboriginal litigant and there was no
14 aboriginal land issue directly before the Court.

15 Now Johnson and M'Intosh has been in part
16 incorporated to the law of Canada and I really
17 don't -- I don't need to say very much about Johnson
18 and M'Intosh insofar as it's been incorporated but I
19 do want to draw your lordships' attention to
20 paragraphs 15 and 16 of the argument because they
21 point out -- the case was argued on an Agreed
22 Statement of Facts and the Agreed Statement of Facts
23 set out what the Indian interest was agreed to be in
24 the Agreed Statement of Facts. Once again, it's two
25 private litigants who want an issue resolved by the
26 Supreme Court of the United States and so when you
27 read the judgment of Johnson and M'Intosh you have to
28 be careful when you read about the factual basis
29 because there was an Agreed Statement of Facts upon
30 which the case was argued.

31 The Cherokee Nation case is set out at pages --
32 starting at paragraph 24 and there are three points to
33 the Cherokee Nation case and also the case that
34 followed which are important when you are considering
35 the applicability of this case in setting general
36 principles. First of all, Georgia did not appear to
37 argue in this case. This case was argued only on
38 behalf of the Cherokee Nation. No one appeared for
39 Georgia. This was at a period of time when some of
40 the states didn't think highly of the Supreme Court of
41 the United States and John Marshall's attempt to stake
42 out the third co-ordinate branch of government in the
43 United States which the U.S. Supreme Court ultimately
44 became but Georgia did not appear and advance any
45 argument in opposition so the case in some senses is
46 an ex parte decision but the Court described the
47 Cherokee Nation as a domestic dependent nation and

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1 they had before them a treaty. I mean, there were
2 treaties with the Cherokee so the historical
3 background to the judgment is inseparable from the
4 treaty which was before the Court and allowed the
5 Court to -- in looking at the treaty to conclude by
6 reviewing the terms of the treaty that the Cherokee
7 were a domestic dependent nation and as Chief Justice
8 McEachern said in his judgment, there is no case in
9 Canada that has characterized an aboriginal tribe in
10 that way constitutionally as a domestic dependent
11 nation and so for that reason, he declined to -- and
12 he made a reference to that, that categorization.

13 LAMBERT, J.A.: That's a categorization in relation to
14 sovereignty and there hadn't been many cases in Canada
15 so far as I am aware in relation to what's been called
16 sovereignty in this case or jurisdiction so the
17 concept may have never had to have been decided in
18 Canada.

19 MR. WILLMS: No. I mean, there have been treaty cases in Canada
20 but my lord is right. There haven't been treaty cases
21 where the issue was sovereignty in the treaty case.
22 One of the important aspects of that case was the
23 Cherokee were arguing that they were a nation so that
24 the Supreme Court of the United States would have
25 jurisdiction to hear the lawsuit and while the Court
26 described them as a domestic dependent nation they
27 didn't describe them as a nation and my lord is right.
28 It may well be that some Court in the context of a
29 treaty in this country might choose to adopt the same
30 language. I am just saying that that hasn't happened
31 yet as pointed out by the Chief Justice.

32 Now the next case is the Worcester and Georgia
33 case and a case that is relied on by a number of the
34 intervenors as well as the appellants and once again,
35 Georgia consistent with its policy did not appear in
36 the -- I start, my lords, at paragraph 37 but the note
37 that my lords can make, Georgia didn't appear again so
38 in some senses it might be called a default judgment.
39 The language of the judgment did not reflect what was
40 happening on the ground in the United States. That's
41 the second point. And the third point is the same
42 point I made earlier with the Cherokee Nation case.
43 The discussion in the case focuses on the treaty.
44 There was a treaty or treaties with the Cherokee in
45 which a political organization, a complicated
46 political organization in respect of the Cherokees was
47 recognized by the U.S. government by treaty and you

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1 cannot consider that case without looking at the
2 treaty before reviewing the language of the Court in
3 some of the statements which are very strong
4 statements, I acknowledge, but if you take the
5 statements out of the context of the case you can see
6 why it would be dangerous to apply it as if it was the
7 common law.

8 The last judgment which has been called one of the
9 Marshall decisions is dealt with from pages 25 to the
10 end of the tab. It's called Mitchel and the United
11 States. It wasn't really a Marshall judgment because
12 Chief Justice Marshall died and didn't participate --
13 didn't write an opinion. He participated in hearing
14 the case but he had passed away by the time the
15 decision was handed down. It was written by Justice
16 Baldwin who was the justice who dissented in Cherokee
17 Nation. This case in U.S. jurisprudence has basically
18 been virtually ignored. In terms of the U.S.
19 jurisprudence, the cases usually stop at Worcester
20 and Georgia but more importantly, and I won't take
21 your lordships to it, but your lordships have heard
22 about the Santa Fe case, U.S. and Dionne, the
23 Tee-Hit-Ton case. The cases before the Supreme Court
24 of the United States in this century are all
25 completely inconsistent with what Mr. Justice Baldwin
26 said, especially the stronger statements advanced by
27 Mr. Justice Baldwin in this case and I think it's fair
28 to say that this case at the present time, the Mitchel
29 case or especially the provisions that my -- the
30 appellants have relied on which is the right of
31 occupancy is as sacred as the fee is -- does not have
32 the effect in American jurisprudence that the
33 appellants suggest that it should have in ours. The
34 jurisprudence has advanced quite a bit further and
35 quite a bit away from what Mr. Justice Baldwin said in
36 this case.

37 My lords, those were the two areas that I wanted
38 to cover today and I have covered them and I -- if
39 your lordships would prefer and I think we would
40 prefer adjourning now and getting into extinguishment
41 tomorrow morning at ten o'clock but we are in your
42 lordships' hands, obviously.

43 TAGGART, J.A.: I assume that by letting us go at ten minutes to
44 4:00 we are not going to stay until ten after 4:00 --

45 MR. WILLMS: Tomorrow?

46 TAGGART, J.A.: -- another occasion?

47 MR. WILLMS: No, my lords, no. Four o'clock, that will be the

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1 end tomorrow and three o'clock will see the end of me
2 on Friday.

3 TAGGART, J.A.: All right. We will adjourn then until ten
4 o'clock tomorrow morning.

5 THE REGISTRAR: Order in court. Court stands adjourned.

6

7

(PROCEEDINGS ADJOURNED ACCORDINGLY AT 3:50 P.M.)

8

9

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

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