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(PROCEEDINGS RESUMED PURSUANT TO AN ADJOURNMENT)

THE REGISTRAR: Order in court.

TAGGART, J.A.: Mr. Gouge, just before you begin, one of the subjects discussed in the pre-hearing conference this morning was the question of the status of Alcan as an intervenor and its prospective status as a party to this appeal. The Court has had an opportunity to discuss that subject. There will be no decision with respect of the party status until after oral argument has been completed on July 3. We will proceed to the end of the oral argument on this appeal on the basis that Alcan is an intervenor. If the matter needs to be dealt with thereafter the 3rd of July, the parties will be given adequate notice.

MR. GOUGE: Thank you, my lord.

My lords, yesterday I was presenting the submission that a provincial statute might be effective to extinguish aboriginal title after Confederation if it was a statute whose pith and substance or fundamental character was one of the heads of legislative authority set out in Section 92, and Mr. Justice Lambert put to me the proposition as I understood his lordship that that might not be so if the effect of the provincial statute was to extinguish aboriginal title and if aboriginal title was in some way bound up with Indianness in such a way as to be fundamental to the rights of aboriginal people.

It is my respectfull submission that the proposition put to me by Mr. Justice Lambert would be in error with respect to the constitutional framework of Canada prior to 1982. The reason for that is that, if your lordship's proposition were accepted, it would be to judge the constitutional validity of a provincial statute solely by its effect and that, in my respectful submission, was not the principle by which provincial statutes were to be tested prior to 1982. The authority for that proposition your lordships will find in Volume A-69 at tab 6, the judgment of the Supreme Court of Canada in the Anti-Inflation reference. The judgment of the Learned Chief Justice is the first of the judgments. I refer your lordships to page 388. I am sorry, my lords, I am on page 12 of my factum.

TAGGART, J.A.: Yes. I have that. It is the reference to the Anti-Inflation.

MR. GOUGE: Yes, my lords. Chief Justice Laskin said at page 388:

> "In order to assess how relevant and, if relevant, what weight should be assigned to the extrinsic material, it is necessary to examine the ambit of the legislative power under which the Anti-Inflation Act was enacted. It is my opinion that only in such a context can the Court be urged, whether through a doctrine of judicial notice or through an adaptation of constitutional purposes of the rules in Heydon's case, to consider extrinsic materials as bearing on the validity of challenged legislation."

Now, in the case of aboriginal title of course the extrinsic material would be evidence as to aboriginal culture, values, that sort of thing.

> "It may well be that in most situations it is unnecessary to go beyond the terms of the impugned legislation to determine its validity. Yet, even where this has been deemed sufficient Courts have thought it proper to consider the operation and effect of the legislation as providing a key to its purpose, especially where the allegation is that the legislation has been cast in colourable form."

So especially, my lords, is that so where the Province, under the guise of legislating in respect of property and civil rights, has actually been aiming at, if you will, aboriginal people. If I obtain the opportunity to make submissions to your lordships on the particular provincial statutes upon which I will rely, it will be my submission that they were in relation to property and civil rights and not colourful. His lordship continued:

> "This was done by this Court in Reference re Alberta Legislation. There, Lord Maugham speaking for the Judicial Committee, pointed out that a necessary step in a case of difficulty is to examine the effect of the legislation and 'for that purpose the Court must take into account any

public general knowledge of which the Court may take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be'.

This Court supported such an approach to extrinsic evidence in Lower Mainland Dairy Products Board v. Turner's Dairy Ltd. where Taschereau, J., as he then was, speaking for the majority of the Court said that 'in certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their arms which otherwise would remain obscure or even completely concealed'. The references by Lord Maugham to the admissibility of extrinsic evidence 'in a proper case' and by Taschereau, J. to admissibility of such evidence 'in certain cases' support my view view that no general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and that the questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought to adduce such evidence.

This view is strengthened by the fact that this Court and the Privy Council have recognized that in some kinds of cases the effect of legislation has no bearing on its constitutional validity. Hence, extrinsic evidence as to its effect has no weight. Thus, in Attorney-General of Saskatchewan v. Attorney-General of Canada, the Privy Council said that 'consequential effects are not the same thing as legislative subject matter. It is the 'true nature and character of the Legislation' - not itself ultimate economic result - that matters."

So, in my submission, my lords, the effect of a provincial statute on an aboriginal way of life is relevant to its characterization as, on the one hand, legislation in respect of property and civil rights or, on the other, legislation of Indians. Relevant, yes; determinative, in my submission, no, on the authorities pertaining to the application of the Canadian Constitution prior to 1982. So if the proposition put to me by Mr. Justice Lambert yesterday were right, your lordships would be finding that in

the context of aboriginal people effect is determinative of constitutional validity. That, in my submission, cannot be so on the authorities.

There was reference in many of the submissions to your lordships to the notions of honour of the Crown, fiduciary obligation, arising out of Guerin and out of other cases, and I had wondered in preparing my submissions for your lordships how one could reconcile those observations with the notion of the sovereignty, supremacy of parliament as it was recognized in the Canadian Constitution prior to 1982, because if, after all, as was held in the cases to which I referred your lordships yesterday, Parliament can do what it likes and the Court has no jurisdiction to question the wisdom of what Parliament has done. How can one reconcile that with the judicially imposed constraint upon legislation to say it must conform to the Court's notes of the honour of the Crown? The answer to the dilemma, my lords, which I faced on that issue is that the ability of the Court to constrain legislation by a conception of fiduciary duty or honour of the Crown arose only from the constitutional amendments in 1982 and has, in my submission, no place in the constitutional analysis of provincial legislation enacted prior to 1982. The authority for that proposition, my lords, comes from Sparrow which is in volume A-69 at tab 3 and if your lordships would refer to page 1109 of that judgment. This is the judgment of the Court given by The Honourable The Chief Justice and Mr. Justice LaForest. If the first full paragraph on page 1109, it was said:

> "There is no explicit language in the provision..."

that is Section 35(1) of the Constitutional Act 1982:

> "...that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights."

Now, your lordships will recall that I referred you yesterday to the decision in Attorney-General of Ontario v. Attorney-General of Canada which is tab 2 in my book and which spoke to the pre-1982 Supremacy of Parliament. Their lordships went on:

> "Yet, we find that the words 'recognition and

affirmation'..."

to be found in Section 35:

> "...incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue..."

that is to say after the constitutional amendments in 1982:

> "...including, of course, the right to legislate with respect to Indians pursuant to S. 91(24) of the Constitution Act. These powers must, however, now..."

and I ask your lordships to note the word "now":

> "...be read together with S. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."

And then if your lordships would turn to the top of page 1110, you will see that the Court said:

> "Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective."

So my point, my lords, is that Section 35 was not retroactive. Your lordships will recall the word existing in the section and the reference that was made to that word in the Supreme Court of Canada judgment made in Sparrow. When your lordships are assessing the validity of a pre-1982 Provincial Statute, you must in my submission do so by reference to the Constitution as it existed at the time that it was -- that this statute was enacted and apply the previous judgments of the Courts of this country and of the Privy Council articulating the principles by which that constitution was to be interpreted and

applied.

If your lordships were to do the contrary, if your lordships were to apply to a pre-1982 statute the constitution of Canada as it now exists and as it has now been interpreted by the Courts of this country, your lordships would be giving retroactive effect Section 35, that is not what the constitutional authority decided to do in 1982. Prior to 1982, the rule was supremacy of parliament. The authority of this court was derived from the Constitution and is in my respectful submission subordinate to the Constitution. It is, in my submission, not open to your lordships to apply to a statute in, for example, 1921 the Constitution as it was amended in 1982.

Now, parliamentary supremacy is not these days a fashionable concept. First, my lords, in my submission, that is not a relevant observation to the issues before your lordships. That goes back to my opening remarks yesterday. The issue with respect to constitution of this country before your lordships is not what it ought to have been but rather what it was. And the constitutional rule in Canada prior to 1982 was for better or worse parliamentary supremacy. I think I should also say, my lords, that there is a legitimate school of thought that said that parliamentary supremacy was the right constitutional principle. That's not for your lordships to decide, in my submission, but is a matter that ought in my submission not to be forgotten.

Returning your lordships to my factum at page 12, I had made the point that the constitutional validity of a statute prior to 1982 was not determined by its effect. My second observation with respect to the principles which guide the assessment of validity of provincial statutes prior to 1982 is that your lordships cannot read the statute in isolation. You have heard the remarks of Chief Justice Laskin about the admissibility of extrinsic evidence but, in my submission, in the pre-1982 constitutional regime more significant than extrinsic evidence was the legislative context of the statute; that is to say, looking at the expression of the will of the legislature first is expressed in the statute in question; what was the fundamental character. In cases of doubt, how did that statute fit into the general legislative scheme of the province as determined by reference to other statutes which may be

companion statutes enacted at the same time. Third, if doubt remains, reference to extrinsic evidence including evidence as to its effect. The authority on that point, my lords, which I will not read from because the passage is long, is to be found at the top of page 13 of my factum which is the Residential Tenancies reference from Ontario. Your lordships will recall that the establishment of the Rentalsman's office had been challenged on constitutional grounds on the basis that the legislature had created in essence a Section 96 court. That submission was rejected by the Supreme Court of Canada which articulated a three-part test set out in the judgment to assess the validity of provincial legislation which took powers away from the superior Courts and can turn them on a provincial tribunal.

It is the last element of the test to which I wish to refer your lordships this morning, because the Supreme Court of Canada held that even if the legislation failed on the first two branches of the test, that is to say, was it a power customarily exercised by superior Courts at the time of Confederation; and, secondly, is it an infringement upon that area. Their lordships said that the legislation may yet be valid and may take authority away from a Section 96 court if it is a small part of a general provincial scheme in pursuit of a legitimate provincial legislative purpose. They referred to the cases on Workman's Compensation legislation which took away from the superior Courts the jurisdiction over on-the-job injuries, and the Court said, yes, that's an infringement on a federal power, Section 96 judges, but it is ancillary to and necessarily incidental to a broader scheme to introduce a system of no-fault compensation for workers injured on the job or for tenants whose residential tenancies are infringed upon and so even though it has that effect upon Section 96 powers, one has to look at the broader scheme of the Act and ask whether, overall, is it a legitimate provincial objective or a legitimate provincial power, or is it, if you will, a deliberate infringement upon a federal power. The legislation to which I will refer, if your lordships give me that opportunity, will show a provincial policy to develop the economy of the province, a legitimate provincial objective, property and civil rights, as a necessary part of the pursuit of that objective, the appropriation to the

province of all of the water power resources, the ability to generate electricity in the province. My submission to your lordships will be that, if you look at the history of water legislation in the province and if you look at the water legislation of general application enacted at the same time as the statute to which Mr. Justice Berger referred to your lordships a few days ago, you will see that the provincial object was to appropriate to itself all of the ability to generate hydro electricity in the province and that they didn't treat aboriginal people any differently in that respect than anyone else. So the province legislated that no one has any water rights in British Columbia unless they have a water licence. There was a suggestion, although not a finding, of this Court in a judgment of this Court in 1918 to the effect that that might not apply to aboriginal people because the statute didn't say anything about aboriginal people. Immediately after that judgment was given by this Court, the Indian Water Claims Act to which Mr. Justice Berger referred was brought into effect to say, no, no, you haven't understood us, nobody has any water rights whether they are an aboriginal person or not, unless they have a water licence.

LAMBERT, J.A.: Could you refer us to that case? It will help us in the understanding of that act.

MR. GOUGE: Yes, my lord. I can tell give you that reference at the break.

LAMBERT, J.A.: It doesn't have to be now. Yes.

MR. GOUGE: So I come to this, my lords, from the Residential Tenancies Act because it is my submission to your lordships that when you are considering whether that statute that Mr. Justice -- that Mr. Berger talked about was valid provincial legislation, you can't just look at the statute. You have to look at it in its legislative and historical context and ask yourselves was the legislature trying to legislate in respect of Native people and Native rights, or was it trying to legislate in respect of water and when it discovered that the Court had raised a possibility that the statute might not apply to Native people, it clarified what it had been trying to do as part of its general scheme.

I come next, my lords, to the concept of reading down provincial legislation, the subject that Mr. Justice Hutcheon and Mr. Justice Lambert have each addressed in their decisions in Dick and other cases,

and I have to make your lordships the most respectful submission that your lordships were in error in considering that, with respect to matters prior to 1982, this Court had jurisdiction to read down the provincial statute.

In your judgment, your lordships referred to Supreme Court of Canada judgments in Gay Alliance Toward Equality and in McKay. In each of those cases, my lords, which were well prior to 1982, the Supreme Court of Canada said, in my submission, when considering a provincial statute which infringes upon a federal power, the court must, if the words of the statute so permit, construe the statute so as to infringe as little as possible upon the federal power. I accept that proposition both before and after 1982. There is, in my submission, a fundamental difference between that proposition and the concept of reading down because the concept of reading down, as I understand it, means, regardless of what the legislature intended and regardless of how explicit the legislature has been about what it's intended, we, the Court, say that they cannot do that and we will construe the statute so as not to apply. My first point about your lordship's observations on that issue, and I say this with great respect --

HUTCHEON, J.A.: Sorry, in what case did we say this?

MR. GOUGE: Mr. Justice Lambert said it in Dick, my lord.

HUTCHEON, J.A.: Yes.

MR. GOUGE: And your lordship said it in -- I trust your lordship will forgive me for this.

HUTCHEON, J.A.: Yes, quite all right. I thought you might know it.

MR. GOUGE: I am sorry, my lord, it is in the other factum.

HUTCHEON, J.A.: All right.

MR. GOUGE: I will give your lordships the reference.

HUTCHEON, J.A.: What I said was I was reading something down, was I?

MR. GOUGE: Yes, my lord.

HUTCHEON, J.A.: And this was in relation to a pre-1982 matter and your point is that that can't be done. Is that right?

MR. GOUGE: Yes, my lord. The defence charged, which was before your lordship, it happened prior to 1982. Your lordship's judgment was after 1982.

HUTCHEON, J.A.: Yes.

LAMBERT, J.A.: I understand your description about reading down as opposed to giving one construction rather than

another and as opposed to severability, I am just waiting for you to pursuade me that the law changed in 1982.

MR. GOUGE: Thank you, my lord, I will do my best. Mr. Justice Hutcheon, your judgment was in Regina v. Jack and Charlie.

HUTCHEON, J.A.: Oh, yes.

MR. GOUGE: And if I may, my lord, I will give the registrar a note of the judgment at the break.

HUTCHEON, J.A.: Thank you. I will remember.

MR. GOUGE: To answer Mr. Justice Lambert's observation, it is necessary to ask your lordships to revisit the judgments in Gay Alliance and in --

LAMBERT, J.A.: McKay.

HUTCHEON, J.A.: McKay. That's a voting case.

MR. GOUGE: Yes, my lord.

HUTCHEON, J.A.: Jack and Charlie was hunting on the island, was it?

MR. GOUGE: Yes, my lord.

TAGGART, J.A.: Religious parks.

HUTCHEON, J.A.: Yes. They went off on a different point in the Supreme Court of Canada.

MR. GOUGE: It did, my lord.

HUTCHEON, J.A.: Yes.

MR. GOUGE: Yes. In fact, if memory serves, the accused was actually convicted in the Supreme Court although incorporating the Section 88 of the Indian Act argument rather than the point which had concerned your lordship.

HUTCHEON, J.A.: Yes.

MR. GOUGE: If one reads the two Supreme Court of Canada judgments, your lordships will see that what the Supreme Court of Canada said is, where the words of the statute so permit, we will endeavour to construe it so as to infringe as little as possible on the federal power. That's very different from saying the legislature can't do that.

In my submission, your lordships now have jurisdiction in respect of post-1982 conduct to read down a statute. That jurisdiction, my lords, comes from Section 52 of the Constitution Act 1982 which is quoted, my lords, in my factum at paragraph 6, and I will -- paragraph 16 on page 9:

> "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is..."

and I emphasize these words, my lords:

> "...to the extent of the inconsistency, of no forcing or effect."

That highlights, my lords, what is in my submission a fundamental difference between the constitutional regime prior to 1982 and that subsequent to 1982. Prior to 1982, there was only one legitimate judicial inquiry: What is the pith and substance of the statute. And that was a decision that was black and white. There is only one pith and substance and it either falls in Section 92 or it doesn't. If it falls in Section 92, then the statute is valid in legislation regardless of its effects and it applies to everybody. If the pith and substance doesn't fall in Section 92, then it is not valid legislation and it doesn't apply to anyone. And I will come back to authority for that proposition in a moment.

After 1982, the constitutional hierarchy of the country was, in my submission, fundamentally changed. Prior to 1982, as your lordships have heard me say, this Court was subordinate both to the Constitution and to the will of the legislature, each within its distinct area. So that prior to 1982, it was not open to your lordships to say this was a bad law. All your lordships could say was, it's either within provincial power or it's not. Since 1982, your lordships have had jurisdiction in limited areas to say the legislature can't do this, even though it is within the sphere of power allocated to the legislature. There are the fundamental freedoms referred to in the Charter of Rights. There are constitutional guaranteed aboriginal rights, and there is this fiduciary obligation of the Crown which arises, as I have attempted to show your lordships, from Sparrow, but arises only from Section 35. So after 1982, your lordships can say this is a bad law, it infringes the fundamental freedom, it infringes an aboriginal right, it offends against the owner of the Crown and pursuant to Section 52 to the extent it does so, it is unenforceable.

LAMBERT, J.A.: Do you know the date of the decision of the McCutcheon case?

MR. GOUGE: I do not.

LAMBERT, J.A.: Supreme Court of Canada. You remember the

McCutcheon case re-examines the area of what you do when provincial -- valid provincial legislation and valid federal legislation meet.

MR. GOUGE: Yes.

LAMBERT, J.A.: And it says, as I understand it, that, if they are consistent with each other, then there is no problem. They are both valid, they both may be directing you to have ten lights per square -- per ten square yards or something in the warehouse, something like that; they both direct you on that but, if one says you must have at least ten and the other says you cannot have more than eight, they are in conflict. At that point, the McCutcheon case says that the federal rule prevails. What McCutcheon is doing is reading down the provincial legislation in those circumstances in my view.

Now, if the McCutcheon case pre-dates 1982 and doesn't rely on this constitutional provision, then I would say that the constitutional provision now expressed in paragraph -- Section 52 of the Constitution Act was being recognized in McCutcheon as a valid and constitutional principle quite separate from the enactment of Section 52, and that the law had developed to the point of permitting reading down before, even if reading down was not mentioned in McCutcheon, it is the same principle so I would be interested in whether McCutcheon relied on Section 52 or not.

MR. GOUGE: We will ascertain the answer to your lordship's question and, again, if we may, we will give the clerk a note. But, with respect, the conclusion which your lordship advances doesn't follow from what you have said about McCutcheon. I, of course, quite accept your lordship's summary of the judgment but, in my respectful submission, the conclusion doesn't follow. I say that for this reason: The paramountcy doctrine has been part of Canadian constitutional law since 1867. It rather makes my point about not assessing the validity of a statute by its effect because, if both the provincial legislature and the federal parliament are competent to tell you how many lights to have in your warehouse, plainly you don't assess the pith and substance of the legislation by looking at its effect, because it can have only one pith and substance, and if that's assessed by looking at how many lights you are required to have in your warehouse, it must be either property and civil rights

or workers' safety or something. But going on from that, it was recognized very early in the constitutional jurisprudence of this country that, because different powers, one federal and one provincial, might justify legislation with respect to the same subject, there had to be a way of resolving that sort of conflict that your lordship has just put to me, and the principle that was articulated by the Courts was that where the conflict is inescapable federal legislation governs. Federal legislation is paramount. That, with respect, my lords, is very different from saying the Court's view of what the legislation ought to be governs. It is a question of which legislative body was paramount, where there was inevitable conflict.

LAMBERT, J.A.: My understanding of the reading down doctrine is that you can only apply that doctrine if you have to do it to preserve constitutionality. You don't have -- the Courts don't have a right to read down legislation because they think it is ill-conceived. It is only -- you can only read down to preserve constitutionality. So there is no judgment evolved in the Court's function in that, except to say, here is the area. It is in this kind of application that this legislation is constitutional. You will read it down so that this application is not intended by the legislature, it is not part of the Act, and if what happens then is that, in the McCutcheon case, if the federal legislation were repealed, the provincial legislation would expand into that field. In other aspects of reading down that may not be so if it was a '91, '92 problem.

MR. GOUGE: If I may comment back to that observation in just a moment, my lord, I'd like to finish with McCutcheon. The difference between McCutcheon on the one hand and your lordship's judgment in the Indian hunting cases from the other is this: In McCutcheon, you have the federal parliament saying you may not have more than eight lights and the provincial legislature saying you must have at least ten, and the question is which legislature must the subject obey. In the hunting and fishing cases that your lordships have been hearing, you have had the province saying you may not hunt but you do not have federal parliament saying you may hunt. So that when your lordship talks about reading down in that way, it is in my submission only permissible to resolve an otherwise irreconcilable

conflict between legislatures, not in my submission, as your lordship put to me a moment ago, so as to limit the ambit of a Provincial statute not in conflict with the Federal statute to a particular area. Forgive me, my lord, one more sentence. Put another way, your lordships can only read down where the conflict is created by legislatures, not by the ambit of legislative authority in the absence of conflict with a parliamentary statute. Got lost in that sentence. Forgive me, my lords. It is not permissible where there is no conflict between a federal statute on the one hand and provincial statute on the other.

Now, if I may, my lords, I'd like to move to the next point that you put to me about reading down in essence to save a provincial statute. The reason, in my submission, that that doctrine cannot be recognized is that the constitutionality of a provincial statute cannot be imperilled by its effect. If it is on its true characterization in pith and substance legislation in pursuit of a provincial power, then it applies to everyone within the province, whether it is an aboriginal person or a federal company or a bank. My authority for that proposition is the judgment in the Supreme Court of Canada in Cardinal to which I will come in a moment. But, if I am right in what I have just said, the constitutional validity of a provincial statute is not imperilled because it purports to apply to aboriginal people in the same way as anyone else. Hence, there is no need to read it down to save it; it was never in jeopardy. As to Cardinal, my lords, I am sure your lordships have been read from this case many times, your lordships will recall the remark of the Supreme Court of Canada to the effect that Indian reserves are not enclaves in provincial legislation and that provincial legislation runs in the same way as it does anywhere else. I ask your lordships to remember the description of the federal power in Section 91(24) which says Indians and lands reserved for Indians. The constitutional statute does not treat lands reserved for Indians any differently than it does Indians. When your lordships are construing the constitutional statute, there is no jurisprudential basis for applying different constitutional principles to Indians than there is to lands reserved for Indians. If lands reserved for Indians are not enclaves immuned from Provincial

legislation, neither are Indians in my submission. Hence, if one says that a provincial statute runs on an Indian reserve the same way as it does anywhere else, it applies to an Indian in the same way that it does everyone else.

HUTCHEON, J.A.: That's too broad, isn't it? The sales tax doesn't apply.

MR. GOUGE: That's because there is a federal statute that says it doesn't. That invokes a paramountcy doctrine but, again, it invokes it as a consequence of legislative conflict, not as a consequence of a judicially imposed constraint on provincial legislative power.

HUTCHEON, J.A.: It seems to me much too broad a statement. All right. Thank you.

MR. GOUGE: Well, I appreciate your lordship's concern. My statement is, in my submission, justified by the authorities, and it brings me with respect back, my lord, to the point which I tried to make and, I fear, made rather poorly yesterday which is that if your lordships are searching for constraints on provincial legislative power prior to 1982, you must find them either in the constitutional statute or in the Canadian constitutional jurisprudence. Those are the sources to which, in my submission, your lordships are entitled to look when you are considering what limits if any there are on Provincial legislative power, and I am not aware of an authority in that context or justification in the statute which would render my proposition too broad as your lordship put it.

Forgive me, my lords. I am in a position to give your lordships the judgment of the Court of Appeal on the question of the Water Act. The judgment is Western Canadian Ranching Company Limited v. Department of Indian Affairs.

TAGGART, J.A.: Could I have that again?

MR. GOUGE: Certainly, my lord. Western Canadian Ranching Company Limited v. Department of Indian Affairs. The citation is 1921, Volume 30, British Columbia Reports, page 25.

TAGGART, J.A.: Thank you.

LAMBERT, J.A.: Thank you.

MR. GOUGE: Thank you, my lord. On the question of reading down, I should draw to your lordships' attention the judgment of the Supreme Court of Canada in Regina v. Dick which is referenced at paragraph 26 of my factum. And your lordships will recall that the Court was there considering Mr. Justice Lambert's reasons in the

same case and gave approval, in my submission, to what your lordship had said on the subject of reading down.

My point about that judgment is simply that the judgment, the observations of the Supreme Court of Canada on that issue in Dick were obiter, and that the provincial legislation in question was upheld and indeed the accused convicted upholding the provincial legislation by virtue of referential incorporation under Section 88 of the Indian Act. I make that observation only to point out that the approval of the concept by the Court in that case was obiter dictum.

That brings me, my lords, to paragraph 27 of my factum at the foot of page 16. And I say, my lords, and it is my submission that on this appeal we must attempt to reconcile the remarks of Mr. Justice Lambert in Dick and those of Mr. Justice Hutcheon in Jack with the decision of the Supreme Court of Canada in the Churchill Falls case which was to the effect that the expropriation of all of the assets of a Federal company did not affect its status or capacity, and we submit that those two jurisprudential concepts are reconcilable only if you accept as a proposition that identity or Indianness, as it has been referred to, is something different from assets. And I will read your lordships in a moment from the Churchill Falls case. Your lordships will recall my summary of the Churchill Falls judgment yesterday to the effect that a company continues to be a company even if it can't carry on its business. So, in my submission, aboriginal people continue to be aboriginal even if they no longer have the traditional territories of the kind which are claimed in the case at bar.

I find it difficult with great respect to understand why it is that the commercial activity of the group of people who gathered together for that purpose can be less fundamental to their being than the right of hunting and fishing. That is not in any way to denigrate from the importance of spiritual values to people, the importance of their cultural adhesiveness and their identity as people. All I say is that the assets which are in issue in this case are not, in my submission, essential to that purpose.

HUTCHEON, J.A.: The difference that I was trying to explain -- to express yesterday as in Churchill Falls, they are dispossessed of their assets. That hasn't happened yet in B.C.

MR. GOUGE: Yes, my lord.

HUTCHEON, J.A.: There would be a parallel if, as in the United States, they moved everyone say to Alberta or somewhere. Then I think there would be a parallel with the Churchill Falls case, but we don't have that. They are there and they are saying we have still got the rights. Now, I can see your point when you come to say the town of Smithers. It's happened there, but they are complaining about it, you see.

MR. GOUGE: I understand what your lordship says. My submission might have been better expressed if I had said the de facto deprivation of their land base, we say it happened de jure a hundred years ago, but I quite take your lordship's point, it didn't happen on the ground a hundred years ago. Our submission is, if you implement today de facto what we say happened de jure a hundred years ago, they will still be aboriginal people; they will still be able to gather, to worship, to dance, to carve, in the same way they did a hundred years ago. They won't own the land anymore. But the question is whether assets are central to identity in the way in which it's been described as Indianness. It is, in my submission, that if, as the Supreme Court of Canada held in the Churchill Falls case, the assets necessary to commercial activity are not essential to the people -- to the identity of people like me in my culture, the assets in question before your lordships are similarly not essential to the identity of aboriginal people in their culture. And my assets are not perhaps as sympathetic as their assets but that is not a basis upon which, in my submission, this Court can act. I am sorry, my lord, but I can't do better than that.

HUTCHEON, J.A.: You can tell that I am not going with you. It just won't work with me.

MR. GOUGE: Indeed, my lord. I am conscious that I ought not to be repetitive but, if I may make this point to your lordship and ask you to consider it, I conceive that your lordship says that because if your lordship's conception, which I don't criticize, of the value of aboriginal culture and of its significance as an existence.

HUTCHEON, J.A.: Culture of any person, any peoples.

MR. GOUGE: Well, then I must ask your lordship, the culture of shareholders of a large corporation?

HUTCHEON, J.A.: One is mechanical and monetary. That's it.

MR. GOUGE: Then I think --

HUTCHEON, J.A.: There is very little spirit in General Motors.

MR. GOUGE: Not much money either.
LAMBERT, J.A.: Not many assets either.
MR. GOUGE: I think your lordship makes my point for me.
HUTCHEON, J.A.: I do? It was accidental then.
MR. GOUGE: No accident that I wear black, my lord.

When your lordship makes the assessment that you just made, you are engaged in an activity, with all respect, of assessing relative cultural values and your lordship is saying to me this set of cultural values is more important than that one. The proposition which I put to your lordships is that that is not a legitimate assessment in the Canadian constitutional context prior to 1982 because the constitutional statutes in the constitutional jurisprudence of this country gave your lordships no right when assessing the validity of legislative action to say one culture is more valuable than another culture. That, in my submission, prior to 1982 was a matter for the legislature and your lordship, with great respect, is assuming the authority to impose upon the pre-1982 constitutional fabric of this country, your lordship's view as to relative cultural values. I don't criticize the view, I simply say it is beyond your lordship's jurisdiction.

My lords, in closing, I'd like to say a word about a difficulty which I face in the submissions that I have made to your lordships. All of these questions, whether they are the response to Mr. Justice Lambert's question, what makes a practice a right, what makes a right aboriginal, or an analysis of the provincial statutes upon which I rely, are specific questions. They require a specific analysis in the first place -- in first case in Mr. Justice Lambert's case of the evidence about a particular practice and its importance. In the case of the validity of the statutes upon which I rely, they depend upon an analysis of the particular statutes in their particular legislative contexts. That sort of analysis is not open to me in my present role and in the time that's been allowed me. But I ask your lordships, when considering whether you can give general answers to those questions, to bear in mind what is in my submission a meritorious principle of the common law and of the constitutional jurisprudence of this country, and that is that the judgment of the Court ought properly to be confined to the specific

issues which are before it and that there is great peril in my submission in broad based statements of principle which are not referenced to particular circumstances.

So, in my submission, Mr. Berger's submission to your lordships, the Province had no power to extinguish aboriginal title. That question can't be answered in the abstract in that way. You have to look at the particular statute in its context and perform upon it the appropriate constitutional analysis.

With respect to Mr. Justice Lambert's questions, I say with greatest deference to your lordship, your lordship is asking the right questions but in the wrong case in my submission because of the way in which the Appellants have framed their case in this action. They say, if it's in the territory, it's ours, and we can do what we like with it. That is too broad a statement to permit the analysis necessary, with great respect, to answer your lordship's question. My lords, those are my submissions.

TAGGART, J.A.: Thank you. We will take the morning break. And then after, begin with the respondent Province.

THE REGISTRAR: Order in court. Court stands adjourned for a short recess.

MORNING RECESS

THE REGISTRAR: Order in court.

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

MR. WILLIAMS: Thank you, my lords.

My lords, first of all I want to take this opportunity on behalf of my client, the Attorney-General for the Province, to thank my learned friends and your lordships for the accommodation that we have been accorded and the adjournment that was granted to permit us to be able to argue in the matter we wished and I appreciate that very much. Secondly, I would like to make some opening observations and we'll then go to the position paper and then into my factum and I will explain which of us is arguing which parts of the factum.

The first thing to say, my lords, is that I believe we are all fully aware of the fact that the disposition of this major case through argument and judgment is clearly a very important historical event

in Canada. The position of the government of the province is that for the future well being of this province, the outstanding land claims, including those of the Appellants, have got to be resolved one way or other, and a determination of these issues in this Court is a part of that, has got to be resolved as soon as it's possible for this province to be able to carry on and not have the continuing problems we have had in the past. Thirdly, I'd like to say that we've tried in this case to adjourn the whole matter so as to be able to negotiate. Of course my learned friends, the Appellants, were of the view and expressed the view that the judgment, that being the law of British Columbia, of the Learned Trial Judge held that any rights which they might have had have been extinguished before Confederation and they were unwilling to and could not go to the bargaining table in that position, and therefore had to come to the Court of Appeal.

The Province and the Appellants tried very hard at the outset of this case to achieve an agreement to have the Court deal with the matters of principle and to have the other matters sent off, as we do ask in our factum, to have the other matters sent off to negotiation with a reference back if necessary, and the list that we had was not a proper list. We couldn't live with that list, neither could the Court, and all the efforts that have been made since that time to do anything, we have been unable to get the Federal government to come to a meeting to discuss that and we have therefore been unable to put before you what we had hoped was a memorandum of agreement by the three parties. We and the Appellants have tried but it's not been possible and, accordingly, I think we have to go on and ask your lordships to deal with it as it is and appears that that attempt will not succeed.

The Province's approach and my instructions are that we are, rather than taking an adversarial position against the Appellants because it is there to take and because there is a trial judgment, rather than take that position, in light of the positions that have been determined recently and indeed the Learned Trial Judge himself about the responsibilities of the Crown, our position has been and will be this, my lords, that we will oppose the positions of the Appellants where we consider them to be wrong in law

and we will support the position of the Appellants where we consider them to be incorrect in law, and modifications thereof if they are correct in law as well. When we -- the breakdown that I would like to explain to the Court now will be as follows: I will be dealing with the issues of aboriginal rights and ownership and sovereignty or self-government, and the blanket extinguishment. Now, that involves issues number 1 and 2 in our factum.

TAGGART, J.A.: Aboriginal rights and?

MR. WILLIAMS: Aboriginal rights, ownership, and sovereignty/self-government, and blanket extinguishment. By that, I mean what is essentially the trial judgment extinguishment by the Calder 13. Glen Bell will be dealing with the Royal Proclamation of 1763, and my partner Bob Taylor will be dealing with the extinguishment by adverse dominion, that's issue number 4, and he will also deal with issue number 7.

LAMBERT, J.A.: Which is that?

MR. WILLIAMS: Well, it is the, sort of, clean-up. I will be coming to that in a moment.

And my colleague Mr. Arvay will be dealing with the whole question of remedies and compensation, and that's issues number 3, 5, and 6.

My lords, we will finish within the time allotted and I hope earlier. And I will now turn to the position paper.

LAMBERT, J.A.: Just for confirmation of the 13 days, I understand that, when you say within the time allotted, that's counting eight days for the Province and five days for the Federal position.

MR. WILLIAMS: Yes, my lord. I hope that we can finish earlier and let my friend Mr. Macaulay have some more time or indeed he may not need it, but he seems to think he will at the moment. Yes.

LAMBERT, J.A.: Thank you.

MR. WILLIAMS: The position paper, my lords, I should read because it remains the foundation of our argument and I say this, it's in tab 1, second page of my factum -- sorry. I am sorry, my factum is --

TAGGART, J.A.: I think it is in volume 1, is it?

MR. WILLIAMS: Yes, it is. Volume 1, the other volume is an appendix.

LAMBERT, J.A.: I've got --

MR. WILLIAMS: That's just the little one.

LAMBERT, J.A.: Yes. Let me say this: I've got something

called Revised Factum of the Respondents, Volume 1, and I've got something called Corrected one.

MR. WILLIAMS: That's correct, the corrected one.

LAMBERT, J.A.: Is it correct that we will be well advised to throw out everything that's just called Revised Factum and obtain instead only things that's are called Corrected Factum.

MR. WILLIAMS: Yes. Let me just explain how that happened. When we went through -- we got our factum in on the date that we were required to, but I guess some of the midnight printing and three in the morning work left some mistakes. There were too many, we felt, to just ask your lordships to pencil them in so we redid the contents and gave you a corrected one but there's no substantial change. It's just corrections in that way and of course the aid volumes were put in as well, so you can dispose of the revised factum as long as you've got the corrected factum. I should have explained that. And there is also some speaking notes and I will explain those in a few moments, which should be before you, and I will explain to you when I get to those how the speaking notes will tie in with the factum if I may.

In my factum then, if we are all together on tab 1 page 2, first is Introduction, and next is Position Paper. This is the fundamental position or the overview, and I think it may be of assistance to keep that in mind. Do you have that, my lords? I am sorry, does everyone have the Position Paper before them?

MACFARLANE, J.A.: Called Introduction?

MR. WILLIAMS: Yes, Introduction, and then it is the next page. Thank you.

The Province of British Columbia will revise its factum to reflect its position with respect to the key issues on Appeal as follows:

1. The Appellants are not entitled to succeed in their claim for ownership of the lands in question.
2. The Royal Proclamation of 1763 does not apply to the areas claimed by the Appellants.
3. The Appellants enjoy certain rights to self-government but subject to the laws of Canada and the laws of general application of the province of British Columbia.
4. The aboriginal rights of the Appellants which did exist may be described as an interest in respect of lands sui generis.

5. A blanket extinguishment of aboriginal rights throughout the province did not occur at any time.
6. The Court will be asked to declare the precise location, scope, content and consequences of these aboriginal rights including whether there has been any extinguishment or diminution of aboriginal rights throughout the territory of the claim, be referred to the parties to form the basis of a negotiated solution. The Court should retain jurisdiction over those issues so that any party may bring the matter back to court in the event that negotiations should fail.
7. The Province will submit in the strongest terms that a remedy declaring the existence of aboriginal rights, but requiring the parties to attempt to negotiate the content and consequences of those rights, accords with the historical approach to the resolution of aboriginal claims, the aboriginal rights provision in the Constitution, the interests that those rights were meant to protect, and also in accordance with sound legal principles.
8. If, and only if, the Court should reject the Province's submissions set forth above, the Province will be required to argue its alternative position which is similar to the position set forth in the factum of the Attorney-General for Canada in paragraph 327 to 380 with certain modifications and amendments thereto.

I should say that in it, in a nutshell, that says that, in the event the Court should decide against us on the reference out after there's been the first determinations, then the position that will be taken by the Province of British Columbia in its alternate argument if it must is that the actual instrument which, for example, issues a deed of land which is totally inconsistent with the existence of aboriginal title on that particular parcel of land, would have the effect of extinguishing it. Other instruments may as well, but I don't want to get into that now because my colleague Mr. Taylor will be arguing that aspect of the case, but that is the position if we are required to take it.

We understand, of course, if the Court should say that the Calder documents do not extinguish and neither does the deed, but that means there's been no extinguishment whatsoever in this province, that of course is the position of the Appellants. While we

don't agree with that and we argue against it, we understand that that is a possible result of this appeal.

MACFARLANE, J.A.: I just don't understand where we stop and make the decision as to the first seven points before you go on to point eight.

MR. WILLIAMS: Well, my lords, I think at this point the entire appeal has to be heard.

MACFARLANE, J.A.: All right.

MR. WILLIAMS: Yes. I am not suggesting for a moment --

MACFARLANE, J.A.: You are going to argue point eight in any event?

MR. WILLIAMS: Oh, yes, we are. We are. What we were hoping to do is to have an agreement before you to say you don't need to hear that at this point because we have made an agreement but --

MACFARLANE, J.A.: That's fine then, I understand. You are going to argue it now.

MR. WILLIAMS: Yes, we are going to argue it now, but we ask you in rendering your decision to consider the possibility of not determining that at the present time but leaving that for further determination if necessary. It seems to me appropriate, if I may say so, that a Court would do that in this sort of situation where, if it felt that there was a very good chance these matters could be resolved short of a decision on that point and it's a complicated area with constitutional -- many constitutional corners, we believe we can pass those constitutional corners and satisfy you that it is a valid extinguishment. But on the other hand, do we need to do that and should we do that if it can be resolved otherwise? That's really what I am really saying but we will be arguing.

My lords, on the Statement of Facts, I suppose I should be embarrassed to say that the case took 318 days, I have a one-and-a-quarter page Statement of Facts, but I will say that in putting this factum together we did our best and we decided that it wasn't humanly possible to review every exhibit and deal with the facts in that manner nor did we think that we needed to. What we felt we could do was that we could simply give you the facts that we believe are important that we rely upon, and say to you as I do on paragraph 2: The Appellants and their ancestors have used the land for many purposes including hunting, fishing, trapping, berry picking and for spiritual and cultural reasons.

3. The Appellants governed themselves and the territory that they occupied in accordance with their own laws, customs and institutions, and they continue to do so. And of course it's subject to the laws of Canada and the laws of the Province of British Columbia. I am talking about internal government there at this point. That's not spelled out as well as it should be. Many of the Appellants and their ancestors --

HUTCHEON, J.A.: I am sorry, but isn't 3 contrary to the Trial Judge?

MR. WILLIAMS: I will submit that there is a difference between sovereignty and governments and I will be getting into that. Perhaps that -- the way in which that's expressed is not as accurate as it should be.

HUTCHEON, J.A.: It is going to be very important for me to know whether the Province supports the Trial Judge, some of his findings of fact that they lived in a legal and jurisdictional vacuum, acted on survival instincts, et cetera.

MR. WILLIAMS: We do not agree with those comments, my lord, but we don't say that those are conclusions that are necessary to the determination of this appeal.

HUTCHEON, J.A.: All right. We spent quite a bit of time on the Appellant's side examining those facts, and perhaps it was overdone, but it worried me that they were there and we were told that we couldn't disturb them, that the province isn't attempting to support them. Is that my -- that's unfair to you. You should know exactly what I am talking about, and it's -- perhaps your colleagues could make a note. It is paragraph 162 of the Appellant's factum, page 108, where the Trial Judge, his findings are set out.

MR. WILLIAMS: I think the problem I am having, my lord, I will come back to that if I may because I am just trying to give an overview at the moment.

HUTCHEON, J.A.: All right.

MR. WILLIAMS: I think the problem is that there are several areas in which the Learned Trial Judge found there was an organized society, that they did have feasts, that they did do all of these things. It is the conclusions that were drawn from that or the effect of them that may be the problem, and it will take me some time to deal with that. I should say that, in terms of facts, I will be dealing far more extensively with them when I get into the ownership area. So this is an inaccurate overview, I am afraid.

Many of the Appellants and their ancestors used and occupied the land and resources within parts of the territory claimed in their own way and under their own jurisdiction prior to the assertion of sovereignty in 1846.

The Appellants have lived a distinctive aboriginal way of life from earliest times to the present.

After sovereignty was asserted in 1846, the Imperial Crown -- well, this is some history. The bottom, I say, during the colonial period 13 Proclamations or Ordinances were passed, known as Calder I - XIII, establishing a regime for the purpose of conveying estates and interests in land to the settlers coming from Europe to the colony of British Columbia.

During the colonial period, pursuant to the authority of the Calder XIII documents and after Confederation pursuant to the Land Titles Act, estates and interests in land were granted to individuals pursuant to that.

Crown has never entered into any treaty with the Appellants.

My lords, the issues on appeal are on the next page and I won't read them because -- except to explain, my lord, Justice Lambert's comment -- issue number 7, is other defences raised at trial. Those are set forth in tab 11, and they deal with the Respondent Province advancing certain defences including the defence of equitable defence Crown Proceedings Act, the Court is of the view that the parties should negotiate the nature and the scope of the -- well, there they are, and those will be commented on by Mr. Taylor.

LAMBERT, J.A.: By who?

MR. WILLIAMS: By Mr. Taylor, my colleague.

If I may then, I will turn to the next tab, which is tab 4, and simply say that, from the position of the Province, the over-arching question which is posed by the appeal is to what extent the Appellants enjoy unextinguished aboriginal rights in respect of any lands or resources included in the claim area. They frame their appeal on the basis of ownership, governance, and some unspecified rights.

I say, in paragraph 2, the Province is of the view that dividing these issues into governance, ownership, and aboriginal rights in the matter proposed by the Appellants obscures the fact that this appeal is

centrally concerned with the nature, extent and consequences of Section 35(1) of the Constitution Act which recognizes and affirms existing aboriginal rights. I should say that, and that 35 may or may not recognize and affirm elements of governance and it may or may not recognize and affirm elements of ownership, et cetera. The section, of course, is that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Now, my lords, since writing this factum, I have concluded that it is not going to be as helpful to the Court to take what I would say was sort of a positive approach on the legal side of this and say that these are what rights they have, instead of commenting on what rights they don't have. I have changed my position on that, having to reconsider the sort of consolidated approach, and I have concluded that to properly respond and assist the Court, I have to separately address the issues of ownership and self-government or sovereignty, and aboriginal rights. And I do that through the speaking notes that I have handed up. And if I may now, I will explain, if you have the white book, we have what's called a white book to demonstrate the purity of our position, and it's, it has in it letters and numbers. It's called Reference of the Corrected Revised Factum of the Respondent Her Majesty the Queen In Right of the Province of British Columbia, W-1.

MACFARLANE, J.A.: W-1one, W for white.

MR. WILLIAMS: I'd like to explain how the white book system will work with the notes and the factum, if I may, and it may seem complicated at first but it does work and I think it's probably the best way to do it.

You will notice in my factum if you will just turn to page -- to page 6 under tab 5, you should ignore the letters. They don't -- all they are is a way of identifying a heading anyway. The important thing in the factum is the numbers, 5, 6, 7, for instance. That's the paragraph number that appears on page 6. And if you look at the speaking notes that I have handed up, you will see that they are A, B, and C; in other words, the speaking notes, on the first page starts with A; on the second page you will see a B and a C. Now, in the book you will see the A, B, Cs which refer to the speaking notes and the numbers which refer to the factum and I can flip as we go, when I am

dealing with the speaking notes, into these letters and I think that through this manner it will work as smoothly as it can. So I will start, if I may, with the speaking notes. And again, what I have done with the speaking notes in order to try to keep up to assist the Court and to keep my argument in focus is to say in each case, I start with Aboriginal Rights, then I move to Ownership as we get into the factum, and then I move into Self-Government. And what I have tried to do is to set forth in each case the position of the Appellants, the position of this Respondent, and the decision of the Learned Trial Judge so that we have that in front of us before we get into the factum.

Now, under A, I say that the Appellant's position on aboriginal rights is unclear. What's been crystal clear until this week is that their claim is for ownership of land. The factum does not appear to advance a claim for aboriginal rights short of ownership, although there is one paragraph, and I have taken from that, it's in the white book under page 22, I don't think I need to take you to it, it says that a declaration that the aboriginal rights of the Plaintiff, including ownership of the jurisdiction over the territory, are recognized and affirmed by Section 35 of the Constitution Act. I don't know whether that's properly pleaded as a claim for aboriginal rights in general but we do know that the Learned Trial Judge said this, at page 210. He said:

> "While all or most of the Plaintiffs' allegations are framed in terms of ownership and jurisdiction I have already said that I understand such claims also include lesser aboriginal interests."

We also know that the Appellants appeared to change their position on February 12 of 1988 moderating the original claim for all or nothing ownership and I should turn you to that one because that's -- that's under tab A and I think it's the third one in. It's page 158. Line 21, page 158, line 21, and what is said is that:

> "I find that a claim for the aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action."

In the previous page, if you will just flip back to 157, page just before that, what is -- what the Trial Judge says is:

> "In the early stages of the trial plaintiffs' counsel indicated that this case, unlike Calder, was 'all or nothing', that is, the claim was for ownership and jurisdiction, and the plaintiffs were not seeking any lesser relief. The position was wisely moderated later in the trial when Mr. Grant made it clear the plaintiffs were also seeking a declaration of their aboriginal rights. He said that while the ownership and jurisdiction were the plaintiffs' primary claims, they wished the court to grant them whatever other rights they may be entitled to."

Oh, I am sorry, these -- I am just reminded that these are not side-barred so I should give you the line where I can -- I don't know whether your lordships followed that last reference, page 157, the second last paragraph and over on page 158, it's just before half-way down the page. I am sorry.

> "I find that a claim for aboriginal rights other than ownership and jurisdiction is also open to the plaintiffs in this action."

Now, I understand on Monday, I wasn't in court on Monday, but on Monday, in response to a question from the Bench that the Appellants appeared to have changed their position by now stating that they are seeking an interim declaration to a non-exclusive right to harvest, manage, and conserve resources within the claimed territory, I say this, my lords, on that matter: That it was the Appellants who insisted on bringing this question of ownership before the Court on the basis that they could not go and negotiate unless they knew if they owned the land. That was one of the positions. And I say that, since they made it an imperative, that the question of ownership be determined for future reference, I submit that the Court should decide the issue of ownership in this appeal and then deal with the question of aboriginal rights. So I ask the Court to make a determination of ownership.

Under B, it is the position of the Province that,

while the Appellants don't have ownership rights with respect to the land they claim, they have aboriginal rights thereto and those rights have been best expressed, in our submission, as a "sui generis interest in respect of land", and I will deal in more detail with that because it is a very broad sweeping statement at the moment. This is a right that is highly context and use specific. It's a right to use or occupy lands, including engaging in practices that were an integral part of their distinctive culture at the date of sovereignty.

Now, there are several ways of looking at a sui generis interest in respect of land, my lords, and I have to say that we appear in this case in many areas, including this one, to be breaking new ground, and it's -- the courts have had to do this many, many times before but we do have some guidance from the Supreme Court of Canada. However, what the nature of a sui generis interest in respect of land is is not something that has been settled. It can be looked at in several ways, my lords. One of them is to say that there is one aboriginal right and it is to do whatever aboriginal people did, self-governance, land, hunting, fishing, all of those things. There is one right. Another way of looking at it, and of course if that is true, then there is a question raised as to whether or not the right to self-government is inherently entrenched in Section 35 of the Charter, but we know from everything that's happened that nobody believes that it is. It is not entrenched because they are trying get it entrenched now, so whatever that aboriginal right included in Section 35, it couldn't have included self-government or people wouldn't be now negotiating to put self-government in.

WALLACE, J.A.: Well, unless they took the position that it might have been extinguished or there might be doubt about it or so forth.

MR. WILLIAMS: Yes. I suppose it may have been --

WALLACE, J.A.: I don't think the inference can be drawn that, because they wish to have this specific inclusion now, that it didn't -- that it was necessarily not existing prior to this time.

MR. WILLIAMS: No. I think -- I suppose where I -- where I became concerned about this and I started looking at, not only the legislation and what was behind it and what has happened since, but the establishment of these conferences that are within the Constitution

that were held with the Prime Minister, all discussed a right, an inherent right, to self-government and nowhere does it even suggest or did anyone even suggest that that's already been granted or that it's been extinguished. It just seems as though it's out there on its own, and I don't know what the answer is. I don't purport to say. I just raise that as a problem. I do say though that aboriginal rights, whatever may be included in them other than that -- oh, and indeed I will be saying later on, my lords, that perhaps we have to say to ourselves that a modicum of self-government rights are included in Section 35 to the extent that they are absolutely necessary to deal with the land rights, or the fishing rights. But that's for later. What I say now is that you can say that there is an aboriginal right to use and occupy the land and that raises the next question: But for what, what can be included in that; hunting, fishing, residing in the village, cultivating the field, pick berries, doing all of the things that were an integral part of their culture brought into a modern context, of course, but doing all of the things that were an integral part are part of that aboriginal right to use and occupation.

The other way of looking at it is that these are a bundle of individual rights and there's a right to hunt and there's a right to fish and there is a right to pick berries and there's a right to cut trees for canoes and totem poles and alike, and so on. And I am not sure that, as we get into the argument later I will be discussing this further, I am not sure that this Court needs to make the decision on that point, but I just raise them now to say that when we speak about aboriginal rights sometimes different people are thinking about different things and what we have tried to do is to call this a sui generis interest in respect of land.

Madam Justice Wilson, in the Roberts v. Canada case, the Dick case, had this to say:

> "This court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands... The Indians' right of occupation and possession continued as a burden on the radical or final title of the sovereign."

I say, my lords, that the statement by Madam Justice Wilson means that the aboriginal title was not an ownership right but, rather, a burden on the Crown essentially for occupation purposes.

Now, the Trial Judge, while holding the Appellant's rights had been extinguished, did find that they had established the requirements for aboriginal rights. He said:

> "Subject to what follows, the Plaintiffs have established as of the date of the British sovereignty the requirements for continued residence in their villages and for non-exclusive aboriginal sustenance rights within those portions of the territory I shall later define..."

Now, his conclusion as to what was included or his specific view of the difference between village sites or the way of characterizing it may be one we differ with, but he did find the existence of aboriginal rights, at least in that regard. And the white book, on page -- this is under tab C, set forth under page 392, that's the first one, in his view, of the sustenance issue, and he says that -- he says, further down, this is the next paragraph after the half-way point:

> "As I understand the authorities, subject to what I shall say later in this judgment, and subject to the requirements I have already described, the law has protected the right of aboriginal groups to continue to use 'traditional' lands for these purposes."

And of course these purposes as read above:

> "In my view the purpose of aboriginal rights..."

This is the paragraph just above that, the second sentence:

> "In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is, to hunt and fish and collect the products of the land and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products

likewise obtained by aboriginal practices."

So that was his finding in respect of the aboriginal rights in that regard. I don't think I need to take you through the other page references there. They are there if you wish to look at them. The Trial Judge then said that, in case he was wrong on his conclusion about extinguishment, in case he had erred there, he'd be delineating the area within the territory which was subject to aboriginal rights at the date of British sovereignty prior to extinguishment and, as you know, he decided, and the quote is here, I needn't take you to the book, the foregoing leaves untouched the conclusion I expressed earlier that, subject to extinguishment, the Plaintiffs were entitled to aboriginal rights to some part of the territory for the benefit of these people. The external boundary is now artificial but it fixes the outermost extent of the lands to which I could make a declaration of aboriginal rights in this case. The question is where to draw the line. It will in this respect necessarily be arbitrary. The Trial Judge then concluded from the alternatives that it would be Map 5.

Now, I should say this: The Respondents have elected to use the phrase "aboriginal rights" as opposed to "aboriginal title" and we were criticized for that by my learned friend Mr. -- the Appellants criticized us for that. The only reason I did that, my lords, was to try and make sure it didn't get confused with what we tend to think about as title. Title we often think about in something that's a document that gives you a right to the land, and a right that is different from an aboriginal right, I say. So I tried to avoid the use of it so as to not have that confusion, and I notice that the Learned Trial Judge in this case, throughout his judgment he makes numerous references to Indian interests, Indian title, aboriginal title, and aboriginal rights. And while the aboriginal interest term appears to be a little broader, he does make the statement and it's recorded below:

"Indian title is commonly used interchangeably with aboriginal rights as I have attempted to define them."

Aboriginal interests, though, he says are something a little broader. And that's at the white book at page 209. If you just flip through the green sheets you will come to page 209. He says:

> "I can dispose of this submission quickly."

That's not the one. No, I am sorry, it is right just the page behind that, 129. It says:

> "Aboriginal Interest.
>
> This is a term I shall use in a neutral, descriptive sense to describe any unspecified aboriginal right. I do not believe there is any aboriginal interest additional or different from the other 'interests' I have defined. It is merely a shorthand term of convenience which I shall use when precision is not required."

So perhaps we have to be -- I raise that only because we have to be cognizant of what the Learned Trial Judge is saying when he is dealing with these issues in the judgment, but I believe that generally speaking when we are talking about all of these terms, perhaps apart from that one, they are being used interchangeably.

Now, I want to read from the top of page 4:

> "The authorities make it clear that aboriginal land claims must be considered in their historical context. I conclude it would not be safe to assume that confident statements made by Dominion officials about 'Indian title' should always be accepted as correct statements of law.
>
> Similarly, the denial of the provincial officials cannot be so construed. These gentlemen were defending positions to which they were committed."

And then he says below that:

> "It seems to me there has always been much uncertainty about the true nature of 'Indian title' in the Province. Even some Indians have not always been completely consistent, because there are references in the historical record to suggestions that enlarged reserves were their

primary concern."

The Trial Judge then explains the approach to analysing the evidence and the findings of fact. And that may be of some importance. It is at the white book at 334 lines -- line 15. That would be quite near the end, it is the third page in, and he says:

> "As already mentioned, I do not consider myself bound by historical statements made either by Indians or Crown officials about questions of law. I am not persuaded any of them spoke with a complete understanding of either the law or the facts..."

and et cetera.

> "For example, these men all spoke without the assistance of authorities such as Calder, Guerin and Sparrow..."

et cetera. He says:

> "My responsibility..."

This is reading from the second paragraph:

> "My responsibility is to apply the present law to the facts as I understand them. I do not propose to attempt a reconciliation of all the different views and activities of the Indians..."

et cetera, et cetera. That sets forth approach that he took and he declared -- I say in my last point on this page he declared a lack of enthusiasm for the American authorities. I don't know that I need to take you to that. It's there in the Reasons for Judgment. He certainly does show -- perhaps that's the nicest way of putting it -- as a lack of enthusiasm for those authorities and I will deal with that of course later on.

And that takes me to my factum, from these notes to the factum at page 6, paragraph 5, and I will be following the factum now right through to paragraph 49.

My lords, the first point that I wish to make is that aboriginal peoples in Canada, by virtue -- this

is under the General Principles relating to Aboriginal Rights. Aboriginal peoples in Canada, by virtue of their historic occupation and possession of tribal lands enjoy particular aboriginal rights in Canadian law. That's Guerin, that's our Chief Justice, that was 1984, and I don't think there is any quarrel with it.

I submit that the key phrase there is the historic occupation of the tribal lands. That, to me, is the key phrase of how to identify what it was that the right consisted of pre-sovereignty.

An aboriginal right provides legal recognition of and protection to aboriginal differences and it protects activities integral to particular aboriginal communities. And then I will go right to the quote which I rely on very heavily throughout my factum and it's this:

> "The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture."

That phrase I will come back to several times because I consider it to be perhaps the most helpful of the phrases that can be used and I will be comparing it with a long, long time and sovereignty and contact and other dates. I say that an integral part of their distinctive culture is the key to what is and what is not an aboriginal practice.

> "The Musqueam have always fished for reasons connected with their culture and physical survival."

Paragraph 7, I say, the aboriginal rights existed as legal rights prior to colonization and settlement of North America by Europeans. The existence of aboriginal rights doesn't depend on British Columbia or British law or Canadian law, but the fact that prior to contact people lived in an organized society on the North American continent, and there are a number of cases that set that out and the references are there.

Prior to 1982, aboriginal rights were only recognized by colonial and then Canadian law as common

law rights, as first and foremost common law rights to the land including common law rights to engage in certain activities. And Professor Peter Hogg said, "the doctrine of Parliamentary supremacy...meant that native rights were vulnerable to change or abolition by the action of the competent legislative body". Again, I don't think there is much argument there but I say this, my lords, that these rights, which include the right which I describe as a sui generis interest in respect of land, all stem from the fact that they occupied or used certain tracts of land and organized themselves into a society with whatever form of self-government they then had in their own traditional way. And that's before the assertion of sovereignty. But it must be noted that those rights in the Canadian legal context were not of a very high value until 1982 because if Her Majesty in clear and plain intent wanted to, she could extinguish them.

Now, assuming that the right to self-government was not included in 1982, it may or may not be constitutionalized in the months that lie ahead but in common law they were -- while these were not of high value, they could still be utilized and have been utilized for a number of very valuable purposes to the native people, but they could also be regulated or extinguished.

Now, as we know the common law was not considered the sole source of these aboriginal rights, they are also said to have arisen from the Proclamation of 1763 and there are other statutes and other ways in which aboriginal rights are said to have arisen. What we say however that we will be dealing with in this factum, because we do not agree that the Royal Proclamation applies in British Columbia, we will be dealing, when we talk about aboriginal rights, with those aboriginal rights which came from the source preceding contact and preceding sovereignty.

Since 1982, there's been dramatic transformation -- I am at paragraph 10 -- by which the way the Canadian law conceives of and protects aboriginal rights. Aboriginal rights in existence as of 1982 are recognized and affirmed by Section 35(1) of the Constitution Act, and as a result they currently enjoy constitutional status in Canadian law. Laws which unduly interfere with the exercise of aboriginal rights must meet constitutional standards of justification. I then say aboriginal title has

been misinterpreted. We have already dealt with that point.

Chief Justice Dickson, at the bottom of that page, and Justice LaForest, by giving aboriginal rights constitutional status, this is what they said, and priority, Parliament and the Provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected.

Again, in the words of the Chief Justice Dickson, and I will just skip down here. The element of -- enactment of Section 35(1) signals that Canada acknowledges the constitutional importance of a prior indigenous presence on the North American continent and recognizes the rightful place of aboriginal people in the Canadian constitutional landscape. I think it has to be remembered, in terms of looking at aboriginal rights, that if the government of Canada and the government of the provinces agreed to constitutionalize aboriginal rights, they must have existed and they must have had some value irrespective of the ease with which they could be disposed of by extinguishment perhaps. They had value or we wouldn't here be talking about it, and I think that's one of the most important things about the constitutionalizing of those rights.

Section 35(1) authorizes the judiciary to define aboriginal rights and to assess the constitutional validity of the laws that impair existing rights. Aboriginal rights, however, are as much the function of negotiation and consent among affected parties through a modern day equivalent of treaty-making. And if you look at 35(3) you see that:

> "For greater certainty, in subsection (1) 'treaty rights' include rights that now exist by way of land claims agreements or may be so acquired."

And that is more than just a hint that the framers of the Charter and the Constitution know that there will be matters that will be negotiated by agreement and therefore will receive constitutional status.

WALLACE, J.A.: I understand that with respect to treaty rights but I have difficulty with your statement that aboriginal rights can be the function of negotiation and consent equivalent to a treaty-making process.

MR. WILLIAMS: No, I say that aboriginal rights which existed in

1982 are clearly constitutionalized. I don't think there is any argument about that. I am saying that, once the dispute about what that means has been resolved and put into a treaty, that too can be constitutionalized.

WALLACE, J.A.: Well, they are treaty rights then.

MR. WILLIAMS: Well, they are treaty rights but they are more than the kind of treaty rights that can be jumped on by a legislature. They are rights that are caught by the Constitution.

WALLACE, J.A.: Under Section 35. Yes.

MR. WILLIAMS: Yes. That's all I meant.

Equally in 35.1 of the Constitution Act, it commits the government of Canada and the provincial governments to invite aboriginal participation in any future delineation of the nature and scope of the aboriginal rights. And I think, without reading that out in total, it says:

> "A constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers..."

et cetera.

> "The Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

And we know -- I think it is notorious since that time what has occurred and what is occurring even in last night's paper with a new hope suggestion that we have an agreement; that we get hope one day and disappointment the next.

The nature and scope of the protection that Section 35 affords to the aboriginal people involves a complex mix of considerations, and this is where I think I can say it in a nutshell and I think there is judicial support for this, that this Court should feel very comfortable, in my respectful opinion, in endeavouring to determine what the right means and indeed to a certain aspect the nature of the right, a definition of the right, or at least a description of it, what it means but without getting into the scope of the right, because when we are dealing with the

scope of the right, the difficulty is we need more facts and we need more specific references than we have here. You can say that, on the facts of this case as the Learned Trial Judge said, the facts did not support what the Appellants argued and therefore the case is dismissed, but I am talking about going beyond general principles into areas that were not really the subject of this case. And I am saying that the judiciary plays an important role in determining the aboriginal rights, but it is not the only institution charged with dealing with those rights. The court stated this, in Sparrow:

> The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and the aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historical relationship.

And also in Guerin at 376, and I do want to turn that one up, and that's in tab 14, the second page in, top of the second paragraph in tab 14. I think this is a very important statement. It says:

> "The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title."

So that these concepts are really tied together, and someone who is in the position of the Crown, federal or provincial, of course it has an obligation to argue in a courtroom that a claim is wrong but equally, I submit, it has an obligation, not in the adversarial way, to say these are our enemies, we have to fight because it's there. They have an obligation to endeavour to establish a legal framework through the courts that will permit a sensible negotiation system to be established and a treaty process to be established.

My lords, I next quote that wonderful organization, the Canadian Bar Association, not as an authority at all, but simply to say that the task force observed -- that, while the courts may be useful to decide some native issues to bring pressure on the parties to settle by some other means, judicial

adjudication will not provide all of the answers to the issues surrounding the native claims. And that was a view of a well put together task force of natives and non-natives that were looking at how these disputes could be resolved.

The judicial role, initially, is to establish broad constitutional principles for context-specific determinations of the scope and the content of aboriginal rights. These principles will serve to guide the aboriginal people and governments alike into determining what the precise nature of the respective rights will be.

And, my lords, at the outset of this appeal, I made the statement that we were all involved in the treaty-making process, and what I meant by that was not that this Court is expected to make a treaty, but that what is happening in this province and in this country today is that cases such as this are serving as the beacons and the guidelines so that the treaty-making process can go forth and that's what I intended to convey when I said that.

I say, in paragraph 17, that this unique mix of adjudication and negotiation involved in the delineation of the scope has been noted in several cases, in Sparrow, where Chief Justice Dickson and Justice LaForest stated Section 35 "provides a solid constitutional base upon which subsequent negotiations can take place". Now, that reference is one I should probably turn up. It's at 406 under tab 17, first page in:

> "...provides a solid constitutional base upon which subsequent negotiations can take place."

The next page, and it's, my lords, Justice MacFarlane in the MacMillan Bloedel v. Mullin case, where he says, on page 607, and this is just after the first green sheet. He says, about two-thirds of the way down, if you are with me, my lords, the paragraph starts:

> "The fact that there is an issue between the Indians..."

And then about two-thirds of the way down that paragraph:

> "I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations."

And that's probably as well as it has ever been said but it has been said since Calder that that's true. And we say it in spades here.

The Reasons for Judgment, of course, the Learned Trial Judge made the same observation at page 119, which is the next one in, in the white book. He says, third paragraph down:

> "The judgment which I must pronounce on legal issues does not preclude an important political and social responsibility that may only be discharged by the governments. I shall presume to mention this from time to time in these reasons for judgment."

Which, of course, he does.

Now, the next paragraphs I am going to skip over because my colleague Mr. Arvay will deal with paragraphs 18 and 19 in the remedies area. And that brings me to paragraph 20. I say that, under Proof of Aboriginal Rights, I suppose we start really with Baker Lake. And in the Baker Lake case, if I can turn you to that, it's page 557, so it's the first thing under tab 20, and it's the bottom of that page, and just to be reminded of what those -- I know that it's been read to you many times, but just to be reminded of what those tests are:

> "1. That they and their ancestors were members of an organized society.
> 2. That the organized society occupied the specific territory over which they assert the aboriginal title."

Those are still, I think, two very sound propositions. The third one:

> "3. That the occupation was to the exclusion of other organized societies."

That, it seems to me, has been altered. And:

> "4. That the occupation was an established fact at the time sovereignty was asserted by England."

And we will have more to say about that. The Learned Trial Judge did and I will too on behalf of my client.

HUTCHEON, J.A.: Didn't Mr. Hutchins tell us yesterday that that was displaced by Bear Lake?

MR. WILLIAMS: Well, Bear Lake -- I don't think Bear Lake disposed --

HUTCHEON, J.A.: Well, you can deal with it but my recollection is we were told yesterday that the Baker Lake --

MR. WILLIAMS: Bear Island.

HUTCHEON, J.A.: Bear Island.

MR. WILLIAMS: Well, Bear Island certainly refers to it. I think the case is in here somewhere. But I suppose what I am saying is I didn't think there was any change in the fact that they or their ancestors had to be members of an organized society.

MACFARLANE, J.A.: I can remember that in argument twice over during the -- since last October, at least twice over, that Bear Island displaces Baker Lake and we have had an argument on the other side, that it does not.

MR. WILLIAMS: Well, I will --

MACFARLANE, J.A.: So it has been an issue and it's an issue that's undecided, and Mr. Hutchins again yesterday made that argument about Bear Island, so that's the reference.

MR. WILLIAMS: Thank you, my lord. I will certainly come back to you on that. I am content at this point at least that the first two parts of the Baker Lake test are clear and should be adopted. I am saying that there is no longer a need for exclusivity, I think even the Trial Judge agrees with that, and I say that, with respect to the last ones, while I am dealing with it, although I will be having more to say later, that the occupation was established in fact at the time of sovereignty, the difficulty with that is that, while there may have been no problem up at Baker Lake, no difference between contact and sovereignty, if you were to leave it at that for everywhere else including the Appellants' area, what could you say by the time sovereignty came along, so much had changed in many areas. I mean, is drinking whisky an aboriginal right, you know. That's something that they may have

learned between contact and sovereignty; doesn't make it an aboriginal right. It would be silly to say that things that happened between contact and sovereignty necessarily became an aboriginal right. If you go back to the date of contact itself, which is a tempting thing to do, there are some pretty difficult problems in establishing what they were on and making perhaps too firm a rule. That is why we have adopted the position, was it an integral part of their distinctive culture and, on a case-by-case basis, it seems to me that that test can be applied and that test can be applied much more sensibly and responsibly than just saying, well, what happened at the date of sovereignty, or what happened at some other date, or a long, long time.

LAMBERT, J.A.: When do you ask whether it was an integral part of their distinctive culture? As of which date do you pose that question?

MR. WILLIAMS: At the date of sovereignty.

LAMBERT, J.A.: As at the date of sovereignty?

MR. WILLIAMS: Yes, at the date of sovereignty. If, at the date of sovereignty, someone tried to advance, well, I can go back -- can't think of it better -- drinking whisky which they acquired, let's assume, from the settlers, is an aboriginal right, it would be silly, it seems to me, to suggest that it was. On the other hand, if there -- let's say trading of fur, and I will be coming to this fur-trading issue later. If they are trading fur, if they trapped, as they used to prior to contact, and if they are trading that fur for a Hudson Bay blanket rather than for some oolichan grease, and it's for sustenance use purposes, not a commercial activity, we will be coming to this later, then why not? If they are hunting with the gun rather than a bow and arrow, why not? It is still hunting but with a modernized technique. So what I am trying to say is that, if the actual -- if the actual -- and again, we get down to this problem of what is -- is there a right to cut a tree or is it part of a right to occupy and use. But if we are saying that we are wanting to look at the practice, the specific practice that took place, the question it seems to me to ask is, was that a distinctive part of their culture, was that an integral part of their distinctive culture.

WALLACE, J.A.: The question I raised before concerning was that relating to gambling and running and operating a casino. You may think about something in doing that.

MR. WILLIAMS: Well, you know, I have -- in this case, there's no evidence of casinos ever having been operated.
WALLACE, J.A.: Gambling was quite a common practice traditionally engaged in by the native population pre-contact or at the time of contact.
MR. WILLIAMS: Well, if we looked -- I don't recollect in this case that the evidence there, but if we can both deal with each other on a hypothetical level, you know, if it was clear that they used to gamble extensively pre-contact and they continued to gamble but instead of using moose hides or their measures that they used to have, they used money instead of moose hides, I would have to say, in keeping with what I have said, that, yes, the practice was a part of their distinctive culture.
WALLACE, J.A.: Than operating a casino as a modern way of --
MR. WILLIAMS: I am jumping ahead but I think maybe there is no answer to this question. It's a very tough one, and one answer is, well, if they used to trade furs which they did pre-contact, there is no doubt they traded furs, there's no doubt that they traded furs for whatever they could get for them so they could assist themselves, but if somebody organized a band of Indians to go in and just trap out hundreds and hundreds and hundreds of furs for the sole purpose of selling them on the Japanese market, I think the line has to be drawn somewhere, and I say that, well, you can always argue, well, can't draw the line, they were allowed to trap furs, they can trap what they want. I say that maybe Madam Justice Wilson has the answer in the Dick case or the Roberts case, and we are coming to that, where she says you look at the purpose. If the purpose was to trade in furs or fish for themselves for enough money to buy a canoe or whatever, that's part of the practice. But if it's clearly set up for a commercial purpose, it's not. And that's one place the line can be drawn but I acknowledge when I say that that there is no place that it can be easily drawn.
MACFARLANE, J.A.: Could I just take you back to the Baker Lake, Bear Island problem that Mr. Justice Hutcheon mentioned and tell you that the note that I made when Mr. Hutchins was making his submissions is that he says that, on the basis of Bear Island, all the Indians need establish is that they exercise sufficient occupation of the lands throughout the relevant period.

MR. WILLIAMS: Yes.
MACFARLANE, J.A.: And those are words from Bear Island in the Supreme Court of Canada. And he says that the result of the Supreme Court of Canada's treatment of Baker Lake is that they say, well, that's enough. That's his argument. The other argument is that, which I won't go into, which was made by Ms. Koenigsberg earlier in one of the other cases in the fall, was that that statement by the Supreme Court of Canada about Baker Lake, it does not have the effect of altering the application of the principles in Baker Lake.
MR. WILLIAMS: Well, my lords, I will take a good look at this over the weekend and I will come back with a good answer or I will pass the puck to somebody else.
MACFARLANE, J.A.: Nobody is suggesting you have got to answer it.
MR. WILLIAMS: The way I read that, the sufficiency -- the way I read that was that it limited the need for exclusivity. I interpreted that as meaning that you would still take the first two parts of Baker Lake and you would still say --
HUTCHEON, J.A.: You don't have to prove they are members, I think.
MR. WILLIAMS: -- that their ancestors were, well, members of an organized society; that they were an organized society.
MACFARLANE, J.A.: I think Mr. Hutchins said that -- acknowledged that he had to prove there was -- you only have to look to the organized society to be satisfied that the rate is communal. That's the note I took. That's not what he said. That's my -- my shorthand.
MR. WILLIAMS: I am sorry, my lord.
MACFARLANE, J.A.: That's my shorthand. You look at the organized society to see that the rate is communal and you look at it, as I understand it, to determine whether there was a society in existence regime which recognized the right about which we are talking because that's an essential feature, and that's Baker Lake.
MR. WILLIAMS: Baker Lake also says that the organized society had to occupy the specific territory over which the assertion was made. I would have thought that's essential.
MACFARLANE, J.A.: Yes. I think that also was part of Mr. Hutchins' advance, if you want to put it that way.

MR. WILLIAMS: And the fourth one, the occupation, was an established fact at the time of sovereignty whether you leave it there or whether you take my suggestion and say integral part of culture. One of those has to be present. I will take a look at that.

LAMBERT, J.A.: Before you adjourn for lunch, the one you are saying is -- you think is not a part of the test is that the occupation was to the exclusion of other organized societies.

MR. WILLIAMS: Yes.

LAMBERT, J.A.: But let me say this: If the right that's being asserted is a right to occupy, then I accept that. If the right that's being asserted as an aboriginal right is a right to the exclusive occupancy of the territory, then I would have thought you would have to show exclusive occupancy as a practice.

MR. WILLIAMS: Yes, my lord. I would agree with that if I may just say this before we break. What I will be saying later in the argument as it develops, what I will be saying is this: that exclusivity is one of the factors you look at to see how much protection the right deserves, if I can put it that way. If you did have and were able to prove that you had -- maybe the Haidas, for example, in Jack Woodward's presentation, if you had absolute proof that you had exclusive use of this forest, you were the only ones there since time immemorial and you had good proof of that, that gives you much higher protection than if you shared it with someone else. It doesn't mean that their right disappears or that theirs has been extinguished, but it adversely affects how much protection you can be given for it. In other words, exclusivity is not essential to establish the aboriginal right but it certainly weakens what you have got if you didn't have an exclusive.

LAMBERT, J.A.: It describes the nature or scope of the right.

MR. WILLIAMS: Exactly.

LAMBERT, J.A.: The characteristics of the right.

MR. WILLIAMS: Thank you, my lords.

TAGGART, J.A.: All right. Two o'clock.

THE REGISTRAR: Order in court. This court stands adjourned.

NOON RECESS

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

_____

Tannis DeFoe,
Official Reporter,
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RECONVENED AT 2:00 P.M.)

THE REGISTRAR: Order in court.
TAGGART, J.A.: Yes, Mr. Williams.
MR. WILLIAMS: Thank you, my lords. My lord, on the -- I was at the Baker Lake thing, and I may have to come back to this on Monday because I have not been able to track down everything I wanted, but I think I can say at this point that in the Bear Island case the quote that was referred to later in the Supreme Court of Canada was:

> "'...I will deal with the entitlement of the defendants to aboriginal rights in the Land Claim Area. I find that the defendants have failed to prove that their ancestors were an organized band level of society in 1763; that, as an organized society, they had exclusive occupation of the Land Claim Area in 1763; or that, as an organized society, they continued to exclusively occupy and make aboriginal use of the Land Claim Area from 1763 or the time of coming of settlement to the date the action was commenced.'"

And the Supreme Court said:

> "It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right..."

And I -- my position is, unless it changes between now and Monday when I finally get everything I'm looking for, is that that doesn't mean what I understand my friend Mr. Hutchins said, that everything else is out. It seems to me that what that does is to say you don't have to prove exclusivity. You still have to prove that somebody was there in some kind of organized fashion, in my respectful submission, and you still have to prove that they are -- they were occupying the land that they're claiming. You can't just say that -- if that's out

the window, it seems to me that there's nothing -- that they claim the entire country. And it seems to me that you still have to establish that the occupation -- that the occupation or the right or the practice was there at the time of sovereignty or apply some other tests that you may wish to apply. It does not mean simply that you prove sufficient occupation of the lands in question and that that's the single strand test. If that's what Mr. Hutchins was saying, I don't agree with it. But I may have to revisit this and say that only now that --

MACFARLANE, J.A.: Well, that was my shorthand note of what I thought he was proposing as the test in place of Baker Lake, and I may have misconceived that.

MR. WILLIAMS: No, we've looked at his factum, and we think that probably -- that your lordship's note is correct, and that being the case, then we -- he and I disagree. But if there's more to add, I will later.

I say then that sort of uses up part of the factum that appears below paragraph 20. That's what we're talking about. I say clearly that the cases establish, including Sparrow, but I haven't found the reference yet, that exclusivity probably isn't necessary, and there are a number of cases on the next page that I didn't bother putting in because I didn't think that the issue was going to be one that was in this much contention. However, as I say, we can look at them later.

Now, paragraph 23 is the sufficient occupation reference, and the two Bear Island cases are mentioned there, and they appear in the tab under 23. So I'll leave that, if I may, and go on. But I say that what does happen with respect to exclusivity, as I indicated earlier in answer to a question by my lord Justice Lambert, is that I think what it drives us to is a fair and logical conclusion that exclusivity is not a condition precedent or a requirement, but it's a very important consideration in terms of the scope of the right, the -- how the right can be exercised and so on.

Now, I'll move over to page 14 and paragraph 27. It just occurs to me -- I wasn't going to bother with 26, but it occurs to me in response to a question that was raised about the -- what is and what isn't an aboriginal practice, we say in 26 that aboriginal rights include practices that are in keeping with the culture and existence of the particular group. In

defining them, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of these rights at stake. And I say that, you know, quite frankly, if you were to ask -- ask the native people whether drinking whiskey was an aboriginal practice, they'd probably readily concede that it wasn't. It might have been fun, but it wasn't an aboriginal practice. And I think that -- that the perspective has to be gleaned from a number of sources.

In paragraph 27, the trial judge concluded that the appellants' claim of aboriginal rights must depend on indefinite, long aboriginal use before the assertion of sovereignty. And he says:

> "What the law requires, as the time-depth component of aboriginal interests, is use for aboriginal purposes for a long and indefinite time prior to the assertion and exercise of European-type sovereignty. Thus, if it were shown, for example, that the plaintiff's ancestors started to use the territory for aboriginal purposes shortly before European contact, or had recently acquired it through conquest of another aboriginal tribe or people, then an aboriginal interest would probably not be recognized."

WALLACE, J.A.: But in this case we're not concerned with this, are we? Isn't it pretty well established that the claimants were practising the aboriginal way of life for some considerable time before contact?

MR. WILLIAMS: Well, I think it arises in the fur trading issue.

WALLACE, J.A.: Does it?

MR. WILLIAMS: And I think it arises perhaps in your lordship's --

WALLACE, J.A.: Oh, I see. You're saying that it depends on the particular practice that we're concerned with, if they've been occupying this land for -- from time immemorial or close to that, but that doesn't mean to say that certain practices to which they might now wish to claim or identify or characterize as aboriginal should indeed be characterized as aboriginal.

MR. WILLIAMS: Yes. It's his lordship's characteristics, it's the Chief Justice's characteristics that trouble me when he says that, well, what if they just picked up this practice of canoe making from another tribe 20

years before contact.
WALLACE, J.A.: No, but in this case are there any facts to indicate that the practices they're now wishing to allege are aboriginal, they have an aboriginal right to did not exist for some considerable time?
MR. WILLIAMS: Well, the one that comes to mind is the fur trading. They would say that they're entitled to trade in furs, and his lordship says no, that fur trading was something that was picked up later. That's my understanding.
WALLACE, J.A.: I see. I was under the impression that this claim for title and ownership of land included the right to use it as in any manner they saw fit to do.
MR. WILLIAMS: That may be the position of the appellants. That is not the position of the respondents.
WALLACE, J.A.: Well, no, but I'm talking about the appellants' position. I see. And you're breaking that down.
MR. WILLIAMS: Yes.
WALLACE, J.A.: You say that may apply insofar as the land is concerned, but this particular practice of fur trading arose --
MR. WILLIAMS: Yes, I was trying to develop a test that would --
HUTCHEON, J.A.: It's the trial judge that used "to cut down the land."
MR. WILLIAMS: Yes. I'm trying to develop a test that, in my respectful submission, is a more workable and appropriate one than the learned trial judge did and one that, however, takes care of some of his concerns coming out of Baker Lake. You see, Baker Lake said sovereignty, date of sovereignty. Well, let's just take the drinking of whiskey. That makes whiskey drinking an aboriginal practice, if you want to be technical about it, because if that's all you have to prove, is date of sovereignty and that's what they did just before, it's an aboriginal practice. And his lordship, the Chief Justice, expressed some real concern about that, and I agree with him. I think that that's a bit silly, to talk about something that we know is a totally European injection into the culture.
WALLACE, J.A.: Yes.
MR. WILLIAMS: But, but the solution that he chose was to say so, therefore, you have to establish that it had a long, long time, and I'm suggesting that, with the greatest of deference, that test is a very, very difficult one for anyone to meet, and perhaps a better test is the test that we're suggesting, which is

that -- another test is to go back to contact and say whatever was there at contact and still there at sovereignty is an aboriginal practice or is something that can be protected, but if they picked it up between contact and sovereignty, can't do it. That gets into a lot of problems, as I see, as well. So I felt -- so we said --

TAGGART, J.A.: Well, that's a pretty short space of time in this case. The first contact seems to have been around, perhaps the earliest, 1810, if I'm not mistaken, 1810 to 1815.

MR. WILLIAMS: Yeah, in the case of the Gitksan of British Columbia.

TAGGART, J.A.: Perhaps some casual observance of Mackenzie making his way to the coast in the late 1870s, but -

MR. WILLIAMS: In the late 1780s.

TAGGART, J.A.: Sorry, 1790s.

MR. WILLIAMS: 1790s.

TAGGART, J.A.: Yes. But that doesn't do you much good in this case.

MR. WILLIAMS: No. And it's, I suppose, part of -- if we are to be looking at general tests that can be used throughout and then be of assistance in the parties to apply to their particular facts, I say in this situation that to suggest, as this test does, that if it had been recently acquired, precontact even, it's still not an aboriginal practice. What he says in the second one at page 388:

> "What the law protects is not bare presence or all activities, but rather aboriginal practices carried on within an aboriginal society in a specific territory for an indefinite or long, long time."

I challenge that. The third one seems more reasonable. But, on the other hand, as I say going over the page, the suggestion that we make and what the province offers as a reasonable test is that they were -- this is really our test. I suppose it comes from Baker Lake originally. We say that there was an organized society. They occupied and they used a specific tract of land over which they assert their claim.

HUTCHEON, J.A.: Sorry, what paragraph are you on?

MR. WILLIAMS: Sorry. This is a note I made to myself. I'm not reading from the factum. I'm saying that the test --

my factum does make the point that, in 28, in adding the further requirement to the Baker Lake test, that is the long, long time, the trial judge transformed a fact that existed in Baker Lake litigation, because in Baker Lake way up north, I suppose, there was really no difference between contact or the suggestion is there was no difference between contact and sovereignty and it just was so far north that it all happened very close to the same time, namely, that the Inuit people had occupied the lands in that case for a long, long time, into a legal requirement without offering, in the province's respectful submission, a proper legal foundation for the addition. So what we're saying is that the better approach, with respect, is to say that once you establish that you had a society that was at least somewhat organized and once you can demonstrate that they occupied or used a specific tract of land over which you're levelling a claim, which you're advancing a claim, and that it was an integral part of their distinctive culture, then it seems to me that that's a better test, and whether it was occupied or used and whether such use or occupancy was an integral part of the distinctive -- the distinct society has got to be one of those things that's done on a case by case basis. See, that's the position of the province on that.

TAGGART, J.A.: We have a problem in this case because the trial judge did not accept the testimony of some of the expert witnesses who gave evidence as to the origin of the ancestors of the present day occupants of the territory, but that aside, it does seem to me one could begin an assessment of the problem of occupancy by accepting that the ancestors of the present occupants had been in the territory one way and another for a very long time, I think 3,000 years or 2,500 years was tooted about, but if you go tiptoeing through the various witnesses who were accepted and rejected by the Chief Justice, I think out of it all one could conclude that the ancestors of the present occupants had been there for say 2,500 years.

MR. WILLIAMS: Yes, and he does agree with that, the Chief Justice does.

TAGGART, J.A.: I think that's the bottom line on that aspect of it. Then if you proceed from that point to what they did there, it would seem to me axiomatic at any rate that the ancestors of the occupants found there at the date of sovereignty or the date of contact -- the two

are so close together that there's not much to distinguish between them -- that what those occupants were doing at that time to sustain themselves was very likely being done throughout the previous hundreds of years of history. If it was only to what they could grow for themselves and catch for themselves from the streams and produce for themselves from hunting expeditions of mountain goats and bears and so on, if that's what the occupants at the time of contact were able to do for themselves, it was highly unlikely that their ancestors could do more than that, and indeed probably with more rudimentary means they had to do with less than that. Nevertheless, that was the only access to sustenance that they had, and that's what they used. So you have a long-time occupation by the ancestors of these occupants of the territory using the land if not in entirely similar ways, at least in somewhat similar ways in a much more rudimentary sense. Now, if you can get that far, have you not shown an occupancy sufficient to show that there is an aboriginal right?

MR. WILLIAMS: Yes, I think that does, but I think you may be able to show less than that and still get there. What I'm -- what I'm really quarrelling with is this suggestion, my lord. I am saying that to suggest:

> "Thus, if it were shown, for example, that the plaintiff's ancestors started to use the territory for aboriginal purposes shortly before European contact..."

Now, I don't know what shortly before means, but it might mean a year or it might mean 50 years, but if they did that, then the trial judge says:

> "...or had recently acquired it through conquest of another aboriginal tribe,"

then he says the aboriginal interest would probably not be recognized. And I suppose what I'm saying is that I consider, with the greatest of respect to the trial judge, that that may be an unworkable test and that -- and that it may be better to say that at the date of sovereignty, in this case, or if you want the date of contact, as you say, they're close together, but to stay with the Baker Lake line of cases and so on, that at the date of sovereignty, if that was an

integral part of their culture, whenever they picked it up or wherever they got it, as opposed to something that they got from us, if that was an integral part of their culture, then it's an aboriginal practice irrespective of whether it started 10, 15, or 20 years before contact or 3,500 years before. That's what I was trying to say.

WALLACE, J.A.: So I'm clear, are you saying that trapping was an integral part of the culture of the natives prior to contact?

MR. WILLIAMS: Yes. And his lordship --

WALLACE, J.A.: Then secondly -- just hear me out first and tell me where I'm going wrong here. Assume they never trapped in a large portion of the land to which they now claim ownership, aboriginal title, but they did after trapping became a commercially viable enterprise after the European contact. Are you saying because in this land to which they had never put that particular aboriginal practice into -- implemented it, because it was a practice which was an integral part of their culture, it now establishes an aboriginal right to ownership of the area to which they did not frequent before?

MR. WILLIAMS: No, I don't say that.

WALLACE, J.A.: I see. I was starting to wonder where this is all going.

MR. WILLIAMS: Well, if there's a brand-new area but there's no evidence that it was ever used for anything at all until contact and they started trapping in the area between contact and sovereignty for the purposes of commercial trapping, I would say that's not included, but as I understand the evidence --

WALLACE, J.A.: Why not?

MR. WILLIAMS: Why would it not be?

WALLACE, J.A.: Yes.

MR. WILLIAMS: Because I'm saying that I think a line has to be drawn somewhere, and I think the line can be drawn as Madam Justice Wilson draws it, if it's done for a commercial purpose. Leaving that aside, if I can go back to the earlier part of your question, if it can be demonstrated that they were trapping generally, just like they were hunting generally, throughout the area of the claim once a year, twice a year, they went through river valleys and they trapped, and they hunted, and they fished, and they picked berries, if that's what they did, and if, as we know the evidence is, they did trading precontact with other groups, the

Mackenzie grease trail and all the other trails through there, that they traded for oolichan grease, it seems to me that it's an aboriginal practice to fur trade in that sense. They traded furs for fish. It seems to me that they have established -- I'm talking hypothetically now, my lord. It seems to me they would have established a right to trade in furs for the purposes that they did, sustenance and so on, at that time. Now, if when the Hudson Bay Company came in they simply traded to the Hudson Bay Company for blankets as opposed to fish, I can't say that that's not part of the aboriginal right either.

WALLACE, J.A.: And if they traded for dollars?

MR. WILLIAMS: If they traded for dollars, it would be the same thing if the purpose is the sustenance. But it's like the casino example.

WALLACE, J.A.: What's sustenance?

MR. WILLIAMS: Well --

WALLACE, J.A.: I mean, when does that stop?

MR. WILLIAMS: There's three possibilities here, it seems to me, and I thought about them all, and I'm concerned about each. As I said, drawing a line is -- drawing a line is a very difficult thing. Either you say I don't care if they did trap beaver and trade the beaver in the early days, we're going to say fur trading is not an aboriginal practice because it leads to a tremendous commercial problem, or you can say because they used to trap furs and because they used to trade them for fish, they could trade them for anything and for any purpose, and they can set up a fur trade business or they can get 4 or 5,000 pounds of fish and fish at special times when no one else can fish, and they can sell those fish. And I suppose all I can say is that, again, we're not dealing with your every day kind of case. We're dealing with a case that needs special treatment, and it needs to have special lines drawn, as the chief's -- as they have done in Sparrow. And I say that maybe the place to draw the line, and I only make this suggestion, is to say that they are permitted to continue with the practices they had before in the areas they used before for the purposes that they had before, albeit with modern techniques. They cannot commence a brand-new practice, which I say is commercial fur trading to set up a profitable industry. Now, I'm just suggesting that a line can be drawn there. I'm not saying that -- I can't think of anywhere else to draw it, and neither could Madam

Justice Wilson.
WALLACE, J.A.: Okay.
LAMBERT, J.A.: Before we leave this question, the test you propound is as an integral part of their distinctive culture, and you're going to come back to Mr. Justice Wallace's example about the gambling and its modern form in casinos, and you've given the example about drinking whiskey. It seems to me that there may be a useful addition to your test in relation to the distinction between rights and freedoms. Mr. Hutchins raised this yesterday. It seems to me that you can say that things like drinking whiskey or eating chocolate cake or gambling are not rights. You're free to do them, but they're not protected with the status of rights. There is an analysis over several pages by Chief Justice Bayda in the Retail Clerks case, which is a 1985 5 Western Weekly Reports, I believe, discussing the difference between rights and freedoms, and it may be that that difference goes to what is integral in the integral part of their distinctive culture, but it may be easier to express the total test as being not just an integral part of their distinctive culture, but that those aspects that are integral parts of their distinctive culture that should be elevated or were elevated by them to the status that we would regard it as rights rather than freedoms.
MR. WILLIAMS: I'm not sure I follow the last part. I'm sorry, my lord.
LAMBERT, J.A.: Yes. That's all right. There is a distinction to be made between rights and freedoms.
MR. WILLIAMS: Yes.
LAMBERT, J.A.: All right. Even if you could say that gambling was an integral part of their distinctive culture, perhaps you should also say that though it was integral --
MR. WILLIAMS: I see.
LAMBERT, J.A.: -- it wasn't treated by them --
MR. WILLIAMS: As a right.
LAMBERT, J.A.: -- as a right. It was treated by them as what we regard as a freedom.
MR. WILLIAMS: I understand.
LAMBERT, J.A.: So that takes you down to those things that are not just integral, but maybe it's because there are correlative duties recognized by other people, but for some reason they're more than just a practice, they're integral, and they're protected by that. I'm only

indicating this not because I've reached any --
MR. WILLIAMS: No.
LAMBERT, J.A.: -- firm views, but because I will welcome any help I can get from counsel along those lines.
MR. WILLIAMS: Well, that's a very interesting point which we'll take up on the weekend. Can I just say this about it. I started out by looking at the rights and freedoms aspects in reference to the self-government issue, and I said to myself, all right, somewhere along the line there's a right to something, and there are some things that maybe aren't rights, and what are they, and I started out by saying, well, the so-called right to self-government, which most people seem to think was not included in 35, maybe it's not a right. Maybe the self-government is a freedom. And I refer in my factum to that, or my speaking notes. I call it a right or freedom because I'm just not sure. Certainly the appellants say they had a right to self-government, and the interveners mostly say there was a right to self-government, and maybe there is. And if it's not entrenched, maybe it will be entrenched before this case is over. But at the moment what is it? And I don't know. It's either a right or a freedom. Then I started looking at the other rights, and I said, well, what about the right -- what about their right to aboriginal title. Well, that's certainly been -- no one has ever suggested that's -- they say it's a legally enforceable right. The courts have said it's a legally enforceable right. So if it's a legally enforceable right, I have to accept that. And then I say, well, what does that include? What is aboriginal title anyway? Well, I think it's the right to occupy and use land. So if there's a right to occupy and use land, sui generis interest in land, interest in respect of land, if there's a right to do that, what does that mean in terms of some of the source practices? Is there a right to hunt, or is that a freedom that hasn't yet made it into a right because it's just something you do on the land? And I met myself coming around the circle on this whole business and felt that except for the right to -- except for the issue with respect to self-government, which hasn't, I think, been entrenched, we can call it a freedom or a right, the other ones -- we know that fishing is a right. It's been dealt with in Sparrow. So I come back to -- come back to where we were with respect to how you can determine it, and I think

that's a valid contribution, my lord, Justice Lambert, to point out, that such things as gambling, which nobody really thought of as a right, an aboriginal right -- it isn't even an unaboriginal right, I don't think.

WALLACE, J.A.: How do you know no one ever thought of it as an aboriginal right?

MR. WILLIAMS: I don't know that.

WALLACE, J.A.: Well --

MR. WILLIAMS: No, it hasn't been talked about.

WALLCE, J.A.: You're giving a subjective viewpoint. It might have been a very desirable way of relaxing, much like going on a hunting trip or anything else, fishing.

MR. WILLIAMS: I don't recollect any evidence of anybody trying to suggest that gambling or drinking or --

WALLACE, J.A.: Well, no, drinking is another matter. I don't -- there is a lot of --

MR. WILLIAMS: They're both bad though, my lord.

WALLACE, J.A.: No, but there is a lot of historical material stating how the natives participated at great length in gambling, gambled all day and all night and that type of thing because they took a very keen interest in it.

MR. WILLIAMS: Well, I think if it was a pleasurable activity along with a lot of other things that they did, it may be a freedom.

WALLACE, J.A.: What I'm getting at really is your definition of a right. It seems to me a right is something that the social laws of the particular culture will enforce and protect, and there is a correlative duty on others to associate with that right. That's why I have difficulty seeing how the aboriginal right that's recognized by European -- after contact by the Europeans could exist precontact. It seems to me it's an aboriginal right because the Europeans by reason of the conduct of -- which arose at the time of discovery, et cetera, was recognized, either by European law or by international law or whatever, as something that these -- the aboriginal people were entitled to have observed and protected by the Europeans, and I have difficulty in that right existing before. I could see the practice existing before contact, but I would have thought the right and hence the correlative duty arose after contact. Now --

MR. WILLIAMS: I think that you have hit the nail on the head, my lord. The difficulty I'm having with this whole

thing, and I'm sure we all are, is that we know that somewhere in there there's a right. It's been recognized, and there's a corresponding duty. That's not a bad start for a definition of a right, it seems to me. It's recognized by everyone, including the European settlers and so on, that there's such a thing as aboriginal title, Indian title, aboriginal rights with respect to land, whatever you want to call it. There is a recognition of the right, and there's an obligation to do something about it until it's extinguished. You can extinguish it, but if you don't extinguish it, you have to recognize it, and certain things have to be done. So there is a corresponding duty. It's a low-level right until it hits the Constitution and gets elevated, but it's there.

Now, my next question is, well, what does that include? What does it mean if you tell me I've got an aboriginal right or aboriginal title? What have I got? Well, you've got a right to live somewhere on some land and to cultivate a field and to go hunting and fishing. So I've sort of brought them all in as part of the right in that way, but you could break them down, and perhaps they should be broken down. The problem with breaking them down is once you get below the ones we all know about or hear about, like hunting and fishing and berry picking and so on, and you start thinking about gambling, then you say to yourself, well, I hadn't thought about that one. That's never been suggested as a right, so maybe it is a freedom not yet a right. But I tried to avoid the confusion by saying there's an aboriginal right to use and occupy certain lands that can be proven to have been occupied by ancestors and to do those things, to do those things on that land which it can be proven were an integral part of their culture. And that's the best that I've been able to do to try to avoid the thorns that you find in any other way you look at it, but perhaps that's not correct.

Now, I agree that it's pretty hard to say that there's a right to gamble, even if it was a practice, because where's the obligation and where's the recognition. I know of no recognition of that sub-right. The right to cut trees to make canoes and totem poles is perhaps another one. I know of no actual recorded right to cut trees, but certainly part of using and occupying the land that's what they did, just in the same way that they fished and hunted.

So I'm sorry that it tends to go around in a circle, but I believe that if we can look at it that way and avoid the long-term test and in dealing with -- if I can now come to the frozen rights, which we're part way through anyway, and I'm on page -- I was on page 15, and I say the sui generis nature of the aboriginal right. The aboriginal rights in respect of land protected by 35(1) are sui generis in the sense that they are unique and they're difficult, if not impossible, to square with traditional property and trust law. Just -- I suppose apropos what we were just saying and what -- in terms of the scope of these rights and so on, I recall that Pierre Trudeau, our previous prime minister, once made the statement that the democracies are ungovernable, have become ungovernable, and by analogy it seems to me that the scope and content of sui generis rights is undecidable in its general form. I think it's undecidable. I don't think you can say that a sui generis right in respect of land is as follows and then just define it. I don't think it's possible. I think what we have to do is that we have to try to describe the nature of the right, and we probably have to turn our minds away from the British-Canadian property channel, the land law channel, in order to deal with that.

And I say that, carrying on in paragraph 29, the statements that have been made by the courts:

> "The inescapable conclusion from the court's analysis of Indian title up to this point is that the Indian interest in land is truly sui generis."

Then he goes on to say:

> "It is more than the right to enjoyment and occupancy although, as the Chief Justice pointed out in Guerin, it is difficult to describe what more in traditional property terminology."

And in the Sparrow case:

> "Courts must be careful...to avoid the application of traditional common law concepts of property as they develop their understanding of...the sui generis nature of aboriginal

rights."

And in Amodu Tijani:

"There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely."

The sui generis nature of aboriginal rights is also reflected in the fact that aboriginal rights are communal. So we have to look at the characteristics of the right to see what it is, and we have to turn ourselves, as I say, we have to switch the channel from our thinking about our British traditional land law concepts to something we haven't yet discovered. And I say that here are the characteristics. The sui generis nature of the aboriginal title is that it's communal, and it's advanced as a communal right and not as an individual right.

The sui generis nature, paragraph 31, of aboriginal rights is also reflected in the fact that they can't be alienated, other than by surrender to the Crown. That's something very different. It doesn't necessarily mean that it's personal or that it's proprietary or neither, but it means that it's different. It can't be alienated. That doesn't sound like a property right at all. And we say, of course, these are non-proprietary rights, but it doesn't necessarily mean that it's limited to being what has been described as a personal right.

HUTCHEON, J.A.: I'm sorry, I hadn't heard that before.

MR. WILLIAMS: I'm on page 16, paragraph 31.

HUTCHEON, J.A.: Yes, I appreciate that. You agree with the trial judge it's non-proprietary?

MR. WILLIAMS: I do.

HUTCHEON, J.A.: Well, I hadn't heard that before.

MR. WILLIAMS: I also agree that on this new channel, if I can put it that way, with the remarks of the Supreme Court of Canada when they say, in effect, it may have some aspects of proprietary, but we say --

HUTCHEON, J.A.: Oh, yes, you said in respect of land, didn't you?

MR. WILLIAMS: Yes.

HUTCHEON, J.A.: Yes.

MR. WILLIAMS: It may have some aspects of a proprietary right and aspects of a personal right, but it is not limited to either. And it is not a proprietary right in the sense that it could be ownership. That's my position.
HUTCHEON, J.A.: Yes.
LAMBERT, J.A.: But you can own it?
MR. WILLIAMS: It's got something to do with the land.
LAMBERT, J.A.: Yes. But a right of occupancy would be regarded, in our terminology, as a proprietary interest in the land, if you own the right to occupy land.
MR. WILLIAMS: Well, if you owned the exclusive right to occupy black acre, I would have to say that's either awfully close to or is a proprietary right.
LAMBERT, J.A.: Yes.
MR. WILLIAMS: But if you simply in a communal way lived in an area which certain parts were allocated to certain people, unless there was evidence of exclusivity, evidence -- acceptable evidence that you had an exclusive right, and unless it was in some way alienable, then I would say that it's not one of those things that we would call a proprietary right, and so I'm basing my non-proprietary argument --
HUTCHEON, J.A.: It may make no difference, I suppose, if -- it's not -- describing it as non-proprietary, as I understand the discussion, leads to an easier removal than proprietary. Isn't that the only difference we have?
MR. WILLIAMS: Well, it's true that it leads to an easier removal because --
HUTCHEON, J.A.: By extinguishment.
MR. WILLIAMS: -- one could say if there's a proprietary interest they could go in and get, I suppose, a caveat or a lis pendens or they could have --
HUTCHEON, J.A.: No, I was thinking of the extinguishment argument. I think the argument runs if it's non-proprietary, it's much more easily extinguished than if it's proprietary.
MR. WILLIAMS: Yes, I think that's true.
HUTCHEON, J.A.: But when you talk about not alienable and that, the rights of way over the common in England are not alienable.
MR. WILLIAMS: The rights?
HUTCHEON, J.A.: The rights of way over the common in England, shared by the whole village, they can't be alienated, but they're certainly a proprietary right, it seems to me. But it may -- the use of the terminology may not

help us very much.

MR. WILLIAMS: It doesn't. I think that we have to steer away from -- well, first of all, I submit there's no case for ownership at all, but I say also that if you steer away from the use of the word proprietary and treat this as the -- and try to develop whatever a sui generis interest in respect of land is, it may be more fruitful in the end, I agree.

Now, there's an interesting analysis by Mr. Justice Estey in the Smith v. The Queen case. I don't know that I need to take you through it, but what he says really is that if the Crown takes back an Indian title, an aboriginal title, and I would certainly urge your lordships to read Smith v. The Queen, it's a very tightly reasoned decision of Mr. Justice Estey, and he says that if you were to take what is called aboriginal title, whatever that may mean, and you were to surrender it, it doesn't get transferred to the federal government. It disappears. It no longer exists. It's gone. It's just evaporated, because once they surrender their interest to the federal Crown, it's all over. There is nothing left to deal with. And his analysis, as I say, is worth reading, but I don't think that I should bore you with reading through it. There is one passage maybe I'll bore you with, if I can find it. Here it is. It's in tab 31 and -- tab 31, and it's the second -- first green sheet in, Smith v. The Queen.

TAGGART, J.A.: What was the page number?

MR. WILLIAMS: Page 568.

TAGGART, J.A.: 568?

MR. WILLIAMS: Yes. It should be right after the beginning of tab 31.

TAGGART, J.A.: Okay.

MR. WILLIAMS: Sorry. At the bottom he says:

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

Then he says this:

> "The release, therefore, is of a personal right which by law must disappear upon surrender by the person holding it; such an

> ephemeral right cannot be transferred to a grantee, be it the Crown or an individual. The right disappears in the process of the release, and a release couched in terms inferring a transfer cannot operate effectively in law on the personal right any more than an express transfer could."

So I think what he's saying is that this odd, unique sui generis interest in respect of land isn't a proprietary thing. It disappears.

Now, I have to then bring you back in the Paul case to that quote, which is that -- this is at the bottom of page 16 -- "as a 'personal and usufructuary right,'" it was described in St. Catherine's Milling.

> "This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown."

Now, that leads us I'm not sure where, but it leads us back where I started on this page, that it's got to be something different. Then at the bottom after that it says:

> "It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it as a personal, usufructuary right."

This is from Guerin.

> "Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from property law. There is a core of truth in the way that

> each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate."

And that's sort of like leaving us in the middle of a movie and saying tune in next Tuesday. I don't know -- we have to go on from there, and I only say that it may be painful for us to lift the anchor that we're so used to in our thinking, but if you take the guidance from the Guerin and the Paul case, painful though it may be, these concepts have got to be put aside, our thinking has to be changed, and the sui generis nature demands a new approach. It's probably more than personal or usufructuary in the meaning that we've given to those words, and it may have some aspects of a proprietary title, but what it is not, in my respectful submission, is ownership, at least by the meaning that we attribute to the word ownership, and I'll come back to that a little later.

And then I move on, my lords, to D, the relationship between aboriginal rights and Crown title, and I say that the province agrees with the learned trial judge's conclusions that it's unnecessary to pin down an exact date and that we all, I think, are prepared to accept 1846 as sovereignty. Other dates could be argued, but it seems to make sense. And I needn't refer to any of those cases.

I say that British sovereignty over lands now included within the province is not contested by the appellants, and that we know they agree to the Crown sovereignty over the land, and that the Crown in right of British Columbia owns the allodial title to the land by virtue of the assertion of Crown sovereignty. It's my respectful submission firstly, and this is also in agreement with the trial judge on both counts, that sovereignty, the assertion of sovereignty and the, therefore, gaining of the allodial title, and I'll be back to that in a moment, was sufficient to terminate any concept of ownership of land by the appellants. And the -- but I say if that were wrong, and the learned trial judge says it's right, we agree that it's right, but if that were wrong, then Calder II would have -- which took from the allodial title and simply identified that the fee belonged to the Crown for the purposes of setting up a conveyancing

system, it was not itself a conveyance, that Calder II by creating that would have done it in any event. I'm talking ownership, not aboriginal rights. I'm saying that the ownership of the land, which is a totally separate concept from aboriginal rights -- aboriginal rights, in our position, not only survived sovereignty, as everyone else said it did everywhere else, it survived the Calder documents because those documents did not, and I'll be coming to this on Monday, because those documents taken together did not extinguish, and there must be a clear and plain intention, which there wasn't there, in our submission. So aboriginal rights continued to ride through the sovereignty and Calder documents, but ownership ended with sovereignty, and if it didn't, it ended with Calder.

The Supreme Court of Canada -- I don't think I need to take you through this very much. You've heard it before. The Supreme Court of Canada acknowledged the underlying Crown title in Sparrow where Chief Justice Dickson and Justice La Forest said:

> "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

Because they pre-date Crown sovereignty and are in no way related to the existence of Crown title, aboriginal rights do not fit within the common law of estates, where private legal interests in land are, factually or fictionally, granted from the Crown. It's unhelpful to even attempt to analyse the aboriginal rights using concepts of traditional land law. We've been through that.

And paragraph 38 is a paragraph I'd like to take up and put to your lordships as a way to look at this because I think it's very helpful, at least it's been very helpful to me, and that is that it comes down to this, that the minute that sovereignty is asserted in British Columbia, the allodial title, and I should have the definition handy, but I have it here

somewhere, the allodial title is everything. There is just nothing left. It's the title. It's the whole thing. So you don't have to talk about estates of land or interests in land or anything else. That is the underlying title. And all estates and interests stem from that. Everything that we can think about in our land law comes from the allodial title, which I finally learned to pronounce. I was calling it the alluvial title, but that's not the right pronunciation. It all comes from that title, and it comes down in the form of estates in fee simple, life estates, other kinds of Crown grants, leases, and any number of interests or estates in land. And the difference between -- and so you can look at it vertically, and you can say it all starts at the top with Her Majesty the Queen, and it works its way down to perhaps the lowest form of an interest in land. You know, it may be a one-day lease or something, but it starts with a fee simple, which is the highest estate in land. But the Indian title, the aboriginal title has nothing to do with that movie, and it isn't part of that vertical graph. It's horizontal. It's over here. And I say that the -- that the --

WALLACE, J.A.: Where is here? I'm sorry, your sketch has sort of got me lost.

MR. WILLIAMS: I'm suggesting --

WALLACE, J.A.: You're saying a fee simple and allodial title are the same, or are you?

MR. WILLIAMS: No, no. I'm saying that the allodial title is everything. It's the highest possible -- it's the highest possible --

WALLACE, J.A.: It's not the origin, it includes everything?

MR. WILLIAMS: It includes everything.

WALLACE, J.A.: Every title that --

MR. WILLIAMS: Everything that could be is included in the original title, which is the allodial title. A radical title it's sometimes called.

MR. WILLIAMS: A radical is the same, a radical is the same as allodial?

MR. WILLIAMS: Yes. Our respective homes that people own are not in theory, they may be in fiction, but are not in theory owned by us really. They are owned by Her Majesty the Queen, and what we have is the highest estate, which is a fee simple grant.

WALLACE, J.A.: What has she got?

MR. WILLIAMS: She's got the allodial title.

WALLACE, J.A.: Well, that's what I was saying. A moment ago

you said she had the fee simple. That's why I --
MR. WILLIAMS: I'm sorry if I did say that.
WALLACE, J.A.: Well, it may be I misinterpreted what you were saying.
MR. WILLIAMS: I didn't mean that, and I apologize if I did. I meant to say --
WALLACE, J.A.: So the fee simple is the first down-grading, if you wish, from the allodial title?
MR. WILLIAMS: Yes. And indeed what happened in the Calder documents was that she who owned all and didn't have to worry about any estates granted herself a lesser estate, and the reason she did that was, the reason she created the fee simple was that so she could get on with granting something to the settlers, and we'll explain that, if I may, later. For the moment what I'm talking about is that the allodial title is the origin, it's at the top, it includes everything, and there's nothing else that anyone can own, nothing. What comes out of that is a grant down to the fee simple and the other estates in land and the other interests in land. Now, what I'm saying is that aboriginal title is not part of that tree. It's a horizontal concept. It's over here. And it's a burden upon the Crown or a burden upon the Crown's title. It isn't something you can go to a land registry office and deal with. It isn't something that was granted by the Queen. It didn't come because of sovereignty. It was here before she got here. It was here before sovereignty was asserted. And whatever this -- whatever this concept is, aboriginal title, it is a burden upon the Crown title. It can be looked at horizontally as opposed to equivalent to a lease or equivalent to a fee. Because it's there when the Crown -- my lord, because it's there when the Crown asserts sovereignty in British Columbia, it has to be dealt with, it has to be considered as something, and what the courts have treated it as is a burden upon the Crown or a burden upon the Crown's title, and that's the manner in which I understand that it is described, and it took many hours to get that through my head, but that's the manner in which it's described, and this -- my idea of the vertical and horizontal is simply that it made it simpler for me to see it, that's all, and I just offer that to the court. In no way can you consider the aboriginal title to be either above or beneath the Crown's title because it's a totally separate concept. And I say

that's another reason why I say it's non-proprietary. It's a burden. It's an obligation.

HUTCHEON, J.A.: It can compete with proprietary interest.

MR. WILLIAMS: Yes.

HUTCHEON, J.A.: It can compete equally with proprietary interest.

MR. WILLIAMS: Well --

HUTCHEON, J.A.: That's the only reason they use different names, to stop it from competing with proprietary interest. Now, I --

MR. WILLIAMS: I think that may be correct. I'd like to make sure that I haven't --

TAGGART, J.A.: You're not giving away the store.

MR. WILLIAMS: I just want to make sure --

TAGGART, J.A.: You can think about that while we're having a break.

MR. WILLIAMS: I just want to make sure I didn't swallow a hand grenade.

HUTCHEON, J.A.: I was using the quotation out of Guerin where he said that in the past they had not elevated it to a proprietary so as not to compete with proprietary interest.

MR. WILLIAMS: But it certainly in some senses does compete.

HUTCHEON, J.A.: Well, that's what I wondered.

TAGGART, J.A.: Five minutes.

THE REGISTRAR: Order in court.

AFTERNOON RECESS

THE REGISTRAR: Order in court.

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

MR. WILLIAMS: My lords, I'll just read one more paragraph and then get you off this vertical-horizontal plane so we can go back to the next. Paragraph 38. Although the Crown may be said to possess underlying title, aboriginal rights are best viewed as a feature of a nation to nation relationship on a "horizontal" plane instead of rights derived from the Crown, such as property rights, which reflect a "vertical" relationship with the Crown. The extent to which the Crown is free to regulate or extinguish this burden by unilateral action, and legislate with respect to lands and resources within the province notwithstanding the presence of aboriginal rights, is addressed below. And that sort of sums up what I was trying to say about that.

So I move now to the scope and contents of the

aboriginal rights, and I say that I think Kruger put it perhaps as well as it could be put.

> "If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis."
>
> "Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances..."

So again we note here that the trial judge has rejected much of the evidence, and the provincial government supports the trial judge in that regard. It doesn't mean to say though that in certain areas, such as aboriginal rights, that general propositions can't be made in your lordships' judgment, but not to deal with, I say, with scope and content.

The precise bundle of rights that a particular aboriginal community can assert may depend on a number of factors, including the nature and the kind and the purpose of use or occupancy of the land by the aboriginal community in question, the extent to which the use or occupancy was exclusive or non-exclusive, the size of the territory over which there was use or occupancy, the extent to which aboriginal people possessed or occupied the land in question or simply used the land as a non-possessory -- in a non-possessory manner. And I have in mind here what I already mentioned earlier, that the rights which they have with respect to village sites would be put on a much higher plane than the rights where they hunt goats every two years, but that is not to say that the place where they hunt goats is not a part of their aboriginal claim. It simply is a use which is considerably lower than the other one.

At one end of the spectrum of entitlements aboriginal rights could include exclusive rights of residence, use and enjoyment, exclusive rights to hunt, trap, fish, as well as exclusive rights to the use of forests.

At the other end of the spectrum the aboriginal

community could possess a single non-possessory right to engage in a particular practice not in relation to a particular plot of land but over some portion of territory not otherwise taken up by competing users, and that's the range.

The aboriginal rights with respect to land may vary dramatically from community to community.

In paragraph 44 I say that the aboriginal rights are not frozen by reference to the date of assertion of the British sovereignty. Although an aboriginal community must demonstrate that they constituted an organized society and occupied or used the lands in question at the time of British sovereignty, the character, and perhaps I should substitute for that the manner -- instead of saying character, I think what's more accurate is the manner in which the right is used, the manner of use of the rights that thereby accrue to a community can evolve over time. While in some contexts aboriginal rights may be restricted in certain types of activity, modern as well as traditional ways of engaging in the activity are protected under the mantle of aboriginal rights, and I think that's what's known as not freezing the rights.

I want to deal for just a moment with the frozen rights because the suggestion in this factum is not quite accurate at all. It's unfair to the learned trial judge. It says the province submits that, with deference to the views expressed by the learned trial judge, the better view of the law is that aboriginal rights are not frozen. It's not quite fair to the trial judge to say that because in his reasons at page 390, which are in the book under tab 44 -- page 390. It's about five pages in. Page 390.

TAGGART, J.A.: It is just ahead of the last green divider.

MR. WILLIAMS: I'm sorry, my lord.

TAGGART, J.A.: I say it is just ahead of the last green divider.

MR. WILLIAMS: Yes. Thank you. He said this at the bottom last paragraph under "Long-time aboriginal practices," third line down:

> "I have concluded that the aboriginal activities recognized and protected by law are those which were carried on by the plaintiffs' ancestors at the time of contact or European influence and which were still being carried on at the date of sovereignty, although by then with modern

techniques."

So his lordship recognized and it's unfair to say that he tried to say the rights were totally frozen because he agrees they shouldn't be. But, on the other hand, the -- I don't know whether there is -- are there two pages in your lordship's factum, frozen rights?

TAGGART, J.A.: There is one preceding that at 112. The page in my book that precedes 390 in between the same green sheets is 112.

MR. WILLIAMS: No, I'm sorry, I was looking back at the factum.

LAMBERT, J.A.: Where do you want us to look?

MR. WILLIAMS: At page 19.

LAMBERT, J.A.: There is no heading "Frozen Rights".

MR. WILLIAMS: Perhaps I can simply say this, that the respondents disagree that the aboriginal rights are to be frozen, if there is indeed anyone who still thinks they should, in the form found at the time of British sovereignty, and this is in line with the -- defining the practices or activities which are protected as aboriginal rights, and they must be drawn -- the line must be drawn somewhere. The respondent submits that Madam Justice Wilson in Horseman suggested the appropriate point at which to draw the line. Now, I believe this is in tab 44, and it's page 367 of the Horseman decision. After the first green sheet.

TAGGART, J.A.: 367?

MR. WILLIAMS: 367. It's about a quarter of the way down, after the word "100 years". Just after the first green sheet, page 367 of Horseman, and it's Madam Justice Wilson. And she says this:

> "Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words 'for food'. It will, of course, be a question of fact in each case whether a sale is made for

purposes of sustenance or for purely commercial profit."

Now, I must say I'm not a hundred per cent comfortable with that as a test, but as they say about democracy, it's not very good, but it's better than any other form of government. It's the best test I've been able to come up with because nothing else seems to work, and if we are fashioning new ways to deal with these matters, then on a case by case basis, if the aboriginal practice was -- or if the practice that's being questioned was one which was for sustenance, the trade was, then it would be allowed, and if it was one which you could establish was purely for commercial profit, then it would not.

TAGGART, J.A.: Of course, we have a test of that, of the scope of that, in --

MR. WILLIAMS: In Gladstone.

TAGGART, J.A.: -- the B.C. Smokehouse case and in the van der Peet case, each of them involving selling fish.

MR. WILLIAMS: Gladstone -- one of the cases was a large, a very large number of fish, 4,000 pounds.

TAGGART, J.A.: Well, it was -- yes, it was. Legally caught.

MR. WILLIAMS: Yes.

TAGGART, J.A.: Legally caught in the sense that they were caught under approved fish licence or other licence and then sold.

MR. WILLIAMS: Well, it is a -- I find it a very difficult area, and as I say, we -- in difficult areas you try to find what seems like a sensible solution and do the best you can. That's the best that I have been able to do. You have to ensure, as I say, ensure that there is some flexibility in the exercise of the right with the passage of time, but to ensure that these practices remain rooted in an aboriginal context. And this is, I think, consistent with the Attorney-General's position in the Gladstone case.

The references, my lord, and this goes back to my lord Justice Wallace's earlier question, the references on the fur trade are to page 111, 111 of the trial judgment. Now, that's in -- under tab 44, same tab.

WALLACE, J.A.: 112, is it, the next page in your tab, paragraph 16?

MR. WILLIAMS: Well, that's another reference to the learned trial judge saying that:

> "The use of modern implements such as mechanical traps and guns since the time of contact does not change the nature of an aboriginal right."

I mean, it shows his awareness of that.

WALLACE, J.A.: No, I -- oh, I see. Yes.

MR. WILLIAMS: Yes, I was looking for -- it's the next green sheet after that, 111. There are two pages there I want to refer to because this is evidence. He says in 111 under number 14:

> "Prior to the commencement of the fur trade these early aboriginals took some animals by snares, dead falls and other means, but there was no reason for them to travel far from their villages or rivers for this purpose..."

That's the finding about the fact that trapping was going on itself.

And on page 392, which is the next page, his lordship says under "Commercial activities":

> "While the Supreme Court of Canada will ultimately be called upon to finally settle this important question, I am not able to avoid expressing an early judicial opinion. In my view the purpose of aboriginal rights was to sustain existence in an aboriginal society, that is, to hunt and fish and collect the products of the land and waters for the survival of the communal group. There would undoubtedly be some bartering but that would be in sustenance products likewise obtained by aboriginal practices."

And what I say from that is that in dealing with the fur trade issue, that the bartering that took place was for sustenance purposes, and that's a protected right. The bartering that took place or might be taking place now for commercial purposes would not.

And, my lords, that moves me over to page 20, and I simply say that the -- this approach would permit the aboriginal people to adapt to conditions that are the result of colonization and not condemn them to assimilation or antiquated practices. I think the rest of it is -- you've heard before.

Well, I think the point I have to make on page 21

of my factum is to simply -- it's somewhat repetitive, but to say that the more exclusive and extensive the aboriginal use and occupation at the time of sovereignty, the greater will be the variety of protected uses. However, the more non-possessory and use-specific the aboriginal rights, the more likely an aboriginal community can only engage in the original practice. And I say that adjustments to the content of aboriginal rights will be required and that can only be accomplished through negotiation.

Now, I'd like to move back to my speaking notes to deal with the concept of ownership, and that is at page 5 of the speaking notes. And as I explained at the beginning, we didn't break down our factum into what I think it's now important it be broken down into, and I've dealt with the first part of aboriginal rights, and I move on to ownership. I say firstly -- and again, I will follow the same format in the speaking notes, to tell you the appellants' position, the respondent's position, and what the trial judge did. The appellants are not satisfied to rest their case upon a claim for aboriginal rights. They claim ownership to the land, and by that I am assuming, my lords, that it's something roughly equivalent to a fee simple ownership that they're claiming.

HUTCHEON, J.A.: And you've said that that's no longer being pursued?

MR. WILLIAMS: Well, I am understanding from my colleagues that on Monday that it was suggested that there be some interim declaration. I am suggesting, and I wish to continue arguing, that ownership should be decided.

HUTCHEON, J.A.: In Ms. Mandell's notes on page 5 the language is the rights include a proprietary interest in the territory, and it's not full ownership, but you want to pursue the full ownership?

MR. WILLIAMS: I'm afraid I have to for two reasons. One is I don't agree with leaving it hanging, and I don't agree -- and I think the proprietary interest may be something I have to deal with in the ownership notes that I've got.

The definition of ownership I have set out here is:

> "...the most extensive right allowed by law to a person, of dealing with a thing to the exclusion of all other persons, or of all except one or more specified persons. It is

> therefore a right in rem... Ownership is essentially indefinite in its nature, but in its most absolute form it involves the right to possess and use or enjoy the thing, the right to its produce and accessions, and the right to destroy, encumber or alienate it... In English law absolute ownership can only exist in chattels as all land is subject theoretically to the obligations of tenure; but practically the fee simple in the land gives absolute ownership..."

That's from Jowitt's Dictionary.

And the appellants' position appears from their pleadings on paragraph 211, and that's in the white book under E. It's after the first three white pages, the first green sheet in E.

> "The appellants submit that when an aboriginal group has exclusive possession of land within defined boundaries, and can pass that land to other aboriginals by alienation or inheritance, then its interest in the land is properly characterized as ownership."

Now, that's the claim, and I say that the trial judge was correct in rejecting as a matter of law the appellants' claim of ownership. Even if the occupation of the land by the appellants' ancestors did amount to ownership prior to sovereignty, and we don't admit that it did, but even if it did amount to ownership prior to sovereignty, it did not survive the assertion of sovereignty. And this is so because it's impossible to conceive of ownership, as we understand that phrase, to be in the hands of the appellants while they're at the same time acknowledging that the Crown acquired the underlying title when sovereignty was asserted in 1846. There can't be, in this sense, two owners.

The inalienability feature I've already pointed out in reference to the previous notes, but the inalienability feature of the sui generis interest in respect of land is an important reason for finding that it couldn't possibly be ownership. And I've already dealt with the surrender of rights and, again, the Smith case there.

The failure of the appellants to prove exclusive

use or occupation is another fatal blow. I'm on page 6 of my notes after the St. Catherine's case. As I say, the failure of the appellants to prove exclusive use or occupation is another fatal blow to the establishment of ownership.

The bulk of the evidence that they put in was directed not to aboriginal rights, but was directed to ownership of the whole territory.

Whatever interest the appellants had, it was clearly not ownership under the Canadian law, and their claim is not supported by any authority, and that's mentioned by Chief Justice Dickson in the Guerin case when he says:

> "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right."

So ownership is denied in law. And Sparrow states at the bottom of that page, the last three lines:

> "...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

St. Catherine's says the same thing, and I won't repeat that clause. Bear Island says the same thing.

I say that the province generally adopts the submissions in the previous factum of the province, Part IX, on the issue of ownership and says that as a matter of law the trial judge was quite correct in dismissing the claim.

That takes us to G. I say that the -- and this is only for the convenience of your lordships really that the -- I'm not going to refer to them. The learned trial judge's principle findings in reference to the issue of ownership appear at pages, and they're listed there. And they're in the white book. They're all in the white book for you, but I'm not going to be referring to them. Just one reference that appears here where the judge said:

> "To put it differently, I have no doubt that another people, such as the Nishga or Talthan, if they wished, could have settled at some location away from the Gitksan or Wet'suwet'en villages and no law known to me would have required them to depart."

Now, I realize there's some conflict on that, and the evidence that was put in by my friend Mr. Rush dealt with somebody floating down a stream and the neighbours dealing with each other on trespass issues. That was not considered to be sufficient to establish it, and we accept the findings of the learned trial judge.

It's the respondent province's first position that since the appellants have failed as a matter of law to establish a right to ownership of the lands, no discussion on the evidence is necessary, but the learned trial judge did, as an alternative ground for disposing of the claim, hold that as a matter of fact the appellants had, in any event, failed to establish the claim for ownership.

And the province urges this court to accept generally the findings of fact of the learned trial judge in reference to ownership but underlines the need to distinguish the application of those findings in reference to the issue of ownership and the issue of aboriginal rights which are addressed elsewhere. His findings principally are found at pages 372-373, and if I may, I'll just run through them because it's important to keep them in mind.

The respondent's comments on the facts are then these. It may not be a fair characterization of the evidence to say that the appellants' ancestors "lived" only in their villages. They certainly used and occupied other parts of the territory for various "living" purposes ranging from seasonal residence to gathering berries. Certainly, though, this presence in the territory was not proved to be so extensive and exclusive as to amount to ownership of the whole territory.

While the appellants' ancestors harvested their subsistence requirements from parts of the territory, the evidence didn't establish a policy for management of the territory claimed or concerted communal conservation.

To govern themselves according to limited self-

governance does not establish that they owned the land.

While the appellants maintained institutions, the evidence did not establish that all of their present institutions were recognized by their ancestors.

While the ancestors may have expressed their "ownership" of the territory through their regalia and adaawk, kungax and songs, these items are not sufficiently site-specific to assist the appellants to discharge the burden of proof.

There's sufficient doubt about the antiquity of the crests and poles to doubt the claim of ownership.

While the feasts system evolved --

HUTCHEON, J.A.: I'm sorry, when they say doubt about the antiquity, how far is it recognized by the province that the crests and poles go back because it just seems to me it wouldn't be suddenly in 1892 they'd start to develop crests?

MR. WILLIAMS: No, I don't -- I'm not suggesting for a moment that the trial judge found that. I think that the reference -- I'll just see if I can find it, but the reference that I'm -- what I'm trying to say here is that I believe the trial judge was saying that the mere fact that they had even since time immemorial developed crests and poles does not establish clearly to his mind that it's an ownership -- that it means ownership.

HUTCHEON, J.A.: Oh, yes. Well, I can find that part. Perhaps we shouldn't hesitate over this then, but I'm just wondering about the antiquity part. It may not be significant.

MR. WILLIAMS: We'll make a note and take a look at that over the weekend. But the only point I'm making here is that even if the crests and the poles could satisfy the antiquity test, that is not conclusive evidence of ownership. That's what I was trying to say.

HUTCHEON, J.A.: I understand. All right.

MR. WILLIAMS: While the feast system evolved from earlier practices and played an important role in the social organization of the present day Gitksan, there's sufficient doubt about its role in the management and allocation of land, and the evidence is at least equivocal about the role in the use and control of land generally that it does -- therefore, it does not confirm ownership of the territory.

We say that the appellants have not proven the Gitksan and Wet'suwet'en had exclusive possession of a

well-defined territory, which they defended against all intruders or trespassers, and the trial judge said in that regard:

> "There seemed to be so many intrusions into the territory by other peoples that I cannot conclude the plaintiffs' ancestors actually maintained their boundaries or even their villages against invaders, although they usually resumed occupation of specific locations for obvious economic reasons. As recently as the 1890s Loring found Indians in defensive, winter locations away from their villages and I am uncertain the plaintiffs' ancestors maintained any boundaries."

Yet the appellants admit that to be an owner one has to have the right to exclude others. They say that, and I'll read again from 211, when an aboriginal group has exclusive possession of land within defined boundaries, it has ownership. Well, they didn't prove exclusivity.

Number 9, the appellants failed to prove the right of exclusive possession both in respect of the internal boundaries and the external boundaries. And your lordships will recall the learned trial judge rejected the submission of the appellants on the internal boundaries of the claim area for four main reasons. Firstly, he didn't accept the territorial affidavits. Secondly, he said that the maps that were presented by the appellants with their internal boundaries had conflicting boundaries. Thirdly, the claims by other tribes overlapped with claims to the territory made by the Gitksan and Wet'suwet'en. And fourthly, the plaintiffs' evidence of internal boundaries is based largely on the trapline registration boundaries. And that all appears in the references that I've given you here. They're in the white book.

The appellants don't challenge the ruling of the trial judge with respect to the internal boundaries. They say that the findings on the internal boundaries "do not alter the land proved to belong to the Gitksan and Wet'suwet'en within the external boundaries, and distinct from that of their aboriginal neighbours." The province disagrees that the trial judge's findings on the issue of internal boundaries are as

inconsequential as the appellants suggest they are. And just to end this one off, just four lines above (b), having failed to prove that any House had or maintained boundaries, let alone exclusive boundaries to this territory, notwithstanding expending great time and effort in attempting to do so, the appellants must be held to have failed to prove their claim of ownership.

Now, under (b) on the external boundaries, and I say, first of all, that it was "the result of all the internal boundaries," the failure to prove the internal boundaries then seriously has to undermine any attempt to prove the external ones.

The trial judge found the appellants failed to prove exclusive possession within external boundaries at 441 when he said correctly, in our view:

> "It can hardly be said that the plaintiffs' claims are undisputed, particularly on the external boundaries, which are the subject of numerous overlapping claims by other Indian peoples. A claim to an exclusive interest in land against the Crown, based upon reputation for long-time use, would require very strong evidence."

I think it's fair to say that when you're trying to prove ownership of anything it requires very strong evidence, and the trial judge's concern was it wasn't there. The trial judge said that the evidence of overlapping claims disclosed:

> "...conflicting claims both along the external boundary, and indeed into the very heartland of the territories claimed by the Gitksan and Wet'suwet'en peoples in this action. These claims are advanced by Tsimshian, Nishga, Kitwankool, Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples. It was not made clear to me what position the Babine people take with respect to this matter, but there seems to be much uncertainty about the Bear Lake area. The position of the Cheslatta bands is also uncertain, but they and the Babine Indians have many reserves in the southern part of the territory claimed by the Wet'suwet'en. The validity of these

> conflicting claims has not been proven, but the very fact that such claims have been made cannot be overlooked in any discussion about a certain reputation for 'undisputed' ownership or occupation of lands."

And the trial judge, I point out, my lords, also expressed concern about neighbours with conflicting claims who weren't party to the proceedings, that it would be a concern to him that they weren't there.

Given that the claims have been accepted by the federal government for negotiation, without prejudice, without admitting that the claim is valid they accepted it as a claim, and that they necessarily relate to claims of aboriginal people at the time of sovereignty, if not earlier, it cannot be said that the appellants' claim of ownership based on the reputation evidence is sufficiently trustworthy to be accepted as a fact.

I say that -- two things here, and I'll just make reference to the reasons at page 440. Let's see, that I think is -- yes, it is. It's in the white book under this tab, which is tab I. There are quite a number of pages from the judgment in here which relate to the ownership issue, and therefore they're easy reference when you're going through my notes, but this one is at 440, which is after the second green sheet. You'll see it starts with 431, 434, and 440. And he makes this observation. He says -- he's coming through and saying it poses serious difficulties. Halfway down:

> "Thirdly, the defendants question the reputation,"

et cetera. Then it says:

> "Even within the plaintiffs' community, details of boundaries were not widely known. Alfred Joseph said chiefs are very reluctant to talk to other Wet'suwet'en about their territory; Art Mathews Jr. said it is hard to follow a chief's boundary descriptions because 'they have a language unique of their own'... and several witnesses said they had seldom, if ever, heard their own boundaries described in the feast hall. There has been no reputation

proven in the non-Indian community."

And he says -- in addition to that he points out, back at my notes, he says that indeed the trial judge observed that even within their own community, of course. Then it says, but I say that long time non-natives were also unaware of the ownership claims, and that's the Cyril Shelford excerpt.

> "...it is impossible to infer a community reputation for an interest in land when a prominent, life-long resident in the area like Mr. Shelford, a member of the legislature for many years, and a cabinet minister for a time, who acknowledges hearing about general land claims for a long time, has never heard until very recently of claims of ownership or jurisdiction, or claims to specific lands, including his own, by chiefs whose families he has known personally for most of his life."

The province says that the appellants have failed to show the trial judge's treatment of the evidence by Dr. Ray amounted to a clear and palpable error, and furthermore, that the Hudson Bay records or the evidence of Dr. Ray established the appellants' ancestors had exclusive possession of the territory claimed. I don't dispute the value of the Hudson Bay records for many purposes that my friends wish to advance it, but it's my submission that it does not, the Hudson Bay records and the Ray evidence does not establish to the degree of proof that's required ownership as advanced.

Dr. Robinson, one of the experts, concluded that the Gitksan-Wet'suwet'en laws about traditionally having owned and managed certain territories are questionable. Dr. Robinson's conclusions are supported by a number of others, and they're listed there.

Now, my lords, on page 12 I say that we must also support the trial judge in reference to his decision on the value of the oral histories. He said at page 181:

> "...the adaawk are seriously lacking in detail about the specific lands to which they are said to relate. In this case, as I shall have

> occasion to mention again, the plaintiffs are seeking exclusive rights to specific lands. Specificity far in excess of what the adaawk provide would be required to support an interest in land. Many adaawk and kungax could relate to any number of locations."

And later on, at page 373, the trial judge says that the regalia, adaawk, kungax, and songs are not sufficiently site-specific to assist the plaintiffs in discharging their burden.

The oral histories, adaawk and kungax, of the Gitksan-Wet'suwet'en perform many important functions. The trial judge says at 179 they represent an unwritten collection of important history, legend, laws, ritual and traditions of the House, including a description of its territories. The trial judge found that for the purpose of proving ownership of land they didn't meet the standards required.

The adaawk may be sufficient to prove the existence of at least some measure of self-governance, I say. For example, the Tenimgyet adaawk explains how two Houses amalgamated and one of the names carries a curse which results in the head of the House being seated further down the feast. And we have, of course, the -- the adaawk presumably performs a role then in, at least to that extent, in self-government.

Then we have the adaawk which is in reference to the Madeek, the Seeley Lake Madeek, and the consistency between the Madeek adaawk and the actual evidence that was put forth, 3500 years ago. The fact that the oral histories exist then is evidence of a degree of organization and cohesiveness among the Gitksan-Wet'suwet'en, and it supports their claim for certain rights. What it doesn't do is it doesn't prove ownership.

And I want to comment on the foreign decisions now, to move to the foreign decisions on ownership rights. These were quite important in the view of the appellants, and I don't for a moment denigrate the importance of them as background, and I say that with respect to the -- and I'm talking now about the United States, Africa, and New Zealand, and I say that those decisions are of importance. They demonstrate what was the historical background in North America and in New Zealand and in Africa in a relatively similar time frame. They demonstrate what was happening in a

colonial way, and they show interesting historical background, but neither for what we're doing here in Canada. But the problem I have is that as interesting as it is, and as fair as it may be in comparison with some of the positions that have been taken in our country, they simply can't compete with Canadian law. It's that simple. I would like to think that some of the Marshall decisions are very, very wise decisions that maybe should have been adopted in certain areas of Canada, and I don't say in British Columbia, but maybe should have been adopted in certain areas of Canada, and indeed even in British Columbia. What I do say is that those cases and the conventions simply can't compete with the law of Canada, which is binding upon this court and which I must respect in presenting my argument to you.

So taken as a whole, though, even though they have that value, taken as a whole the Marshall decisions do not establish that Indians in the United States had an ownership interest in land. They're of some real value to the appellants in other areas, perhaps the consent area and so on, but they don't establish that they had an ownership interest in land, and I think the only case I need to refer to there is the Guerin case. This again this is under tab J, and --

TAGGART, J.A.: Guerin is about the second green sheet in, I think.

MR. WILLIAMS: Yes.

TAGGART, J.A.: 380, Guerin at page 380?

MR. WILLIAMS: What I'm looking for, there's a long -- well, it may be quicker if I refer to the Johnson v. M'Intosh. It's page 688 to 692. What happened was that there's a quote from the -- a long quote, I thought it was in Guerin, from the Johnson v. M'Intosh one, and it sort of saved me from going to both, but I haven't found it.

TAGGART, J.A.: Well, there's a Johnson v. M'Intosh.

MR. WILLIAMS: Yes, it's the first green page in. I'll go from there.

TAGGART, J.A.: After the first green divider?

MR. WILLIAMS: Oh, we've got it on the Guerin -- no, sorry. It's, let's see, one, two -- third green sheet in.

TAGGART, J.A.: 377?

MR. WILLIAMS: It's 377 at the bottom, and they're quoting from --

"In Johnson v. M'Intosh Marshall C.J.,

> although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of (the) opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected."

And then he goes on to quote from that judgment. And the point I am making here is simply that recognized by Chief Justice Dickson and quoting from Johnson v. M'Intosh and indeed the Johnson v. M'Intosh case --

MACFARLANE, J.A.: Is this after the first green sheet?

MR. WILLIAMS: Perhaps I should read that. It's just after the first green sheet. It's page 570, I think it is, or 1623 on the right-hand side. At the very bottom of the right-hand column you can see:

> "Mr. Chief Justice Marshall delivered the opinion of the court."

Then at the very right it says:

> "In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

> While the different nations of Europe rejected,"

and then he goes on from there,

> "rejected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives."

So there is no comfort to be gained, in my respectful submission, from these foreign judgments, the Marshall decisions, in reference to the issue of ownership.

And over the page, page 14 on my notes, I say that, under paragraph number 3, similarly it's our submission that the Amodu Tijani and the Symonds decision occurred -- do not really give that much assistance either for a number of reasons. We have the same kind of basic allodial title, the Queen owns all, sovereignty concept that we've heard so much about, but in addition we have in -- the African case and the New Zealand case occurred in a very different historical and factual context, and it makes them of great interest from an historical perspective, but of limited value as a legal precedent in the case at bar.

The Symonds decision occurred in the context of a statute which specifically governed the grant in question, the Treaty of Waitangi, and the Treaty of Waitangi, as you'll see, told them that they could keep possession as long as they wanted. It ought to be seen as a codifying of the common law of aboriginal rights. I am aware my friends distinguish that case --

HUTCHEON, J.A.: It ought not to be seen.

MR. WILLIAMS: Pardon?

HUTCHEON, J.A.: You left out the negative.

MR. WILLIAMS: That's right.

HUTCHEON, J.A.: You didn't mean to do that?

MR. WILLIAMS: No. An accident, my lord. In the Symonds case -- there was a case that followed that that my friends dealt with called Tamaki. It was cited by the appellants in argument as approving the Symonds decision. The statement by the Privy Council at 578 of Tamaki doesn't approve the Symonds decision. It

merely says that extinguishment must be in accordance with the terms of the Treaty of Waitangi and the various statutes that implemented the treaty. The treaty is by its terms permitting aboriginal people to retain land in their possession so long as they wish to. And if you will just turn to the tab here, it's J. Yes, it's Lord Davey. It's page 566. Let's see, how far in is it? I think it's closer to the back. Let's go from the back, if I may. There's one green sheet gone, two green sheets gone, three green sheets, and it's a three-page decision. Three green sheets to the wind. Okay.

WALLACE, J.A.: Bottom of 566, that's what you're referring to?

MR. WILLIAMS: Yes. They had mentioned the Treaty of Waitangi, Lord Davey, the Treaty of Waitangi is as follows, article first, article second, and over on the next page it says, and all this is part of the treaty:

> "...and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession."

Now, that's the difference between the treaty and what's happened here. And then over on the next page, 578, he says:

> "Their lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title."

So that's a different situation.

And then finally, I'll deal with the Amodu Tijani and say that with respect to that case, first of all, there is an acknowledgment here whether they actually fitted it in or not. It was a settlement or discovery mode. It was a settlement or discovery that they were supposed to have done in Canada, and -- as opposed to conquest, and the Amodu case, of course, is one which involved conquest, and the situation there is opposed to settlement, and there the chiefs could convey their land, the head chief could convey the land. The case

also involved aboriginal people who had established a system of rental for the land that they occupied and a number of other different features, so that the court in that case considered many historical documents specific to the case, and the case by virtue of its facts, I say, cannot stand for the general proposition that my friends advance it for, that all aboriginal people own their land.

Finally then, the Amodu case is cited by the appellants for the proposition that the aboriginal ownership must be determined with respect to the habits and modes of life of the aboriginal people, but we submit that the proper test in Canada for evaluating the rights would be, and I'll stop here and say either Baker Lake or the Baker Lake -- Baker Lake changes.

And in conclusion on this issue, I say that there is no way that the appellants can be permitted to win on the question of ownership. Thank you, my lord.

TAGGART, J.A.: Thank you, Mr. Williams. We'll adjourn now until Monday next.

THE REGISTRAR: Order in court. Court stands adjourned until ten o'clock Monday.

(PROCEEDINGS ADJOURNED AT 4:05 P.M.)

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

_____

Leanna Smith
Official Reporter
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