SMITHERS, B.C.
May 12, 1987

THE REGISTRAR: Order in court. In the supreme court of British Columbia, this 12th day of May, 1987, Delgamuukw, also known as Ken Muldoe, suing on his own behalf on behalf and on behalf of all other members of Delgamuukw, and others and her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada, at bar.

THE COURT: Thank you. Mr. Rush.

MR. RUSH: Yes, my Lord. We're prepared to start the opening, and I would like to ask Gisday Wa, Alfred Joseph, and Chief Delgamuukw, Ken Muldoe, to make the opening on behalf of the Gitksan and Wet'suwet'en chiefs.

THE COURT: All right, thank you. Who's first, please?

MR. JOSEPH: My Lord, I'll read my address now. My name is Gisday Wa. I am a Wet'suwet'en Chief and a plaintiff in this case. My House owns territory in the Morice River and Owen Lake area. Each Wet'suwet'en plaintiff's House owns similar territories. Together they own and govern the Wet'suwet'en territory. As an example, the land on which this courthouse stands is owned by the Wet'suwet'en Chief, Gyolugyet, in Kyas Yax, also known as Chief Woos' House.

MR. MULDOE: My Lord, I am Delgamuukw. I am a Gitksan Chief and a plaintiff in this case. My House owns territories in the Upper Kispiox Valley and Upper Nass Valley. Each Gitksan plaintiff's House owns similar territories. Together, the Gitksan and Wet'suwet'en Chiefs own and govern the 22,000 square miles of Gitksan and Wet'suwet'en territory. For us, the ownership of the territory is a marriage of the Chief and the land. Each chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit, they all must be shown respect. That is the basis of our law.

MR. JOSEPH: The chief is responsible for ensuring that all the people in his House respect the land, respect the land, and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority. That authority is what gives the 54 plaintiff's their right to bring this action on behalf of their House members, all Gitksan and Wet'suwet'en people. That authority is

what makes the Chiefs the real experts in this case.

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

MR. JOSEPH: By following the law, the power flows from the land to the people through the Chief; by using the wealth of the territory, the House feasts its Chief so he can properly fulfill the law. This cycle has been repeated on my land for thousands of years. The histories of my House are always being added to. My presence in this courtroom today will add to my House's power, as it adds to the power of other Gitksan and Wet'suwet'en Chiefs who will appear here or who will witness the proceedings. All of our rolls, including yours, will be remembered in the histories that will be told about by my grandchildren. Through the witnessing of all the histories, century after century, we have exercised our jurisdiction.

MR. MULDOE: The Europeans did not want to know our histories, they did not respect our laws or our ownership of our territories. This ignorance and this disrespect continues. The former Delgamuukw, Albert Tait, advised the Chiefs not to come into this court with their regalia and their crest-blankets. Here, he said, the Chiefs will not receive the proper respect from the government. If they are wearing their regalia, then the shame of the disrespect will be costly to erase.

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

MR. MULDOE: If the Canadian legal system has not recognized our

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

MR. JOSEPH: Our histories show that whenever new people came to this land, they had to follow its laws if they wished to stay. The Chiefs who were already here had the responsibility to teach the law to the newcomers. They then waited to see if the land was respected. If it was not, the newcomers had to pay compensation and leave. The Gitksan and Wet'suwet'en have waited and observed the Europeans for a hundred years. The Chiefs have suggested that the newcomers may want to stay on their farms and in their towns and villages, but beyond the farm fences the land belongs to the Chiefs. Once this has been recognized, the court can get on with its main task, which is to establish a process for the Chiefs' and the newcomers' interests to be settled.

MR. MULDOE: The purpose of this case then, is to find a process to place Gitksan and Wet'suwet'en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue. I will explain to my people in my town what I have just said.

THE COURT: Well, excuse me, I'm sorry, Chief. Have arrangements been made for an interpreter of this part of the opening, or is it --

MR. RUSH: My Lord, the idea was to provide a short summary of what had been said rather than to translate throughout the statement of the address, and I understand it's the wish of the Chiefs to summarize briefly what it is they've just said in English.

THE COURT: Well, I have no difficulty with that, Mr. Rush, if what is about to be said is not to be deemed to be part of the record at this trial. If it's to be part of the record of this trial it seems it must be translated.

MR. RUSH: I'm certainly happy to have it translated.

THE COURT: Is there someone available for that purpose?
MR. RUSH: Yes, there is. Mr. George Holland can translate for the Wet'suwet'en, and Fern --
THE COURT: Well, it would seem that following my expressed desire yesterday to have this trial conducted as close as possible in conformance with the regular procedure of the court, that the interpreter should be sworn.
MR. RUSH: Thank you.
THE COURT: Or affirmed. Could we have the name of the interpreter, please.
MR. RUSH: My Lord, Alice Sampson will interpret the words of Delgamuukw.
THE COURT: And for the purposes of the registrar administering the oath, how should the language or dialect be described?
MR. RUSH: As the Gitksan language.
THE COURT: Gitksan? Madam registrar, are you able to administer the oath to the interpreter?

ALICE SAMPSON - Interpreter sworn

THE REGISTRAR: Please state your name for the record?
THE INTERPRETER: Alice Sampson.
THE COURT: Chief Delgamuukw, can you please make your statement in short bursts so that it can be interpreted, or translated, I suppose.
MR. MULDOE: My Lordship, ladies and gentlemen, I will tell you what has been said today. It has been centuries now since they've taken our ancestor's land, and this is where our strength lies in. We are here to discuss our territories. These are our territories, it belongs to us, and it's not for what you call Canada to run this land as they wish, the territory. That is the end of my address.
THE COURT: Thank you.
MR. RUSH: My Lord, I'll ask Mr. George Holland to translate on behalf of the Wet'suwet'en.

GEORGE HOLLAND - Interpreter sworn

THE REGISTRAR: Please state your full name for the court?
THE INTERPRETER: George Holland.
MR. JOSEPH: Your Lordship, what I have said to you I will reiterate to the Chiefs. Your Lordship here has been notified of our intention and why we are here. We are here to explain how we have asserted our laws and how we have practised our laws within the Feasts, and the

1 defence here does not believe in our laws, and that is
2 why we are here to explain everything to them. Your
3 Lordship has been notified of the situation of where
4 the courthouse is situated, which is in Gyolugyet's
5 territory, and Gyolugyet is here in the courthouse.
6 He lives on his own territory within -- within his
7 territory, and he is also paying for living there, and
8 that is one of the reasons why we are here. We are
9 going to find out the reasons for that. There is a
10 lot of people living in the same area here that are
11 from overseas. We are not here to chase anybody away,
12 we are -- we are going to find out how we are going to
13 be able to live amongst other people besides
14 ourselves. And that is the extent of my address.
15 THE COURT: Thank you gentlemen.
16 THE COURT: Mr. Rush.
17 MR. RUSH: My Lord, we've provided with you the blue-bound
18 volume of the opening.
19 THE COURT: Yes.
20 MR. RUSH: The presentation of this opening will similarly be
21 divided between Mr. Grant and I, and I will submit to
22 you for about the half-way mark of the opening and Mr.
23 Grant will then take the rest.
24 THE COURT: Thank you.
25 MR. RUSH: My Lord, the Gitksan and Wet'suwet'en, in asserting
26 their rights of ownership and jurisdiction over their
27 territory, are affirming the foundations upon which
28 their civilizations are based and have been based for
29 for over 5,000 years. In denying that these rights
30 exist, the Province of British Columbia and the
31 Federal Government of Canada are denying the very
32 existence of those civilizations. The foundations of
33 Gitksan and Wet'suwet'en societies are firmly
34 entrenched in their own laws. But in the face of
35 Provincial and Federal disrespect for these laws and
36 the injustice this has brought, the Gitksan and
37 Wet'suwet'en have come to this court to secure those
38 foundations in Canadian law, law which the Province
39 and Federal governments can be compelled to respect.
40 Only then will the Gitksan and Wet'suwet'en people be
41 able to negotiate a just resolution of their
42 relationship with Canada. This case is therefore a
43 search for the legal pathway to justice.
44 This is not the first time the Gitksan and
45 Wet'suwet'en Chiefs have sought recognition of their
46 rights to ownership and authority over their
47 territory. Indeed, their efforts span the last

1 century. In 1884, the Gitksan Chiefs of Gitwangak
2 told the Provincial Government that the influx of
3 miners to Lorne Creek within their territory, without
4 there consent, was wrong and had to be stopped. I
5 will read from their statement:
6
7 "From time immemorial the limits of the district in
8 which our hunting grounds are have been well
9 defined. This district extends from a rocky point
10 called 'Andemane' some two and a half or three
11 miles above our village on the Skeena River to a
12 creek called 'She-quin-khaat', which empties into
13 the Skeena about two miles below Lorne Creek. We
14 claim the ground on both sides of the river, as
15 well as the river within these limits, and as all
16 our hunting territories, fruit gathering and
17 fishing operations are carried on in this district,
18 We can truly say we are occupying it.
19 The district is not held unitedly by all the
20 members of the tribe, but is portioned out among
21 the several families, and no family has a right to
22 Trespass on another's grounds: so that if anyone
23 family is hindered from hunting on their own
24 ground, there is nowhere else for them to go, they
25 lose all the benefits they derived from their
26 hunting. As they cannot follow the animals across
27 the bounds into their neighbours' grounds. We
28 would liken this district to an animal, and our
29 village, which is situated in it, to its heart.
30 Lorne Creek, which is almost at one end of it, may
31 be likened to one of the animal's feet. We feel
32 that the white men by occupying this creek are, as
33 it were, cutting off a foot. We know that an
34 animal may live without one foot, or even without
35 both feet, but we also know that every such
36 loss renders him more helpless, and we have no wish
37 to remain inactive until we are almost or quite
38 helpless. We have carefully abstained from
39 molesting the whitemen during the past summer. We
40 felt though we were being wronged and robbed, as we
41 had not given you the time nor opportunity to help
42 us, it would not be right for us to take the matter
43 into our own hands. Now we bring the matter before
44 you, and respectfully call upon you to prevent the
45 Inroads of any whitemen upon the lands within the
46 fore-named district. In making this claim, we
47 would appeal to your sense of justice and right.

> We would remind you that it is the duty of the government to uphold the just claims of all peaceable and law-abiding persons such as we have proved ourselves to be. We hold these lands by the best of all titles. We have received them as the gift of the God of Heaven to our forefathers, and we believe that we cannot be deprived of them By anything short of direct injustice. In conclusion, we would ask you, would it be right for our Chiefs to give licences to members of the tribe to go to the district of Victoria to measure out, occupy, and build upon lands in that district now held by whitemen as grazing or pasture land? Would the whitemen now in possession permit it, even if we told them that as we were going to make a more profitable use of the land they had no right to interfere? Would the government permit it? Would they not at once interfere and drive us out? If it would not be right for us so to act, how can it be right for the whiteman to act so to us?"

This territory, my Lord, described in 1884 is the same territory as is claimed in this action today by the Gitksan Chiefs of Gitwangak.

In 1889, Chief Gyetm Galdoo from Gitanmaax framed his appeal to justice in this way:

> "There is land belonging to me and my tribe in the lower Delta, near the confluence of the Skeena and Haguil-get Rivers. This land mentioned belongs to us, to times back as far as can be remembered. The land in question is part of our hunting, trapping, Snaring and especially fishing grounds. A fish house is thereon and has been there for many years back. All this has been taken up by the people not belonging there. Houses are hereon and more being built. Those people came there to erect a school house as a pretense, but turned the same into a trading establishment for the purpose of gain. I strictly protest against all these proceedings and appeal to the law, to aid and protect me in this matter."

In 1908, Gitksan Chiefs travelled to Ottawa to present a petition to the Federal Government to stop the wrongful appropriation of their territory. In 1910, some of the Chiefs met Prime Minister Sir Wilfrid Laurier at Prince Rupert. His response to

1 them was clear:
2
3 "The only way to settle this question --"
4
5 That is the Indian land question:
6
7 "that you have agitated for years is by a decision
8 of the Judicial Committee, and I will take steps to
9 help you."
10
11 In the face of the refusal by Premier Richard
12 McBride of British Columbia to agree to any reference
13 to the courts which included the issue of aboriginal
14 title, the Federal and Provincial Governments
15 established a Royal Commission to address the question
16 of Indian reserves. In addressing the Commission the
17 Chiefs insisted on talking about their territories and
18 rejected the idea that their rights to ownership and
19 authority could be contained or restricted to
20 reserves.
21 One of those Chiefs who appeared before the Royal
22 Commission known as the McKennat McBride Commission,
23 Charles Wesley, stated this to the Royal Commission:
24
25 "I wish to tell that you this Reserve that you have
26 just spoken about is something that we don't wish
27 for... this country originally belonged to our
28 ancestors, we were placed here originally by God,
29 and it is only quite recently that the government
30 has sent men out here to measure this land
31 immediately around us, we were not notified of it
32 when they did. Then the Provincial Government came
33 in and sold the remaining land immediately around
34 us... and what we most strenuously object to is
35 that you insist upon us having his Reserve. I was
36 one that signed the petition in 1908 which we sent
37 down to Ottawa. We asked that the land which the
38 Provincial Government has sold be returned or given
39 back to us...this is where our inheritances come
40 from and where they were handed down from
41 generation to generation."
42
43 Efforts to have the courts address the issues of
44 territory and authority were responded to by the
45 Governments by amending the Indian Act in 1927, making
46 it an offence, punishable by imprisonment, to raise
47 money to press for land claims. That law was not

1 repealed until 1951.
2 Recently the hereditary Gitksan and Wet'suwet'en
3 Chiefs have endeavoured to resolve the conflict
4 between Gitksan and Wet'suwet'en jurisdiction and the
5 Federal and Provincial Governments through
6 negotiation. After a massive undercover operation by
7 the Government of Canada against Gitksan and
8 Wet'suwet'en fishermen in 1977, the Chiefs authorized
9 an effort to negotiate a recognition of Gitksan and
10 Wet'suwet'en management of the fishery on the Upper
11 Skeena. In 1979 these negotiations came the closest
12 to agreement when the department of Fisheries and
13 Oceans and the Gitksan and Wet'suwet'en Chiefs entered
14 into an interim agreement, under which the river was
15 open seven days a week except for conservation
16 closures. It was agreed that the Gitksan and
17 Wet'suwet'en Chiefs would have to agree that the
18 closure was necessary for conservation.
19 Unfortunately, this breakthrough was short-lived.
20 In subsequent years although there were -- although
21 there were continued efforts to negotiate, the
22 Government of Canada refused to recognize the Gitksan
23 and Wet'suwet'en jurisdiction over the fishery and to
24 negotiate as equal partners in its management. This
25 continued even after the entrenchment of section 35 in
26 the Constitution Act of 1982.
27 As an alternative, Gitksan and Wet'suwet'en people
28 endeavoured between 1983 and 1986 to implement by-laws
29 under the Indian Act which recognized the authority of
30 the hereditary Chiefs. Finally, in April 1986 these
31 by-laws were passed by the Minister of Indian and
32 Northern Affairs. Ones again, however, the apparent
33 recognition of Gitksan and Wet'suwet'en authority was
34 short-lived. In June 1986, the Provincial Government
35 applied and obtained an interim injunction in this
36 court, prohibiting Indian people from exercising their
37 rights to fish under a validly enacted by-law.
38 Some 50 years ago, the Gitksan and Wet'suwet'en
39 registered traplines in the belief that to do so would
40 both protect their territories against encroachment
41 and secure a measure of recognition of their authority
42 from the Province. Yet, throughout the territories of
43 the Gitksan and Wet'suwet'en, they have seen
44 increasing destruction by clear cut logging. In an
45 effort to provide for some interim level of
46 co-operation, the Gitksan and Wet'suwet'en Chiefs
47 recently commenced negotiation with the Province for a

1 blanket trapline. This proposal would have allowed
2 for joint management of the fur-bearing and animal
3 resources, while recognizing that the Gitksan and
4 Wet'suwet'en laws of succession would apply, and that
5 the Gitksan and Wet'suwet'en would determine trapline
6 boundaries within the overall context of Gitksan and
7 Wet'suwet'en territory. The Government of British
8 Columbia withdrew from any negotiation, for the same
9 reason as the Federal Government refused to negotiate
10 on the fishery. For both governments, the Gitksan and
11 Wet'suwet'en had no rights to the resources or to
12 their management.
13 In 1982 the Constitution of Canada patriated.
14 Clauses protecting aboriginal rights were included.
15 There have been constitutional conferences at which
16 representatives of the Gitksan and Wet'suwet'en Chiefs
17 have been present in 1983, 1984, and 1985. The end
18 result of these constitutional conferences has
19 provided no recognition of the Gitksan and
20 Wet'suwet'en authority and jurisdiction over their
21 territory. Unfortunately, at the conclusion of the
22 last conference in March of 1987, it became clear that
23 the Government of British Columbia would never agree
24 to amendments to the Constitution which defined
25 ownership and jurisdiction of the Gitksan and
26 Wet'suwet'en as part of their aboriginal rights.
27 The Gitksan and Wet'suwet'en Chiefs have seen parts
28 of their territory destroyed. This will only increase
29 as large corporations build faster, more efficient
30 computer-operated sawmills which will increase the
31 rate at which trees are turned into lumber and
32 exported out of the Gitksan and Wet'suwet'en
33 territory. The Gitksan and Wet'suwet'en hereditary
34 Chiefs have watched their land being stripped bare.
35 They have seen the destruction of fishing sites and
36 spawning grounds and the extinction of salmon stocks.
37 They have protested and they have resisted. Whenever
38 possible they have enforced their own laws. They have
39 continually insisted on their recognition as peoples
40 with authority over the territory in which they have
41 exercised stewardship for many thousands of years.
42 Johnny David, a Wet'suwet'en Chief, who has lived
43 for approximately 100 years, was asked in his
44 commission evidence why the Chiefs have come to court.
45 This was his answer:
46
47 "You can see throughout our territory all the

1 stumps and the white people have pocketed millions
2 and millions of dollars. All the money taken from
3 our territory, we want that back and we want our
4 territory back. Once get back the money, we would
5 like to go back to our old Indian laws to make life
6 better for our people. The other hereditary Chiefs
7 as well as the other leaders are thinking about the
8 same way and it is with their words and my words
9 that I am giving you today. It is the generation
10 that will follow me that will use the resources. I
11 will not be able to use it. I am ready to go."
12
13 Today the Gitksan and Wet'suwet'en enter the
14 Canadian legal system to seek justice. This is an
15 opportunity for the courts to find a just and lawful
16 process to place Gitksan and Wet'suwet'en ownership
17 and jurisdiction within the context of Canada.
18 If the courts provide no mechanism for a solution
19 then the people will have to guarantee the survival of
20 their societies for themselves. As Delgamuukw and
21 Gisday Wa have said this morning, they will continue
22 to survive. The Gitksan and Wet'suwet'en and their
23 laws are not going to go away.
24 But this court can set the foundation for a
25 resolution of the impasse which has characterized the
26 history of the last 100 years. In coming to such a
27 resolution, we urge you to initially set aside your
28 task of determining appropriate remedies and
29 concentrate on the evidence of the complexities and
30 intricacies of the Gitksan and Wet'suwet'en societies
31 from which the nature of their aboriginal rights will
32 emerge. It will be from this evidence that the legal
33 pathway to a just resolution can be found.
34 This court, my Lord, in hearing the evidence which
35 will be presented in this case will be faced with a
36 series of legal and intellectual challenges and
37 opportunities of nature not normally found in matters
38 that come before the bench. These are challenges and
39 opportunities which we as counsel also have had to
40 face and with which we continue to grapple.
41 The Gitksan and Wet'suwet'en in seeking recognition
42 from this court of their rights to ownership and
43 jurisdiction over their territory are seeking
44 recognition of their societies as equals and
45 contemporaries. The challenge here, both for the
46 court and for us as counsel, is to understand and
47 overcome the tendency to view aboriginal societies as

existing at an earlier stage of evolutionary development. The assumption underlying such a position offers persistent, powerful and ultimately distorting conclusions as to the real nature of Indian society. The persistence of this assumption can be readily seen in the judgments of the Court of Appeal in the Calder case as recently as 1971. There, the court stated in relation to the Nishga, neighbours of the Gitksan and Wet'suwet'en, "that they were undoubtedly at the time of settlement, a very primitive people with few of the institutions of civilized society and none at all of our notions of private property". The sense of superiority implicit in such a statement is expressed in many different ways as a function of social development that places the native people at the bottom of the ladder and western man at the top; or as a result of divine preference and appointment of Judeo-Christian religion as the ideal with the corollative rejection of aboriginal shamanism and cosmology, or as a result of technological sophistication that entail obligations to improve the lot of other less advanced peoples.

Evidence will be presented as to the way these assumptions have been manifested on the frontiers of British Columbia within the territories of the Gitksan and Wet'suwet'en in the form of missionaries, federal Indian agents and provincial government representatives.

A belief in white Euro-Canadian superiority has powerful implications not only in its devaluation of Indian societies as "primitive", but also in terms of their asserted rights to their territories and to their authority over their resources. If the white people of European ancestory are the representatives of the highest of human, moral, social and technical achievements, then is it not right and in everyone's interests, that whatever rights the Indians may have, be extinguished and vested in us? The links between moral, policitical, economic hegemony and cultural dominance are not hard to see. We will be inviting this court through its rulings to reject any legal theory of aboriginal rights which depends upon such evolutionist and supremacist assumptions.

A second challenge for the court, very much related to the first, involves the problem of communication between very different cultures. The problems here are not simply those inherent in the necessity to

translate from Gitksan or Wet'suwet'en into English and vice versa, as would be the case in a situation where the witnesses were Francophone. French and English cultures, although different, trace common intellectual and historical roots and share a world view. The Gitksan and Wet'suwet'en world view is of a qualitatively different order.

Anthropologists have long realized that a people's world view is composed of two interrelated parts: First, the notion of how the world is structured, of how its parts have been fashioned into a cohesive whole; and second, a set of rules by which that structure is set into motion and of how that motion can be controlled or directed. There is a natural tendency, to which lawyers and judges are not exempt, to look at Indian societies using a model of the world that derives from western consents of the nature of the world and society. The dangers of this are that what Indian people say and do is either not understood or is distorted into shapes and concepts which deprive Indian societies of their essence. The challenge for this court in listening to the Indian evidence is to understand the framework within which it is given and the nature of the world view from which it emanates.

The Western world view sees the essential and primary interactions as being those between human beings. To the Gitksan and Wet'suwet'en, human beings are part of a interacting continuum which includes animals and spirits. Animals and fish are viewed as members of societies who have intelligence and power, and can influence the course of events in terms of their interrelationship with human beings. In Western society causality is viewed as direct and linear. That is to say, that an event has the ability to cause or produce another event as time moves forward. To the Gitksan and Wet'suwet'en, time is not linear but cyclical. The events of the "past" are not simply history but are something that directly affects the present and the future.

The nature of the continuum between human, animals and the spirit world, within cycles of existence, underpins much of the evidence you will hear. The Gitksan and Wet'suwet'en believe that both humans and animals, when they die, have the potential to be reincarnated. But only if the spirit is treated with the appropriate respect. If bones of animals and fish are not treated with that respect, thereby preventing

their reincarnation, then they will not return to give themselves up to humans. In this way, a person's actions not only interact with those of the animals and the spirits, but also have repercussions for future generations, deprived of the food that will ensure their survival. Pivotal events in Gitksan and Wet'suwet'en history, such as the dispersal from Temlaxam over 3,000 years ago, will be explained by reference to human beings failing to observe the prescribed respect for salmon and mountain goats and the spirits of these fish and animals.

It is important to reflect on how such a view of causality would be rendered conceptually from within a Western framework. Such a view would not be regarded as "scientific" and such attribution of events to the powers of animals or spirits would be characterized as mythical. Both of these adjectives imply that what Indian people believe is not real, or at least, if it is real for them, it represents primitive mentality pre-scientific thinking, which is to say, magic. On either basis, Indian reality is denied or devalued. Their history is not real history but mythology. The binding rules which determine how Indian people should relate to animals are not real laws but primitive rites.

The interconnectedness between human beings and other life forms is only the beginning of the different ways in which the Gitksan and Wet'suwet'en see the world from those of us that are brought up in the Western tradition. The distinction we as lawyers make between constitutional, criminal and commercial law are part of a vast array of distinctions such as those between law and morality, politics and economics, science and religion. Of particular importance to us are such fundamental distinctions between the secular and the sacred, the spritual and the material, the natural and the supernatural. Many of the distinctions which we make in order to make sense out of the world are absent in the Indian world view. It is not difficult to see, therefore, and indeed it is inevitable that if we apply our distinctions without discrimination and caution to what Indian people say, we will make nonsense out of their evidence. The integration of what to us are discreet and separate parts of life infuses Gitksan and Wet'suwet'en thinking and permeates their most important institutions.

At the outset of this case it is important, therefore, to give the court an overview of the evidence of Gitksan and Wet'suwet'en societies in order to illustrate this interconnection between the Indian world view and the distinctive elements of these societies.

The Gitksan and Wet'suwet'en are two societies whose peoples, while speaking different languages, share many common elements in their social organization and institutions which they have, however, developed in their own ways so as to give meaning to their separate identities as Gitksan and as Wet'suwet'en people. Over the centuries, through intermarriage, adoption, trade and the introduction of each other's ideas, they have forged their own distinctive form of confederation.

Both Gitksan and Wet'suwet'en witnesses, in identifying their place in their respective societies, will refer to their House and and to their Clan. Houses and Clans are the two most important units of Gitksan and Wet'suwet'en society. A person is born into a particular House and Clan by virtue of laws of matrilineal descent. The four Gitksan clans are Lax Gibuu, Wolf; Lax Xskiik, Eagle; Giskaast, Fireweed; and Laxseel/Lax Ganeda, Frog. There are five Wet'suwet'en clans: Gitdumden, Wolf; the Gilserhyu, Frog; the Laksilyu, Smal Frog Clan; the Laksamshu, Fireweed; and the Tsayu, Beaver. Within each Clan there are a number of related Houses, which are identified in the Statement of Claim. These groups are called Houses because, in the past, their members would live under one roof. Over the course of history, some Houses, as a result of population increase and decline, have split off from or amalgamated with other houses. In terms of the difference between House and Clan, the House is a matrilineage of people so closely related that the members usually know their relationship. In the case of Clan affiliation, there is the assumption that all the Clan members are related, although the precise nature of that relationship may or may not be known. As you will hear in the evidence, the relationship between House and Clan is complex and is differently expressed in the Gitksan and Wet'suwet'en systems.

You will hear how each Gitksan House is identified by its crests, images that encapsulate and provide a visual record of the major historical events

experienced by the ancestors of this group. The Gitksan crests, ayuks, commemorate the group's origins, odysseys from ancient villages, moments when the people drew upon the assistance of spirit power, the the defeat of neighbouring peoples who threatened their security, or the discovery of new ways to survive the natural disasters they periodically experienced. With the crest goes the ada'ox, the verbal record of the event. Key images within the ada'ox are evoked by songs, limx'ooy, a determining song, that comes out of the ancient past, literally from the breaths of the ancestors, to take the listener back in time by the very quality of their music and the emotions they convey.

The formal telling of the oral histories in the feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the Chiefs of other houses, constitute not only the official history of the House, but also the evidence of its title to its territory and the legitimacy of its authority over it. The oral history, the crests and the songs of a House are evidence, however, of something more than even its history, title and authority. They represent also its spirit, its power, its daxgyet.

The witnessing and validation of the House's historical identity, territorial ownership and spirit power is integral to the feast. But also integral is the House's demonstration of its prosperity through a distribution of its wealth. A House's wealth is directly linked to its territory. In very early times, sometimes a cane was touched to the land, to signify the power of the Gitksan House group merging with that of the land, and the existence thereafter of a bond between the group and their territory. The cane used to forge the bond between the House and its territory foreshadowed the crest pole or totem pole. The pole which encodes the history the House through its display of crests, also recreates, by reaching upwards, the link with the spirit forces that give the people their power, while at the same time is planted in the ground, where its routes spread out into the land, thereby linking man, spirit power and the land so they form a living whole. Integral to this link and the maintenance of the partnership, is adherence to the fundamental principles of respect for the land and for its life forms.

You will hear evidence of pole-raising feasts, including the feast given by Guxsan within the past year. In the pole-raising feast, the power which flows from the pole not only links the House to its territory and the life forms that feed them, it also spreads out to strengthen the network of human relations forged by this and other feasts. The power is shared with all members of the House and feeds the other Houses and Clans witnessing it.

In each pole-raising feast, the display of the crests, the telling of the ada'ox, the singing of the songs, recreates the historical events they represent. This history is relived in the feast. The identity and power it confers on the House group is thus kept alive through its continuous recreation by each generation.

Many of the Gitksan ada'ox refer to extensive migrations of the Gitksan ancestors in the establishment of their territories. By contrast, the Wet'suwet'en oral tradition does not detail the immigration of the Wet'suwet'en into their territory. As you will hear, from the earliest time, they depict the Wet'suwet'en sharing a salmon village, a salmon fishing village, with the Gitksan and other groups at Dizkle, on the Bulkley River, not far from the present site of Hagwilget. There, the Wet'suwet'en, like the Gitksan, lived in large cedar planked houses, presided over by a head Chief. The territory is described as belonging to a Wet'suwet'en Chief whose people had the sole right to use the territory. Thus, from their most ancient history the evidence will show that the Wet'suwet'en identify their system as one in which the territory is held by a named hereditary Chief on behalf of House members. The oral history, or Kungax, depicts a series of battles until the Chief decides to make piece by holding a Feast. In this way, in Wet'suwet'en history, the Feast was initiated as an international mechanism for settling disputes and demonstrating ownership of a contested territory. Wet'suwet'en witnesses will explain to you how in a settlement of a dispute in a Feast, eagle down is distributed to mark the binding nature of the resolution. This symbolizes that truly peaceful relations require respect being shown not only between human beings but also between human beings and animals.

The evidence will show that the Wet'suwet'en kungax

1 operate on a number of different levels, the
2 explication of which will illustrate some of the
3 subtle differences of the Wet'suwet'en system with
4 that of the Gitksan. The word kungax is the
5 possessive form of the word kun. Kun means song. It
6 also means spirit or spirit power. Kungax, depending
7 on context, can mean a person's own spirit power or
8 his own song or his personal crest. It can also mean
9 a "trail of song". The Wet'suwet'en songs, which
10 express the spirit trail of a Chief's name, and the
11 enactment of personal crests, serve as a validation of
12 succession to a Chief's name and its association with
13 a particular territory. What the ada'ox are for the
14 Gitksan, the kungax, the trails of song, are for the
15 Wet'suwet'en. As the Wet'suwet'en follow the trails
16 to their territories, so they seek to capture the
17 songs that go with their titles to their territories.
18 The songs link the land, the animals, the spirit world
19 and the people. The power of hereditary names and
20 crests is continually renewed for the Wet'suwet'en by
21 the highly personal and individual experience of being
22 captured by song.
23 The distinctive Indian world view has directed
24 implications in this court's understanding of the
25 evidence relating to the nature of the Gitksan and
26 Wet'suwet'en societies and their institutions,
27 particularly those institutions through which the
28 plaintiffs exercise their jurisdiction or authority.
29 Societies marked by centralized government such as
30 Canada possess discrete institutions and departments
31 for conducting political life, economy, social
32 welfare, education, dispute resolution, peace keeping,
33 religion, and so on. Non-state societies, such as
34 those of the Gitksan and Wet'suwet'en, do not have
35 institutions which can be viewed as discretely
36 political, economic, domestic or spritual, rather
37 their institutions simultaneously perform a
38 multiplicity of functions.
39 This, my Lord, will be most vividly revealed in the
40 evidence dealing with the most significant Gitksan and
41 Wet'suwet'en institution, the Feast. While we will be
42 referring to the feast generically as the lynchpin or
43 fulcrum of the Gitksan and Wet'suwet'en systems, it
44 should be borne in minds that there are different
45 kinds of feasts to which you will be referred in the
46 course of the evidence. These include pole-raising
47 feasts, funeral, headstone, and shame feasts. These

and others collectively comprise the feast system.

When today, as in the past, the hereditary Chiefs of the Gitksan and Wet'suwet'en houses gather in the Feast Hall, the events that unfold are at one and the same time policitical, legal, economic, social, spritual, ceremonial, and educational. The logistics of accumulating and borrowing to make ready for a Feast, and the process of paying debts in the course of the feast, have many dimensions; they are economic in that the Feast is the nexus of the management of credit and debt; they are social in that the Feast gives impetus to the ongoing network of reciprocity, and renews social contracts and alliances between kinship groups. The Feast is a legal form for the witnessing of the transmission of Chiefs' names, the public delineation of territorial and fishing sites and the confirmation of those territories and sites within the names of hereditary Chiefs. The public recognition of title and authority before an assembly of other Chiefs affirms in the minds of all, both the legitimacy of succession to the name and transmission of property rights. The Feast can also operate as a dispute resolution process and orders peaceful relationships both nationally, that is within and between Houses, and internationally with other neighbouring groups.

The Feast is charged with the power of the spirit world in the form of the Crests used in the feast and in songs and dances performed. Furthermore, the public and ceremonial emphasis upon giving, paying debts, recognizing and legitimizing the status and authority of the Chiefs and the ownership of territories and maintaining the etiquette of reciprocity, all of these aspects of Feasting are highly educational. By means of their practice, there repetition and recombination through the course of the feast, the essential values of the culture are both given expression and transmitted from generation to generation.

You will hear evidence how, through its many facets, the Feast weaves each generation into the fabric of Gitksan and Wet'suwet'en history and sustains them as they move forward into the complexities of their future. Despite the efforts of missionaries and Indian agents, aided by the legal prohibition of the Feast from 1884 to 1951, the Feast has remained a bastion of Gitksan and Wet'suwet'en

societies. It has remained so because the system of ceremonial, reciprocal relations expressed in the Feast remains a model for everyday interpersonal transaction between kin, Houses, Clans and villages as well as between human beings and the non-human world with whom they share their territories. The transactions in the Feast Hall give meaning to what it is to be Gitksan and Wet'suwet'en.

This conjunction and combination of what, in state societies are seen as discreet, will also be manifested in the evidence of other institutions through which the Gitksan and Wet'suwet'en exercise authority over their territories. This case is brought in the name of the hereditary Chiefs. But these are not personal names. They are names which the Gitksan and Wet'suwet'en can trace back over the centuries and in themselves they represent incapsulation of the people's history and its projection into the present and future. Indeed, some of the Gitksan and Wet'suwet'en hereditary Chiefs' names stand among the oldest continuously held titles that exist anywhere in the world.

You will hear evidence that on his or her succession to a high Chief's name, the person holding that name accedes to ownership of the House territory. As the proprietary representative of the House, the Chief has a range of responsibilities dealing with allocation and disposition of rights to use the territory amongst House members and non-House members. He also directs and safeguards the House's production components: The fruits of land, labour, knowledge and skills which are utilized in relation to the territory, so as to secure for its members and frequently for there relatives and in-laws, an appropriate standard of living. The Chief, as the proprietary representative, also has the responsibility for defending the integrity of the territory against the claims of other House groups or other nations. However, in addition to succeeding to the proprietary responsibility for the territory, the Chief also assumes a reciprocal stewardship of lands grounded in the people's sharing of the land with the animals, the fish and other life forces.

As steward, the Chief is responsible for ensuring that the animals and the fish are accorded the respect which Gitksan and Wet'suwet'en law demands. Thus, by ensuring that salmon are not wasted, the Chief

maintains his House's relationship with the salmon to ensure their annual return to provide for the needs of House members. In accordance with Gitksan and Wet'suwet'en world view, if something goes wrong with the relationship, it is not considered an accident. In his or her role as representative of the House in the animal and spirit world, the Chief is responsible for determining the reason for the breach and for correcting it.

The roles of the Chief are not limited to those relating to the proprietorship or stewardship of the territory. Both within the Feast Hall and outside of it the hereditary Chiefs mediate and resolve disputes between House members, between Houses and with neighbouring Indian nations. Sometimes the exercise of this peace-keeping and conflict resolution role is highly visible in the Feast Hall; at other times his authority is excercised informally, operating through consensus and consultation. You will hear evidence of this process of consultation, involving elders and what the Gitksan will refer to as the "wings of the chief" and the Wet'suwet'en as "the head push". These are the men and women who are the holders of other high names or titles within the House associated with crests, kungax and songs.

The Gitksan and Wet'suwet'en Chiefs have another important responsibility within the overall Gitksan and Wet'suwet'en system when they are invited to Feasts of other Houses and Clans. That is to perform the essential role of witnesses and validators to the claims to chiefly titles and territories made by other Houses. In order for Chiefs to perform their role as witnesses to this distinctive form of public acknowledgement of land title, they are trained by their predecessors in the boundaries of their own House's territories, and the boundaries of the territories of their neighbours, and those with whom they are socially closest. They are taught to understand the power of the poles from the crests that proclaim the origins and the legitimacy of the House's right to possession of their lands.

This is yet more to the role of the Chief. The Chief inherits, along with the Chief's name and the House territory, the crests enfused with spirit power. Gitksan and Wet'suwet'en Chiefs exercise their authority and carry out their responsibilities with the aid of this spritual power. In the course of the

trial you will also hear evidence from the Gitksan witnesses as to the Naxnox performances which take place in the Feast Hall. Some of these dramatize the implications for a people whose members lack respect for the rights and territory of others and who lie, boast or disdain their social responsibilities. If ignored, these dark qualities grow to become a destructive force that threatens the social order and welfare of the society. The performance is the ritual taming and controlling of this negative force thereby creating order, peace and harmony. The Chief as the embodiment of the House and the individual whose spritual strength is most involved must use that strength to contain or mitigate these destructive qualities. The Chief controlling one of these forces takes on its name as one of his own. Each Chief holding such a naxnox name tames that anti-social force for his House and for the society as a whole. Naxnox performances of this kind can be considered as an enactment of the process of civilization.

My Lord, this might be a convenient time to break.

THE COURT: Yes, All right. We'll take the morning adjournment. Thanks you.

THE REGISTRAR: Order in court. This court stands adjourned for 15 minutes.

(MORNING RECESS TAKEN AT 11:00)

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

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Graham D. Parker
Official Reporter
United Reporting Services Ltd.

1 (PROCEEDINGS RESUMED AT 11:15)
2 THE COURT: Mr. Rush.
3 MR. RUSH: Thank you, my lord. Continue then at the top of page
4 36.
5 My lord, you will also hear about other forms of
6 naxnox and the power of the halayt. And in this
7 context the halayt means seer. You will also hear
8 evidence that the authority of the Wet'suwet'en chiefs
9 derives not only from the assumption of the high
10 chiefs' names, but also from individual contact with
11 the spirit realm which comes from dreams, visionary
12 experiences, and what the Wet'suwet'en will refer to
13 as habo'stat.
14 Clearly the Gitksan and Wet'suwet'en hereditary
15 chieftainship is a complex institution. In its
16 perpetual succession it shares the characteristics of
17 what in the common-law is classified as a corporation
18 sole, the principal examples of which are the English
19 monarchy and the office of the Archbishop of
20 Canterbury. Indeed, the attributes and
21 responsibilities of the hereditary chief share some
22 characteristics with both of these other institutions.
23 The wisdom, judgment, political and moral leadership,
24 and spiritual strength, and stewardship expected of
25 monarchs and archbishops are part of the attributes
26 demanded of the Gitksan and Wet'suwet'en chiefs.
27 In the course of this trial, you will hear repeated
28 references by Gitksan and Wet'suwet'en witnesses to
29 their law. Yet, you will not hear evidence locating
30 the power to legislate in any Gitksan legislature.
31 You will not hear of any Wet'suwet'en Supreme Court
32 House, inhabited by a specialized judiciary, charged
33 with interpreting and applying the law. Nor will you
34 see any Wet'suwet'en policeman or Wet'suwet'en
35 bailiffs, who make their living enforcing Gitksan and
36 Wet'suwet'en law. What the court will hear about are
37 principles in rules which entrench fundamental Gitksan
38 and Wet'suwet'en values, establish a basis for social
39 order, and provide for the peaceful resolution of
40 conflict. In this regard, Gitksan and Wet'suwet'en
41 law shares common features with the legal systems of
42 all civilized societies. Although Gitksan and
43 Wet'suwet'en do not divide up their laws and its
44 administration in the manner of Canadian law, much of
45 the evidence you will hear about their laws can be
46 understood in terms familiar to lawyers trained in
47 common and civil law. Thus, evidence will be

1 presented which shows the existence of what we would
2 call property law. Rules which deal with the
3 delineation and public recording of boundaries, the
4 right to exclusive possession, the right to grant or
5 withhold a subsidiary interest to use the land for a
6 limited time and on conditions, rules which deal with
7 rights of access to land by children and spouses,
8 rules which deal with trespass and the right to
9 protect the land from trespassers, rules which
10 regulate the succession of property and which
11 determine its alienability. Evidence will be
12 presented of other laws which can be analogized to
13 natural resources law, laws relating to the allocation
14 of harvesting rights and regulation of harvesting
15 activities. You will be told about laws which are
16 readily recognizable as Family Law and Succession,
17 dealing with marriage, adoption and divorce and the
18 orderly disposition of interests in property and
19 titles on death. But evidence will also be presented
20 on laws which are not the subject of study in any
21 Canadian or, indeed, Western law school, laws dealing
22 with the appropriate conduct of human beings in
23 relation to animals. Environmental law does not begin
24 to capture what it is when the Gitksan and
25 Wet'suwet'en talk of the law of respect for the
26 natural world.
27 Although Gitksan and Wet'suwet'en law represents a
28 more integrated legal order than Canadian law, it
29 recognizes what Madam Justice Wilson referred to in
30 the Motor Vehicle Reference case when dealing with
31 section 7 of the Canadian Charter of Rights as the
32 "bedrock principles that underpin a system". You will
33 hear that the legal connection between a high chief's
34 name and territory is one such principle. You will
35 hear that succession to the name gives authority over
36 the territory is another; that succession, the name,
37 territory and authority must be witnessed and
38 validated by the other Houses is a third; that in
39 exercising their authority the chief and all other
40 House members must observe proper respect for the
41 animals and fish that sustain them. Over the course
42 of the trial, these and other principles that underpin
43 their distinctive system will be identified. You will
44 also hear in the evidence of the chiefs the ways in
45 which another fundamental principle -- that Gitksan
46 and Wet'suwet'en law be obeyed -- has been repeatedly
47 breached federal and provincial governments.

The foregoing is an outline of some of the most significant aspects of Gitksan and Wet'suwet'en societies, their institutions and their systems of authority and ownership of territory. Never before has a Canadian court been given the opportunity to hear Indian witnesses describe within their own structure the history and nature of their societies. The evidence will show that the Gitksan and Wet'suwet'en are and have always been properly counted amongst the civilized nations of the world; that their ownership of their territory and their authority over it has always existed; and that they have shaped a distinctive form of confederation between Houses and clans. The challenge for this court is to hear this evidence, in all of its complexity, in all its elaboration, as the articulation of a way of looking at the world which pre-dates the Canadian constitution by many thousands of years.

We have so far talked about the challenges facing the court in understanding the Indian world view and the distinctive nature of Gitksan and Wet'suwet'en institutions and law. There is another crucial aspect of Gitksan and Wet'suwet'en society which bears directly on the nature of the evidence which will be presented to this court. The Gitksan and Wet'suwet'en languages have not, until the last century, been written down. Their societies are in the oral tradition. The evidence in support of the plaintiffs assertions of ownership and jurisdiction will include evidence of the chiefs and elders in which they will relate the history of their Houses' territory and of their name. Their accounts go back to the most ancient remembered village and territory, including migrations or dispersal of the group to other villages and territories since then; they include an account of the major hostilities that took place when boundaries were being established or re-established. The significance of this evidence is that it will demonstrate the evolution of Gitksan and Wet'suwet'en society and the origins of the clans, the Houses, the Feast and the laws. It not only relates to the essential elements of Gitksan and Wet'suwet'en ownership and jurisdiction to a time long before Europeans came into their territories, but it documents the depth of the Indian peoples' presence in and relationship to these territories. It explains the incredulity of the Gitksan and Wet'suwet'en chiefs

in the face of the assertion by the Province that the events of the last 100 years have had the result of divesting them of their ownership and authority which they have exercised for more than 5000 years.

How should this court view the evidence of Gitksan and Wet'suwet'en history stretching back over the millennia in the absence of the usual written historical record? Some assistance will be provided to the court in the form of archaeological and geological evidence which relates significant events and places which relates significant events and places referred to in the ada'ox and the kungax to conventional 'scientific' proof.

For example, the Gitksan ada'ox of Medeek describes the destruction of Temlaxam by a terrible force which ripped through the forest, bringing down trees in its wake and causing a rapid rise in the waters of a nearby lake. This destructive force is attributed in the ada'ox to a giant grizzly bear. The ada'ox describes this in graphic detail. Using the detail of the account in terms of the nature of the event and its physical location, "scientific" evidence will be presented relating this event to a landslide or debris flow that occurred in what is now known as the Chicago Creek drainage, accompanied by the damming of and rise in the waters of Seeley Lake. This event occurred, according to the scientific evidence, some 3500 years ago.

The Wet'suwet'en kungax of the House of Goohlaht describes its origins in the ancient village of Dizkle, where enemies had killed off all but one of the inhabitants and the lone survivor, a woman, unearthed, two-and-a-half feet under the ground, an inert Chief Goohlaht, with a crown of grizzly bear claws on its head, the sign of being a shaman. The woman brings him back to life, marries him and together they build a new house at the Dizkle site, establishing a totem pole with a raven on top to warn them of any other impending attacks. This is the first Wet'suwet'en totem pole and the founding of the first Wet'suwet'en House. Archaeological evidence will be presented as to analysis of artifacts and contextual archaeological data from sites in the Morricetown and Hagwilget Canyons, which indicates continuous human occupation in the middle Skeena River drainage for at least 6000 years up to the present. Archaeological evidence of salmon processing

activities, food storage facilities, large house structures, evidence of participation in widespread trade networks and evidence of warefare, will be used to support the position that the cultural patterns of the Gitksan and Wet'suwet'en, as described in their oral histories, have been operating in their present territories for a long period of time.

Because we have no written contemporary account of the landslide at Stekyooden, or the founding of the House of Goohlaht, must the Court view the scientific geological and archaeological evidence as the only real evidence of the time depth of Indian occupation of the territory? Must the plaintiffs' own accounts of events which took place hundreds and thousands of years ago be deemed unscientific and mythical, mirages and reality, rather than the real evidence of history?

For the Court, however, to deny the reality of Gitksan and Wet'suwet'en history except where it can be corroborated by expert evidence in the western scientific tradition is to disregard the distinctive Gitksan and Wet'suwet'en system of validating historical facts.

In Gitksan and Wet'suwet'en society the chiefs are responsible for their part of the society's history and for knowledge of their particular territory. However, chiefs are reluctant to answer questions about histories or places that probably belong to someone else. It is as if to speak of another's territory were to constitute a trespass. As a total system of knowledge, therefore, Gitksan and Wet'suwet'en facts are shared out. The totality of the historical record exists in the minds of the chiefs that feast together, those feasting together being those whose historical paths have crossed. In this way, the record of Gitksan and Wet'suwet'en history exists in its totality in the minds of those whose duty it is to remember it. Each chief tells his history in the living context of the knowledge of other minds. Thus, when a chief describes the events that took place long ago, events that he or she could not possibly have witnessed, these can be told as established truths by virtue of having been tested and validated at a succession of narrations. These typically occur at the Feast where other chiefs are responsible for ensuring that all that is told is told as it should be. Elders know that the important parts of their history, contained within the ada'ox or

expressed through the kungax have been told, heard and acknowledged many, many times. This accumulated validation lies behind the present day chiefs insistence that a particular story is true and is not anything like mere hearsay.

In the course of his commission evidence, Fred Johnson, Chief Lelt, several times insisted that things he was saying were true because they had been witnessed and acknowledged. He used the Gitsksan word nidn't, which Glen Williams, the translator at the time, rendered in English as acknowledged, confirmed, witnessed. Translation of this term is difficult precisely because it is used to establish validity of a type which is deeply unfamiliar to Western ideas of truth.

For Chief Lelt, historical facts are facts by virtue of nidn't. They are confirmed by being acknowledged by a succession of witnesses who, thanks to their specialized training as high chiefs, can be trusted to police distortions. We can thus begin to see the analogy between Gitksan and Wet'suwet'en nidn't-based fact and what, in other cultures, or epistomology, is taken to be scientific fact. Western tradition distinguishes between what is experienced and what is hearsay; the Gitksan and Wet'suwet'en chiefs make this distinction in a different but analogous form, by virtue of testimony and witnessing at the Feast. Western tradition distinguishes between opinion and knowledge; a individual can have his views of any matter, but only properly qualified specialists or experts can venture to offer information that transcends individual opinion.

The test of the experts' truth in the Western scientific tradition has two facets: on the one hand, there is expertise by virtue of special training and discipline, while on the other hand, there is discovery and truth by virtue of testing hypotheses under controlled conditions. In the Gitksan and Wet'suwet'en system of knowledge, there are properly qualified specialists: Hereditary chiefs and elders, and they have responsibility for facts that are more than individual opinions. Also, a chief has undergone specialized training and study, thanks to which he or she can be trusted to ensure that facts are stated and ordered in the proper manner. Finally, this stating and ordering amounts over long periods of time, often reaching far beyond the lifetime of any single chief,

to a test of truth. By surviving in the Feast system, facts acquire a higher status, and come to constitute a part of accepted knowledge -- much as scientifically verified facts assume the status of knowledge in the Western tradition.

The difficulty we in the Western tradition have is in seeing the nature of facts in another, different kind of cultural arrangement. If one culture refuses to recognize another's facts in the other culture's terms, then the very possibility of dialogue between the two is drastically undermined. The challenge for this court in understanding the nature of Gitksan and Wet'suwet'en validation of facts and in accepting Gitksan and Wet'suwet'en history as real, is part of the Court's task in treating Gitksan and Wet'suwet'en societies as equals.

The historical evidence which will be presented to this Court is also intended to address some of the distorting cultural biases with which we typically view Indian societies. Even though it may be acknowledged that Indian people have lived in British Columbia for thousands of years before Europeans came, that enormous span of time is viewed as a period in which little, if anything, of historical consequence happened. To the extent that it is admitted that Indian peoples had their own cultures and their distinctive ways of making a living, these are seen as static as well as primitive. In this way native peoples are commonly viewed by Western societies as being without history. As recently as 1966, Hugh Trevor-Roper, the Regius Professor of Modern History at Oxford university, claimed that Africa had no history prior to the era of European civilization. He says: "Perhaps, in the future, there will be some African history to teach, but at present there is none, or very little: There is only the history of the Europeans in Africa. The rest is largely darkness...and darkness is not a subject for history: .... which is essentially a form of purposive movement." In the same superiorist vein, the history of British Columbia begins for us when our ancestors arrived. Part of this Western historical perspective is that starting from the point of European contact, Indian societies started to change. The adoption of European trade goods and the incorporation of new economic opportunities, along with the incorporation of new religions, are seen as a gradual abandonment of

1 the real traditional Indian life. This view of the
2 nature of historical change has direct implications
3 for the legal issues in this case. It has given rise,
4 in some of the judicial statements of aboriginal
5 rights, to a definition of those rights as frozen, as
6 of the time of the assertion of European sovereignty
7 and European contact. According to this legal theory,
8 the evidence must then be focussed on demonstrating
9 the nature of the Indian society at that point, to
10 determine the nature of their aboriginal rights. You
11 will hear evidence from the Indian people themselves
12 and from historians and anthropologists which will
13 show that, at the legally relevant time according to
14 this view of aboriginal rights, the Gitksan and
15 Wet'suwet'en systems, and in particular, their
16 concepts of ownership and authority, were in place.
17 You will also hear legal argument that this test of
18 frozen rights is misconceived.
19 There are other legal implications for this
20 particular view of historical process which dates real
21 "Indianness" to a point determined by European
22 contact. To the extent that Indian life has changed,
23 assertions of aboriginal title in the contemporary
24 world are seen as historically and legally outmoded,
25 because Indians are not now sufficiently aboriginal.
26 There is then seen to flow from the inexorable course
27 of history the abandoning of "real traditional
28 aboriginal life" and with that the withering of the
29 raison d'etre for aboriginal rights. We suggest that
30 this thesis underlies the real defence of the
31 provincial Crown in this case.
32 MR. GOLDIE: Perhaps my friend might let me speak as to what the
33 defence is of the provincial Crown.
34 THE COURT: I am sure he will, Mr. Goldie, in time.
35 MR. RUSH: My lord, we will be arguing that this court should
36 not endorse a frozen concept of aboriginal rights. We
37 will be arguing that the entrenchment of aboriginal
38 rights in the Charter is inconsistent with such a
39 view. We will also be arguing that the aboriginal
40 rights of the Gitksan and Wet'suwet'en are not to be
41 defined exclusively by reference to some fixed notion
42 of traditional Indian society. We will be presenting
43 evidence that the division between traditional and
44 non-traditional is false and misleading. It is
45 misleading, my lord, because it implies judgments
46 about Indian life and culture that we would not apply
47 to our own. These judgments also tend to place a

1 cultural obligation on Indian people to live according
2 to limiting and unchanging rules. The application of
3 such a dichotomy denies to "traditional" cultures a
4 right to be modern, a right to change, a right to
5 evolve, a right to progress, and thus consigns these
6 cultures to the past.
7 Evidence will be presented to this court to support
8 the position that the Gitksan and Wet'suwet'en systems
9 are open and adaptive, and that many of the
10 developments in their territories since white contact
11 are not the symbols of their demise as Indian
12 societies, but are a product of their vitality; many
13 developments have been incorporated into an existing
14 framework and structure of their society in ways which
15 are a part of a chain of continuity with the past.
16 We will be presenting evidence describing the
17 ecological and economic facets of the Gitksan and
18 Wet'suwet'en relationship to their territories. That
19 evidence will show how the major Gitksan and
20 Wet'suwet'en villages occupy an ecosystem that is
21 uniquely favourable to human habitation. Compared to
22 the surrounding region, the mild, dry climate of the
23 middle Skeena produces an abundance of food and plants
24 as well as being best suited for the smoke-drying
25 preservation of foods. Here are also found the most
26 productive salmon fishing canyons of the Skeena
27 system. This same ecosystem lies at the conjunction
28 of three major North American climatic and biotic
29 zones: The Pacific coast, the interior plateau, and
30 the boreal forest. From their villages the Gitksan
31 and Wet'suwet'en can efficiently travel to a wide
32 diversity of rich valley and Alpine environments that
33 comprise their territories. This has enabled the
34 Gitksan and Wet'suwet'en societies to sustain higher
35 population concentrations than is normally found in
36 other societies that depend upon hunting and fishing.
37 These concentrations necessitated harvesting animals
38 more intensely than is customary in such economies.
39 This, coupled with the importance of trade, has meant
40 that ecological monitoring, the orderly conduct of
41 harvesting activities and defined rights of ownership
42 to territories and fishing sites, have always been
43 important to the Gitksan and Wet'suwet'en systems.
44 The evidence will also show that trade has long
45 been a significant part of Gitksan and Wet'suwet'en
46 economies. By virtue of their location at the meeting
47 of coast and interior environments and peoples, the

1 Gitksan and Wet'suwet'en are actively engaged -- were
2 actively engaged in trade long before the arrival of
3 Europeans. From the earliest days some part of the
4 food, clothing, along with much material culture, has
5 been the subject of import and export between the
6 Gitksan and Wet'suwet'en and their northwest coast
7 neighbours. Trade routes and trails created a web of
8 interconnection throughout the northwest coast. No
9 one community existed in economic isolation and the
10 use or value of resources was not limited to its place
11 of harvesting. Oolichan grease, a important part of
12 both Gitksan and Wet'suwet'en diet, was transported
13 from one river system to another and sold. Dried
14 berries, dried seaweed, smoked Oolichan, the meat of
15 animals, dried salmon, all these figure in a trade in
16 foodstuffs. Caribou and especially moose skins were
17 also brought into the area, notably for distribution
18 at the Feasts. Obsidian, used in the manufacture of
19 tools, according to the archaeological evidence, was
20 traded into northwest British Columbia for some
21 thousands of years. A trade in dentalia shells, also
22 part of what the archaeologists refer to as the "tool
23 kit", was also of considerable historical depth. This
24 trade depended upon labour -- the men and women who
25 carried boxes, skins and other goods from one
26 community to another. At the same time, trading
27 canoes moved up and down the Skeena. These were
28 crewed, supplied and welcomed by various men and women
29 of villages between the Queen Charlotte Islands and
30 Gitanmaax.
31 It is within the context of an economy which was
32 never isolationist, and which combined elements of
33 domestic production and consumption with an elaborate
34 complex of trading networks, that the more recent
35 history of contact with Europeans must be assessed.
36 Historical evidence will review the observations of
37 the early traders, and in doing so, provide an
38 evidentiary antidote to some well-entrenched
39 stereotypes regarding the nature of the relationship
40 it between the Hudson Bay Company and Indian traders.
41 The evidence will document the difficulties the early
42 white traders experienced in their dealings with the
43 Indians of the Upper Skeena because of the strength of
44 pre-existing trading patterns. The Indians controlled
45 the communication corridors and were jealous of their
46 trading alliances. In order to participate in the
47 regional trading economy, the Hudson Bay Company had

to fit into the ongoing system, contrary to the common assumption that it was the Indians who were brought within the encircling web of the Bay's system.

You will hear how Peter Ogden in his first journey to Hotset -- the site of the ancient village of Kya Wiget and the present site of Morricetown -- in 1821, identifies the Wet'suwet'en chiefs by the names which appear on the statement of claim in this case and refers to them as "men of property". The observations of these early Hudson's Bay traders indicated that access to resources was regulated by a land tenure system in which tracts of land were managed by the hereditary chiefs. The chiefs also controlled access to trails that traversed their Houses and teritories. The historical evidence will demonstrate that while there was an intensification of competition with the advent of European trading enterprises, and some distortion in the Feast or Potlatch system, particularly amongst the Indians on the coast, in the interior amongst the Gitksan and Wet'suwet'en, increased trading opportunities were incorporated into a existing economic and social system.

The evidence will show that the participation of Gitksan and Wet'suwet'en men and women in new forms of economic opportunity in the late 19th and early 20th centuries, constitutes not discontinuous change but evolution based upon existing patterns. Thus the evidence will show that with the increased volume of traffic on the Skeena, occasioned by the establishment of Hazelton as a major supply depot, Indian freighters formed the most significant part of the transportation network. When the Grand Trunk Pacific Railway line was built through the territory, Indian fishermen regularly sold fish to the construction crews. When white settlers began to farm the Bulkley, Kispiox, Skeena and Kitwanga bottomlands, they quickly established arrangements for trading farm produce to the Gitksan and Wet'suwet'en for salmon. The development of logging and sawmill operations to provide poles and tiles for white transportation, and communication corridors, such as the railway and telegraph, are other significant examples of trade and exchange of human and natural resources of the Gitksan and Wet'suwet'en Houses and territories. The advent of opportunities for wage labour provided a new dimension in pre-existing exchange arrangements. Many people began to spend the summer months working in the

fishing industry, either in the canneries or in the commercial fishery. This activity was again incorporated in the ongoing network of reciprocity, in that those who stayed at home caught and prepared salmon for those working on the coast, who, in return, reciprocated with store-bought commodities and cash.

The evidence will show how these new forms of economic opportunities have been layered on to existing and dynamic economic systems. It will make clear that Gitksan and Wet'suwet'en economies were never based on subsistence alone. If we equate "traditional Indian life" with subsistence, the Gitksan and Wet'suwet'en have not been traditional since time immemorial. The absurdity of this kind of conclusion is some indication of how misleading seeking to confine aboriginal rights to some proto-typical definition of tradition can be. They blind us to the way in which Gitksan and Wet'suwet'en economies are open and mixed. The element of subsistence is part of a continual but changing economic balance.

By avoiding the mistaken and sterotypic implications of the idea of "traditional" subsistence economic life, the gain in understanding is extensive for it means this court can see Gitksan and Wet'suwet'en societies in the same kinds of terms as we usually discuss our own society. That is to say, by reference to institutions of ownership and jurisdiction of territories as socio-economic foundations. Societies without these foundations are properly understood as ethnic groups or sub-cultures. Societies with these foundations look to their boundaries and territories as the basis for well-being and identity in the present and future as well as the past.

So it is with the Gitksan and Wet'suwet'en people. The rights which they assert in this case are ownership and jurisdiction over their territory and not to any particular economic form or way of making use of these territories. It is important not to misunderstand the implication of this assertion. Economic activities centering around the fishery remain to this day, as they have been for centuries, the economic well-spring of Gitksan and Wet'suwet'en well-being. This will be evidenced not only outside of the court by the enormous activity and energy which will be generated this summer and fall by the the plaintiffs and their Houses on the Skeena, Babine,

1 Bulkley, Nass and Nechako Rivers but also in the court
2 through the evidence you will hear as to the efforts
3 that have been made in the development of a fishery
4 management plan. This plan, while building upon the
5 people's immense knowledge of and relationship to and
6 respect for the salmon, integrates appropriate
7 technology and scientific information sources
8 regarding fish stocks. The use by the Gitksan and
9 Wet'suwet'en of computer technology in this regard, is
10 not a demonstration of their abandonment of their
11 cultural inheritance, any more than the incorporation
12 of new forms of trade and labour represents a slide
13 from a time of real and pristine "Indianness" to one
14 of contamination by alien economic elements. What the
15 evidence will show is that there is a continuity which
16 relates the Gitksan and Wet'suwet'en to their
17 territories, and to their distinctive form of
18 ownership of, and responsible stewardship over, their
19 resources.
20 The theme of continuity and change will also be
21 reflected in the evidence you will hear regarding the
22 incorporation of Christianity into Gitksan and
23 Wet'suwet'en spiritual systems. This evidence will
24 also demonstrate something else -- the determination
25 of Gitksan and Wet'suwet'en to maintain their central
26 institutions and laws in the the face of a concerted
27 effort to stamp them out.
28 You will hear in the evidence that many Gitksan and
29 Wet'suwet'en are members of Christian churches. You
30 will hear also these witnesses describe the continuing
31 significance of their spiritual beliefs centred on
32 their relationships with animals and the spirit world.
33 How can these beliefs exist side by side with
34 Christianity? Is not the assumption of the mantle of
35 Christianity the assumption of the benefits of a
36 progressive civilization and the inevitable withering
37 of "paganism"? You will hear evidence that over the
38 past century and a half, the Gitksan and Wet'suwet'en
39 have integrated aspects of Christianity into their
40 systems and maintained both absolutely. They are
41 participants in Anglican, Catholic, Pentacostal and
42 Salvation Army churches; at the same time, songs,
43 dreams, spirit power and reincarnation continue to
44 keep them in personal contact with the spiritual
45 forces that have always animated their lives and which
46 inform their practice of Christianity.
47 You will hear evidence that the introduction of

missionary work amongst the Gitksan and Wet'suwet'en took place at a time when their peoples had been decimated by the introduction of white epidemics of measles and smallpox. In Gitksan and Wet'suwet'en cosmology there is no such thing as accidental death. If misfortune befalls a person and there is a death, someone must be responsible. Deaths by new diseases were no exception; the act causing the death had to be located. The chiefs and shamans -- those endowed with special powers for dealing with sickness and death -- were obliged to make some sense of, even if they could not minimize, the devastation that early contact caused. Part of that explanation had to be found in the fact that white newcomers seemed to be exempt from the effects of the epidemics. It is not surprising, then, that the Gitksan and Wet'suwet'en saw missionaries as the white man's equivalent of their shamans. Nor were the missionaries slow to see the analogy and to use it to try and challenge the authority of the Gitksan and Wet'suwet'en spiritual authorities. Not only did the missionaries advance the theory that the Indians died because they failed to be Christians, they also insisted that Christianity offered eternal life. On the one hand, these new ideas seemed to explain the disaster; on the other hand they seemed to offer a escape from its consequences.

The evidence will show that despite missionary activity and the diseases by which they were proceeded and aided, the Gitksan and Wet'suwet'en did not give up their own systems. In turning to or accepting Christianity, the chiefs did not abandon their own authority, rather they sought to supplement it or adopt some of its terms of reference. A major example of how the Wet'suwet'en incorporated Christianity within the context of their own system will be described in the evidence about their most famous prophet, Chief Kweese, who took the full name of Bini. Bini fits into an ancient tradition of prophets amongst Indian societies in different parts of North America. Indian shamans responded to the influx of disease and the missionaries' message about the death and resurrection of the Son of God by a heightening of the shamanic role in which the shaman leaves his body, travels to the sky realm and comes back to re-animate his body, bringing with him songs, dances, and prophetic messages as to how the people must conduct

1 themselves to prepare for the changes that lie ahead.
2 You will hear evidence about how Bini's account of his
3 ascent to heaven and return to earth links the
4 spiritual journeys set out in an ancient Wet'suwet'en
5 kungax with New Testament prophecies.
6 You will hear how the Christian missionaries did
7 not share the ecumenical perspective of the Gitksan
8 and Wet'suwet'en. Whereas the Gitksan and
9 Wet'suwet'en were prepared to accord Christianity and
10 its practitioners a proper measure of respect, the
11 missionaries were not content with co-existence.
12 Their mission demanded and acceptance of the
13 superiority of the Christian ethos as part of the
14 process of civilizing the Indians. In this regard,
15 the efforts of missionaries and Indian agents, also
16 bent on bringing Indians into the pale of
17 civilization, were well reflected in the legislative
18 prohibition of the Feast in 1884. You will hear
19 evidence of the efforts within the Gitksan and
20 Wet'suwet'en territories to eradicate the Feast from
21 the fabric of Indian society. You will hear evidence
22 of apparent missionary success in persuading the
23 Wet'suwet'en chiefs to burn their Feast regalia in
24 honour of the Bishop in 1901. You will hear evidence
25 of a petition of Kispiox chiefs in 1914 apparently
26 endorsing the prohibition of the Feast. But these
27 events, placed in their proper historical and cultural
28 context, will be shown not to be the acts of voluntary
29 abandonment but Indian efforts to accomodate new
30 beliefs in terms of the form of the Feast without
31 changing its convention function. Despite the
32 outlawing of the Feast, you will hear evidence of the
33 Feast given by Chief Nikateen in the 1930s to protest
34 the legislation. You will hear evidence of the Feasts
35 held in the 1940s. But the best evidence of the
36 failure of missionaries, Indian agents and the Indian
37 Act to eradicate the Feast will be found in the
38 evidence of the Gitksan and Wet'suwet'en chiefs that
39 the Feast continues today to be their overarching
40 institution.
41 The evidence relating to history and nature of
42 Gitksan and Wet'suwet'en societies will be lead not
43 only in order to enable the court to understand the
44 Gitksan and Wet'suwet'en system of ownership and
45 jurisdiction, but also to understand the response of
46 the Indian peoples to the assertion of authority by
47 colonial, provincial and federal agents and

1 governments. It is part of the Province of British
2 Columbia's defence, which they seek to support through
3 historical evidence, that the Gitksan and Wet'suwet'en
4 readily submitted to the arrival of the whiteman, his
5 activities, his laws and authorities, and that in so
6 doing, they have acquiesced in the incremental
7 extinguishment of whatever rights they may have once
8 possessed. This evidence relies on "primary"
9 historical material, by which is meant the archival
10 papers of the provincial governments, the diaries and
11 correspondence of the officials, missionaries and
12 other private individuals. It is, in other words, the
13 historical record and contemporary newspaper stories
14 of those who live at the frontier and those who bring
15 "civilization" to the frontier. Where it speaks of
16 the Indian voice, my lord, it does so through the
17 distorting lens of superiorist ideology with its
18 mixture of lack of understanding and disdain for
19 Indian societies.
20 The evidence which the plaintiffs will present,
21 while dealing with many of the same events which are
22 relied upon by the Province to show "acquiescence" and
23 "submission" to Canadian authority, will explain these
24 events in terms of the authentic Indian voice. And
25 the Indian understanding of these events within their
26 cultural framework. So explained, the evidence of
27 so-called "submission" and "acquiescence" will take on
28 a totally different character. A graphic illustration
29 of this, which will be referred to in the evidence, is
30 the burning of the village of Kitseguecla in 1872,
31 which may be regarded as the first significant
32 conflict with whites. The fire was caused by a group
33 of miners who had neglected to extinguish their
34 campfire. The resulting conflagration destroyed 12 of
35 the Gitksan Houses and most of their contents together
36 with 12 crest poles.
37 As we have already stated, in the Geiksan world
38 view there is no such things as a accident. The
39 persons responsible must acknowledge their culpability
40 and make suitable public restitution. When this
41 failed to materialize, the Kitseguecla chiefs
42 blockaded the Skeena to all trading and supply boats.
43 The provincial government sent two gun boats to the
44 mouth of the Skeena and a meeting took place on board
45 H.M.S. Scout, between the Lieutenant-Governor and the
46 Attorney-General and the Kitseguecla chiefs, who
47 attended wearing their ceremonial regalia. The

Lieutenant-Governor, Joseph Trutch, while maintaining the provincial government could accept no responsibility for the fire, stated that the government was prepared to make a present as an act of grace to the people of Kitsseguecla and that, while the blockade of shipping would be overlooked on this occasion, in future the rule of law must prevail. As reported by the Victoria Colonist, the payment promised amounted to some $600 and after its distribution to the chiefs, the indians "fired off their muskets and sang songs expressive of their love for the Whites." The ship's guns were also fired at the conclusion of the meeting and again, according to the Colonist, "the shot and shells as they crashed through the trees or ricocheted through the water, seeming no to impress the savages very forcibly with an idea of the power of the whites."

There is not Kitseguecla Colonist which we can consult for the Indian account of these events (and the Victoria Colonist did not have a regular Gitksan columnist on its staff) but the Indian account has not gone unrecorded. In the archival material Barbeau-Beynon, a series of detailed interviews conducted by an eminent White ethnographer and an eminent Tsimshian ethnographer, we are provided with a important window into these and other critical events relating to the early days of Indian-White contact. Through a review of this archival material, and an appreciation and understanding of Gitksan law, the evidence will show that the meeting at Kitseguecla can be seen in terms other than the affirmation of White law and authority and order, coupled with a charitable benovolence towards the poor beknighted natives. Viewed against this historical background and cultural perspective, the evidence will illustrate that the meeting on board H.M.S. Scout had certain elements of the traditional Feast. The chiefs of the Kitseguecla Houses were there as well as the chiefs from Victoria; the chiefs wore their regalia indicating their titles; there were formal speeches, food was distributed; there was a dramatic presentation of power accompanied by songs. In terms of, and in accordance with, Gitksan law, a settlement of a dispute was reached and witnessed, accompanied by demonstrations of power, payments were promised in recognition of wrongdoing, and agreement reached that in future there would be harmony instead of discord.

The Gitksan response to the burning of Kitseguecla will provide this court with an important insight into the nature of the Gitksan and Wet'suwet'en systems. They place great emphasis on respect and compensation. These two are closely connected. You show respect by sitting in your appropriate place in the Feast Hall as well as by aabiding by rules for use of House resources. Failure to show respect, a breaking of the law requires some form of compensatory payment. Compensation redresses wrongdoing symbolically, in the the form of public admission of liability through a Feast and then materially, often with payments of money, land or, in extreme cases in the past, with a life. The result is a negotiated settlement in which a wrong is put to right.

Throughout the history of White-Indian contact in north-west British Columbia, Indians have made many demands for respect and compensation. When Whites break Gitksan or Wet'suwet'en laws, as the evidence will show they have done in a cumulative manner over the last 100 years, Gitksan and Wet'suwet'en people have expected to be compensated. A failure of compensation demonstrates lack of respect for their system. Lack of respect for the system constitutes a further form of wrongdoing requiring additional redress. Indian demands for compensation cannot be interpreted as a demonstration that Indians in return for money are prepared to abandon their rights. Payment, so far as it equals compensation, acknowledges and endorses the Indian system and is the very opposite of acquiescence in its demise.

The central role in Gitksan and Wet'suwet'en law of compensation and restitution has other implications in terms of some of the evidence this court will hear. When Gitksan and Wet'suwet'en elders relate what has happened in the past in terms of the abuse and disregard of their ownership and authority, they are not consigning their culture to history. This court should not see this as a lament for times and rights now lost, but rather a demonstration of the continuing life in the tissue of the system which causes elders and chiefs to pay restitutional attention to the insult and injury of which much of the recent history is composed.

My lord, this was the point in the opening that I intended to stop and Mr. Grant was going to pick up from this juncture. And looking at the hour, it might

be an appropriate time to commence in the afternoon.

THE COURT: All right. Thank you. We will adjourn then until 2 o'clock.

(PROCEEDINGS ADJOURNED FOR LUNCH)

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

Wilf Roy
Official Reporter

1 (PROCEEDINGS RESUMED AT 2:00)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Grant.
5 MR. GRANT: Thank you, my Lord. My Lord, we have split the
6 argument at this point at page 72 because it is
7 natural to move from my colleague's description of the
8 evidence of the plaintiffs to the more recent history
9 and the evidence of the last hundred years. I'll
10 start at page 72.
11 The principal basis upon which the Province of
12 British Columbia alleges that the Gitksan and
13 Wet'suwet'en have given up whatever ownership and
14 jurisdiction they may have had, is that they requested
15 from the various Indian Reserve Commissions that
16 additional lands be set aside as Indian reserves. The
17 defendant's thesis here is that by accepting reserves
18 and seeking to add to them the Indian people
19 acknowledged the loss of their larger territories and
20 accepted the reserves as a settlement of their
21 asserted rights to those territories. This thesis is
22 the legal analogy to a commonly held view that the
23 Indian reserve represents the symbol of Indian
24 capitulation to European presence in North America.
25 To see the reserve as such a symbol is to imply a
26 particular historical process: Indians once had their
27 territories, and now adays they have their reserves.
28 This alleged continuum of contracting land contains a
29 stereotype which is closely allied to the evolutionism
30 which Mr. Rush has already brought to the attention of
31 this court; the roaming hunter, with the life of
32 limitless freedom that comes with dependence only on
33 subsistence resources is progressively confined.
34 There is a perceived inexorable logic that Indians who
35 once had territories in their "traditional" life now
36 have the remnants of those territories, their very
37 small reserves, matching the remnant of their
38 "traditional" culture. There are further corollaries
39 to this view. The reserves are those places which we,
40 the non-Indians, have given them, the Gitksan and
41 Wet'suwet'en, so we acknowledge them to be their
42 lands. On this view, the rest of the land is not
43 theirs but ours. What does this mean in this case, my
44 Lord?
45 The Gitksan and Wet'suwet'en reserve lands
46 presently amount to 45 square miles. The thesis
47 embodied in paragraph 34 of the Province's Statement

1 of Defence is that the Gitksan and Wet'suwet'en
2 villages that make up most of the 45 square miles
3 represent the fitting conclusion of this historical
4 process. The plaintiffs will be presenting to this
5 court extensive evidence relating to the establishment
6 of Indian reserves and the Gitksan and Wet'suwet'en
7 responses to this process. That evidence will show
8 that Gitksan and Wet'suwet'en Chiefs have always
9 rejected the reserve system, and that this rejection
10 is a thread that runs through, and in many ways ties
11 together, many of the key events of this last century.
12 Gitksan and Wet'suwet'en life never could, and never
13 did, allow itself to be confined to a small set of
14 reserve lands.
15 You will hear much evidence relating to the
16 establishment of the McKenna-McBride agreement and the
17 ensuing McKenna-McBride Commission, also known as the
18 Royal Commission on Indian Affairs for the Province of
19 British Columbia, which held hearings throughout
20 British Columbia between 1912 and 1915. The
21 circumstances leading up to the agreement are of great
22 significance to this case, linking together as they do
23 a period of accelerating Indian protest and assertion
24 of their aboriginal rights to their territories,
25 including petitions to the English Crown and efforts
26 to obtain judicial rulings from the Privy Council,
27 then of course the highest court to which an appeal
28 could go from this country. They also prove an
29 important window into provincial and federal responses
30 to these initiatives, which, in the form of the
31 McKenna-McBride agreement, resulted in an accord to
32 deal with -- only with the resolution of outstanding
33 federal-provincial issues relating to Indian reserve
34 lands and specifically excluded any determination of
35 the issue of aboriginal rights. That issue was to be
36 set aside for future consideration. As you will hear
37 later this was not the first nor the last occasion in
38 which, in the spirit of co-operative federalism, a
39 principled resolution of Indian rights was deferred.
40 In the extensive hearings which the McKenna-McBride
41 Royal Commission conducted across the province, Indian
42 attempts to raise the issue of aboriginal title were
43 met with the response by the Commissioners that this
44 was beyond the Commission's terms of reference. Of
45 great relevance to the position taken by the Province
46 in its defence in this case is the assurance Indian
47 witnesses were given that participation in the work of

the Commission would not prejudice their claims based on aboriginal title. Thus, you will hear evidence of the following exchange between the Chairman of the Royal Commission and Chief Haalus, William Holland, at the meeting of the Kuldoe Band. William Holland is the father of the present Chief Gyolugyet, Mary Mackenzie, who will be the first witness that you will hear on the stand. Her father said this 76 years ago to the commission:

> "The chief wants me to speak for him. We just want one thing, and that is to get back our land again. The land was here before we were here and we want to get it back, all the land along the Skeena River."

The chairman:

> "Some of the Indians, and those who are supporting your claim, thought at one time that if you applied to us for certain lands and we gave them to you that you were, to some extent, giving up some of your privileges; that if you accepted those lands you would not have the further right to take this matter up in the Courts, but a further Order-in-Council was passed expressly stating that this would not affect you in the least."

Paragraph 34 of the Province's Statement of Defence would seek to make a liar out of the Chairman of this Royal Commission.

The evidence of Gitksan and Wet'suwet'en Chiefs at the Royal Commission hearings is significant in understanding Indian attitudes to reserves. You have already been referred to the statement of another Chief, Charles Wesley, to the Commission, where he told the commission:

> "I wish to tell you that this reserve that you have just spoken about is something that we don't wish for. This country originally belonged to our ancestors, we were placed here originally by God, and it is only quite recently that the government has sent men out here to measure this land immediately around us, we were not notified of it when they did. Then the provincial government came in and sold the remaining land immediately around

1 us, and what we most strenuously object to is that
2 you insist upon us having this reserve. I was one
3 that signed the petition in 1908 which we sent down
4 to Ottawa. We asked that the land which the
5 provincial government had sold be returned or given
6 back to us. This is where our inheritances come
7 from and where they are were handed down from
8 generation to generation."
9
10 And again, you will hear evidence from the
11 Wet'suwet'en Chiefs of an exchange between the
12 Commission and one of their Chiefs, where the Chief
13 said in describing the reserves:
14
15 "If you want to help us there is only three things
16 we want and that's the first thing just people
17 dead. It's just the same thing as tying them up
18 and letting them die."
19
20 The commissioner questioned him on this:
21
22 "You mean that to restrict or confine the Indians
23 to their reserves, you mean that is killing you."
24
25 The Chief's answer was simple and affirmative.
26
27 My Lord, the evidence you will hear will leave you
28 in no doubt that the Gitksan Chief's statements to the
29 Royal Commission stand as a testament to the
30 affirmation of their rights to their territory and not
31 their voluntary participation in their demise.
32 Evidence will be presented to you as to the role
33 that the Gitksan and Wet'suwet'en reserves play in
34 Indian life in order for the court to understand that
35 they are not the capital of a residual Indian culture.
36 Many of these reserves are ancient village sites,
37 where Indian people have chosen to spend at least part
38 of each year over a period of centuries, and in some
39 cases, millenia. They include Kitwanga, Kitsequecla,
40 Kispiox, Kisgagas, Kuldoe, Gitanmaax, Hagwilget and
41 Moricetown. Other reserves such as Glen Vowell are
42 places which missionaries thought were a good place
43 for Indians to relocate. Indian agents and
44 missionaries encouraged Indians to move to or remain
45 living all year round on reserves through a set of
46 incentives in the expectation that ultimately and
47 inevitably Indians would become like us.

1 But the evidence you hear will show that reserves
2 were never seen nor accepted by the Gitksan or
3 Wet'suwet'en as centres of assimilation. Conceived by
4 the early Indian agents as a legal and administrative
5 fence to confine, control and to monitor Indians, the
6 reserve has never succeeded in confining the Gitksan
7 and Wet'suwet'en culture and economy within its
8 limits. The evidence of the activities of each
9 historical period will show this failure, and I may
10 say will show it dramatically. The ever developing
11 round of Gitksan and Wet'suwet'en economic life, most
12 notably in the growth of the mixed economy, for
13 example, the inclusion of small-scale logging and
14 sawmill operations, will indicate that the Gitksan and
15 Wet'suwet'en life was not confined to the reserve in
16 the 1940's and 1950's. The importance of trapping for
17 so many Gitksan and Wet'suwet'en families shows that
18 there was no such confinement in the 1930's. The way
19 in which the many threads of Gitksan and Wet'suwet'en
20 life led people and produce along trails, that
21 criss-cross through the territories, shows the active
22 life of the cultures beyond reserves in the 1920's.
23 And I may say, my Lord, that the evidence will show
24 that many of the routes that you saw in those coloured
25 maps yesterday are routes -- are routes that have been
26 travelled by hundreds of years by the Wet'suwet'en,
27 Gitksan and Wet'suwet'en before the arrival of the
28 Europeans. The transcripts of the McKenna-McBride
29 Commission show that Indian people regarded the
30 intention to confine them to reserves as an affront
31 and an unacceptable offence against Gitksan and
32 Wet'suwet'en life and culture. The land claims
33 process, and ultimately this court case itself,
34 reveals the extent to which the Gitksan and
35 Wet'suwet'en have refused to accept the ideas implicit
36 in the reserve system.
37 My Lord, the boundaries of the Gitksan and
38 Wet'suwet'en territories are not to be found by
39 reference to the surveyed limits of their reserves.
40 Those boundaries, for many generations, have been and
41 are still being proclaimed and validated in the Feast
42 Hall. For the benefit of this court they have been
43 set out in maps. As you will hear, in preparing these
44 maps, the Chiefs went out into their territories and
45 from the mountain tops pointed out to the researchers
46 and map makers the metes and bound of those
47 territories. From up there on top of those mountains,

1 the reserves assumed their proper significance. In
2 the course of their evidence in this case the
3 plaintiffs will in effect walk you, the court, around
4 their territories as part of the process to obtain
5 this court's acknowledgement of what to them has never
6 been in dispute: These territories are Gitksan and
7 Wet'suwet'en.
8 In the same way it is essential that this court has
9 a clear understanding of the place of reserves in
10 Indian life in order to address the legal issues
11 raised in the Statement of Defence, so also it must
12 come to understand the issue of traplines and trapline
13 registration. These terms are charged with legal
14 significance. Traplines are registered under
15 provincial legislation, and you saw yesterday a map
16 that the defence wishes to tender of those traplines.
17 The system is administered by provincial officials.
18 Does it not follow, therefore, as argued by the
19 defendants, that a Gitksan and/or Wet'suwet'en chief
20 who has registered the trapline has, as it were,
21 attorned to provincial authority and voluntarily
22 surrendered and given up whatever aboriginal rights he
23 or she may have had in return for a grant. The
24 evidence the plaintiffs will be presenting will show
25 that trapline registration is far from an attornment
26 to provincial jurisdiction, was an attempt by the
27 Gitksan and Wet'suwet'en Chiefs to seek a measure of
28 recognition from the provincial government of their
29 rights to their Houses' territories. The evidence
30 will show that trapline registration was introduced by
31 the provincial government in the 1920's as part of a
32 practical solution to wildlife resource problems
33 emerging out of the changing frontier. The
34 registration system, together with the game
35 legislation, was the first component in an evolving
36 attempt to manage the wildlife resources in concert
37 with new agricultural and other economic activities.
38 The evidence will show that federal Indian agents
39 actively encouraged Indians to register traplines by
40 informing them that unless they did, their territories
41 would be taken up by whites, with the resultant loss
42 of their hunting -- with the resultant loss of their
43 hunting and trapping economy. Many Indians were also
44 given to understand that registration would make no
45 difference to their existing rights. The evidence
46 will show that registration of a trapline was
47 understood by the Gitksan and Wet'suwet'en to

1 reinforce and underpin their aboriginal rights, that
2 is their ownership and jurisdiction. Informed by an
3 understanding of the nature of the Gitksan and
4 Wet'suwet'en system, the evidence will explain why
5 this would be so. Provincial officials did not come
6 to the Feast Hall, the proper and legal forum for
7 dealing with rights to territories; therefore, the
8 Chiefs concerned about their territories, must find
9 whatever means they can to establish publically and
10 officially that they own their lands. Trapline
11 registration, therefore, was seen within the legal
12 logic of their own system as a form of validation of
13 their rights and authority.
14 This confusion between white and Indian views of
15 trapline registration will be revealed in the course
16 of the evidence by the interchangeability of the
17 terms, trapline and hunting territories. Indians
18 registered at least a part of their land, without
19 giving up their claim to own and manage the whole of
20 it. The word trapline is generally used to refer to
21 the territory as a whole. Registration maps, other
22 documents, and the peoples' own accounts will show a
23 high degree of correspondence between areas registered
24 and hereditary House territories. In addition, the
25 evidence will show that many Chiefs registered a
26 "company" or group, which was in effect a House rather
27 than an individual name, facts which support the
28 conclusion that registration was undertaken within the
29 existing Gitksan and Wet'suwet'en legal system.
30 Trapline registration, properly understood in this
31 historical and cultural context, can be seen as an
32 attempt by the Gitksan and Wet'suwet'en Chiefs to
33 accommodate and incorporate certain aspects of
34 Canadian law as a measure of protection for their
35 ownership and authority. You will hear how this has
36 resulted in strains upon their existing legal systems.
37 The most significant of these has been the result of
38 differences in provincial and Indian laws of
39 succession. As we have already explained, under
40 Gitksan and Wet'suwet'en law, ownership and authority
41 of a House's territory descends with the hereditary
42 Chief's name through a matrilineal system. On the
43 contrary, under provincial law, traplines are
44 inherited patrilineally from father to son. You will
45 hear evidence of how the Gitksan and Wet'suwet'en have
46 attempted to deal with this conflict of laws. They
47 have not turned to Professor Cheshire to seek the

1 answer in his text on Private International Law,
2 rather, they have drawn upon the dynamic quality of
3 their own system to seek to resolve this problem.
4 The efforts at resolution themselves require an
5 understanding of the system. Although we have
6 referred you already to the principle of matrilineal
7 succession as an essential feature of Gitksan and
8 Wet'suwet'en law, this does not mean that the father's
9 side, that is, the father's House and Clan, are
10 legally or socially irrelevant. Indeed, you will hear
11 much evidence how the father's house has important
12 legal and social responsibilities towards the father's
13 children, both within and outside the Feast Hall.
14 While the children cannot inherit the House's
15 territory from their father, they are accorded rights
16 of access to that territory during his lifetime. That
17 access can be renewed after his death. It is within
18 the context of this existing recoprocity between the
19 father's side on the one hand, and the mother's side,
20 that the problems of trapline registration have been
21 addressed.
22 You will hear evidence of individuals who, as a
23 result of succession to a trapline under the
24 provincial system, used territories which rightfully
25 belonged to another House and do so as caretakers,
26 acknowledging the legitimacy of the title of the
27 rightful owners. The Wet'suwet'en term for this,
28 "negedel des", means we are here frying something. It
29 is very concrete, they are on the land cooking on the
30 land of their father. Amongst the Gitksan this
31 relationship is called "am niq cootxw", or the
32 privilege granted to the father's children.
33 The problems inherent in trapline registration
34 have, in many cases, been mitigated further by the
35 pattern of intermarriage between two Houses, as a
36 result of which, over time these interacting Houses
37 will be, one may say, feeding each other's children
38 from their own respective territories in alternate
39 generations. In fact, my Lord, you will hear evidence
40 that such interaction and intermarriage between two
41 Houses sometimes goes back for hundreds of years. All
42 of this is not to say that all of the conflict between
43 provincial and Indian law has been resolved. Indeed,
44 the very fact of conflict and ongoing attempts to
45 resolve these within the context of the Feast Hall is
46 the best evidence of the continuing vitality of the
47 Indian system.

The thrust of what we have said about the evidence we will be leading on the issues of reserves and traplines is that the Gitksan and Wet'suwet'en have not voluntarily surrender, nor have they acquiesced in the abridgement of those rights. But voluntary surrender and acquiescence are only part of the defence of the Province of British Columbia. In paragraph 36 of the Defence, the Province pleads that whatever aboriginal rights the plaintiffs may have had, these rights were reduced, diminished or extinguished by the Colony and Province of British Columbia through the making or enactment of laws of general application, by administration actions pursuant to such laws and by the actions of third parties in the exercise of rights and privileges conferred thereby.

As we understand this defence, it is that the rights have been granted by the colonial and provincial governments under various land and preemption proclamations, ordinances and acts, as a result of which third parties have entered into possession of lands claimed by the Plaintiffs. This process, according to the Defendant, as a matter of law, has extinguished the plaintiff's asserted rights. Underlying this defence is a certain view of realpolitik which can be set out in this way. The Province of British Columbia has made grants to Indian land on the basis that Indian people had no rights. The parties to whom the grants were made have taken up these lands and treated them as their own. If Indian people in fact did have rights, it is now too late to turn back the clock, and therefore, as a matter of law, those rights must be held to have been extinguished. My Lord, under this thesis the more blatant in fact the disregard for Indians rights the more self-evident in law it is that those rights be disregarded. In this way injustice, like virtue, can be its own reward.

We will have much to say about the legal bankruptcy of the Province's position in our legal argument. The Province will be presenting evidence, as you have already seen yesterday, in the form of detailed maps describing the extent of their alienations within the Gitksan and Wet'suwet'en territory. The plaintiffs also will be presenting evidence on the process of alienation in order to recreate in this courtroom the dark reality of what lies behind the Province's

colour-coded maps.

Your attention will be directed particularly to evidence of what took place at the beginning of this century right here in the Bulkley Valley on the territories of the Wet'suwet'en Chiefs. The evidence will show how, between the years 1901 and 1905 a considerable amount of prime land in the Upper Skeena and Bulkley Valley regions was conveyed by the Province to private parties through the vehicle of the South African war scrip. Under this scheme, a volunteer from British Columbia who served in the Boer War was eligible to receive scrip which entitled him to take up 160 acres of "unoccupied, unclaimed and unreserved Crown land" anywhere in the province. The scrip could also be sold. Because of the way the legislation was drafted, many veterans could not or chose not to use the scrip to take up land. You will read the letter of one such veteran, Mr. Dobie, who, describing the legislation stated as follows:

> "If the government had studied to devise a scheme by which a large area of land would be turned over to the hungry "land sharks" no more effective scheme could have been adopted."

In fact, much of the scrip was rapidly acquired by a small number of large-scale land speculators. Mr. Dobie's scrip was purchased by one of the larger dealers in South African scrip and was used to acquire a quarter of section of land in the Bulkley Valley, land which became the townsite of Telkwa, 12 kilometres to the east of here. Scrip was frequently resold to smaller investors, some of whom held either the scrip or the land waiting for it to appreciate in value. In this way, title to considerable areas of land were held by absentee owners for years before there was any attempt at actual entry or settlement.

Through the medium of South African War scrip, a paper transfer of title to many quarter sections of land in the Bulkley valley was effected while the Wet'suwet'en Chiefs and their House members continued to use these territories unaware of any purported changes or transfers in ownership. In many cases, the Wet'suwet'en did not learn until years afterwards that the Province had "alienated" the land by issuing Crown grants.

The use of South African war scrip to take up land

in the Bulkley valley should not have resulted in the dispossession of Indian families. Under the legislation quoted earlier only unoccupied, unclaimed, and unreserved land was available. When lands were surveyed, the surveyor was required to record in his field notes the existence of Indian houses or other improvements. Failure of surveyors to abide by this requirement was unfortunately very common. If the field notes showed no Indian improvements, the Lands Department in Victoria regarded the land as available for sale, pre-emption, or other forms of alienation. When failures to record the existence of Indian houses and other improvements were brought to the attention of the Commissioner of Lands, he was unwilling to disturb the equities of non-Indian purchasers. He noted that some of the lands alienated through use of South African war scrip had been sold two or three times. Examination of the record shows that a number of these re-sales were between well-known dealers in scrip. The record also shows that some of the individuals who traded or invested in scrip were individuals who held positions of trust with respect to Indians, that is, government employees and church mission officials.

You will hear that the effect of the issuance of the South African War scrip was that tragically family after family of Wet'suwet'en were forced from their homes. Wet'suwet'en farms were simply seized; clusters of houses and buildings were raised to the ground. Wet'suwet'en hunters and trappers and fishermen returned to their homes at the end of the summer or in early winter, having completed there season's fishing at Moricetown or Hagwilget, to find white settlers in possession, which white settlers were able to summon the police to enforce their new, supposed right to these Indian lands. The deep bitterness of this appalling invasion of their homes was followed, in many cases, by severe hardship, with winter coming on families found themselves without shelter.

The names of the Chiefs who were dispossessed appear in government documents of the day under their English names, the Christian names that they were given by whites who could not manage to learn, or chose to disregard their Wet'suwet'en names. The real names that the newcomers ignored included hereditary Chief names. You will hear much evidence of the

dispossession of Round Lake Tommy, Chief Wah Tah Kwets; Belnai, Madeek; Mathew Sam, Chief Woos, Auguste Pete, Chief Kwees; and Johnny David, Chief Maxlaxlex. Johnny David, in his commission, the person of approximately a hundred years old, in his commission evidence described what happened:

> "In the area of North Bulkley my father had a big smokehouse and when he died the white people burnt it down and they kicked me off the land. My dad died in 1908 and must have been around 30 or 40, and I got a letter from Mr. Loring, who was the Indian agent at Hagwilget. I received a letter from him telling me to get off the land and he was going to give me acreage in Hagwilget which he never did."

To realize that these Christian names represent important Chiefs in Wet'suwet'en clans leads to another dimension of the damage done to Wet'suwet'en life by these early settlers along the Bulkley Valley. Dispossession was not simply of individuals; those Chiefs were the heads of, and responsible for, large extended families. Family homes and lands were taken and destroyed. The suffering was therefore on a much larger scale than a list of individual names suggests.

The nature of the dispossession and the intimidation with which it was accomplished will become evident to the court from contemporary statements made by the Wet'suwet'en. Thus, the courts will hear the words of James Yami, Chief Caspit as he addressed officials of the Department of Indian Affairs in 1909:

> "The Bulkley River is our river and we get our living therefrom. On the lakes are located some of our houses. They are small and crude of pattern but we cannot do without them. In those houses we have many articles such of hunting, trapping and fishing implements. A white man comes along and sets fire to the houses, and on remonstration we are told by the settler: 'You get away from here, I bought this land and if I catch you here again I will have you jailed."

The Wet'suwet'en Chiefs sought to protest their dispossession in a variety of ways, ranging from

confrontation to diplomatic petitions. Violence against whites was averted not only by promises of Indian agents that the land claims of the Wet'suwet'en would be dealt with by government, but by the Wet'suwet'en abiding belief in peaceful resolution of disputes and respect for law. As Chief Caspit stated in 1909:

> "We always tried to be law abiding. If we want to cut a little firewood we are stopped at once By threats. If we were educated people we would make more complaints. We always give way to the lawless white rather than offend him."

I believe, my Lord, as you will see, the law he is referring to there is the Wet'suwet'en law. The words of this Wet'suwet'en Chief must not be read as acquiescence to lawlessness. They speak to the importance in the Wet'suwet'en system for respect for other societies, even at the point where they have shown lack of respect, and they speak to a belief in and commitment to the rule of law, even within the Wet'suwet'en system.

The Wet'suwet'en still hunt and trap on such of their territories as they can safely use, but in travelling the Bulkley Valley they must pass by farmhouses and fields where white people are now living on land that, in several instances, Wet'suwet'en men and women have themselves cleared and fenced: "unoccupied" farmland that was made available through the Boer War scrip. The feelings that surround this large-scale appropriation of Wet'suwet'en territory not faded into the distant past, nor have these territories disappeared from the Wet'suwet'en system. The court are will hear how ownership of all these places is still identified in the Wet'suwet'en Feast system and the territories are passed on, as always, from generation to generation.

My Lord, to move from the written text, an example of this you will hear is where a witness will describe how going back to her own home she was stopped by white people on the road as to what she was doing looking at their farm. They go to their homes, see the ruins of their homes, and they are questioned even for being there.

Despite their own dispossession, the Wet'suwet'en and Gitksan Chiefs do not consider as a measure of

1 justice the dispossession of those whites who have
2 settled amongst them. This is evidenced by paragraph
3 79 of the Statement of Claim. The Chiefs have
4 maturely considered this matter and have decided
5 together that the title of the settlers and the
6 security of their homes and homesteads shall be
7 confirmed and guaranteed by the Gitksan and
8 Wet'suwet'en Chiefs. But this is not to say that the
9 legacies of past dispossession are resolved. As the
10 evidence will reveal, there are outstanding issues
11 pertaining to the relationship between settlers and
12 Indians which include, but are not limited to, access
13 across lands to fishing sites. These must be the
14 subject of negotiated settlement.
15 My Lord, before proceeding to the next section on
16 the nature of the legal argument, I wish to make a
17 brief aside to assist the court as to the presentation
18 of the plaintiff's case. We intend in this case to
19 commence with the three Gitksan simgighets(?) or
20 Chiefs, who I referred you to yesterday. This is Mary
21 McKenzie, Gyolugyet; Antgulilbix, Mary Johnson; and
22 Mrs. Olive Ryan. At the conclusion of their evidence
23 we will be commencing with Wet'suwet'en evidence, and
24 I should say what the focus of these three witnesses'
25 evidence will be. It will be --
26 MR. GOLDIE: Which three, the Gitksan?
27 MR. GRANT: The first three witnesses.
28 MR. GOLDIE: Thank you.
29 MR. GRANT: They will be dealing with an overview of the
30 authority, the jurisdiction of the Gitksan Chiefs and
31 talking about the components of the Gitksan society.
32 They will also be talking about their specific
33 territories. We will then move to Wet'suwet'en
34 evidence, and there will be a group of Wet'suwet'en
35 witnesses, commencing with Gisday Wa, who you heard
36 this morning, who will give evidence of the
37 Wet'suwet'en system, and again for lack of a better
38 word, although I think it may be as misleading as
39 helpful, it would be an overview, it would be an
40 explanation of the authority of the Wet'suwet'en
41 Chiefs, an explanation of central parts of their
42 system, such as the Feast, and a description of such
43 key components of the system. We will then continue
44 with Wet'suwet'en evidence, which will amplify on the
45 evidence of the first four Wet'suwet'en Chiefs in
46 terms of the specific witnesses relating to specific
47 territories and also referring back to the main

1 evidence of the system, and then we will return at the
2 conclusion of that to the Gitksan evidence, and in
3 which you will hear the balance of the Gitksan
4 witnesses. The reason we have adopted this approach,
5 my Lord, is to try as quickly as possible to give you
6 an understanding of the Gitksan system and the
7 Wet'suwet'en system, and then when you deal with the
8 specifics of the territories, the specifics of the
9 authority, it would be -- it would be in that context.
10 At the conclusion of the Gitksan evidence we will be
11 calling our expert witnesses. We anticipate, my Lord,
12 that the first witnesses will be lengthy, the later
13 witnesses will not be as lengthy, because the first
14 witnesses will be describing in great detail certain
15 components of the system and introducing you to
16 concepts which you will then become familiar with as
17 when they are referred to. Proceed now to the latter
18 part of the opening, the nature of our legal argument.
19 The pleadings in this case, the Plaintiff's
20 pleadings, assert that the Gitksan and Wet'suwet'en
21 Chiefs have ownership and jurisdiction over their
22 territory; these rights are ones which can only be
23 altered with the consent of the Gitksan and
24 Wet'suwet'en; that in the absence of any settlement of
25 the relationship between them and the colonial,
26 provincial, and federal governments who have come into
27 their territory, and in the absence of any conquests
28 of their peoples and their territory in just war,
29 their rights as aboriginal peoples have never been
30 extinguished and continue to exist; that those rights
31 are ones recognized by the common-law and are
32 proclaimed in the Royal Proclamation of 1763; and that
33 those rights are now entrenched in section 35 of the
34 Canadian Constitution.
35 We will be tracing in the evidence the evolution of
36 the legal relationships between the Indian nations and
37 the European governments who have established
38 settlements in North America over the past 400 years.
39 In presenting this evidence, we will be focussing on
40 what we consider to be a central legal issue in this
41 case, the identification of the fundamental principles
42 upon which we assert aboriginal rights are based.
43 This evidence is not to be viewed as an exercise in
44 antiquarianism, nor as interesting historical
45 background, a prologue to the real issues. In the
46 same way as we will be presenting evidence of the
47 history of the Gitksan and Wet'suwet'en people, to

1 enable the court to understand the development of the
2 fundamental principles by which their societies are
3 ordered, and to determine the scope and content of
4 their aboriginal rights, so the evidence of the legal
5 history will be tendered to identify the fundamental
6 principles which require the Gitksan and Wet'suwet'en
7 rights to ownership and jurisdiction be recognized by
8 a Canadian court.
9 The importance of the historical matrix to a
10 resolution of the legal issues was made clear by Mr.
11 Justice Dickson, as he then was, in Kruger and Manuel
12 v. The Queen, when he stated:
13
14 "Claims to aboriginal title are woven with history,
15 legend, politics and moral obligations."
16
17 The significance of historical evidence has been
18 indelibly underlined by the Supreme Court of Canada in
19 more recent pronouncements dealing with the
20 interpretation of rights entrenched in the Canadian
21 Constitution. We will be urging you to adopt a
22 purposive approach to the interpretation to section
23 35. In Regina v Big M Drug Mart Chief Justice Dickson
24 articulated the analysis to be undertaken in such a
25 purposive approach to the Charter of Rights. Such an
26 analysis requires the court to analyse "the purpose of
27 the right of freedom question by reference to...the
28 historical origins of the of the concepts enshrined".
29 The historical evidence will show that from the
30 earliest stages of colonial settlement, treaties and
31 agreements were entered into with Indian nations for
32 the acquisition of territory and jurisdiction. The
33 process was initiated by the Dutch. These early Dutch
34 treaties date back to the early 17th century and make
35 specific reference to the protocol of acquiring the
36 consent of the Indians in full council. They
37 acknowledge the jurisdictional authority of Indian
38 Chiefs and recognize as pre-existing the Indian system
39 of land ownership. Establishment of English
40 settlement was also accompanied by agreements with the
41 Indian nations for the acquisition of rights to land.
42 The language in contemporary documents, which will be
43 submitted to this court, indicates that the colonists
44 did not see their rights pursuant to Royal Charters as
45 giving them title to the land, but only the right to
46 acquire title from the Indians. Thus, you will hear
47 of agreements describing the Indians as "the native

1 inhabitants and true owners" of their territory and of
2 English Royal Commissioners who, in reviewing colonial
3 laws dealing with Indian lands, affirm that "no doubt
4 the country is theirs until they give it or sell it."
5 A review of early colonial documents will also throw
6 important light on the nature of the political
7 relationship between the Indian nations and the
8 British colonists, particularly in terms of the
9 recognition of Indian jurisdictional rights. The
10 evidence will show the extent to which here also
11 changes in jurisdictional arrangements were the
12 subject of negotiated settlement through treaty
13 making.
14 The evidence will reveal the extent to which, in
15 the 17th and 18th centuries, the formal protocol of
16 treaty making constituted the legal paradigm for the
17 consolidation and expansion of colonial interests, and
18 the ways in which the fundamental principles
19 underpinning the relationship between the Indians and
20 the British emerged, and were forged, and as a result
21 of such treaty making. Of greatest significance, was
22 the principle that Indian rights to their territory be
23 respected, and that there lands could only be
24 alienated to colonial authorities with Indian consent,
25 given by authorized representatives. This principle,
26 as you will see, was to become the centrepiece of the
27 Royal Proclamation of 1763 and a founding principle of
28 the common-law, as it was articulated by Chief Justice
29 Marshall in the early 19th century.
30 The evidence will show how the maintenance of the
31 Indian alliance became of critical importance to the
32 British at the outbreak of hostilities with France in
33 the mid-18th century. The Indian nations made it
34 clear that the pre-condition for maintaining that
35 alliance with the British colonies was recognition of
36 their territorial rights, and the redress of frauds
37 and abuses of colonial land speculators. It was
38 largely the inabilities of the colonial authorities to
39 properly address these vital concerns of the Indians
40 relating to their lands rights that led, in 1753, to
41 the Imperial authorities in London taking charge of
42 Indian policy and placing Imperial imprimatur on the
43 affirmation and enforcement of Indian rights to their
44 territories. The evidence will leave you in no doubt
45 that the British authorities came to understand that
46 the integrity of the British Empire in North America
47 in its continuing struggle with the French for

1 hegemony, was grounded in Indian insistence and
2 British acknowledgement that Indian rights must be
3 respected.
4 Generations of Canadian students have come to know
5 that 1763 was the year in which the treaty of Paris
6 was signed and the imperial struggle between France
7 and England was resolved in favour of the English.
8 Canadians know that the outcome of the encounter
9 between the English and the French continues to
10 reverberate in contemporary Canadian life regarding
11 the constitutional and political status and role of
12 Quebec in the Canadian confederation. But 1763 is
13 also of great importance to the relationship between
14 Canadians and Indian nations. As with Quebec, the
15 events of that year continue to resonate with
16 contemporary legal and constitutional significance.
17 On October 7th, 1763, what will be referred to
18 throughout this case as the Royal Proclamation of 1763
19 was issued. You will be hearing much evidence from
20 both the Plaintiffs and the Defendants regarding the
21 nature, geographical scope and proper interpretation
22 of this document. As we understand the Province's
23 position, they will be arguing that the Proclamation
24 was conceived at a particular historical juncture at a
25 time of great Indian unrest; that its measures were
26 designed to ensure peace on the North American
27 frontier, and to protect the interests of the British
28 manufacturers by containing westward expansion of the
29 existing and newly created colonies. Placing the
30 Proclamation in a narrow historical framework, they
31 argue that it was never intended to apply to British
32 Columbia, and its provisions are therefore of no legal
33 or constitutional significance to the resolution of
34 the issues before this court.
35 Our position is different. Based upon the
36 historical evidence we will be presenting, we say that
37 the Proclamation is the Imperial affirmation and
38 recognition of the fundamental principles upon which
39 the legal relationship between Indians and the Crown
40 are to be resolved. Mr. Justice Hall, in the Calder
41 case referred to the Proclamation as the Magna Carta
42 of Indian rights. Like the Magna Carta, the Royal
43 Proclamation is not the source of aboriginal rights
44 but an affirmation of their existence. Our historical
45 evidence will how essential features of the
46 Proclamation are pre-figured in prior treaty making,
47 and thus the document affirms principles agreed upon

by the Indian nations and the colonial and Imperial authorities.

The principles so affirmed by the Royal Proclamation are first, that Indian nations are recognized by the Crown as possessing rights to their territory, territory which they are entitled to possess and which is reserved to them until they surrender those rights to the Crown. The preamble to the Indian provisions of the Proclamation reads:

> "Whereas it is just and reasonable and essential to our interest and the security of our colonies, that the several Nations or Tribes of Indians with whom we are connected and who live under our protection, should not be molested or disturbed in the possession of such part of our dominions or territories, as not having been ceded today or purchased by us, are reserved to them as their hunting grounds."

The second principle of the Proclamation is that Indian rights are to be acquired by the Crown by consent in accordance with formal treaty making protocol. The Proclamation states:

> "If at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name at some public meeting or assembly of the said Indians to be held for the purpose by the Governor or Commander-in-Chief of our colony respectively."

Other provisions of the Proclamation make clear its effect: The Indians are not to be disturbed in possession of their lands; representatives of the Crown are not to make grants of unsurrendered lands; private individuals cannot purchase Lands from Indians; private individuals settled on lands on which have not been acquired in accordance with proscribed procedures are to leave; and if the Crown wishes to make use of Indian lands for the purpose of settlement, those lands must be purchased by the Crown at a meeting between the representatives of the Crown and the Indian nations.

In contrast to the Province's position we will argue that the recognition and the Royal Proclamation of aboriginal rights and of a process by which those

1 rights can be transferred to the Crown, continued upon
2 the consent of the Indians, are not transient notions
3 limited in time and geography by a narrow reading of
4 the events of 1763. We will be arguing that, as a
5 basic constitutional, document the Proclamation must
6 be given a large and and liberal interpretation; that
7 placed in its proper historical context, it confirmed
8 pre-existing law and policy and serves as a
9 codification that law and policy to be applied as
10 British settlement advanced westward.
11 We will be presenting evidence as to the
12 contemporary interpretation of the Proclamation those
13 colonial officials charged with its implementation.
14 We will also be presenting extensive evidence of the
15 over 500 treaties which have been made between the
16 Crown and the Indian nations within Canada since 1763,
17 treaties which we say are the best evidence of the
18 Proclamation's prospective application.
19 We will be arguing that the Royal Proclamation
20 placed legal and constitutional limitations on the
21 authority of colonial governors to grant Indian lands,
22 except where those lands were surrendered with Indian
23 consent, in accordance with the Proclamation's
24 prescribed procedures. We will further argue that a
25 proper interpretation of the Colonial Laws Validity
26 Act requires that all colonial enactments must be read
27 down to be consistent with the operation of the Royal
28 Proclamation. We will argue therefore that the
29 colonial Proclamations and Ordinances relied upon by
30 the Province of British Columbia, in their Statement
31 of Defence, to extinguish the aboriginal rights of the
32 Gitksan and Wet'suwet'en, cannot have that legal
33 effect.
34 However, our case does not hang on a single legal
35 hinge that the Royal Proclamation applies to British
36 Columbia. Paralleling our argument on the Royal
37 Proclamation, we say that the fundamental principles
38 which are reflected in the Proclamation have also
39 become embodied in the common law. The legal
40 relationship of the Indian nations with Britain and
41 the United States was the subject of extensive
42 judicial consideration, in a series of judgments of
43 the United States Supreme Court, written by Chief
44 Justice Marshall in the early 19th Century. You will
45 be referred extensively to these, as they have come to
46 be regarded by the highest courts of Britain, Canada
47 and other Commonwealth countries as the authoritative

1 decisions on the common-law of aboriginal rights. In
2 reaching his decisions, Chief Justice Marshall engaged
3 in an extensive analysis of British Crown and Indian
4 relationships in North America. As such, they have
5 direct legal relevance to Canada. This point has been
6 clearly articulated by Canadian judges, most recently
7 by the Supreme Court of Canada in the Guerin case.
8 My Lord, before proceeding with those, it may be an
9 appropriate time for the break.
10 THE COURT: Yes, all right. We'll take the afternoon
11 adjournment.
12 THE REGISTRAR: Order in court. This court is adjourned for 15
13 minutes.
14
15 (PROCEEDINGS ADJOURNED AT 3:00)
16
17 I hereby certify the foregoing to be
18 a true and accurate transcript of the
19 proceedings herein transcribed to the
20 best of my skill and ability.
21
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25 Graham D. Parker
26 Official Reporter
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1 (PROCEEDINGS RESUMED AT 3:15 P.M.)
2 MR. GRANT: Before proceeding, a few pages back I referred to
3 the Magna Carta and there was typographical error.
4 There are a few other errors within the text and we
5 will provide a corrigendum.
6 THE COURT: You would have inhuman secretaries if there wasn't
7 the odd typographical error.
8 MR. GRANT: On the bottom of page 109 of the opening, my lord, I
9 was referring to the judgment of Chief Justice
10 Marshall.
11 The judgment of Chief Justice Marshall in Worcester
12 v. Georgia is properly regarded as the centrepiece of
13 the common law of aboriginal rights. In Worcester,
14 Chief Justice Marshall espoused as fundamental to the
15 common law a "universal conviction that the Indian
16 nations possessed a full right to the lands they
17 occupied until that right should be extinguished by
18 the United States with their consent."
19 It is more than an interesting historical
20 coincidence that this statement of common law
21 principles regarding aboriginal rights was made within
22 a decade of Peter Ogden's first journey to the ancient
23 Wet'suwet'en village of Kya Wiget, which today is
24 called Morricetown, and his recognition of the
25 Wet'suwet'en chiefs as "men of property".
26 As you will hear, Worcester and Georgia came before
27 the Supreme Court of the United States in the wake of
28 attempts by the state of Georgia to take over the
29 lands and jurisdiction of the Cherokee nation in
30 violation of a treaty between the Cherokee nation and
31 the United States. That litigation was referred to in
32 1847 by a New Zealand judge, Mr. Justice Chapman, in a
33 search to identify what he called, and I quote
34 "certain established principles of law applicable
35 to...the intercourse of civilized nations and
36 especially of Great Britain, with the aboriginal
37 natives of America and other countries during the last
38 two centuries". Mr. Justice Chapman's search for
39 fundamental principles yielded this conclusion, and I
40 quote from his decision:
41 "The practice of extinguishing native titles by
42 fair purchases is certainly more than two
43 centuries old. It has long been adopted by the
44 government in our American colonies, and by that
45 of the United States. It is now part of the law
46 of the land...In the case of the Cherokee Nation
47 v. State of Georgia, the Supreme Court through

1 its protective decision over the plaintiff-
2 nation, against a gross attempt at spoilation;
3 calling to its aid, throughout every portion of
4 its judgment, the principles of the common law as
5 applied and adopted from the earliest times by
6 the colonial laws...whatever may be the opinion
7 of jurists as to the strength or weakness of
8 their native title.. it cannot be too solemnly
9 asserted that it is entitled to be respected,
10 that it cannot be extinguished (at least in time
11 of peace) otherwise than by the free consent of
12 the native occupiers."
13 MR. GOLDIE: I wonder if it would be convenient to my friend to
14 give us the citation for that?
15 MR. GRANT: I will provide the citation for that tomorrow with
16 the corrigendum.
17 We will be arguing that, as with the Royal
18 Proclamation, the common law of England as it was
19 received in British Columbia, imposed a legal
20 obligation on the Crown to acquire lands for
21 settlement with the consent of the Indian nations.
22 We will be placing before this court evidence
23 which documents the intention of the British Crown
24 that the rights of the Indians of British Columbia be
25 respected in accordance with the obligations imposed
26 by the Royal Proclamation and the common law. You
27 will hear of the instuctions issued to Captain James
28 Cook in 1776. On Cook's third voyage he explored
29 what is now the coast of British Columbia and British
30 claims to the land rest in part on Cook's
31 discoveries. Cook was thus instructed:
32
33 "You are also with the consent of the natives to
34 take possession in the name of the King of Great
35 Britain of convenient situations in such countries
36 as you may discover, that have not already been
37 discovered or visited by any other European
38 power."
39
40 You will read the instructions given to Captains
41 Nathaniel Portlock and George Dixon to purchase land
42 from the Indians on which to build trading posts
43 which they were said to establish at Nootka Sound on
44 the west coast of Vancouver Island.
45 You will hear evidence that with the establishment
46 of the colony of Vancouver Island as a British
47 settlement in 1849, the Crown grant of land to the

Hudson's Bay Company carried with it the same burden of extinguishing Indian title as that which rested on the Crown. The evidence of the early history of the colony of Vancouver Island will show how James Douglas, as governor of Vancouver Island, concluded a series of treaties for the acquisition of Indian territories required for settlement purposes. The analysis of evidence drawn from contemporary documents will show that these treaties were understood to be in conformity with the law and policy of recognizing Indian title and of extinguishing such title only with the consent of the Indians. That same evidence will show that both the Imperial and colonial authorities contemplated that treaty making would be continued. You will be referred to a petition from the House of Assembly in Victoria forwarded to the Duke of Newcastle in which funds are requested to extinguish Indian title to certain lands in the colony of Vancouver Island. In his letter of transmittal, Governor Douglas noted that the Indians expected that settlement would proceed only with their consent and that the failure to make proper arrangements boded ill for the future of the colony. Douglas' words have a contemporary significance for this case. He wrote:

> "As the native Indian population of Vancouver Island have distinct ideas of property and land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the colony by White settlers, unless with the full consent of the proprietory tribes as national wrongs."

Evidence will be presented to you showing that while then as now, public opinion was divided on this issue, there existed a considerable body of public opinion that recognized the existence of native title to their territories, and regarded it as a matter of justice and the upholding of the honour of the Crown, to negotiate for the surrender of Indian lands required for settlement.

It is in the historical context of this evidence that you will be able to assess the strength of the Province's argument that ordinances and Proclamations passed by Douglas and the House of Assembly during

this period were intended to extinguish Indian title unilaterally, without fair purchase, without Indian consent.

You will hear extensive evidence regarding the policies of the colonial administrations who succeeded to the governance of British Columbia after James Douglas's retirement. From 1864 until the admission of British Columbia into Confederation in 1871, Indian policy came under the influence of Joseph Trutch. You will find in his views on Indians and Indian rights the historical source of the statement of defence of the Province of British Columbia. My lord, his ghost rattles within their pleadings.

Not to put too fine a point on it, Joseph Trutch was an archetypical colonialist who represented the ideology of the frontier with all its implicit and explicit assumptions regarding the superiority of European civilization and the inferiority of native people. You will hear how he arrived in British Columbia in 1859 with years of experience behind him in the United States as a surveyer and farmer. After working for five years in British Columbia as a surveyer and engineer, he became the colony's Chief Commissioner of Lands and Works. His interest in the gold colony in the early days was in building roads and bridges, in surveying townships and establishing farms, and in amassing a personal fortune.

For Joseph Trutch, Indians and Indian rights stood in the way of his view of civilization. His attitude towards Indian rights was expressed in this statement which he made in 1867. He wrote:

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

Two years prior to this, in responding to Indian land claims in the Thompson River area, Joseph Trutch responded that he was quite "satisfied from my own observations that the claims of the Indians over tracts of land, and on which they assume to exercise ownership, but of which they make no real use,

1 operate very materially to prevent settlement and
2 cultivation." To Joseph Trutch, Indian life was
3 invisible and their rights were to be disregarded as
4 obstacles to progress.
5 Our evidence will direct your attention to the
6 terrible paradox of history by which this
7 archetypical colonialist became recognized as a
8 expert on the Indian question and was called upon to
9 defend the Province's position on Indian policy, in
10 the face of the criticism that it disregarded Indian
11 rights, contrary to law. You will hear how, in 1870,
12 Joseph Trutch took the opportunity to claim that
13 British Columbia had always denied the idea of
14 aboriginal title. He wrote that "the title of the
15 Indians in fee of the public lands, or any portion
16 thereof, has never been acknowledged by government,
17 but, on the contrary is distinctly denied."
18 Not surprisingly, Trutch does not explain why the
19 Vancouver Island House of Assembly should ask the
20 Imperial Government in 1861 for money to extinguish
21 an Indian title, the existence of which they did not
22 recognize.
23 Joseph Trutch's self-serving memorandum of 1870
24 provides the script for British Columbia's position
25 in this courtroom today. It is a script which has
26 been read to the Indians of British Columbia for over
27 100 years. Its repetition does not make it right
28 either as a as a matter of fact or as a matter of
29 law.
30 In our argument we will be submitting to you that
31 the period 1864-1871 is properly to be viewed as an
32 attempt by colonial administrators to flout the
33 fundamental principle embodied in the Royal
34 Proclamation and the common law, and it should be
35 exposed for what it represents -- the distortion of
36 fundamental principles of justice in the interests of
37 racism.
38 In the course of our evidence and argument, you
39 will be referred to the protectorate or trust
40 responsibility of the Crown. In the Royal
41 Proclamation of 1763 the preamble refers to the
42 nations of Indians "with whom we are connected and
43 who live under our protection." We will be
44 submitting that this protectorate was not by way of
45 diminution of the rights of the Indian nations to
46 exercise their jurisdiction over their territory
47 (except in accordance with treaty making), but was

conceived as a legal and political measure to ensure the protection of Indian rights from such diminution. As our evidence of the history of the period preceding the Royal Proclamation will demonstrate, the need for protection of Indian rights from abuse and fraud by whites at the frontier of the colonies, and the inability or unwillingness of local governments to protect such rights, spurred the consolidation and codification of Imperial recognition of Indian rights.

Nor did this cease to be an important concern of the Imperial authorities after 1763. In the evidence you will be referred to the report of the Select Committee of the British Columbia House of Commons in 1837 which predicted a potential conflict of interest situation should the jurisdiction to administer Crown obligations regarding Indians fall to the legislatures of the colonies. In considering the measures to be adopted to guard against this, the report stated that Britain held a trust "peculiarly belonging and appropriate to the executive government as administered either in this country or by the governors of their respective colonies. This is not a trust which could be conveniently be confided to the local legislatures."

The evidence regarding the policies of Joseph Trutch will demonstrate that the Select Committee's concerns were well-founded. It was for the reason given by the Select Committee that jurisdiction of Indians and lands reserved for Indians was vested in the Federal Government in section 91 (24) of the Constitution Act of 1867. We will be presenting legal argument that section 91 (24) in conjunction what section 109 of the Constitution Act provides the framework for the constitutional protection of aboriginal rights.

But constitutions are not self-executing. The Federal Government, in the exercise of its constitutional obligations, and in particular its protectorate role did, shortly after British Columbia's admission into confederation, exercise its power of disallowance of provincial laws on the basis that the B. C. Land Act of 1874 did not adequately recognize the aboriginal rights of the native people of British Columbia. You will be referred to the opinion of the then federal Minister of Justice who stated:

"There is no shadow of a doubt that from the earliest times England has always felt it imperative to meet the Indians in Council, and to obtain surrenders of tracts of Canada as from time to time such were required for the purposes of settlement."

The Minister of Justice went on to recite the provisions of the Royal Proclamation and concluded that:

"The undersigned feels that he cannot do otherwise than advise that the Act in objectionable, as tending to deal with lands which are assumed to be the absolute property of the Province, an assumption which completely ignores, as applicable to the Indians of British Columbia, the honour and good faith which the Crown has, in all other cases since its sovereignty in North America, dealt with their various Indian tribes."

Unfortunately, as our evidence will show, the later history of the federal government's exercise of its protectorate or trust responsibility was formed more by a concern for the protection of federal-provincial relationships than the protection of the interests of the Indians from provincial incursions. The statement of defence filed in this case by the Attorney-General of Canada constitutes the best evidence of the federal government's contemporary understanding of its protectorate responsibility.

The extent to which Indian rights have been subordinated to federal-provincial interests is well illustrated by the debate leading up to the passage of section 35 of the Constitution Act of 1982. The decision to entrench aboriginal and treaty rights in the constitution was first reached on January 30, 1981. In November of that same year, the federal government agreed to delete the aboriginal and treaty rights clause in exchange for a broader political accord with the provinces. That about-face created a storm of protest, extensive lobbying and lengthy negotiations, which ultimately led to a new agreement to entrench the present form of section 35.

The speeches in Parliament, by leaders of all three political parties at the time of that agreement, show that the legislative objective of

1 including aboriginal and treaty rights in the
2 constitution of Canada was to restore the honour of
3 the Crown in its dealings with the Indian nations.
4 I would like to refer you to the statement of the
5 Right Honourable Joe Clark, then leader of the
6 opposition:
7 "I want to speak for a moment, if I might, of
8 the nature of that duty, the nature of our
9 responsibility to the aboriginal people of the
10 country. One in this nationalist age would be
11 reluctant to quote a poet from the United
12 States except perhaps in the case of
13 aboriginal title, because the aboriginals were
14 here before the United States or Canada was,
15 before the 49th parallel meant anything more than
16 another widening in the trees. I am struck by
17 the words of Robert Frost who came late to this
18 continent. He said:
19 'The land was ours before we were the
20 lands.'
21 Mr. Frost was speaking of the white
22 population, not the natives. The land of this
23 continent belonged to, was used by, the original
24 people well before the concept of land took root
25 as something that was possessed and parcelled
26 out. Land to the natives was where you lived,
27 where you worked, and where you took your nature.
28 It was heritage, not just territory. In a very,
29 very real sense, land and people were the same.
30 We took that away, we who came later. We took
31 it away as an inevitable consequence of our
32 civilization and the compensation we offered was
33 often meagre, often mean, sometimes nothing at
34 all. But the original people were here before
35 our civilization. Our treatment, our meagre,
36 mean treatment of them, has increased our
37 obligation, not diminished it.
38 We cannot reverse history, but we can take
39 account of it. A minimum step must be for this
40 Parliament to put in a document that deals with
41 the rights of our people and to acknowledge at
42 least the particular rights of our first people
43 to draw their life and their culture from what we
44 made our land."
45
46 The Honourable John Munro -- then the
47 minister of Indian Affairs of the government of the

1 day also made a statement which I wish to refer to.
2 He said:
3 "Members of the House, I cannot over-emphasize the
4 significance that I place on the events of the
5 last couple of days in view of the outcome. The
6 distance that native people have come in those
7 few short days, by gaining recognition for their
8 aboriginal and treaty rights in what is soon to
9 become the highest expression of the law of this
10 land, is immeasurable at this time. However, I
11 predict that history will prove it to be a giant
12 step.
13 I want the Indian people especially to
14 understand why I feel as I do. To be sure, the
15 contrast between my disappointment of a few days
16 ago and my mood today is uplifting. But that is
17 not the only reason. Honourable members, we are
18 here today in the House of Commons with a motion
19 that proposed to accord to native peoples a
20 unique status in the highest law of the land."
21 Notwithstanding the inclusion of section 35,
22 Indian Nations from Alberta and the Maritimes took a
23 case to England to urge Britain to refuse patriation,
24 on the basis that Britain had not transferred formal
25 Crown obligations to Canada with the Indian consent.
26 In refusing the application, the Court of Appeal held
27 that the Crown obligations had passed to Canada at
28 least with the passage of the Statute of Westminster.
29 Lord Denning said this about his view of the effect
30 of section 35:
31 "It seems to me that the Canada bill itself
32 does all that can be done to protect the rights
33 and freedoms of the aboriginal peoples of Canada.
34 It entrenches them as part of the Constitution,
35 so that they cannot be diminished or reduced
36 except by the prescribed procedure and by the
37 prescribed majorities. In addition, it provides
38 for a conference at the highest level to be held
39 so as to settle exactly what their rights are.
40 That is most important, for they are very
41 ill-defined at the moment.
42 There is nothing, so far as I can see, to
43 warrant any distrust by the Indians of the
44 Government of Canada. But, in case there should
45 be, the discussion in this case will strengthen
46 their hand so as to enable them to withstand any
47 onslaught. They will be able to say that their

1 rights and freedoms have been guaranteed to them
2 by the Crown -- originally by the Crown in
3 respect to the United Kingdom -- now by the Crown
4 in respect of Canada -- but, in any case, by the
5 Crown. No parliament should do anything to
6 lessen the worth of these guarantees. They
7 should be honoured by the Crown in respect of
8 Canada 'so long as the sun rises and the river
9 flows.' That promise must never been broken."
10 As this you are aware, through Constitutional
11 amendment to section 37, a series of
12 federal-provincial conferences have been held with
13 the participation of the aboriginal peoples of
14 Canada. What emerged from these conferences is the
15 the overarching concern of the aboriginal peoples was
16 to ensure the entrenchment of their right to
17 self-government. In March of this year, the
18 Conferences ended with no accord. The exhaustion of
19 this process has made it clear to the Gitksan and
20 Wet'suwet'en Chiefs that there is not the political
21 will in this country to come to grips with historical
22 and legal reality of aboriginal rights. The
23 politicians, have, in effect, deferred the matter to
24 the courts.
25 As our evidence will show, the subject of
26 aboriginal rights in British Columbia has its own
27 history of being deferred. Indeed, the decision by
28 the Supreme Court of Canada in the Calder case, in
29 which the court split evenly on the substantive issue
30 of whether the aboriginal title of Nishga Indians had
31 been lawfully extinguished, was wildly regarded as a
32 judicial deferral of the issue back to the
33 politicians. The Government of British Columbia,
34 however, has taken a narrow, technical view of that
35 decision as confirming its intransigent position that
36 the Indians of British Columbia do not have existing
37 aboriginal rights. The B. C. Court of Appeal in the
38 Meares Island case has made to clear, not only that
39 the Province's position on the effect of Calder is
40 misconceived, but also that the issue is to be
41 deferred no longer. Mr. Justice Seaton stated:
42
43 "There is a problem about tenure that has not been
44 attended to in the past. We are being asked to
45 ignore the problem as others have ignored it. I
46 am not willing to do that."
47 In bringing this case to court, the Gitksan and

1 Wet'suwet'en chiefs are not, however, simply
2 religating the issues raised in Calder, nor are they
3 re-presenting the same evidence in argument. In
4 Calder, there was no argument about the scope of
5 aboriginal rights. The issue was limited to the
6 Nishga rights of ownership to their territory; there
7 was no claim to jurisdiction or authority over it.
8 In Calder the legal argument related to
9 extinguishment turned on a debate between whether
10 aboriginal rights could be extinguished implicitly by
11 the provisions of the colonial Ordinances and
12 Proclamations cited in the Province's statement of
13 defence or whether such rights could only be
14 extinguished by specific legislation expressly
15 directed to that purpose. There was no argument that
16 aboriginal rights could only be extinguished with
17 Indian consent.
18 My lord, it is, however, the nature of the
19 evidence which will be presented to this court that
20 most distinguishes it from Calder. It is a
21 remarkable feature of aboriginal rights litigation
22 that some of the most important cases have been
23 argued in the absence of Indian evidence. Indeed,
24 one of the leading Canadian authorities, the St.
25 Catherine's Milling case was decided in the context
26 of a federal-provincial dispute over lands which had
27 been surrendered in a treaty in accordance with the
28 procedures of the Royal Proclamation, so that
29 therewas no representation of the Indian interest at
30 all, let alone any Indian evidence before the court.
31 Other cases have proceeded on agreed statement of
32 facts. The Calder case proceeded on a combination of
33 agreement of fact and limited Indian evidence. No
34 court in grappling with the issues of aboriginal
35 rights has had the opportunity which this court will
36 have of hearing Indian witnesses describe their
37 history, the nature of their society, their
38 institutions and their legal order from which their
39 rights to ownership and jurisdiction are derived.
40 The evidence of the chiefs will not only provide
41 you with a understanding of the substance of their
42 rights, but it will also inform your judgment on the
43 Province's principle defence in this case. That
44 defence is that the assertion of ownership 100 years
45 ago in colonial Ordinances and Proclamations by
46 implication has the legal effect of extinguishing the
47 ownership and jurisdiction of a civilization that has

1 existed for more than 5000 years. In a case
2 involving the search for fundamental principles for
3 for determining the legal relationship between the
4 Gitksan and Wet'suwet'en chiefs and the provincial
5 and federal governments, we will be arguing that
6 there is no room for a legal doctrine that
7 countenances the extinguishment of the rights upon
8 which a civilization is based through the stroke of a
9 colonial pen. I wish to refer you to one of your own
10 judgments in which you referred to the common law as
11 "a statement of the accumulated wisdom of history --
12 a dynamic force which is always ready to respond to
13 the reasonable requirements of civilization." We
14 will be submitting to you that the principle of
15 Indian consent to the acquisition by other
16 governments of ownership and authority over their
17 territory represents a fundamental principle of the
18 common law. It was fundamental to the integrity of
19 the British Empire in 1763. It is no less
20 fundamental to the integrity of Canada in 1987.
21 We have already referred to the judgment of Mr.
22 Justice Dickson in the Kruger case and his Lordship's
23 reference to aboriginal rights being interwoven with
24 history, legend, moral obligations and politics. By
25 granting the declarations the plaintiffs seek in this
26 case the court will be acknowledging the real history
27 of the Gitksan and Wet'suwet'en and ensure their
28 rightful place in the history books of British
29 Columbia and Canada; by granting the declarations the
30 court will also put legal fibre into the moral
31 obligations on the provincial and federal
32 governments. But most important of all, by declaring
33 that the plaintiffs have rights of ownership and
34 jurisdiction over their territories and that these
35 rights have not been extinguished, this court will be
36 charging the provincial and federal governments with
37 the legal and constitutional obligation to negotiate
38 with the Gitksan and Wet'suwet'en a just settlement
39 of their relationship on the basis that they have
40 existing aboriginal rights.
41 My lord, you are used to charging juries. The
42 charge we are asking to you make in this case is
43 perhaps the most important one any judge in British
44 Columbia has ever been asked to make. From this
45 perspective, it is appropriate that you sit as the
46 Chief Justice of the Supreme Court of this Province.
47 But challenges of a similar order of magnitude have

1 been made to other Chief Justices to affirm the legal
2 rights of native people in the face of government
3 disregard. We have already referred you to the
4 judgments of Chief Justice Marshall. In the face of
5 the attempted disposition of the Cherokee nation, he
6 affirmed that the Cherokees were indeed a nation of
7 Indians with rights to their territory. That
8 affirmation was not enough in the face of the
9 doctrine of Manifest Destiny to stop the
10 dispossession of the Cherokees under the guise of a
11 fraudulent treaty and their horrible forced march
12 along the Trail of Tears to Oklahoma. The Gitksan
13 and Wet'suwet'en have also suffered the effects of
14 dispossession from significant parts of their home
15 lands. But the dispossession and destruction of
16 their territories must stop from this point on and
17 legal acknowledgement must be made of the extent of
18 the Province of British Columbia's disregard of the
19 fundamental principles of justice upon which
20 aboriginal rights are based, and from which a just
21 settlement of the relationship between the Gitksan
22 and Wet'suwet'en and the provincial and federal
23 governments must evolve.
24 In the Meares Island case Mr. Justice Macfarlane
25 acutely observed that litigation is "but a part of
26 the whole of a process which will ultimately find its
27 solution in a reasonable exchange between governments
28 and the Indian nations." But litigation is a
29 necessary and vital part. This case offers you , my
30 lord, an historic opportunity, based on evidence no
31 other court has ever heard, to render judgment that
32 will move Canada closer to the achievement of a true
33 Confederation which includes its founding Indian
34 nations.
35 That is the conclusion of our opening.
36 THE COURT: Thank you, Mr. Grant.
37 All right. I don't suppose you want to do
38 anything else this afternoon do you, Mr. Grant or Mr.
39 Rush?
40 MR. GRANT: I would propose we adjourn until tomorrow morning
41 for the commencement of the evidence.
42 MR. GOLDIE: My lord, the desirability of the defendant making
43 an opening at this stage of the case is, although
44 questionable, in this particular case Mr. Rush and
45 Mr. Grant have embarked upon a discussion of the
46 Province's case, which is not wholly accurate, and my
47 friend, Mr. Grant, I think chose the right word when

he said argument. I don't propose to respond in the same vein. There are, however, I think, some aspects of the case, in light of the characterization of certain defences as principle, which I think your lordship ought to know.

And unless your lordship would prefer me not to, I would propose to say something along those lines tomorrow morning.

THE COURT: Mr. Macaulay?

MR. MACAULAY: I had not intended to make an opening address on behalf of the Attorney-General of Canada until the usual time, that is, before we open our case. I may be -- I may find it necessary to make some form of reply, depending on the nature and extent of Mr. Goldie's submissions. I don't know what they will be. But I will have to govern myself accordingly.

THE COURT: All right. Thank you. Mr. Rush or Mr. Grant, do you want to reply to what Mr. Goldie last suggested?

MR. RUSH: My lord, I think we will reserve our position on this. I can think of certain constraints on Mr. Goldie's right of makin an opening when his case starts, should he decide to make an opening tomorrow. And I am not entirely sure what our position would be. I note under the rules what the normal order of openings is and I think we would enjoy the evening to consider our position on it.

THE COURT: All right. I think that Mr. Goldie is entitled to know, for the purposes of scheduling his time, that my present view is that I would allow him to make an opening tomorrow, confined to a reply to those comments made by plaintiffs' counsel where they stated their view of what the defence of the Province was as disclosed by the pleadings. I think that's all Mr. Goldie has suggested and that is all I would allow, were I ruling now. But I send Mr. Goldie that message, but reserving any final disposition of his suggestion until I have heard from you further tomorrow, Mr. Rush and Mr. Grant.

All right. If there is nothing else we will adjourn until -- I am sorry, there is one other matter. What do counsel think about starting time tomorrow? I am in counsels' hands.

MR. GRANT: I would prefer us to start at 10 o'clock.

THE COURT: All right.

MR. GOLDIE: In the circumstances, I agree, and this may be the last time I agree with my friend.

THE COURT: All right. 10 o'clock. Thank you.

(PROCEEDINGS ADJOURNED UNTIL 10 O'CLOCK A. M., WEDNESDAY, MAY 13, 1987)

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

Wilf Roy
Official Reporter