1 Vancouver, B.C.
2 July 2, 1992
3
4 CORAM: Taggart, Lambert, Hutcheon, Macfarlane, Wallace
5
6 THE REGISTRAR: Order in court. In the Court of Appeal for
7 British Columbia, Thursday, July 2nd, 1992.
8 Delgamuukw versus Her Majesty the Queen at bar, my
9 lords.
10 TAGGART, J.A.: Yes, Mr. Jackson.
11 MR. JACKSON: Thank you, my lord. I had left off Tuesday at
12 paragraph 29 of our revised position on remedies, and
13 I'll pick up at paragraph 30. Your lordships will
14 recall I had gone through the thinking of the
15 appellants in how the declaration in relation to the
16 right to self-government had been constructed, and in
17 paragraph 30 I had turned to the alternative
18 declaration sought in paragraph 3 of the revised
19 order. The difference between the two declarations is
20 that the right asserted in paragraph 3(a) as an
21 existing aboriginal right is a proprietary interest to
22 lands and resources within the claimed territory in
23 contradistinction to a right of ownership, which is
24 asserted in paragraph 2(a). The essential distinction
25 here is that whereas the right asserted in paragraph
26 2(a) is an exclusive right, the proprietary right in
27 paragraph 3(a) is not so encompassing. The
28 proprietary interest is exclusive as to certain lands
29 but may be non-exclusive as to others.
30 And the appellants have set out what they say
31 would be the appropriate principles, which do not have
32 to be identified in the order but which could be
33 referred to in the course of your lordships' reasons,
34 the principles which initially would guide
35 negotiations of this matter, but ultimately, if
36 necessary, would also inform a judicial consideration,
37 and we say that the extent to which the interest of
38 the appellants relating to specific lands would be
39 exclusive or non-exclusive would take into account
40 five factors: the historical, cultural or spiritual
41 significance of the lands to the appellants; the
42 historical, contemporary and future economic
43 significance of the lands to the appellants; whether
44 the land is in its original or natural condition; the
45 extent to which similar lands in terms of general
46 location, climate, flora, fauna, resources and
47 accessibility are in the exclusive possession of the

1 appellants; and the impact on the appellants of
2 interests and activities of third parties and the
3 Crown having regard to the responsibilities of the
4 appellants to protect and conserve the land and
5 resources for future generations, and to ensure to the
6 appellants a just, equitable and honourable
7 entitlement to the lands and resources within the
8 claimed territory.
9 In the revised position we have given some
10 examples of how those principles might be applied. I
11 am not going to go through them, but I do want to just
12 take your lordships to paragraph 44 and 45, which
13 deals with the last of the factors. The last factor
14 there requires a consideration of the impact on the
15 appellants of the interest and activities of third
16 parties and the Crown. In essence, what this criteria
17 does is to require that restitutional attention be
18 paid to what has happened in the territory in the
19 past. The appellants, as your lordships know, make no
20 claim in relation to fee simple grants. However, the
21 inescapable reality is that the most fertile lands
22 within the territory have been taken up through fee
23 simple grants with the result that the appellants have
24 been effectively dispossessed of those lands. And we
25 say even though they make no claims to those lands,
26 apart from a claim to compensation from the Crown, the
27 reality of dispossession must be given great weight in
28 determining whether the appellants have exclusive
29 rights to other lands which, in terms of their
30 productivity, are capable of supporting and sustaining
31 the appellants.
32 And the final clause, which is, as it were, an
33 umbrella, an overall clause which is designed to state
34 a purposive goal in the determination of the extent of
35 exclusivity, is directed, and in this sense I would
36 just reflect back on what I said on Tuesday in terms
37 of the duality of rights and responsibilities which
38 the appellants see as in viewing their relationship to
39 their territories, this is directed to the obligation
40 of the appellants to protect and conserve the land and
41 resources for future generations and their right to a
42 just, equitable and honourable entitlement to those
43 lands and resources. The words chosen here are chosen
44 with care. The entitlement must be just.
45 And in my previous arguments, my lords, you will
46 recall that the concept of justice is one which
47 reverberates down through the centuries in relation to

how the Crown has understood its obligations towards aboriginal peoples, and I have referred again to a statement made by the Iroquois statesmen in 1744, the Treaty of Lancester, where justice again was the clarion call for the Iroquois in their demands of the British Crown as the sine qua non of their renewing the Covenant Chain.

But justice is also coupled with equity in the appellants' formulation, and in conceiving of that I had in mind the comments made by Mr. Justice Vancies in a case cited by my friend Mr. Arvay during the course of his submissions on remedies where in the Saskatchewan Human Rights Commission case his lordship said:

> "The meaning of 'juste' contains within it an element of 'justice' and 'equite' and conveys a sense of fairness and respect for the rights of others."

The final characteristic is that the entitlement to lands and resources must be honourable. As the Supreme Court of Canada has so clearly articulated in its dealings with aboriginal peoples, the honour of the Crown is always engaged. I say parenthetically, although perhaps it is more than a parenthetical statement, but in the context of British Columbia it is more appropriate in terms of the past behaviour to talk about the dishonour of the Crown. But, in any event, in determining the entitlement to lands and resources and the contours of the accommodation between aboriginal peoples and the Crown and those who derive their interest from the Crown, the disregard of aboriginal rights in the past and the extent to which aboriginal peoples, including the appellants, have been pushed to the margins of their own territories and of our just society must be addressed in determining how the honour of the Crown is exercised today in order to achieve a just, fair and honourable settlement.

Now, my lords, I have given Madam Registrar some speaking notes which fall into the rare genre of silent speaking notes. I would ask you to put them into your remedies piece following paragraph 48, where hopefully they will remain full of meaning but unspoken by me this morning. Just to give you some sense of what's in them, this is a comparison between

what the appellants are seeking in their declarations as to the nature of the rights compared to that which the province has articulated, and I've consciously tried to reflect upon the difference and the extent to which the declarations of the appellants are more likely to achieve what we say is a just resolution of the issues before this case.

What I would like to turn to now, if I may, is the second issue which the appellants have sought to grapple with arising from your lordships' questions, and that is the relationship between the rights the appellants assert and on the one hand provincial and federal powers and on the other hand the relationship between the appellants' rights and the rights of third parties.

Now, addressing first the question of the relationship between aboriginal rights and provincial and federal legislative powers, what I have done starting from paragraph 49 is to set out, and it continues through to paragraph 61, in a summary form what we have sought to do is, building upon the more detailed elaboration given to you on Monday and Tuesday by Mr. Paterson and the work and thought that has gone into the factum, we've tried to summarize what we say are the respective powers of federal and provincial governments vis-a-vis aboriginal rights.

Mr. Macaulay in the course of his submission on remedies was somewhat discomforted, I think, by the inclusion of a section on federal powers given that in this case there is no issue in relation to federal powers. I hope to allay his discomfort. This was not an intention to raise an issue which is not an issue. It was an attempt to give your lordships the full picture, as we understand it, of the relationship.

No statute is being challenged in these proceedings. The appellants do not say that any particular provincial statute, let alone any federal statute, is ultra vires or is inconsistent with the exercise of their aboriginal rights. That may be an issue in future litigation, but it is not an issue in this litigation. We are trying to, as I say, respond to your lordships' concern that how can you declare a right of self-government without having some sense of its relationship to other powers in s. 91 and 92.

And I thought that, in terms of perhaps clarifying that by way of an illustrative example, it might be helpful to give one example of how the appellants

would see the interaction between an inherent right to self-government defined in the manner its defined in our revised position on remedies in relation to provincial powers, and I have chosen the field of education. And, my lords, the Gitksan and Wet'suwet'en have already done much work in the development of educational goals which provide for their children an experience which integrates Gitksan and Wet'suwet'en ways of learning history and cultural values within the non-aboriginal system. Indeed, one of the hereditary chiefs and a plaintiff and an appellant in these proceedings, Hanamuxw, is one of the great educational pioneers in this province in relation to cross-cultural education. She was one of the founding members of the Native Indian Teacher Education Programme at the University of British Columbia and has been very much involved in the founding of the First Nations House of Learning at the university.

Now, my lords, clearly education is an area which is integrally related to social, cultural and linguistic identity and so prima facia would be encompassed within the right to self-government as it's identified in the declarations sought by the appellants. But this is a field where in thinking of the relationship between the exercise of an aboriginal right to self-government and provincial legislative powers the experience of the past few years demonstrates that the opportunities for cooperation and accommodation are very broad. The provincial School Act already accommodates different educational experiences, private schools, home education. In terms of a constitutional analysis, the provincial School Act is a law of general application and as such would continue to apply to the Gitksan and Wet'suwet'en and any schools they established in the absence of any conflicting exercise of Gitksan-Wet'suwet'en self-government powers.

Now, in many areas we would suggest it is not likely there would be any operational conflict. The standards for school safety, fire regulations, the supervision of children in playgrounds, limitation on the number of hours children can be kept in school are all designed to protect the safety and well-being of all our children, regardless of their aboriginality. It's unlikely to anticipate the Gitksan and Wet'suwet'en would see the need as part of retaining

1 their identity, their cultural identity that those
2 matters would be challenged, but it is possible --
3 LAMBERT, J.A.: I may not have grasped all the points in Mr.
4 Paterson's argument, but is what you're saying now a
5 statement that education of Indian people is not a
6 core value which as such is not susceptible to
7 provincial legislation at all?
8 MR. JACKSON: No, my lords, that is not my submission.
9 LAMBERT, J.A.: You're saying that education is not a core value
10 and consequently the School Act would apply to
11 Indians?
12 MR. JACKSON: I am saying that education involves cultural
13 integrity. All aspects of education, however, are not
14 foreclosed from provincial legislation.
15 LAMBERT, J.A.: Some are, some aren't?
16 MR. JACKSON: Some are, some are not, yes, my lord.
17 LAMBERT, J.A.: And what you have to do to decide that is to
18 decide which are core and which are not?
19 MR. JACKSON: What you have to do in our analysis, my lords, is
20 to determine whether or not the interference goes to a
21 matter which is integral to the cultural, spiritual,
22 linguistic identity of the Gitksan and Wet'suwet'en,
23 and what I am suggesting here is that matters dealing
24 with safety, minimum hours, that kind of thing, would
25 not be ones which necessarily would infringe upon the
26 exercise of an aboriginal right under s. 35 as we have
27 articulated it.
28 LAMBERT, J.A.: But the School Act provisions dealing with the
29 appointment of teachers, for example --
30 MR. JACKSON: Yes, my lord.
31 LAMBERT, J.A.: -- might well.
32 MR. JACKSON: Yes, and I was going to address that point --
33 LAMBERT, J.A.: All right.
34 MR. JACKSON: -- immediately.
35 LAMBERT, J.A.: Sorry. I anticipated you.
36 MR. JACKSON: Just picking up on your lordship's point, it is
37 possible to envisage, however, conflict in some areas,
38 and I have tried to give some examples. If the
39 Gitksan and Wet'suwet'en wish to change the structure
40 of the educational experience, if they wish to greatly
41 modify the curriculum, for example, place more
42 emphasis upon their own history rather than our
43 history, if they wish to alter the requirements for
44 teachers' certification, for example, to recognize
45 highly gifted educators amongst their own people who
46 did not have a university degree as required under the
47 School Act, these would be matters, we say, which

1 would be within their powers under the declarations
2 sought and would take precedence over competing
3 provincial jurisdiction. The question would be
4 whether in areas of conflict these were related to the
5 preservation and enhancement of social, cultural and
6 linguistic identity.
7 I would say, my lord, that even in these areas one
8 should not too readily jump to conflict as being the
9 premise for understanding the contours of this right.
10 Much work has already been done in these areas, but
11 ultimately under our declarations these matters would
12 not be determined, for example, whether or not there
13 should be some leeway given to certification for
14 exceptionally gifted educators who lack the normal
15 university qualification, these matters would not be
16 determined simply by reference to whether non-
17 aboriginal educators think that these developments are
18 appropriate, but would be based upon the legal rights
19 of aboriginal people to develop educational
20 experiences relevant to their own experience, their
21 own history, and their own vision of the future.
22 Now, my lords, what I wanted to do at this point
23 is to turn to the other side of the question of
24 reconciliation and relationships, the question of the
25 aboriginal rights, the lands and resources and third
26 party interests, which, of course, is an enormous
27 problem, at least it seemed to be an enormous problem.
28 And starting at paragraph 62, I have set out, and this
29 again builds upon the foundations of Ms. Mandell's
30 presentation and Mr. Paterson's presentation on
31 Monday, the analysis, the legal analysis based upon
32 s. 91(24) and s. 109, and those principles are
33 summarized in paragraph 68. And if your lordships
34 would just turn to paragraph 68, and essentially there
35 are three principles. The province has no power to
36 extinguish aboriginal title. Third party grants do
37 not extinguish aboriginal title, and the grantee takes
38 the grant subject to aboriginal title. Three, the
39 province may not legislate in respect of Indian land.
40 That power rests with the federal government under
41 91(24) and the appellants as an incident of their
42 aboriginal rights.
43 Now, my lords, if I could just take you back a
44 paragraph to paragraph 67, and I want to make a point
45 which I think is of the essence here. We say that the
46 jurisprudence clearly establishes that a grant made
47 prior to the lawful extinguishment, and we say through

1 cession or surrender with consent, of aboriginal
2 title, while it is a valid grant vis-a-vis the Crown
3 and the grantee, is subject to aboriginal title, and
4 we have cited the American decisions in Buttz and
5 Santa Fe.
6 Now, my lords, when you look at those cases in
7 their historical context, what you see is that at the
8 time the grants were made to the third party, the
9 railway companies in both cases, aboriginal title had
10 not been surrendered. The grantee, the Supreme Court
11 unequivocally said, took the naked fee subject to the
12 aboriginal title. But the other thing is that by the
13 time the case came before the courts the Indian title
14 had been surrendered through a treaty of cession.
15 Now, the question facing and the issue facing your
16 lordships in British Columbia in the context of
17 British Columbian history is that with the exception
18 of the Vancouver Island treaties and area covered by
19 Treaty No. 8, the historical reality is that cessions
20 have not taken place. Grants have been made for a
21 hundred years, and no cessions have been made. It is
22 a different historical reality, and it gives rise, my
23 lords, to the question how do your lordships respond
24 to that very different historical reality. Are those
25 cases, in other words, applicable to the different
26 historical reality of British Columbia where the right
27 thing was not done? And I have referred this argument
28 to how do you deal in a fair and just way with that
29 historical reality as the weight of history argument.
30 That's how it was referred to in the recent decision
31 of the Supreme Court of Vermont. Things have happened
32 in British Columbia for a hundred years. People have
33 acquired rights under grants. Expectations have been
34 laid and founded. How does this court respond to
35 that? Fairly. In accordance with the law.
36 The weight of history metaphor, my lord, is not an
37 inappropriate one for your lordships to deal with. We
38 say as a matter of law that aboriginal title is a
39 burden on the title of the Crown and those who derive
40 their rights and interests from the Crown. Aboriginal
41 title has a legal weight. It is a legal right to
42 possess and occupy lands. The reality, of course, in
43 British Columbia is that the province has ignored that
44 legal weight and has acted as if either deiure it did
45 not exist or that it could de facto ignore it, and
46 grants and interests have, as I've said, been made for
47 a hundred years on that basis.

1 In considering how this court should legally react
2 to the weight of history argument there are a number
3 of things which the appellants say you should take
4 into account, and some of them have been dealt with
5 extensively in our factum. One of them, which I would
6 like to take your lordships to now, if I may, which we
7 say is highly significant, is that in 1910, after a
8 decade of intense activity by aboriginal people to
9 obtain a reference to the Privy Council on the Indian
10 title issue, a joint provincial reference was proposed
11 by Canada identifying certain questions relating to
12 Indian title and Indian reserves. Even though those
13 questions were worked out jointly by counsel between
14 Canada and the province, the Premier of British
15 Columbia at the last moment refused to agree to the
16 joint reference if the questions involving aboriginal
17 title were part of it. And I want your lordships to
18 consider for a moment what those questions were and
19 why it was felt appropriate in 1909 or 1910 to have
20 them referred to the Supreme Court, and both the
21 rationale for the reference and the questions
22 themselves are set out in a memorandum, and I've given
23 Madam Registrar copies of it. The reference is --
24 this is all set out in our factum, but this will make
25 it easier, I think, for your lordships to follow my
26 argument.
27 LAMBERT, J.A.: It's in your factum but at a different place?
28 MR. JACKSON: Yes, my lords. I'll give you the references where
29 this can be found. I wanted to avoid the problems of
30 your turning to the factum at this point.
31 LAMBERT, J.A.: All right.
32 MR. JACKSON: This is a memorandum by the then Deputy Minister
33 of Justice, Mr. Newcombe, who subsequently is Mr.
34 Justice Newcombe of the Supreme Court of Canada, and
35 the original memorandum is Exhibit 1040, tab 123. And
36 that memorandum is in the package I have just given
37 your lordships, but at the front of that in a
38 typescript form rather more legible is Mr. Newcombe's
39 memorandum, which is Exhibit 1040, tab 149. And the
40 factum references where all this sequence is set out
41 is Volume 2 of the appellants' factum, Appendix K,
42 paragraphs 210 to 256.
43 And if your lordships could turn to the
44 memorandum, the very first page.
45 TAGGART, J.A.: Volume 2?
46 MR. JACKSON: Volume 2, Appendix K.
47 TAGGART, J.A.: Appendix K. Thank you.

1 MR. JACKSON: Paras. 210-256. If your lordships could turn to
2 the document just handed up and go to the second page
3 of the document, the second full paragraph, which
4 should in your lordships' copy have a bold mark down
5 the side. It begins, "There, are however..." Do your
6 lordships have that?
7
8 "There are, however,"
9
10 and this is the rationale for the reference,
11
12 "There are, however, in the northern part of
13 the Province, which is now becoming a field of
14 settlement, large areas of public lands in
15 which the Indian title has never been ceded or
16 surrendered, and where no special reserves have
17 been laid out. The Indians there remain in
18 such possession as they have had from time
19 immemorial, and they deny the right of British
20 Columbia to put settlers on their lands until
21 treaties, surrenders or cessions have been made
22 as usual. It has been held distinctly by the
23 Judicial Committee of the Privy Council with
24 regard to the Indian title in Ontario and
25 Manitoba,"
26
27 and this obviously is a reference to St. Catherine's
28 Milling,
29
30 "that the Indians have an interest other than
31 that of the Province within the meaning of
32 Section 109 of the British North America Act --
33 an interest which may be vindicated in
34 competition with the beneficial interest of the
35 Province. If this rule applies,"
36
37 and this is Mr. Newcombe,
38
39 "as we contend in British Columbia it would seem
40 to follow that those portions of the Province,"
41
42 and that should be,
43
44 "which have not been ceded or surrendered cannot
45 be open for settlement until competent
46 arrangements are made to secure the rights of
47 the Indians. You will observe that the first

1 three of my draft questions are directed
2 entirely to this point, which of course
3 underlies the whole situation,"
4
5 and I emphasize those words,
6
7 "and now for some reason which has not been
8 explained the Government of British Columbia
9 object to having this question elucidated by
10 the court."
11
12 Now, your lords, if you would just keep turning
13 the pages, after the typescript you will see the
14 original copy from the archives of Mr. Newcombe's
15 memorandum. That goes for five pages. And then if
16 your lordships turn the page one more time, you will
17 see the questions, which were the questions to be
18 referred to the Supreme Court of Canada. And the
19 first three deal with aboriginal title issues. The
20 next seven deal with questions of reserves and the
21 question of the reversionary interest of the province
22 in the reserves. I'm just going to take your
23 lordships through the first two questions.
24 The first question:
25
26 "Was the right or title of the Crown as
27 represented by the Government of British
28 Columbia at the Union in or to the lands in the
29 province which were at the time ungranted, and
30 which were claimed by and then were and had
31 been from time immemorial in the possession of
32 the several tribes of Indians inhabiting the
33 province within their respective limits,
34 subject to any interest, right or title of the
35 said tribes in so far as the interest, right or
36 title claimed by them had not been theretofore
37 ceded, surrendered or otherwise relinquished?
38
39 If so,"
40
41 second question,
42
43 "does such interest, right or title of the said
44 tribes of Indians so inhabiting constitute an
45 interest other than that of the province in the
46 said lands within the meaning of Section 109 of
47 the British North America Act, 1867?

> Is such interest, right or title of the said tribes of Indians an interest independent of and legally sustainable in competition with the beneficial interest of the province?"

And most significantly, my lords, the next part of the question:

> "Are the said tribes of Indians entitled to remain in possession of the said lands according to their respective limits as against the Government of the province, or any person to whom the province may grant the same, until the said interest, right or title of the said tribes of Indians shall have been ceded, surrendered or otherwise relinquished?"

Now, my lords, the reference never happened. With the changing government in Ottawa the questions of the reference was not pursued. Instead negotiations took place between Canada and the province to resolve outstanding differences on the Indian issue. Once again, because of the resistance of the premier of British Columbia, Mr. McBride, to deal with the Indian land title issue, that was dropped from the terms of reference, and the agreement was limited to the question of reserves and the establishment of the McKenna-McBride Reserve Commission. Both in the establishment of the terms of reference of that commission and the way it was explained to aboriginal peoples as the commission went around the province make it exquisitely clear that the question of reserves was entirely separate from the question of the unsurrendered Indian title in lands outside of the reserves.

And I make this point in relation to the question posed on Tuesday by my lord Mr. Justice Taggart, where in response to Mr. Paterson's argument the question was posed why were Indian reserve commissions travelling around British Columbia establishing what should be the size of reserves if, quite apart from that, there was an Indian interest in land outside of the reserves, and we say that question is very much answered in the context of this course of events because it was always understood that that was a separate question which was not resolved by the

1 allocation of reserves.
2 In 1914 the federal government provided the legal
3 machinery for another reference to the Exchequer Court
4 and from there to the Privy Council, but the terms of
5 reference under which it was to be made were
6 calculated to elicit, as indeed they did elicit,
7 rejection by the Indian peoples of British Columbia.
8 The conditions for the reference -- the reference in
9 1910 was unconditional. There were no conditions
10 attached. It was a straight reference. There are the
11 questions. The reference proposed in 1914 was of an
12 entirely different order. It required that the Indian
13 peoples of British Columbia in advance, before the
14 reference, agree to certain conditions. One of the
15 conditions was that counsel for the Indians be
16 nominated and paid for by Canada. The Indians could
17 not choose their own counsel. Secondly, if the
18 questions were answered in the affirmative, the
19 Indians were required in advance of the
20 recommendations being known to accept the
21 recommendations of the Royal Commission, the McKenna-
22 McBride Commission as to the size of their reserves.
23 And not knowing what the commission was going to do
24 and how responsive it was going to be to Indian
25 demands for much larger reserves in order to support
26 their economies, and not being prepared to have a
27 lawyer they could not instruct themselves, the
28 reference never took place. And this historical event
29 is set out in Appendix K, paras. 249 to 256.
30 Now, my lords, I'd like you just to think for a
31 moment what would happen had that reference been made.
32 In 1910 settlement was still in its very early stages
33 in the appellants' territories. Had the reference
34 been made and had the Supreme Court found, as Canada
35 was confident it would find, that the province's
36 underlying title was burdened by the Indian interest
37 under 109, that it was an interest independent of and
38 legally sustainable in competition with the beneficial
39 interest of the province, that the Indians were
40 entitled to remain in possession of their lands until
41 lawfully ceded or surrendered by treaty, the basis for
42 treaty-making would have been established, and the
43 opportunity for mutual accommodation would have been
44 laid. Most significantly, most of the dispossession
45 which took place in the Bulkley Valley would not have
46 happened. It would have been known to have been
47 illegal before it started, unless there was the

1 consent given by the Wet'suwet'en to those coming in
2 and taking over and settling on their lands.
3 But because, what we say, of provincial
4 intrasigence the reference didn't happen and the
5 weight of history, unburdened by a recognition of
6 aboriginal title, bore inexorably onwards as more and
7 more and more alienations took place.
8 What else should your lordships consider in the
9 weight of history argument? In 1927, following the
10 hearings of the Joint House of Commons and Senate
11 Committee, the likelihood of aboriginal peoples
12 bringing a case before the courts of this country was
13 further and immeasurably burdened by another legal
14 weight: amendments to the Indian Act which made it an
15 offence to solicit monies for the purpose of pursuing
16 Indian land claims.
17 What else should go into your lordships'
18 deliberations? Under the law as Canada understood it,
19 both in 1874, when it disallowed the first provincial
20 land act, and as it's reflected in the Newcombe
21 memorandum, and also as the appellants have argued
22 what the law is, it is the province which has to bear
23 the weight of the Indian legal burden, which is
24 aboriginal title, but the reality has been entirely
25 different. It is the Indian peoples of British
26 Columbia, including the appellants, who have borne and
27 borne alone the burden of de facto dispossession.
28 But, my lords, that is not all they have borne.
29 They have borne the effects which dispossession and
30 marginalization have caused everywhere in the world
31 where they have occurred. They are reflected in the
32 litany of disadvantage and disempowerment which
33 collectively represent the trail of tears along which
34 the aboriginal peoples of this province travelled.
35 And I would refer your lordships to a report of the
36 Canadian Bar Association written during the presidency
37 of my friend Mr. Williams, which describes some of
38 that litany, much of which, of course, is now all too
39 familiar to Canadians. That the infant mortality rate
40 is 60 per cent higher than the national rate. That
41 Indian children who survive their first year of life
42 can expect to live ten years less than non-Indian
43 Canadians. The rate of violent death is more than
44 three times the national average. Rates of suicide,
45 especially among young people, are six times the
46 national average. The likelihood of Indian children
47 being taken out of their family and community and

1 placed under the care of a child welfare agency is
2 five times higher. And the final statistic, which is
3 the subject matter of this report, appropriately
4 entitled Locking Up Natives in Canada, is the
5 horrendous over-representation of aboriginal peoples
6 in the prisons of this country, such that prison has
7 become for young aboriginal people the promise of a
8 just society that high school and university
9 represents for the rest of our children.
10 Now, these facts, my lords, make us all feel very
11 guilty. But what are we to do with such feelings as
12 lawyers and judges in the context of legal proceedings
13 in which legal rights are being asserted? The trial
14 judge was of the view the courts of law, and I'm
15 quoting from his lordship's reasons, are "frequently
16 unable to respond to these subjective considerations".
17 But I say, my lords, that we as lawyers and your
18 lordships, particularly your lordships as judges of
19 the highest court of British Columbia, have a special
20 responsibility. We see every day in our courtrooms
21 the young aboriginal men and women upon whom the
22 weight of history has placed its heavy and unkind
23 mantle. In determining how to respond to the weight
24 of history argument and what are appropriate
25 declarations of rights to make in this case, these are
26 not irrelevant considerations and they should not be
27 shrugged off.
28 The legal implications of the appellants' argument
29 is that Crown grants are subject to the burden of
30 their aboriginal title, and the appellants say that
31 the assumption and acceptance of such a burden is
32 entirely appropriate. Having for a century assumed
33 the benefit from the enjoyment of unsurrendered Indian
34 lands, is it not time that all of us accepted that
35 some of the weight of history falls on our collective
36 shoulders?
37 Now, this court has before it a number of possible
38 responses to the weight of history argument. It can
39 accede to it in the manner suggested by the province
40 and Canada, which is to say that the appellants'
41 aboriginal rights have been extinguished to the extent
42 that they are inconsistent with Crown grants.
43 Now, my lords I would point out to you this is not
44 a theory upon which either the province or Canada has
45 ever acted before. It is a theory which should be
46 understood for what it is. It is a theory developed
47 to legitimate the weight of history argument and to

1 secure and protect the rights of everybody else in
2 preference to those of aboriginal people. It is a
3 rationale developed late in the day to legitimate
4 dispossession. It may be seen as being more palatable
5 than blanket extinguishment because it has the
6 appearance of leaving something for aboriginal
7 peoples, which is to say whatever else is left.
8 Now, the appellants say that these theories of
9 extinguishment, blanket or inconsistent grant, are not
10 legally supportable and they are blatantly unjust, and
11 Ms. Mandell has elegantly and eloquently addressed you
12 on that matter the other day. It is true that in Mabo
13 the High Court of Australia has concluded that Crown
14 grants extinguish aboriginal title to the extent of
15 inconsistency, but it is our submission that in that
16 decision the intellectual energy of the court was
17 directed principally to rejecting Australia's own
18 legacy of injustice in that Australia was seen by the
19 courts of that country as terra nullius and the
20 aboriginal peoples never had any rights at all. This
21 court can do better than the High Court of Australia,
22 and we say it has to do better to achieve a just
23 resolution of the issues in this case in accordance
24 with the law.
25 My lords, the appellants in their revised position
26 on remedies have sought to provide the basis for a
27 just resolution of the issues in accordance with the
28 law. They do not assert that the implications of the
29 declarations sought are that they can turn back the
30 clock and recover all the lands they have lost. They
31 have purposely refrained from making claims in
32 relation to fee simple. They say that the principal
33 way to resolve the issue of existing third party
34 interests is not through a judicial stroke of the pen
35 in the way the province and the federal government
36 would have it by getting a declaration of
37 extinguishment through inconsistent grant any more
38 than it is through the legislative and executive
39 stroke of the pen which was the basis for the trial
40 judge's conclusions on extinguishment.
41 The principal and principled process for resolving
42 the issue between aboriginal rights and third party
43 interests is through negotiation and treaty-making.
44 The appellants have established the very long history
45 of treaty-making. In a contemporary context, when
46 modern treaties have been entered into, an integral
47 part of those treaties has been to address existing

third party interests. This is not uncharted terrain in the context of the realities of contemporary life, including the weight of history. Treaty negotiations in British Columbia will not start with a blank slate. We have learned much over the past 15 years since the James Bay Agreement was signed in Northern Quebec, and we know more about the process of accommodation between aboriginal rights and third party interests. This court's declarations anchor those negotiations and will give them an urgency and incentive which they have never had before in this province.

The emphasis of the appellants and their whole approach to remedies as reflected in the revised position is to secure the co-existence rather than the extinguishment of aboriginal rights. That is why we have advanced what we say are principles upon which to determine the co-existence of those rights and third party interests. And I would refer your lordships to those principles in paragraph 70 of our revised position.

Let me be clear about this, my lords. The appellants make no claim that those principles represent the best that our collective legal thinking and imagination can develop. Negotiations themselves may lead to different or better principles, and ultimately the courts will have to make their contribution to a new jurisprudence dealing with the co-existence, not the extinguishment of aboriginal rights. We say this court, in other words, is at the crossroads of legal history. It marks a point in which a British Columbian court can declare and give real substance to the rights of aboriginal peoples as part of the contemporary fabric of Canadian law which have to be taken into account in the determination of British Columbia's future. From this court's declarations the pathways to justice lead to the negotiation table, where the energies of the appellants and the respondents can be put to far better use in seeking a true accommodation founded upon respect and recognition of each other's rights.

But negotiations may not resolve all of the problems, and this court therefore finds itself, as I say, at a crossroads pointing the way to a new jurisprudence directed to the resolution of problems of co-existence. Courts in the United States and New Zealand have found themselves in just such a situation, and it is reasonable to expect that a

1 comparative law perspective will benefit all of us.
2 Nor should this be seen as an accident of history that
3 the courts in those countries find themselves at this
4 juncture. The appellants have sought to show that the
5 early legal history of each of our countries resonates
6 with mutual accommodation based upon treaty-making and
7 reflects a common source of legal principles reflected
8 in the Marshall judgments.
9 1992 brings with it the weight of 500 years of
10 European colonization. The judgment of this court and
11 the declarations it makes offers the enormous
12 opportunity of creating a new beginning based upon
13 principles of respect and recognition which have been
14 so long denied the aboriginal peoples of this
15 province. Your lordships' judgment, to contribute to
16 that process, must ensure that the injustices of the
17 past are not retained as the foundations for the
18 accommodation of aboriginal rights and the interests
19 of other British Columbians in both our futures.
20 Now, my lords, the remedies which are sought, the
21 last order which your lordships are being asked to
22 make, it's in paragraph 6 of the revised order, is an
23 order that pending the determination -- it's page 3 of
24 the free-standing document -- that pending the
25 determination of the scope of the proprietary rights
26 of the appellants, no grants of land, interest in land
27 or right to use land or resources in the territory
28 shall be made by the province without the consent of
29 the appellants or by court orders. My lords, we say
30 that declaration reflects nothing more or less than
31 what the appellants say the law demands. If the
32 appellants are right and their aboriginal rights have
33 not been extinguished, if the appellants are right
34 that their aboriginal rights represent in relation to
35 their interest in lands and resources an interest
36 other than that of the province, if the appellants are
37 right that that interest can be vindicated in
38 competition with the interest of the province, there
39 is no foundation or basis in law upon which the
40 province should be permitted to act illegally. And
41 pending negotiations, we say no such grants should be
42 made, save and except by order of this court or
43 through consent, which, of course, we come back to as
44 the hallmark, the principal and principled process
45 through which there should be reconciliation of third
46 party interests and aboriginal rights.
47 My lords, we have in our remedies also addressed

1 the position advanced by the Amicus, and your
2 lordships should have in tab 5, appellants' speaking
3 notes --
4 TAGGART, J.A.: Tab 5 of what?
5 MR. JACKSON: Of the speaking notes book, my lord. Tab 5 of the
6 red book in which everyone else's speaking notes seem
7 to be going. Do your lordships have something headed
8 "Appellants' Speaking Notes In Relation To Amicus'
9 Submissions On Remedies"?
10 TAGGART, J.A.: Yes.
11 MR. JACKSON: We don't intend to address all of the issues in
12 oral submissions. The speaking notes, of course, we
13 commend to your lordships. Mr. Rush will be
14 addressing some of the issues. I just want to deal
15 with two of them, starting at paragraph 31.
16 LAMBERT, J.A.: Maybe this is an appropriate time. If I may
17 interrupt you, Mr. Jackson. You're moving away now
18 from the text, the speaking notes that you gave us
19 earlier and the factum, but on page 26 of tab 9 you
20 start off in paragraph 62, in essence, to deal in
21 summary form with the argument that was made by Ms.
22 Mandell and Mr. Paterson, and you say:
23
24 "The starting point of this analysis is s.
25 91(24). The focus is on exclusive federal
26 jurisdiction in respect of 'lands reserved for
27 Indians.' The enquiry also involves an
28 interpretation of s. 109."
29
30 And then as the argument goes on, as I understand it,
31 it deals with what is meant by lands reserved for the
32 Indians, and as I understand the conclusion we are
33 invited to reach, it is that essentially all of the
34 lands in British Columbia are in the sense of
35 s. 91(24) lands reserved for the Indians.
36 MR. JACKSON: Yes, my lord.
37 LAMBERT, J.A.: That argument is not self-evident just by
38 stating it. It requires a very careful analysis of
39 St. Catherine's and other cases and a good deal of
40 thought.
41 MR. JACKSON: Yes, my lord.
42 LAMBERT, J.A.: But it has occurred to me that the section says,
43 91(24), Indians and lands reserved for the Indians and
44 that maybe the argument isn't entirely dependent on an
45 acceptance of the fact that the whole of British
46 Columbia is land reserved for the Indians. Maybe the
47 argument will hang together, perhaps in a slightly

1 modified way, but will hang together if the question
2 of the Indians' interest in the land of British
3 Columbia is regarded as coming within the class of
4 subjects Indians. That is, it's not necessarily in
5 the context of s. 91(24) a question of lands. It's
6 within the broader class of subjects of Indians as a
7 legislative class of subjects, and so the same
8 argument that the province's powers have been
9 sterilized since 1871 in relation to extinguishment of
10 Indian title may all hang together on Indians in
11 91(24) without necessarily having to decide that all
12 the lands in the province are lands reserved for the
13 Indians.
14 I am putting that to you now not truly because I
15 need an answer now, but if there is an easy answer of
16 some kind that puts the matter away one way or the
17 other, I'd like you or Ms. Mandell or Mr. Paterson or
18 Mr. Rush to say what it is and perhaps if you wish to,
19 and certainly when the province's surreply comes on
20 tomorrow then they should have an opportunity to put
21 my mind at rest too on this question, so I thought I
22 would raise it now.
23 MR. JACKSON: I'm obliged, my lord. We will endeavour to
24 respond to your lordship's concern.
25 In relation to the Amicus' position -- I seem to
26 have shrugged off. Paragraph 31. The Amicus argues,
27 and in this respect it's an argument in which they're
28 joined by the Business Council and Alcan, that the
29 appellants and the province in seeking a retained
30 jurisdiction of this court to permit them to do the
31 difficult task of negotiating the scope of aboriginal
32 rights in relation to the claimed territory have
33 misconceived the nature of aboriginal rights. The
34 argument, as I understand it, is that you can't
35 negotiate aboriginal rights. You can negotiate treaty
36 rights, but only the courts can determine aboriginal
37 rights.
38 And I think that was a point which at one time, as
39 I was reviewing the transcripts, I think my lord Mr.
40 Justice Wallace, you raised that as a concern that you
41 had which you wanted some response to. And our
42 position on that, my lords, is that negotiations will
43 not determine as a legal matter the scope of
44 aboriginal rights. The courts ultimately have and, of
45 course, retain that power. But that does not prevent
46 this court making declarations which encourage, indeed
47 invite the parties to seek an accommodation and a

1 resolution. Every day governments and private parties
2 negotiate settlements of issues which courts could
3 adjudicate but are not asked to, and we say that s.
4 35(3) expressly contemplates such negotiations with
5 respect to aboriginal rights.
6 And, my lords, to envisage that there's a bright
7 line between aboriginal rights and treaty rights, you
8 can negotiate the latter, but aboriginal rights
9 negotiations have nothing to do with that, that's
10 entirely a matter of legal adjudication, we say that
11 misconceives the relationship between aboriginal and
12 treaty rights.
13 At paragraph 34 I have referred to a number of
14 cases in which the courts have dealt with this,
15 including this court in White and Bob, but the
16 reference I made in particular is to Simon, where the
17 Supreme Court in relation to an argument there that
18 the treaty should not be given any particular weight
19 because it didn't really do anything different, didn't
20 reflect on aboriginal right, the Supreme Court said:
21
22 "[T]he right to hunt already existed at the time
23 the treaty was entered into by virtue of the
24 Micmac's general aboriginal right to hunt."
25
26 "To begin, the fact that the Treaty did not
27 create new hunting or fishing rights but merely
28 recognized pre-existing rights does not render
29 S. 88 inapplicable."
30
31 Treaties, my lords, often are about recognizing
32 and affirming existing aboriginal rights. They may do
33 other things. They may include matters which are not,
34 strictly speaking, to do with aboriginal rights at
35 all. But commonly they are reflective of and an
36 affirmation of existing aboriginal rights, and we say
37 on that basis that that is not an inhibitor to your
38 lordships making the declarations we seek.
39 The second argument which my friends make, which I
40 just want to briefly touch upon, is they say, and I'm
41 at paragraph 37, that your lordships ought not to make
42 the declarations in relation to the right to
43 self-government either in relation to land or in
44 relation to non-land matters because there is an
45 interplay between s. 35 and s. 25, and without your
46 lordships knowing what the nature of that interplay
47 is, you should tread cautiously, indeed you should not

tread at all, and we say that argument is misconceived.

The argument, as I understand it as developed by Mr. Willms, is that s. 35 says that nothing in the Charter shall affect the aboriginal rights or other freedoms of aboriginal peoples, s. 25, either under the Constitution or under the Royal Proclamation, and my friend's argument is that seems to suggest that the exercise of the right to self-government is not bound by the Charter and you should not make that kind of declaration because members of the Gitksan-Wet'suwet'en houses may not be prepared to accede to that.

Now, our declarations are as against the Crown, but quite apart from that point, the Amicus has misunderstood why s. 25 is there. And I've referred your lordships to an article by my colleague at the university, Professor Saunders, who having reviewed the debates on the Charter has summarized why s. 25 was put in the Charter, and he says:

> "After the experience with the 1969 White Paper,"

this was the document in which the Government of Canada advanced the point that aboriginal rights and treaty rights should be abolished and we should simply get on with the job of assimilation,

> "After the experience with the 1969 White Paper and the controversies over the Lavell litigation the federal government recognized that a Constitutional bill of rights must explicitly signal whether Indian status was to continue or not [and therefore] a protective section along the lines of section 25, should be inserted in the Charter."

In other words, it was put there to ensure that aboriginal rights would not be challenged on the basis they're a denial of equality, they deal with aboriginal peoples differently, and therefore under s. 15 they could be impugned. This was meant to immunize those kinds of rights from equality arguments. It plays the same function as s. 29. And you'll notice, my lords, that I've referred to a judgment of Madam Justice Wilson, where in relation to s. 29, which

provides along parallel lines to s. 25 that nothing in this Charter abrogates or derogates from, it uses the words rights and privileges as opposed to rights and freedoms, rights and privileges guaranteed by and under the Constitution in relation to denominational and separate schools. So again, it was intended to avoid s. 15 challenges.

Now, it may be in the future that s. 25 will be a vehicle for an argument that aboriginal collective rights are subject to the Charter in some way, that collective rights are not immune from respect for individual rights. That is another case. That argument has yet to be made. It may be made, but it does not stand in the way of your lordships making declarations as against the province that they have a right to self-government.

As I say, my lords, other matters, in particular the de facto argument of the Amicus, which has a close relationship to the weight of history argument, will be addressed by Mr. Rush this afternoon. This would be a convenient point to take the break.

TAGGART, J.A.: All right. We'll take the morning break.

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

MORNING RECESS

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

_____

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THE REGISTRAR: Order in court.
THE COURT: Ms. Mandell.
MS. MANDELL: Thank you, my lord. I have a brief few minutes to reply on the Royal Proclamation. And I have asked Madam Registrar to put into your speaking notes binder at tab 7 a reply to the Proclamation issue, together with a reference book which is labelled tab 7 which I'll be referring to one tab in it briefly.

My Lords, I began in the speaking notes to bring together for your lordships the various places in the factum where the Royal Proclamation argument has been referred to. I did this not for any reply purpose, but simply to save you the time that it took me to figure out where all of these arguments were to be located. And I would like to at this time address only a few points which have not been covered in the factum reply but which, in our submission, are raised directly by the oral submissions of the Province on this point and which have to be separately addressed.

I am beginning at page 2 of the speaking notes. And the headings which I've -- which I've created are an attempt to concisely state what the Province's argument is on these points, not what ours are.

This is in reply to Mr. Bell's argument that the Royal Proclamation defined geographic boundaries. And his first point was in respect of the Treaty of Paris. He said that the Treaty of Paris stated that Britain got Canada from France. He made an argument to you as to what constitutes Canada. And in this first point we point out that the Treaty of Paris didn't simply state the word "Canada", which was the source of Mr. Bell's submission, but the phrase "...in full right" -- France surrendered to Britain "...in full right, Canada, with all its dependencies." And in the next number of paragraphs I set out the evidence. I have contained it in your reference binder as to what "with all its dependencies" was intended to mean.

And if I could ask your lordships in your own time to review those evidence references but to turn at this stage to page 6. I'm sorry, at the end of page 5, the very last line under i. We point out that England had added the word "dependencies" to the description of the proposed French session and the French wanted the word defined.

And then dropping down to paragraph j, the English

Crown believed there were other dependencies in Canada. And this was contained in a dispatch. The French were asked in address what it is that England wanted to be added to the Treaty of Paris.

And down at the bottom of page 6 under k, among the documents which the Crown received, this is the British Crown, in answer to Egremont's dispatch was a report from Mayor General Thomas Gage. And Gage attached to his report a "List and account of the trading posts in Indian country".

The Crown also received a report from James Murray, who was the Military Governor of Quebec. Murray enclosed an extract of a letter giving some account of the "Indian trade in Upper Country". And your lordships will recall that the French trading posts were the ones at that point which were in our present-day prairies, which were at that point the French trading posts.

We say if His Majesty did not already know that the claims of the French had extended indefinitely westwards -- and we believe that he did -- then these reports were determinative. There was no northwestern boundary between Canada and Louisiana. These reports were among the papers considered by the Board of Trade in its June 8th letter when they were reporting on the "cessions made by France and Spain" in the Treaty of Paris. And that land was described as:

> "Canada possessed and claimed by the French consisted of an immense tract of country including the whole lands to the westward indefinitely which was the subject of the Indian trade."

Now, the next point which I want to address is this question about a so-called boundary which was to be inferred or implied by a reading of paragraph 2 of the Proclamation. And I address this section at paragraph 6, page 8. The Province argues that when you read paragraph 2 that a western and northwest boundary can be implied.

And our first point is that when you read paragraph 2, you have to read it in the context of the whole of the Proclamation. And we have already submitted to you that read as a whole no such interpretation can be read into it.

The Province puts great stock on the fact that

since it was the practice of the day to describe boundaries by reference to heights of land and watersheds, it would have been logical to infer that when such descriptions are used in paragraph 2 they were intended to be used to describe a boundary which can be inferred to be a contiguous line along the Mississippi River where it meets the height of land delineating Ruperts Land. Now, we say that on its own argument the Province concedes that this approach, in our submission, is not well founded.

And if I could take you to paragraph 10 of page 9, the southern and western boundary of the territory granted to the Hudson's Bay was never settled and there was considerable disagreement about it. And this fact was admitted by the Province.

Nor was the source of the Mississippi known in 1763. Maps show various theories of its location, and official maps show no intersection of the Mississippi with the Hudson's Bay territory. The fact that the source of the Mississippi was unknown is also conceded by the Province.

So at the very place that this so-called western boundary was to meet with the northwestern part of the supposed reserve, the Province concedes that that geography was not known. But they say that from the fact that the source of the Mississippi was unknown, it can be inferred that the drafters must have intended to imply an intersection with Hudson's Bay territory. And we say that if such a result was intended the drafters should not -- should have said so.

We say it is not logical the Crown would intend that unsettled boundaries and unknown rivers would be used to define a boundary in respect of newly organized territory. That the Province would interpret a public legal instrument by reference to ancient maps reflecting the contingent historical knowledge of particular people and what they knew of the geographic bounds of the colonies, plantations, territories and unceded and unpurchased lands. We say that when boundaries are in question, they are to be decided as a matter of fact and interpretation, not on the basis of private opinions or geographic misconceptions of officials or cartographers.

Now, the Province puts stock on the fact that when the Proclamation was being considered, Egremont in a letter from him to the Lords of Trade, proposed that

the commission for Canada should, in fact, include the area which was under discussion as being Indian country. And in that proposal the -- Egremont creates a boundary which he suggests should be the upper most boundary for Canada.

> "The King therefore is of the opinion, that, in the commission for the Governor of Canada, all the Lakes, Ontario, Eerie, Huron, Michigan and Superior, should be included with all the country, as far north and west as the limits of the Hudson's Bay company and the Mississippi."

Now, the King and the Lords of Trade decided not to include such a land description for Canada, and not to define a western boundary for Indian country. We say if, as the Province argues, the western boundary of the Mississippi is so clearly intended that it ought to be read into the Proclamation, the question is raised: Why the drafters did not include such a boundary in the description of paragraph 2 when the clear wording to do so was before them for their consideration. And this is as late as July of 1763.

We point out that where the drafters intended to define the boundaries for the new colony, they did so with precise language. And I am referring to Part I of the Proclamation. And I have set out the description of the Quebec boundary which your lordships in reading it will notice that the boundary uses heights of land. But it is not done in order to obscure the boundary, it is done in order to provide a geographic reference point. Otherwise, the boundary is very well described. And in looking at the boundary for West Florida, the Mississippi river is actually used as a reference point inside the boundary itself.

And we say at paragraph 19 that the Mississippi River is actually used as part of the boundary description. The question is raised if the Mississippi were intended as a western boundary for the Indian reserve, why was it not so stated as in the case of West Florida? Even if the drafters did not know with certainty the area, but wished to close off a reserve, as the Province argues, they could at least have said: "...and the line running north of the Mississippi source to intersect with the height of land delineating Ruperts Land". They could have made

1 those clear words in the same way they did when they
2 were describing the boundary for West Florida and
3 Quebec.
4 We finally say on this point that we don't
5 speculate because there is no language or evidence to
6 show that the Proclamation intended a western
7 intersection at the Mississippi and the southern
8 boundary of Ruperts Land (wherever it was). And we
9 say, finally, if the Province's theory is correct,
10 there would have been no purpose in including section
11 25 in the Constitution Act because by then treaties
12 had already been concluded in that part of Indian
13 country which the Province says was encompassed within
14 the Proclamation.
15 My Lords, I would just like to address the final
16 point about Indians affected. And your lordships will
17 recall that the Appellants commented on the trial
18 judge's error in relying upon the plan which the trial
19 judge said was enacted in Quebec. We say that the
20 Province has not disagreed with our analysis that
21 there was no plan enacted in Quebec in 1777.
22 The 1764 plan was argued by the Province as
23 accomplising the result of confining the Indians with
24 whom we are connected. And our point is that that
25 plan was not intended to circumscribe the Indians with
26 whom the Crown is connected. And if your lordships
27 would turn to tab 44 of the reference material, I
28 would like your lordships' attention to be put to the
29 document which actually described the plan when it was
30 first brought into place in 177 -- 1764. It is found
31 in tab 7, volume 44 -- tab 44. And I only -- at this
32 point if your lordships don't want to turn to it I can
33 read you the letter. This is the Lords of Trade to
34 William Johnson. He, William Johnson, received the
35 plans. And the Lords of Trade was explaining to him
36 at the last page -- I'm sorry, the last paragraph at
37 the bottom of page 634:
38
39 "This Plan has for its object the regulation of
40 Indian Affairs both commercial and political
41 throughout all North America, upon one general
42 system, under the direction of Officers
43 appointed by the Crown, so as to set aside all
44 local interfering of particular Provinces,
45 which has been one great cause of the
46 distracted state of Indian Affairs in general
47 and it is judged expedient in the execution of

1 this plan that North America should be divided
2 into two districts each having one Chief Agent
3 or Superintendent the first difficulty which
4 occurs in the consideration of the Plan, is how
5 to ascertain the limits of each district."
6
7 And so our submission is that when you look at the
8 plan now that the Province relies on, we say that its
9 object was clearly stated which was the regulation of
10 Indian Affairs.
11 And, My Lords, I am not going to take you to it,
12 but I have set out from my speaking notes in pages 13
13 to 19 the evidence which was before the trial judge
14 regarding this plan, the 1764 plan which the Province
15 made reference in reliance on.
16 And, finally, my lord, if I could address the
17 Labrador Boundary case, although my friend qualifies
18 his reliance on the case, we say that the Labrador
19 Boundary case in its decision about the Indians with
20 with whom we are connected and who lived under our
21 connection, in that aspect of the decision the case is
22 clearly wrong. It has been discredited or commented
23 upon as such by the authors.
24 I have set out at tab 46, although I won't take
25 you to it, I would ask your lordships to make note of
26 it beside paragraph 46, page 19. This is a summary,
27 two-page summary of the Labrador Boundary case by Dr.
28 Slattery. And in the Labrador Boundary case the Privy
29 Council said that the Indians who were encompassed by
30 the phrase "included only the Six Nations", that is
31 the Iroquois confederacy because they were Indians
32 with whom the British were connected and also did not
33 include the Indians who were against the British
34 during the war with France. So, in other words,
35 French allies would not have been included within that
36 phrase.
37 And as Dr. Slattery points out, this is not
38 anywhere -- first of all, there is historical
39 inaccuracies about the description itself inside the
40 case. But also the conclusion which the Privy Council
41 reach doesn't accord with the authorities. And, in
42 fact, in our submission it contradicts the Province's
43 theory which is that the Indians with whom we are
44 connected extend to those tribes who occupied lands to
45 the east of the Mississippi.
46 My Lords, I have no more time, and I will leave
47 the rest of this with you. I would just like to say

this is the last time that I will be speaking to you in these appeals. And I would like to tell your lordships that I appreciated the opportunity of talking to you over this last year.

TAGGART, J.A.: Thank you, Ms. Mandell.

MR. PATERSON: My Lords, I will be speaking to speaking notes which you should find at tab 8 of the speaking note brief. And I suppose these could best be characterized as unfinished business in some ways. I am going to address some questions that have been asked, and I will also attempt, so far as I am able, to speak to the question addressed by Mr. Justice Lambert to Mr. Jackson this morning.

The first point at the beginning of these speaking notes is in response to a question asked of me Tuesday to which I didn't have a very good answer. Mr. Justice Taggart asked if I knew whether the Guerin case had been applied in respect of common law interest to lands and if there had been a further case considering that. And the response I gave at the time was the only case I could refer to is Sparrow, which of course referred to common law fisheries.

And after that day's session my friend Mr. Pape for the Carrier Sekani Tribal Council drew my attention to the Pasco decision, which is a decision of the Court of Appeal. And I will just draw your attention to the points that are highlighted on page 2:

> "To summarize: land on a reserve, and rights which adhere to the reserve (such as fishing rights), are held for the use and benefit in common of members of the band. Trespass is a wrong done to persons in possession -- those persons who are entitled to the use and enjoyment of the rights."

And then carrying down to the next paragraph:

> "Similar considerations apply to the action in trespass based upon common law aboriginal rights."

And Guerin there is relied upon as an authority for that proposition.

I now take you directly into the response. I tackled part of the answer on Tuesday. I gave the

1 court some indication of our thinking on this matter.
2 I can't say that what we have here takes us a great
3 deal further, but I am going to attempt, at least, to
4 clearly articulate our position on this. The question
5 that was asked was what was the effect -- as I
6 understand it, what was the effect of the cumulative
7 impact of four separate matters.
8 And the first was the reception of the allodial
9 title by the Crown at the time of the assertion of
10 sovereignty. And the second was the declaration of
11 the Crown's interest in fee in the ordinance or
12 Proclamation which we are referring to as Colonial
13 Instrument II. The third is the actual granting of
14 titles under that instrument. And the fourth is use
15 of lands by a grantee in a manner inconsistent with
16 the exercise of the continued aboriginal rights. And
17 carrying that question a bit further, the question
18 posed: what was the effect of all of this with the
19 decision of powers of upon Confederation.
20 I would like to dispose of the first and last of
21 those four items at the outset. And with respect to
22 the first, the question of the reception of the
23 allodial title at the time of the assertion of
24 sovereignty, we say that this has no effect at all and
25 can be left out of the equation. We say that this has
26 been decided by Guerin that a change in sovereignty
27 does not, in general, affect the presumptive title of
28 the inhabitants. And there has been no reason offered
29 in this litigation why anything other than the general
30 rule would apply to British Columbia. Indeed, the
31 Supreme Court of Canada addressed that rule in a case
32 that arose from this jurisdiction.
33 In respect of the last matter, that is the
34 question of the exercise of a grant in a manner
35 inconsistent by a grantee, we say that that cannot
36 have the effect of extinguishing aboriginal title.
37 The Crown may well authorize an interference with the
38 exercise of an aboriginal right. And I believe that
39 question was, in fact, addressed at some length by Mr.
40 Arvay that the Crown may authorize an interference.
41 But we say that extinguishment is exclusively the
42 Province of the Crown and is not something that can be
43 delegated to a third party. Either the legislation
44 distinguishes aboriginal title, in which case there is
45 nothing by the third party to do, or it doesn't, in
46 which case the act of the third party itself would be
47 insufficient to extinguish.

1 Alternatively, I think you would have to find a
2 clear delegation of the power to extinguish to a third
3 party in the legislation of the grantee. And that
4 nothing in the legislation does that.
5 LAMBERT, J.A.: In relation to hunting rights my understanding
6 is that Bartleman decides that land can be owned in
7 fee simple, but hunting rights would not be
8 extinguished if they were still unoccupied lands. But
9 the question of extinguishing those hunting rights
10 depends on whether the owner puts up a fence around
11 his land, puts up "no trespassing", "no hunting" signs
12 and things like that. So at least in relation to the
13 hunting rights, there is a parallel example under the
14 treaty of how an effective extinguishment could take
15 place through the actions of the owner of the fee
16 simple.
17 MR. PATERSON: I would read Bartleman, with respect, slightly
18 differently than that. And that is that I would say
19 that putting up the fence would interfere with the
20 exercise of the aboriginal rights so long as the fence
21 were there. And if the fence were taken down and the
22 lands again ceased to be occupied then the treaty
23 rights would again be exerciseable. And that's the
24 distinction that I would make.
25 On that basis, My Lords, we submit that the
26 question falls to be determined on the basis of the
27 declaration of Colonial Instrument II and on the
28 grants issue pursuant to that.
29 And before getting into the confederation question
30 I wanted to address, and I raised to your lordships
31 the other day the question about different
32 Proclamations applying to Vancouver Island and also
33 the question of the repealing. I would like to just
34 address the context in which I think Colonial
35 Instrument II has to be construed.
36 And the first is that at paragraph 10 the Royal
37 Proclamation we say constrained the future exercise of
38 the Crown's prerogative power in respect of granting
39 title to land. That the Crown bound itself to
40 recognizing aboriginal title as a burden on the land,
41 and to obtaining consent of the Indians.
42 And paragraph 11, if the Royal Proclamation did
43 not apply, we submit that the governor of the colony
44 was not vested with the power to extinguish aboriginal
45 title through the passing of Proclamations or
46 ordinances to that effect. And we have made
47 submissions to you on that question.

We say that, in fact, the aboriginal title having survived the assertion of sovereignty, you must then go to the Sparrow test and see in legislation or, in this particular case ordinances and Proclamations, whether or not there is a clear and plain expression of the sovereign will to extinguish aboriginal title. And we say that that cannot be found in those instruments.

The Instrument II, we say, cannot be construed as enlarging the Crown's interest beyond what it was at the time of the sovereignty. "The King does not convey to himself", the Supreme Court noted in the Higbie case. The ownership of the allodial title which the Crown assumed at the time of sovereignty comprehends the title in fee which is the ordinary grant made from the Crown to subjects. So that we say the declaration added nothing to the interest of the Crown in that sense.

The second point is that the instrument in question never applied to the lands on Vancouver Island. It was limited to the Mainland. Now, if significance is attached to the declaration of fee in Colonial Instrument II, then it follows that a different regime was and, indeed, is in place if that declaration is deemed to have some continuing force on Vancouver Island than the regime which exists on the rest of the Province. This would result in the conclusion that insofar as we are concerned with the extinguishment of aboriginal title, a different legislative intention existed, and as a matter of law continues to exist in relation to both Vancouver Island and British Columbia. We simply say that that is an unreasonable way of constructing the effect of the legislation carrying through 1870 and so forth in the circumstances.

And I now turn to the 1870 Ordinance which repealed both the Vancouver Island legislation and the ordinance II 2. And that 1870 Ordinance was a consolidation of all of those previous, the Calder 1 through whatever it is, 12, I guess. And was a consolidation of replacing them and establishing an uniform law for application throughout the entire colony.

There is no declaration of fee in the 1870 Ordinance such as appears in Calder 2. If the declaration of Colonial Instrument II is seen as somehow enlarging the right of the Crown or

extinguishing rights of aboriginal peoples. It is submitted that this was itself repealed by Colonial Instrument XIII. In other words, we say that some sense has to be made out of the fact that that ordinance was intended to make the laws uniform through the Province. And that you cannot simply infer into it that which appears in Colonial Instrument II in respect of the Mainland which itself is the foundation for a further inference of an intention to extinguish aboriginal title on the making of a grant.

The 1870 Proclamation did not include provisions extended such an antecedent declaration to Vancouver Island and cannot be read as including a clear and plain intention to extinguish or permit the extinguishment of aboriginal title or ownership on Vancouver Island. Consistent with the principle of uniformity, it is submitted that it cannot be read as including or incorporating a power to extinguish title assuming such power was created by one of the instruments it repealed.

Then I turn in the 1870 Ordinance there is a continuing -- there is a preservation of rights provision in the very section that constitutes the repealing section. And it sets out -- it says the following are repealed and it lists them. And then it goes on to say:

> "...but such repeal shall not prejudice or affect any rights acquired, or payments due, or forfeitures or penalties incurred prior to the passing of this Ordinance in respect of any Land in this Colony."

And the question arose in my mind, at least, as to whether this might be a saving provision in respect of whatever the Crown might have acquired under Ordinance II, assuming that argument has some force.

And we say it can't be construed that way for the following reasons. First, aboriginal title is not an interest in land acquired by the Crown. It is an interest in land which, in the phrase the Chief Justice Dickson used in Guerin "disappears in the process of release". When aboriginal goes, it goes. It doesn't pass to somebody else. So it is not an interest acquired within the meaning of that section.

Secondly, even on the construction which the

1 Province would give to Colonial Instrument II, that
2 section does not constitute an acquisition of
3 something by the Crown, but it constitutes legislative
4 empowerment granting the power to colonial officials
5 to extinguish or cause the extinguishment of
6 aboriginal title through the making of an inconsistent
7 grant. That power does not purport to be continued by
8 the 1870 Ordinance. Indeed, it appears to be repealed
9 by it.
10 And finally, as I mentioned earlier, the King does
11 not "convey" to himself. That section cannot be read
12 as a conveyance. The only relevant instrument --
13 HUTCHEON, J.A.: Excuse me a moment. On the top of page 7.
14 MR. PATERSON: Yes.
15 HUTCHEON, J.A.: You say an interest within the meaning of
16 section. What section are we talking about?
17 MR. PATERSON: I am talking about the section set out at 16.
18 And that should be a right within the meaning of a
19 section.
20 HUTCHEON, J.A.: A right rather than an interest?
21 MR. PATERSON: That's right, my lord.
22 HUTCHEON, J.A.: It is not a right --
23 MR. PATERSON: There is an error there. That should be a right
24 within a meaning of -- a right acquired or that sort
25 of thing.
26 So we say that with the repeal of these
27 provisions, the only relevant instrument which
28 survived to Confederation was this 1870 Ordinance
29 known as Colonial Instrument XIII, which we say and
30 have made submissions to you that this instrument
31 which consolidated the land law and established a
32 Province wide or colony wide registration system and
33 so forth, we say that it has been held by this Court
34 in the Uukw decision that establishment of a legal
35 registry system could not be construed as affecting
36 the aboriginal title, that title not being
37 contemplated by the Torrens system. If the instrument
38 on its terms, did not extinguish aboriginal rights,
39 then again the affect of Confederation need not be
40 considered. Those rights would have carried through
41 Confederation and we would have to look to
42 post-confederation federal legislation.
43 My Lords, I led you through -- I am being advised
44 by my colleagues that I am encroaching on other
45 people's time, so I am going to try and proceed as
46 quickly as I can. I led you through, and I have set
47 it out in somewhat more detail the construction of

1 section 129 and how we would say it would apply to
2 continued laws, and those laws would be continued as
3 federal laws.
4 My lord Mr. Justice Lambert asked the question
5 about: well, the law being continued as an
6 administrative provision, perhaps, or carrying with it
7 implications and not being fully repealed by a federal
8 repeal. And I am not able to direct you to a case on
9 point, but it seemed to me a proper analogy here would
10 be the Natural Parents case where the court in that
11 case read down the language for all purposes that it
12 found in a provincial statute.
13 And it seems to me we should ask ourselves: what
14 would be the case if the Adoption Act was, in fact,
15 pre-Confederation legislation in British Columbia
16 which was continued by section 129? That
17 pre-Confederation legislation, without a division of
18 powers, could well be construed in those circumstances
19 as having deprived the Indian child in question of
20 status as an Indian for legal purposes. But once we
21 hit 1871, then I say the reasoning in the Natural
22 Parents case would apply. And that legislation could
23 no longer be construed as having an effect as granting
24 as an incident of the action of the provincial Crown
25 something which could only be done by the federal
26 Crown.
27 And I say that the question would be essentially
28 the same if the legislation had said -- for example,
29 if we look at the Colonial Instruments, if the
30 legislation had said: And the granting of title shall
31 extinguish the unextinguished aboriginal interest
32 herein, then once you reach Confederation you would
33 have to repeal or deem that section to no longer be of
34 force.
35 In particular, after the 1874 repeal the
36 legislation was inconsistent. So I say that the
37 effect of section 129 was to, in fact, move away from
38 the Province, both in terms of its executive powers
39 and also in terms of its legislative powers, the
40 ability to extinguish aboriginal title either directly
41 or administratatively through the exercise of its
42 powers.
43 My Lords, I won't take you through the rest of it
44 this. I have some notes which I prepared. I was
45 hoping I would get a moment to get through them, but I
46 won't.
47 In replying to the surreply document which was

1 delivered to us on Monday as directed by the courts,
2 and we have made some submissions in respect of those
3 matters which I would recommend to your lordships.
4 My lord, I just want to very quickly address, as
5 well, the question that you raised this morning of Mr.
6 Jackson. I am not -- and I do it with some hesitancy
7 because I am not sure I understood the direction you
8 were going. But as I understood your question, it
9 was: how would the claims in respect of the
10 aboriginal interest in lands differ in terms of what
11 we say is the constitutional scope of the power of the
12 federal government if 91(24) comprehended a power over
13 Indians. Is that --
14 LAMBERT, J.A.: Well, my recollection of what 91(24) says is
15 "Indians, and lands reserved for the Indians."
16 MR. PATERSON: That's correct.
17 LAMBERT, J.A.: Full stop, or whatever punctuation is at the
18 end. And then that section had 92 says "matters
19 coming within the classes of subjects".
20 MR. PATERSON: Yes.
21 LAMBERT, J.A.: It is possible to say there are two classes of
22 subjects in 91(24). One is Indians and the other is
23 lands reserved for the Indians. You have made an
24 entire argument about the legislative sterilization of
25 the British Columbia legislature because of 91(24) in
26 relation to core matters on Indian lands.
27 MR. PATERSON: Yes.
28 LAMBERT, J.A.: And you've made that argument and Ms. Mandell
29 made the argument entirely constructed on the words
30 "and lands reserved for the Indians". But it is
31 quite -- it is arguable, it seems to me, that lands
32 reserved for the Indians do not have the meaning that
33 you're contending for. But nonetheless, it seemed to
34 me that the whole argument about legislative
35 sterilization could stand if it was thought that the
36 Indians' claims to land came within the class of
37 subject Indians, even if they didn't come within the
38 class of subjects, lands reserved for the Indians.
39 And that's my question.
40 MR. PATERSON: I understand your question now. I agree with
41 that. And I'll put it this way, and it may be that
42 there has been an excessive focus on the question of
43 lands reserved. For our purposes, the principal
44 difference in terms of, you know, in a practical sense
45 of finding whether something affects Indians or lands
46 reserved for Indians in that kind of sense goes to --
47 goes to the question of practical sense of whether or

not it is incorporated under section 88. And so apart from section 88, perhaps nobody would be focusing very carefully on the difference.

The way I would address the question is starting by analogy if there was no reference to lands reserved for the Indians, what would section 91(24) comprehend in that sense? And I think that 91(24) would comprehend Indian rights over and in respect of lands. I think that it was in the contemplation of the drafters of the constitution, as it were, when the original division was made that the Indian problem, if we could put it that way, and the problem concerning Indian lands was going to be a major preoccupation for the development of Canada. It was only two years after Confederation that a revolt broke out in Manitoba.

So I think that the jurisdiction in respect of Indians would mean as, for example, has been construed in cases like Dick and so on, as things which go to their Indianness. Things which are essential for their continuation and preservation as societies in relation to the lands from which they came and so forth. And so I think Indians in that sense, if you asked a question which was asked in a question like Dick, would the taking of their lands go to their Indianness, I think you would get the same answer as the taking of their hunting or fishing rights and that sort of thing. And in that sense I think that the Indians can comprehend that.

In a practical sense, I think the reason why there are two phrasea in 91(24) and why both limbs were put in that section is to make it clear to any court following that the import of the section was that Parliament was having a power in rem over lands and not just a power in relation to persons. It was to make clear that 91(24) was not, for example, analagous to the power in relation to aliens, that it comprehended something a bit more than that.

And if you wanted to give separate effect and see 91(24) as including two classes of subject, then you would say that the power over Indians affects those things which are rights in personam, if we can put it that way, and lands reserved for Indians would protect and address those which are rights in rem.

And if you find, as we've submitted, and this has been our submission, that the Indian rights to lands are in rem and constitute an ownership or a

1 proprietary interest, then they would fall under
2 91(24) lands reserved for the Indians. And if you
3 find that there are rights in personam that you are
4 not prepared to address as proprietary or ownership or
5 rights in rem, then you may very well find that those
6 same rights and the exercise of them is protected
7 under the first head of 91(24).
8 As I say, for practical purposes the difference
9 seems to come more in terms of section 88 and the
10 impact of that. But that is a bit of a different
11 question. Thank you, My Lords.
12 MR. GRANT: My Lords, I will be speaking to you with respect to
13 tab 9, 10 and 11 in the speaking notes. And I believe
14 you have 9 and 10. After the break this afternoon I
15 will speak to the other tab. There is a reference
16 book at tab 9 that I will be referring you to. And I
17 believe I have given them to Madam Registrar, but I
18 haven't -- I am not sure if she has passed them up to
19 you. She indicates she has. I will be referring to
20 them later just in a couple of references.
21 Now, My Lords, this submission in reply on the
22 facts focuses on this -- today, this morning and this
23 afternoon, we will be dealing with the facts and the
24 challenge by Canada and the Amicus to those facts.
25 What I would like to direct your attention to first is
26 the very vigorous, and I say extremely vigorous attack
27 by Canada and the Amicus on the anthropology. And the
28 first question that comes to mind is why? Why was I
29 believe one to one and a half days of Canada's
30 argument and the principal Amicus argument challenging
31 the anthropology? And, of course, they both focused
32 on Dr. Daly. And Canada then said the same argument
33 applies to the others.
34 Well, it is not because -- it is not just for an
35 academic reason. It goes to the very question raised
36 by your lordship, Mr. Justice Macfarlane. And that
37 is: Is the territory over which the Appellants have
38 these rights that we say, is it just the village and
39 village areas, or does it go beyond the villages?
40 And the Chief Justice's findings at page 384 said
41 that: "They exercise their ownership and jurisdiction
42 in the areas of the villages but not in the
43 territories beyond." And there is a debate about how
44 big those areas of the villages are.
45 Now, what we submit is that when you call in aid,
46 as it is appropriate for a court to do, the expertise
47 of anthropology, the answer will be a resounding yes.

The rights of the Appellants, of the Gitksan and Wet'suwet'en people, are beyond the villages.

Now, Canada in argument, I am at page 1 of the speaking notes, described Dr. Daly's evidence as "so far removed from any kind of reality that has ever been recorded, that it was of no assistance to" the trial judge, and that it was "sheer nonsense". Now, Mr. Macaulay also admitted that "when it comes to anthropologists he had a tin ear".

The Appellants have dealt with much of this attack in our factum. I take you to the issues to which anthropological evidence is directed.

Canada says, at page 2, the point is twofold: to demonstrate continuity in the exercise of aboriginal rights, and to permit inferences about what was happening pre-contact.

Now, this court's judgment in Pasco points to the inquiry directed at finding, among aboriginal peoples at the assertion of sovereignty:

> "...a recognition of the claimed rights, sufficiently defined..."

Now, that's a recognition within their own system:

> "...to permit their recognition by the common law upon its advent in the territory."

And I refer you to Amodu Tijani, "the study of a particular community and its useages", and to the Mabo case where Mr. Justice Brennon for three judges in the majority called "the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of the territory".

Now, Canada identified the major issue between itself and the Appellants to which anthropological evidence is relevant as the extent, geographically and legally, of what Canada admits was a Gitksan and Wet'suwet'en social organization, and in particular a system for land use, allocation and control regulated by the feast. And I submit, my lord, that's an important concession. And it is important to show its limits as well as its scope. Canada does recognize in their argument that there was a social organization for land use, allocation and control, regulated by the feast at those references cited at tab 7.

What Canada does not acknowledge is that that went

very far beyond the villages. And this, of course, is where your Lordship Mr. Justice Macfarlane raised that the central issue dividing Canada from the Appellants is one of rights to use and control beyond the villages.

Now, I submit, My Lords, that there can be little doubt that the anthropological evidence tendered by the Appellants addresses the issue directly, as a matter of both historical and contemporary fact. We have argued in our factum that if this evidence is accepted it established that the Gitksan and Wet'suwet'en societies have had the following central features: institutionalized ownership and management of large, widespread territories; institutionalized political authority over themselves; and commerce in primary and manufactured products, both within the territories, and beyond their boundaries.

And I say, my lord, that those conclusions are not solely based on the anthropological -- the three anthropological witnesses critiqued by the trial judge. They are based on such material as George Macdonald's map, which I believe reference book 12A refers to in argument. And as I will point out to you, by persons that Canada relies on like John Adams. It is not an unique theory. It is well accepted in the world of anthropology and the study of the northwest coast groups.

But Canada says, at page 4, in terms of the handling, the court's handling of anthropological evidence, Canada makes this suggestion:

> "Anthropology as a body of information is almost antithetical to legal evidence. Its very nature is to explain something from someone else's point of view. It isn't merely to describe it in a factual way, that isn't what it's about."

And I would like to take you to paragraph 15. The Appellants submit that, where the relevant legal inquiry is into the community and its useages, and where the trial judge does not belong to the community, and in that sense aboriginal rights cases like the ones you've heard over the last 12 months are unique because usually the issues your lordships deal with are from our society, our community. You don't have to go and study another society to understand the

1 issues. But that's the situation here. The
2 Appellants' perceptions are at the very heart of the
3 matter. And where the time depth or cultural
4 differences are such as to make it difficult for the
5 trial judge to understand the community,
6 anthropological opinions are indispensable.
7 Now, Mr. Brody dealt with this in his opinion
8 report. And I have bolded portions of his quotes.
9 But he says: "In order to apply" -- "The word
10 'jurisdiction'" in the second paragraph:
11
12 "The word 'jurisdiction' is loaded with western
13 legalistic connotations. In order to apply it
14 elsewhere requires the best available
15 understanding of Indian economic and cultural
16 systems."
17
18 And I encourage your lordships to consider the Brody
19 opinion report and review it.
20 At paragraph 17 I refer you to that,
21 anthropological evidence is expert opinion evidence.
22 The function of anthropologists is to draw inferences
23 as to the "particular community and its useages",
24 according to the methods of their discipline, which a
25 trial judge is incapable of, or would have difficulty,
26 drawing alone.
27 We then challenge this thesis the Kenny "The
28 Expert in Court" thesis that keeps being raised and
29 has been raised on argument here and in the lower
30 court by Canada. And that is certainly not the law
31 here in light of Lavallee.
32 Now, I would like to take you, though, to
33 Milirrpum where Mr. Justice Blackburn -- now, of
34 course, in Milirrpum the final finding of Justice
35 Blackburn was relying on the Terranullius document in
36 Australia, which, of course, has been overturned. But
37 in the course of his careful judgment he did consider
38 and it was a challenge to admissibility of
39 anthropology. But he went on to talk about what it
40 was about and overruled the objections.
41
42 "A particular matter upon which the defendants
43 pressed their objection to the admission of
44 expert evidence, was the question whether a
45 relationship between a given clan and a given
46 piece of land existed at a time before any
47 evidence based on personal experience could be

1 given of it, particularily in 1788, when the
2 subject land became part of New South Whales.
3 ... In my opinion both the experts were
4 qualified by their experience in anthropology,
5 and in particular their knowledge of the
6 Australian aboriginal, to express an opinion on
7 the permanence of a social group and of its
8 relationship to a particular piece of land, and
9 therefore on the likelihood that such a
10 relationship existed in 1788."
11
12 My Lords, that's exactly the point to which the
13 Appellants called expert anthropological evidence. It
14 is exactly the issue. It is the issue that the kind
15 of evidence accepted in Sparrow and Calder and all the
16 other cases. And it is not just -- in Milirrpum
17 Justice Blackburn recognizes the significance of it.
18 Now, Canada attempts to refute Calder as a good
19 example of the danger relying on anthropological
20 evidence respecting legal issues.
21 But we say on page 8 that the trial judge is not,
22 as Canada suggests, obliged to choose between facts
23 and opinions.
24 Canada would have you eliminate anthropological
25 evidence where lay evidence is available, and in any
26 event to confine it to "objective observable
27 phenomena":
28
29 "Anthropologists ...Canada says... can assist
30 the court with an opinion upon or explanation
31 of objectively observable facts where the
32 Appellants' own evidence on their culture and
33 history is not available."
34
35 In other words, the fact that the Appellants called
36 lay witnesses upon whom the experts relied their own
37 evidence in court, they say: well, then, you can't
38 call the anthropologists.
39 Now, I would like to take you to one of the two
40 references. And this is at tab 20 of the reference
41 book to the Milirrpum case. It is after the second
42 brown sheet at tab 20.
43 TAGGART, J.A.: Which --
44 MR. GRANT: The reference book is tab 9, the reference book of
45 Appellants speaking notes, my lord. Because this goes
46 to what anthropology is all about. And Justice
47 Blackburn in considering it considered how it could

1 help him in a way that unfortunately the trial judge
2 concluded he didn't need. At page 161.
3 LAMBERT, J.A.: Can you give us the tab again in the book?
4 MR. GRANT: Oh, I'm sorry, my lord. It is tab 20. And it is
5 the third brown sheet in and the second sheet of the
6 case. At page 161 the paragraph three-quarters of the
7 way down, "My ruling". He says:
8
9 "My ruling is based on accepting that there is
10 a valid field of study and knowledge called
11 anthropology..."
12
13 And I want to refer you to the fact that Canada in
14 their argument suggested if one can call it a
15 discipline.
16
17 "...which deals with social organization of
18 primitive peoples (the definition will serve
19 well enough for the purpose in hand)."
20
21 And he wasn't trying to make a pejorative statement
22 there.
23
24 "The process of investigation in the field of
25 anthropology manifestly includes communicating
26 with human beings and considering what they
27 say. The anthropologist should be able to give
28 his opinion, based on his investigation by
29 processes normal to his field of study, just as
30 any other expert does. To rule out any
31 conclusion based to any extent upon hearsay --
32 the statements of other persons -- would be to
33 make a distinction, for the purposes of the law
34 of evidence, between a field of knowledge not
35 involving the behavior of human beings (say
36 chemistry) and a field of knowledge directly
37 concerned with the behavior of human beings,
38 such as anthropology. A chemist can give an
39 account of the behaviour of inanimate
40 substances in reaction, but an anthropologist
41 must limit his evidence to that based on what
42 he has seen the aboriginals doing, and not what
43 they have said to him."
44
45 In other words -- and the trial judge did not adopt
46 that principle because the trial judge, and Canada at
47 trial and here, has said the participant observation

1 of Dr. Daly is a basis to make his conclusions -- it's
2 fatal to his conclusions were the words of the trial
3 judge. And yet Mr. Justice Blackburn recognizes that
4 it is a completely artificial distinction when the
5 field of expertise is to deal with human beings to say
6 they cannot -- that evidence should be rejected.
7 Now, I take you to the Lavallee comments where the
8 court cautioned at paragraph 27, I am back in my
9 speaking notes, My Lords, against judges and juries
10 who are "their own experts on human behavior", when
11 they "may not have sufficient knowledge of or
12 experience with human behavior to draw an appropriate
13 inference from the facts before them".
14 And the Appellants submit that these
15 considerations apply in particular force to the
16 opinions of anthropologists in a case where the court
17 has to try and understand the behavior in question --
18 the social organization of the Gitksan and
19 Wet'suwet'en -- across both a profound cultural
20 divide, and from a distance of 200 years or more. As
21 Bruce Trigger, the noted anthropologist wrote, an
22 implicit approach relying on the experience of every
23 day life:
24
25 "...does not provide an adequate basis for
26 understanding behavior of people in earlier
27 times or in cultures radically different from
28 our own."
29
30 In other words, My Lords, it is not good enough, with
31 all respect, for the trial judge to say he did not
32 need anthropology. And that was fatal when he
33 rejected, or found he didn't need it, to the points
34 about the widespread exercise of ownership and
35 jurisdiction by the Appellants over the territory.
36 If I can take you to paragraph 35, I say that our
37 simple point is that anthropological opinions in this
38 case are admissible, and that is not contested, and
39 entitled to considerable weight, and that is
40 contested. The vast majority of facts on which they
41 are founded were proven in evidence, and they are
42 listed there.
43 The real dispute in the case is about the
44 inference to be drawn from the evidence, and the
45 appropriateness of the trial judge's approach to
46 weighing it.
47 As your lordship Mr. Justice Hutcheon said, and

1 this is where anthropological opinions should have
2 been an important part of the answer to the question
3 asked of Canada:
4
5 "What does the trial judge use? ... If he has
6 to come to some conclusion is he in a better
7 position than the anthropologist?"
8
9 And your quotation to -- your question to Canada is
10 there. What we say, my lord, is that in fact,
11 although Canada suggested that he had all of this
12 weighty material before him, he rarely identified the
13 bases for his sweeping anthropological conclusions.
14 For example, no witness and no evidence put forward by
15 any party denied that the Appellants' ancestors had
16 institutions and instead attributed their behaviour to
17 "survival instincts", yet that is precisely what the
18 trial judge found.
19 We submit at paragraph 41, and this is the issue
20 for your lordships on anthropology because there
21 certainly must be some guidance to the lower courts on
22 this point, that his lordship's question points out
23 the importance at this stage of judicial consideration
24 of aboriginal rights of this court doing two things.
25 First, setting generally-applicable standards for the
26 courts below in evaluating and using anthropological
27 evidence; and, second, carefully scrutinizing the
28 particular reasons offered by the trial judge in this
29 case for rejecting some or all of the anthropological
30 evidence (as both unnecessary and entitled to no
31 weight) for conformity to those general standards.
32 And I would like to now take you briefly to the
33 trial judge's evaluation of anthropological evidence
34 in general. In paragraph 42 I say that your lordship
35 Mr. Justice Lambert asked whether the trial judge saw
36 anthropological evidence in general as comparatively
37 unimportant, and whether his statement that "the
38 anthropologists add little to the important questions
39 that must be decided in case", applied to all
40 anthropologists. Canada said this, after some
41 discussion, that his comments only applied to Dr.
42 Daly, Dr. Mills and Mr. Brody, notwithstanding that in
43 its factum, Canada says that the statement was one
44 made "generally about anthropologists".
45 And their statement in their factum is the correct
46 statement, in our view. Because if you look at the
47 trial judge's dealings with "history" where I bolded

it under his general category of history, he says:

> "I cannot hope to do justice,"

This is halfway down the quote, my lords:

> "...to these rich and fascinating histories. Some of them are remarkably well documented."

And here is is the emphasis:

> "Others, unfortunately, exist only in the memory of plaintiffs, and some of them have received some scholarly attention. I intend no disrespect to the fascinating work of Morice, Barbeau, Beynon, Duff and others, but much remains to be done in order to prove or disprove the authenticity of their conclusions."

And then he refers to archaeology.

When the trial judge first treated those works as unproven, and later said that he was "able to make the required important findings about the history of these people, sufficient for this case without this (anthropological) evidence", he was rejecting anthropological evidence in general. Certainly he was rejecting it as useful in establishing the propositions for which it was tendered: that from a long time before the advent of European influence, the Gitksan and Wet'suwet'en societies have had institutionalized ownership and management of large, widespread territories. And that proposition, My Lords, is central to their history. That proposition is central to this case because the challenge is -- if we can -- if you do find rights limited to their villages and then we have no problems. And it is sort of the alternative argument of the Respondents to their legal argument on diminution of rights or adverse dominion. If you are going to find large rights, put them in a very small place like 45 square miles of reserves.

Now, I refer you at paragraph 45 to the broad scope the trial judge attached to the "history" which is apparent in his reasons.

I want to point out that we don't -- we are not suggesting that anthropologists and ethnographers who

1 studied the Gitksan and Wet'suwet'en are not mentioned
2 in the judgment. But their opinions on the central
3 factual issue in the case -- the nature and geographic
4 extent of the Appellants' system of land use,
5 allocation and control -- are misstated or ignored.
6 And we submit that the trial judge, contrary to an
7 expectation of your lordship Mr. Justice Lambert, did
8 not rely on the anthropological literature referred to
9 in making findings about the history of the Gitksan
10 and Wet'suwet'en. Rather, he ignored or rejected all
11 of it.
12 And I refer there to the Barbeau and Duff's
13 opinions where the trial judge found them as unproven.
14 We've provided the writings or the index of exhibits
15 of Wilson Duff's materials, the reference to Drucker
16 only once. And I am not going to read paragraph 52.
17 But you will see that we have endeavoured to collect
18 every single reference by the trial judge to an
19 anthropologist in paragraph 52.
20 And I will only take you to the last reference
21 because it is rather interesting. He said:
22 "Goldman, Steward, Kobrinski, Jenness, Robinson and
23 Father Morice" -- as "a strong but not unanimous body
24 of anthropological opinion ... that the social and
25 economic organizations of these peoples was likely a
26 response to the fur trade". The trial judge says that
27 he has "already mentioned" and "already discussed"
28 this "body of anthropological opinion", but in fact he
29 did not mention it anywhere else in the judgment. He
30 did reach a similar conclusion that the society
31 changed as a result of the fur trade in his reasons.
32 But furthermore, he was mistaken in attributing this
33 opinion to at least Jenness and Morice who did not, in
34 our submission, come to that conclusion.
35 LAMBERT, J.A.: Well, he does say it is a strong and not
36 unanimous body, so I suppose he says that he is taking
37 into account others are contrary, others of those are
38 contrary.
39 MR. GRANT: No. That's right. There are others contrary, and
40 he knew that.
41 LAMBERT, J.A.: Yes.
42 MR. GRANT: But even Jenness and Morice -- because, you see, the
43 Respondents put forward this litany and said: all of
44 these people say this. And their expert Dr. Robinson
45 kept referring to this litany. And, with respect,
46 when you look at these scholars which, of course,
47 there was a large body of material, when you look at

1 them I can only assume that possibly the trial judge
2 relied upon what Dr. Robinson said.
3 But when you look at what the scholars actually
4 said, Jenness and Morice don't even say that point,
5 but they were included in that litany. But the trial
6 judge appears to refer that he discussed it. But he
7 really never discussed that anthropological evidence.
8 The other point is that he never referred to Adams.
9 I'm sorry, my lord, I see the time.
10 TAGGART, J.A.: Yes. I think perhaps we should adjourn now for
11 lunch. 2 o'clock.
12 THE REGISTRAR: Order in court. Court stands adjourned until 2
13 o'clock.
14 I hereby certify the foregoing to
15 be a true and accurate transcript
16 of the proceedings transcribed to
17 the best of my skill and ability.
18
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22 _____
23 Lisa Reid,
24 Official Reporter,
25 UNITED REPORTING SERVICE LTD.
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Submissions by Mr. Grant

1 NOON RECESS
2 TAGGART, J.A.: Yes, Mr. Grant.
3 MR. GRANT: Thank you, my lord. I was in tab 9 at page 19,
4 referring to the statement of the trial judge. And I
5 just want to point out that in the litany of the -- of
6 these anthropologists that kept being repeated by the
7 respondents at trial, Goldman studied the
8 Algacho-Carrier. Now, the significance of that is
9 that that is substantially south near the -- I always
10 confuse Bella Bella and Bella Coola, my lords. But in
11 that area and just inland. And it's on the --
12 basically it's on the route of Mackenzie.
13 MACFARLANE, J.A.: Which area?
14 MR. GRANT: I apologize, my lord. The route of Mackenzie in
15 1873. So it's completely different than the
16 Wet'suwet'en, because that was the route that
17 Alexander Mackenzie himself went on. And as, of
18 course, you know, Mackenzie never came into any of the
19 territory that we're talking about in this action and
20 wasn't in our submission even near.
21 Paragraph 53, Canada argued strenously, and I am
22 going to come to Mr. Adams because I think he's
23 significant on this distant territories point, but
24 Canada suggested that he was a reputable alternative
25 to Dr. Daly and they endeavored in argument, in oral
26 argument to contrast Daly and Adams. In response to a
27 question from your lordship Mr. Justice Hutcheon, I
28 want to say that the trial judge never mentioned Adams
29 at all. He never mentions him in any way from our
30 review of the judgment.
31 Now, Canada argues that the immensity of the
32 subject and the immensity of the material brought to
33 bear on the resolution of the issues as a reason to
34 defer to the trial judge on questions which involve
35 considerations of anthropological evidence. But, and
36 I am at 55, and I think this is significant, the trial
37 judge did not make use of these supposed advantages.
38 He did not avail himself of the assistance from the
39 anthropologists and their writings which was available
40 to him. In fact the trial judge said:
41
42 "I heard so much evidence, and I was given so
43 much literature,"
44
45 and surely this applies to the anthropology,
46
47 "that it is impossible to do more than extract

Submissions by Mr. Grant

1 from it an impression of what was going on in
2 the Babine territory before and during trader
3 Brown's time there."
4
5 In other words, my lords, the trial judge's finding
6 about no territories far from the villages pre-Brown
7 is an impression. It's sort of an overriding
8 impression. And I am going to--
9 WALLACE, J.A.: It's an impression he extracted from all of the
10 evidence. What's wrong with that?
11 MR. GRANT: It's an impression he extracted, but it's not an
12 impression based on an analysis, for example, of the
13 anthropology, and that's the point here, my lord. The
14 anthropology which he said I don't need it.
15 WALLACE, J.A.: Well, that's your original point.
16 MR. GRANT: Yes.
17 WALLACE, J.A.: But the fact that he says I can do no more than
18 extract from this mass of material an impression, the
19 alternative would be to extract, I suppose, the
20 specific references, a multitude of them, and then
21 form an impression.
22 MR. GRANT: But -- well, the point is, is that -- and he does
23 refer, for example, to Drs. Ray and to the Brown
24 material in the historical. And there is more than an
25 impression there. But what he gets clouded by, and I
26 am going to come back to it, is the Provincial
27 respondent's expert. And there is crucial points for
28 the analysis and a crucial point for the analysis that
29 we say the judge didn't make and it has to be more
30 than an impression, is that the Gitksan and the
31 Wet'suwet'en had territories far beyond the villages.
32 That's the crucial point here. At the pre-contact
33 time or pre-sovereignty time, pre-assertion of
34 sovereignty. And I point out that because of that,
35 the sequence of that goes on on that page in my
36 argument.
37 If I can just refer you to page 21 and what we do
38 here in the speaking notes is we respond to Mr.
39 Justice Hutcheon's question about whether the trial
40 judge was "weighing" the anthropologists' evidence
41 when his first comment was that dealing "almost
42 exclusively with chiefs" was "fatal to the credibility
43 and reliability of their conclusions."
44 And we analyse in these speaking notes not as a
45 repeat of the Factum, but in response to how Canada
46 relies upon the trial judge's finding we respond to
47 the different points raised by Canada. But I just

Submissions by Mr. Grant

1 want to say, and I am not going to take you through
2 all of those points, because they are carefully
3 analysed, but I do ask you to carefully consider this
4 part of our submission in reply. But I do want to
5 take you to paragraph 63. Canada does not identify --
6 they suggest there is a particular conclusion that the
7 judge found the reliance on chiefs' evidence was fatal
8 for it, but they don't identify that conclusion which
9 was affected by reliance on chiefs, but not by the
10 balance of the trial judge's reasons for rejecting
11 anthropological evidence. It's impossible to tell
12 from the judgment what specific opinions the trial
13 judge thought were fatally wounded by the
14 anthropologists' reliance on information from chiefs.
15 And I say, we say there is nothing partial or
16 equivocal about his use of the words "fatal" and
17 "conclusions." He does not appear to confine his
18 comments to some part of the anthropologists' opinion.
19 This is a thesis that Canada has amounted in argument
20 here to defend those comments, but there is really no
21 basis for it.
22 Now, I refer you at paragraphs 65 to 67 to Heather
23 Harris' evidence and I only say, my lords, to look at
24 that and I ask you in considering the anthropology to
25 consider her report as well. Canada mounted a large
26 attack on Dr. Daly as not doing statistical analysis.
27 Now, Ms. Harris did not do statistical analysis by
28 using computer modelling, but she did count numbers.
29 She counted the number of marriages which was an
30 answer to Mr. Justice Lambert's question earlier on.
31 It's all in her report. She counted things like
32 adoptions and different aspects of her report.
33 Now, at 69 I refer to the cross-examination of Ms.
34 Harris, that she -- and this -- Ms. Harris was married
35 to a Gitksan person. Now, Canada -- Ms. Koenigsberg
36 has pointed out to me that, of course, was not what
37 she was directing her attention to, but she was
38 directing her attention to crossing the line of
39 observing for the purpose of making a report to make a
40 cultural intelligible to participating in the very
41 core of the endeavor. And she called that, in the
42 page references there, she referred to that type of
43 conduct among anthropologists as possibly "going
44 native."
45 Now, I refer to the balance and I just want to
46 take you to paragraph 74, this is again the reliance
47 on the chiefs' evidence. Now, Canada -- neither

Submissions by Mr. Grant

1 Canada nor the trial judge, and the trial judge wasn't
2 directed to any such point, point to any
3 anthropological work or opinion which suggests that
4 gathering information principally from chiefs is
5 methodologically objectionable for an anthropologist.
6 Nor does Canada engage the appellants' observations in
7 their Factum on that point that Barbeau and Duff
8 relied heavily on information from chiefs as well.
9 And I want to say as did Beynan, William Beynan in
10 those materials that have been directed to you, as did
11 Adams, John Adams. And you've been referred to that
12 by Canada.
13 If I can take you to paragraph -- and as I say
14 this argument deals with each of these points and I
15 don't have to read it all to you. But if I can take
16 you to paragraph 90 and this goes to Daly and Adams
17 and I referred just ahead of that to how Canada relies
18 so much to Adams and Canada attacked Dr. Daly in the
19 argument here, saying he disagreed entirely with
20 Adams' observations 20 years earlier and completely
21 discounted Dr. Adams' works. And we say that is quite
22 frankly wrong. He did not completely - paragraph 92 -
23 disregard or discount Adams' works. And we have
24 quoted what Dr. Daly himself says.
25
26 "I don't totally discredit his work. He is a
27 colleague and there are items of value in it,
28 but he -- it seems to me he began his
29 systemization sort of at the moment he got off
30 the plane... . It comes through from the
31 reading of his results."
32
33 Now, I then want to take you to paragraph 26 and refer
34 you here to the reference binder.
35 HUTCHEON, J.A.: Paragraph? What paragraph?
36 MR. GRANT: 96. I am sorry. I said 26. 96. And I'd like to
37 take you for a moment to the reference book if I can
38 at tab 96, because I think it -- it's sort of -- it
39 becomes a sort of a thesis, as your lordship Mr.
40 Justice Wallace suggested maybe one could do nothing
41 but get an impression, but let's look at what Dr.
42 Adams says. Let's take a little look at it which I
43 don't think Canada -- I am sorry, Ms. Koenigsberg took
44 into the preface. But there is some comments I have
45 extracted and of course, Canada has given you all of
46 the preface in their argument and I think they have
47 read it all, and the Amicus has quoted it and put it

Submissions by Mr. Grant

in their material. At tab 96, after the first brown sheet, page 7. This is what Mr. Adams or Dr. Adams said. The second last paragraph. Referring to the Gitksan, this is not the Wet'suwet'en.

> "These villages tracts of hunting territory are subdivided into parts belonging to different 'native' -- "

Sorry, my lords, do you have that?

TAGGART, J.A.: What page is that?

MR. GRANT: Page seven. It's at tab 96, page 7.

TAGGART, J.A.: 96, page 7.

MR. GRANT: The second page in right after the title page.

TAGGART, J.A.: Okay.

MR. GRANT: The paragraph at the bottom on the right.

> "The village tracts of hunting territory are subdivided into parts belonging to different native 'Houses' which are matrilineally organized corporate groups."

You can compare that with Dr. Daly and there is no difference.

> "They own resources in only one village. Only the Houses which own such tracts are said to 'belong' to the village. In addition to owning hunting territory, each House owns berry grounds and one or more fishing spots in or near the village."

Now, I say that the evidence of the fishing spots, what he must be referring to there is the proximity of those to the villages he's talking about, which the evidence indicates many of them are proximate to Gitwangak and Gitsegukla and Hazelton.

Now, then going to page 9 at the bottom he refers -- and this will come to the next point about the traplines.

> "... lines are registered to individual owners,"

And then he ties thems into the houses in the bottom there. But if you turn to page eleven you will see his relief map of approximate area of Gitksan hunting

Submissions by Mr. Grant

1 grounds. And it's hard to read in this photocopy, but
2 it's fascinating, my lords, because, and I say this is
3 my unscientific non-cartographic measurement, and my
4 colleagues. It's between ten and 15,000 square miles.
5 It includes Bowser Lake up in the northwest. It
6 includes the headwaters of the Skeena, the headwaters
7 of the Nass. Now, this is the objective
8 anthropologist referred to by Canada. His conclusions
9 support and corroborate what we say in terms of the
10 distant territories. And if the map is not
11 significant, going to page 104, I'd just like to refer
12 you to this comment. He says -- which is on the next
13 page:
14
15 "When the membership of a House expands, it is
16 ordinarily impossible for it to acquire more
17 territory at the expense of its neighbours
18 because of the layout of the terrain.
19 Traplines -- "
20
21 And this is interesting distinction he makes.
22
23 "Traplines run along river courses and House
24 territory tends to consist of a whole valley
25 together with the streams which flow into it up
26 to their sources near the tops of the
27 mountainous ridges which surround the valleys.
28 Such terrain is considered by Gitksan to be an
29 integral unit, best held by only a single
30 House. Though the expire Gitksan region
31 comprises many sectors which do not
32 conveniently isolate themselves this way, this
33 model is consciously recognized and affirmed by
34 Gitksan in discussions of their territorial
35 rights. The perpetuity of the Houses thus
36 finds a basis in the natural distribution of
37 terrain which the Gitksan occupy."
38
39 What he is saying in 19 -- from his work in 1960s and
40 there is many other comments in his report, but these
41 are not inconsistent with Dr. Daly. In fact, they are
42 completely consistent with Dr. Daly.
43 Now, I just want to take you to the other side of
44 the problem of anthropology. And you saw the trial
45 judge's analysis, that we've explained it and Canada's
46 relied on it about Daly, Mills and Brody. But on the
47 other hand, Canada has agreed with us that the trial

Submissions by Mr. Grant

1 judge accepted some of Dr. Robinson's evidence about
2 what was going on before the Hudson's Bay Company
3 arrived without even mentioning her by name. I am
4 back at my speaking notes, my lord, page 34. This
5 reinforces the appellants' point that her evidence, to
6 the extent it informed the judge's views, was not
7 subjected to the same or any scrutiny. And I refer
8 you to her own quotes that she was permitted without
9 comment from the trial judge and this is from her own
10 correspondence and exhibits to "marshal an army of
11 support" for a made-to-order theory in favour of the
12 legal position of her client, the Province. And
13 before commencing her work in March '86 she said to
14 the Province:
15
16 "My task is to develop theories showing that
17 significant changes occurred in Gitksan and
18 Wet'suet'en [sic] socioeconomies during the
19 late pre-historic and early historic eras, and
20 these are the result of both indirect and
21 direct European influence."
22
23 And when you read her report that she prepared and
24 delivered over a year or two later and you see her
25 evidence, you will see that lo and behold her task was
26 accomplished. She did develop such theories.
27 I'd like to take you very quickly to tab 11, if I
28 may, and this goes to the lack of reliability on the
29 appellants' collective memory. It's the next -- or
30 tab 10, I am sorry, in the speaking notes. Mr.
31 Macaulay said about Ksun at paragraph two:
32
33 "... if a major fishery -- after all, that was
34 the centre of their lives until pretty
35 recently, -- is totally forgotten, so far
36 forgotten never to have been mentioned when
37 particular questions were asked about it, then
38 that goes to the reliability of recall of those
39 people if it's totally forgotten."
40
41 HUTCHEON, J.A.: Is it tab 11?
42 MR. GRANT: I am sorry, it should be -- the reply to Canada's
43 argument on reliability of collected memory.
44 HUTCHEON, J.A.: I have it at tab 11.
45 TAGGART, J.A.: So do I.
46 MR. GRANT: Okay. Then probably what I will come to next will
47 be at tab 11. I will just leave it where it is if you

Submissions by Mr. Grant

1 don't mind. Mr. Macaulay was wrong that the fishery
2 was forgotten. He must have misunderstood the
3 appellants' evidence. The fishery at that location
4 was mapped by Mr. Morrell and referred to by Mr.
5 Richard Benson in evidence and it indicated the
6 fishing sites at that location are used to the present
7 day.
8 And at page two and following I refer to all of
9 that material and I take you to paragraph -- I ask you
10 to look at this because I refer to the specific
11 evidence. And my lords, if you have -- and you can
12 just make a note of this. If you look at overlay 62
13 and this evidence establishes as I refer in paragraph
14 21, there is a group of reserves, all little circles.
15 One's called Sidina on the Skeena River. That's Ksun.
16 And the evidence of Loring, the evidence of the
17 witnesses refers to it. But the trouble is that Mr.
18 Macaulay misunderstood what that map was all about and
19 that's in your map atlas. You see the yellow sticky I
20 put there, that's the location of Ksun. It's on
21 your -- in your small map atlas as well. It's -- Mr.
22 Morrell was mapping fishing sites. And I refer you to
23 paragraph 24 where the Duff files -- I am referring, I
24 am sorry, to the sticky on the far right on that map.
25 I am referring to paragraph 24 where Duff transcribed
26 Barbeau's Reminiscences of his 1920 trip to Kisgegas
27 where Barbeau refers to stopping at Ksun. And then
28 Barbeau, on the next page, lists the fishing places in
29 the canyon by order of Houses. The other side and
30 this side. And I have listed there for you those same
31 fishing sites on the -- on the Morrell map. Barbeau
32 like Morrell labelled fishing sites. And the fishing
33 camp is where a group of people were who had several
34 lodges.
35 Now, the next point is Dam Olp, at page 12,
36 paragraph 33 of my speaking notes. Now, what's really
37 fascinating about Dam Olp, when you look at -- Mr.
38 Macaulay says none of the appellants have referred to
39 it. And it's not labelled. That's quite true. But
40 on the word list the Gitksan name for Babine Lake is
41 Dam Git Gwoimt, people of the spring. Now, the only
42 thing we can do to figure this out is when you -- and
43 you don't have to take your maps out now, but look at
44 the base map of Mr. Macaulay's. And when you go 35
45 miles east/northeast of Hazelton and the mileage is
46 out, but if you go here, he's -- Loring talks about
47 lower Dam Olp, upper Dam Olp. There is nothing -- no

Submissions by Mr. Grant

lake that's of greater than six miles east/northeast. But the trail he would have used is marked. It's the Babine Trail and is marked, goes along the Suskwa River, and it crosses over a very low height of land into the Babine watershed and lo and behold he comes out to the Babine villages there. He then says in a later trip that he goes downstream or down the lake or up the lake and he goes -- and it's referred to in my notes, and that would take him to the other reserve and the other camp. And Mr. Macaulay refers to this and says, well, there is Hagwilget people there. Well, yes, the evidence established that the Hagwilget and the Babine worked closely together and at the times of years he was there, there were Wet'suwet'en. My lords, it's the only place if he was going at all in that direction he says he was going, and I hope -- I am sure Mr. Loring knew his directions, the only place he could have been going to was Babine. And it's not named by the Gitksan because it's outside the territory.

The final point on this is the winter villages. And I just referred on those maps to the two villages. One is Luu Andilgan. And it's referred to by Loring. And my friend Mr. Macaulay refers to it at paragraph -- I refer to it at paragraph 45 of the argument and Mr. Macaulay refers to it there as well. And that is actually labelled on the fishing sites map. It's 30 miles from Hazelton up the Kispiox River and he refers to it as winter camp and it's actually labelled as the place of Geel, a fishing site. At paragraph 51 he refers to Anlagasademdeex 50 miles of up the Skeena from Hazelton. This is the site on the Morrell/Marsden map, which is an exhibit, of a fishing -- of a village weir. And it was a known village site; Mr. Fred Wale gave evidence about it.

I submit in conclusion, my lords, that with respect to Mr. Macaulay's argument that the failure to mention Ksun and these other places shows there is no collective memory with respect is completely wrong. It was in evidence. I have referred you to the evidence. And Mr. Macaulay misunderstood the intent of that map when he thought it must have been talking about fishing villages or villages and not just fishing sites.

Now, I have at the last tab, which I take it, it says "What came first? House territories or trapline registrations." I have -- this is a submission in

Submissions by Mr. Grant

1 response to Mr. Justice Lambert's question.
2 HUTCHEON, J.A.: This is under tab 10. We have it.
3 MR. GRANT: It's under tab 10. And I am not going to go through
4 that. I am not going to go through that submission.
5 It answers the question, but I do want to say, my
6 lord, to Mr. Justice Lambert on the first page, I
7 say -- you ask:
8
9 "My other question is, can you tell from the
10 names of the people to whom the traplines have
11 been historically allocated whether they are
12 connected to the houses that now claim the
13 internal areas which coincide with the
14 traplines."
15
16 My understanding of that question, my lord, was that
17 you wanted to know that at the time the registrations
18 were first sought, were they connected to house
19 groups. That's what my understanding was. Were they
20 connected to people whose territory's in that area at
21 that time.
22 LAMBERT, J.A.: I was interested in both initially and
23 continuously. But --
24 MR. GRANT: Okay. Well, if you're interested -- Canada has
25 answered the 1985 question or '84 question.
26 LAMBERT, J.A.: Yes.
27 MR. GRANT: But my understanding was historically. And the
28 material is in -- is in the exhibits, the trapline
29 material. I -- with leave of the Court, we would
30 undertake to answer that first question or provide the
31 Court with an answer to that question, but I did not
32 have the table of concordance done because I wanted to
33 get clarification after answering Canada's question,
34 but we could file that with you, with the Court based
35 on those two exhibits just to show the concordance. I
36 would ask leave to do that.
37 TAGGART, J.A.: In essence, Mr. Grant, you really wanted
38 clarification of the question what was involved and
39 you now want to submit amplified responses to the
40 question. That is to say, an amplification of what
41 appears on tab 10. Am I correct in that?
42 MR. GRANT: As you may recall a few days ago Canada provided a
43 listing.
44 TAGGART, J.A.: Yes.
45 MR. GRANT: A contemporary listing and I had understood the
46 question as historical and now Mr. Justice Lambert's
47 clarified it as both, and I had thought Canada was

Submissions by Mr. Grant

1 going to do it historically, so we would like to
2 provide a similar listing basically historically at
3 the time the registration applied. Again, just a
4 listing.
5 LAMBERT, J.A.: Mr. Wolf said that it hadn't proved possible on
6 an examination of the records to do it historically.
7 What I had said was it might be revealing - I couldn't
8 tell until the work had been done - as to the
9 relationship between the traplines and the territories
10 from 1920 to the present time. And of course, it was
11 a great amount of work and I don't want to ask people
12 to go to more work than they feel is wise in the
13 circumstances, but Mr. Wolf said that they couldn't do
14 it for the earlier times because the trapline records
15 weren't well enough maintained in the early days and
16 didn't have proper maps with them. If they had a map
17 at all it was a kind of rough sketch.
18 MR. GRANT: A sketch.
19 LAMBERT, J.A.: So he said that Canada couldn't do it. I still
20 think it's an interesting question, but it may well be
21 that the time involved in exploring it is not worth
22 the results that would flow. But if you -- if you
23 think it would be worthwhile to prepare something for
24 1920 or for any time historically, then I would very
25 much like to look at it.
26 MR. GRANT: Right.
27 LAMBERT, J.A.: But Canada should have a chance to respond. If
28 you file something like that it should be on the basis
29 that Canada can have ten days after your material is
30 filed to file in response.
31 MR. GRANT: I have no difficulty with that, my lord.
32 LAMBERT, J.A.: Very well.
33 MR. GRANT: My lords, just before sitting down, this is my last
34 opportunity on these appeals to speak to you and on
35 this appeal, and I just wanted to raise with you what
36 I see is the difficulty when the trial judge dealt
37 with this evidence. I submit, my lords, that there
38 were two handicaps that we, as counsel, and that the
39 trial judge and that the Court generally has. One is
40 general and one is particular. The handicap of the
41 general is the question that in our society there has
42 not been -- history has not been looked at of this
43 continent from the side of the Indian people. And in
44 a recent book published for the 500th aniversary by
45 Ronald Wright, he wrote a book called "Stolen
46 Continents" and he talks about that very issue that
47 the history has been invisible. And it's interesting

Submissions by Mr. Grant

1 what he says about his own experience when he was
2 growing up in England. He said he became bored with
3 the history of Greece and Roman Britain before 1850
4 and then he said:
5
6 "Even a school boy could see that the cultures
7 of South, Central and North America had been
8 casually and ignorantly dismissed by western
9 historiography. Ancient American was
10 criticized for lacking things that Europe had,
11 things deemed epitomes of human progress. The
12 plough and the wheel were favourites; another
13 was writing. It never occurred to Eurocentric
14 historians that ploughs and wheels were not
15 much use without draft animals such as oxen and
16 horse, neither of which existed in the Americas
17 before Columbus. Far from marvelling that
18 civilization arose there despite these
19 handicaps, historians took the absense of
20 plough and wheel as proof than ancient
21 Americans could not truly have been civilized."
22
23 And that really what he is saying here in this book
24 and he goes on and studies from Canada the Iroquois
25 all the way to the Incas, he goes on to analyse the
26 history from the Indian perspective and the aboriginal
27 perspective. And that I say is a general problem that
28 we have and have to try to overcome in dealing with
29 aboriginal rights issues. We have to try to
30 understand, as I said in argument on the Manitoba
31 Justice Inquiry, try to understand from the aboriginal
32 perspective. And fortunately things are better than
33 they were 20 years ago. The particular problem is
34 that the Court never had an opportunity to participate
35 in the feast. And I just want to say that that would
36 have assisted, I submit, the Court, because you cannot
37 attend a feast without seeing the power of the
38 people's own government, how it works on control of
39 their land.
40 The real task Mr. Jackson and Ms. Mandell have
41 raised for the Court. The Court in the Mabo decision
42 notwithstanding the written submissions we will make
43 and we don't agree with all of it, but the real
44 intellectual issue as Mr. Jackson said this morning,
45 was to overcome the terra nullius doctrine in
46 Australia. That was the insurmountable impediment to
47 aboriginal peoples in Australia whose rights were

1 completely non-recognized. And this Court has the
2 same, I submit, task before it to really change the
3 trend in this province and to recognize
4 non-extinguishment in any of its cloaks, the cloaks of
5 complete extinguishment or the cloak of this new
6 version of Canada and B.C.
7 I just want to say from having worked with the
8 appellants for these several years, that I submit that
9 the appellants did not come to this Court or the trial
10 Court to get recognition that they can hunt moose and
11 berries on unoccupied Crown lands. They don't really
12 have to do that. And this trial and this huge appeal
13 would not have been mounted for such a reason. Nor
14 did they come to this Court to get a right to govern
15 themselves in their own villages. They don't really
16 have to do that. What they have come to you to this
17 Court for is a recognition of the law, the European
18 law, I mean the Anglo-Canadian law now, the common
19 law, that is directed to Canada and British Columbia
20 which says to them, the Court says to them: Enough.
21 You can no longer hide by these other legal excuses
22 and you can no longer avoid the question that was
23 tried to be put before the Privy Council in 1910. You
24 cannot keep stealing the land and resources of the
25 First Nations of this Province until you negotiate
26 with them. Now, there is not a declaration of
27 negotiation. There is -- the only thing you can do is
28 recognize the rights. I ask you don't be misled by
29 the talk of Treaty Commission. The Gitksan and
30 Wet'suwet'en have heard this language for the last
31 hundred years. There has been governments that have
32 been generous and governments that have been
33 parsimonius.
34 So I ask the Court to apply the laws as argued by
35 the appellants so that the government will be
36 compelled to negotiate if they want the issue of the
37 territory and resources to be resolved. And also to
38 recognize that the people -- it is not a creation, but
39 the people do have territories far beyond the villages
40 and I thank you for the opportunity to make the
41 submissions that I have been able to make to the
42 Court.
43 TAGGART, J.A.: Thank you, Mr. Grant. Mr. Rush.
44 MR. RUSH: I will conclude for the appellants. I am going to
45 direct your lordships' attention to four subject
46 areas. The first will be the appellants' argument on
47 the Amicus' Submission on Remedies. Secondly, it will

1 be in respect of Canada's argument on the overlap.
2 LAMBERT, J.A.: You are going a little too fast for me, Mr.
3 Rush.
4 MR. RUSH: The first will be the Amicus' Submission on Remedies.
5 LAMBERT, J.A.: Yes.
6 MR. RUSH: And secondly, with respect to the overlap. Third,
7 Canada's argument on the facts and finally, the
8 Amicus' argument on the facts. What you will need is
9 only the speaking notes binder. I am not going to
10 take you to references. What I need is in the
11 speaking notes. And if you will place that in front
12 of you and open the binder to tab five. I will make
13 my submissions for the appellants on the Amicus' view
14 of remedies. And I take you in tab five to page
15 seven, and at page seven, paragraph 19. And this
16 deals with the test for overturning the trial judge's
17 finding. It was argued by Mr. Willms - I am now at
18 tab -- at paragraph 19 - that the appellants'
19 declarations in paragraphs 2(a) and 3(a) require the
20 overturning of findings of fact by the Chief Justice
21 without meeting the test of palpable or overriding
22 error. The proposition advanced by the Amicus is
23 this, is the test, and it's only the test. And we say
24 that the Amicus simply ignores, bypasses the test set
25 out by the Supreme Court in Geffen. And the
26 appellants say that these tests are completely
27 compatible in the circumstances of this case. And if
28 I leave you with no other point it is this point, that
29 the test for overturning factual findings by a trial
30 judge set out in Geffen can be understood as an
31 instance of the operation of the palpable and
32 overriding error test. And so we say that it was a
33 palpable and overriding error for the trial judge to
34 fail to appreciate or disregard relevant evidence.
35 And at 20, the appellants have shown in this
36 appeal that the record at trial, including the reasons
37 for judgment, "disclose a lack of appreciation of
38 relevant evidence and more particularly the complete
39 disregard of such evidence." In circumstances such as
40 those argued for by the appellants, as a matter of
41 law, we say it falls to this Court to intercede. And
42 we say in particular response to the Amicus here, that
43 if the trial judge has erred, as we say he has, in his
44 appreciation of relevant evidence, then this Court
45 must intervene even if it requires reversing him on a
46 substantial body of his factual findings.
47 The appellants have shown throughout their

1 argument how the Chief Justice misinterpreted and
2 wholly ignored evidence before him. I take you to
3 the -- to one example here and that is his blanket
4 rejection of the anthropological evidence without
5 referring to the specific reasons for doing so.
6 Now, my lords, I point out in paragraph 22, that
7 in further written submissions to be filed by the
8 appellants on the test for overturning findings of
9 fact which this Court has invited, we will submit on
10 this issue in greater detail.
11 At 23, paragraph 23, the Amicus similarly submits,
12 in its paragraph 36, that declarations in relation to
13 paragraph 2(a) and 3(a) of the appellants' relief can
14 only be granted if the Court is satisfied that a
15 palpable and overriding error was committed by the
16 trial judge in his findings. Now, once again, the
17 Amicus casts this test as if this sole issue
18 concerning the appellants' claim to ownership or to a
19 proprietary land interest relates to findings of fact.
20 It doesn't. The appellants have argued that first and
21 foremost the trial judge's errors are legal errors.
22 His finding that the appellants' rights are not
23 proprietary in nature is a legal error. His "very
24 long time before" sovereignty test is a legal error.
25 The trial judge's approach to the facts we say was
26 conditioned on these and other legal errors. He made
27 legal errors on his assessment of the facts. And
28 again, by way of example, I point to the fact that he
29 ignored the evidence such as Plate 13, the Historical
30 Atlas, Dr. Ray's evidence on the fur trade influence
31 and the 1910 MacDougall map. The applicable test for
32 evaluating the evidence in the circumstances of this
33 case is failure to appreciate or disregard relevant
34 evidence. And this is what we say his lordship did.
35 Now, turning to another point, at paragraph 24,
36 Mr. Willms suggested in his oral submissions that the
37 trial judge had actually made factual findings in
38 relation to the appellants' ownership claims
39 notwithstanding his extinguishment findings. And he
40 took this from the trial judge's comment in his
41 findings. And I there set it out, my lords, and I ask
42 you to look at the bolded portion. And my comment
43 about this is at page ten, paragraph 25. Because
44 here, we say, that the trial judge found as a matter
45 of fact that the appellants had proved their ownership
46 and jurisdiction as a matter of aboriginal rights in
47 the areas of the villages. He went to to say, and I

1 add this, but he did not make and would not make the
2 same finding with respect to the rest of the
3 territory. And that's in the passage I've cited.
4 Now, my lords, this finding is premised we say on
5 the legal assumption that there was a pre-existing
6 legal and jurisdictional vacuum in the appellants'
7 territory prior to 1846. And we say as a legal
8 finding this is manifestly wrong. The appellants sui
9 generis law applied as a pre-existing right and we say
10 their ownership system applied.
11 Now, I take you down, my lords, to the third line
12 of paragraph 26 as the point that I want to emphasize.
13 We say as a matter of fact it is established that the
14 appellants' ancestors in their villages owned and had
15 jurisdiction over the land of the villages.
16 Established fact. And I say this is accepted,
17 accepted by the trial judge, and we've worked on that
18 premise in this proceeding. However, the trial judge
19 was wrong to then find that with regard to the rest of
20 the territory - outside the village sites - as a
21 matter of both law and fact, there was no organization
22 of ownership and jurisdiction of the appellants.
23 Now, I ask the question, in paragraph 27, how can
24 it be that as a matter of fact the appellants'
25 ancestors owned and governed themselves inside their
26 villages, but when they stepped outside those villages
27 they didn't? Nobody else was there. Only the
28 appellants' ancestors. And what does the trial judge
29 mean when he refers to the areas outside the villages?
30 Does he mean ten metres? Does he mean ten miles? We
31 don't know. He doesn't help us.
32 HUTCHEON, J.A.: Where did the 20 miles come from?
33 MR. RUSH: My lord, that was taken from a passing comment made
34 by a witness at trial that one could walk 20 miles in
35 a day.
36 HUTCHEON, J.A.: I see.
37 MR. RUSH: And that was considered to be the full extent of the
38 reach of the --
39 HUTCHEON, J.A.: But the trial judge didn't use that or did he?
40 MR. RUSH: He did use that.
41 HUTCHEON, J.A.: He did use that?
42 MR. RUSH: Yes.
43 HUTCHEON, J.A.: Well, I don't understand when you say we don't
44 know what he MEANT.
45 MR. RUSH: Well, my lords --
46 HUTCHEON, J.A.: I am lost.
47 MR. RUSH: I say that there is no principle, it's no principle

1 to determine the geographic extent of the appellants'
2 territory based on how far somebody could walk in a
3 day. With respect I say that the answer to the
4 question is in the territorial system described by the
5 appellants at trial. It's only in the appellants'
6 evidence that you find the principles of their land
7 tenure system which provides the answer to this
8 question.
9 Now, my lords, I take you now to the next point
10 that I want to make and that's at page 16, and I shift
11 gears here to discuss for the moment the de facto
12 doctrine. It's at paragraph 45. The Amicus argued,
13 at paragraph 45, that the de facto doctrine applies to
14 the remedies sought by the appellants. And in this
15 paragraph I have set out their argument and I have
16 three points that I wish to make in response to this.
17 The first is at 46. The Amicus' argument on the de
18 facto doctrine proceeds on a faulty premise about the
19 nature of the remedies which the appellants seek,
20 namely, that the appellants seek to have provincial
21 laws declared invalid in this litigation. This is not
22 so. The appellants do not claim here that the laws of
23 the province are invalid. The appellants say that the
24 provincial law must operate constitutionally. It
25 cannot operate so as to extinguish the aboriginal
26 rights of the appellants. Nor can provincial law
27 operate to impair or disable aboriginal rights except
28 pursuant to constitutionally-recognized principles.
29 Any permissible infringement would be determined by
30 subsequent case-by-case analysis. And as we have
31 submitted this morning in Mr. Jackson's submissions,
32 we say that the province can grant tenures pursuant to
33 valid provincial laws, but to the extent that those
34 tenures are irreconcilably inconsistent with the
35 appellants' aboriginal rights, the grant may not be
36 exercisable.
37 My second point is at 49, and this is directed
38 specifically at the nature of the de facto doctrine.
39 On the submissions advanced by the Amicus "[t]he de
40 facto doctrine is engaged when the Court determines
41 that an official act was performed without authority."
42 And at 51, I make reference to the Manitoba Language
43 Reference case and the cases on which it relies in
44 which our submission it makes it clear that the
45 doctrine applies where there is a gap in the
46 legitimate governing powers or process. And we -- I
47 direct your attention to the indented passage and

1 particularly to these comments:
2
3 "Thus, the de facto doctrine will save those
4 rights, obligations and effects which have
5 arisen out of actions performed pursuant to
6 invalid acts..."
7
8 I just ask you to underscore the word "actions."
9 And I direct your attention now over the page to
10 paragraph 54 where it's our proposition that the de
11 facto officer doctrine - and that's what this doctrine
12 is about, it's the de facto officer doctrine - does
13 not validate illegalities themselves, but only the
14 consequences of acting in good faith in disregard of
15 those illegalities. And I cite the passage upon which
16 we take that -- from which we take that from Manitoba
17 Language Reference.
18 I make the point, in paragraph 55, that the
19 doctrine does not apply where the governing authority
20 was valid but the grants made by it were not.
21 Otherwise the grant that was made in the St.
22 Catherine's Milling case would have been saved by the
23 doctrine.
24 Now, I take you, my lords, over to page 22,
25 paragraph 63, for my concluding points. And at the
26 top of 22 I say that Mr. Willms argued in his
27 paragraph 106 on the strength of the de facto doctrine
28 and the state necessity doctrine, that if the
29 appellants' declarations are granted the validity of
30 Crown grants will come into question and will create
31 uncertainty. In his oral argument, Mr. Willms made a
32 little more of this by calling your lordships'
33 attention to "chaos" and "anarchy" that would result
34 "as to the effect of all instruments which have been
35 granted in the territory." And he says, then, that a
36 transition period is required to protect those
37 interests. Well, I say that the Supreme Court
38 recognized that the doctrine of state necessity and
39 its role in preserving the legal consequences of
40 unconstitutional laws, but only for the limited
41 purpose of according temporary validity to those laws.
42 And I draw your attention to the portion that I have
43 set out here, the fifth line down:
44
45 "But even more fundamental that this
46 distinction is the fact that all of these cases
47 require that the laws saved by the application

1 if the doctrine not impair the rights of the
2 citizens guaranteed by the Constitution. In
3 the present case, the laws in question do
4 impair these rights."
5
6 Now, in the case at bar, referring to the whole of
7 this passage, there is no constitutional attack on the
8 laws of the province. Insurrectionary governments so
9 far as I am aware are not in issue. And at the top of
10 23, the rights of the appellants, guaranteed by
11 section 35, are impaired by actions taken by
12 government officers.
13 More importantly, my lords, we say that the onus
14 is on the Province to demonstrate necessity and it has
15 not done so. It must provide a convincing
16 demonstration. Speculation, such as that indulged in
17 by Mr. Willms, about the consequences of the exercise
18 of the appellants' aboriginal rights is simply not
19 sufficient to invoke the necessity doctrine.
20 Now, in his oral submissions, Mr. Willms argued
21 that if this Court declares the appellants have
22 aboriginal rights to land within section 35, that will
23 invalidate provincial laws because those laws do not
24 recognize that title. And we say that this argument
25 exaggerates the effect of the declarations sought.
26 This theory is concerned with inconsistency at a
27 general level, and it assumes that legislative schemes
28 which do not reflect recognition and affirmation of
29 aboriginal rights cannot be reconciled with it or that
30 inconsistency will result in every case from the
31 application of such laws.
32 The appellants do not argue such a position. No
33 laws are impunged by the appellants. The appellants
34 do not assert that all provincial laws would
35 automatically be unconstitutional if their remedies
36 were granted.
37 And we say, at paragraph 70, that the decision in
38 Sparrow demonstrates relationship between a finding of
39 rights within section 35 and laws which may be
40 implicated. In that case the Fisheries Act was
41 generally inconsistent with the recognition and
42 affirmation of aboriginal rights under section 35.
43 The Act provided for no fishing as a matter of
44 aboriginal right and only allowed food fishing by
45 permit. But the Court did not strike down the
46 Fisheries Act, even though Canada argued that it was a
47 unified statutory scheme that was completely

1 inconsistent with aboriginal rights.
2 The Court in Sparrow, instead, was concerned with
3 operational inconsistency - whether the regime
4 developed and applied pursuant to the statute was
5 inconsistent with the exercise of existing aboriginal
6 rights.
7 That does not mean that all or portions of some
8 legislation might not be challengeable under section
9 35 providing those were clearly inconsistent with
10 section 35 and could not have any other effect. In
11 most cases relevant legislation will likely only be
12 limited in application.
13 Because the justification procedure was not
14 examined at trial does not mean that there cannot be a
15 declaration of section 35 rights. It means only that
16 no particular law can be tested for inconsistency with
17 section 35 by that procedure, and this assumes that
18 the justification test is an appropriate one for
19 provincial land legislation. As Mr. Jackson has
20 argued, we propose other principles be applied. The
21 appellants have submitted the proper procedure for the
22 reconciliation of inconsistent laws and their section
23 35 rights in their Revised Submission on Remedies.
24 Now, that concludes, my lords, what I have to say
25 about the Amicus' Submission on Remedies and I want to
26 now take you to tab 12 and I want to reply for a
27 moment on Canada's argument on the overlap. I am not
28 going to ask you to turn this up. But I want to
29 illustrate the one point, if you will, from this map
30 which purportedly shows the overlaps of the
31 appellants' territory. And if you are with me at tab
32 12, my lords, and I am at paragraph one. Canada
33 relied extensively on overlapping "claims" as a
34 foundation to dispute the reputation of the external
35 boundary of the appellants. And they rely on the fact
36 that adverse claims have been made is sufficient, they
37 say, to dilute the undisputed reputation of boundary
38 for which the appellants contend.
39 Canada filed an overlay to the Judge's or Canada's
40 Map Series as part of its argument. This is what's on
41 this map now. And I say this overlay is highly
42 misleading. And it can be demonstrated by reviewing
43 some of the claims. Now, I go to these claims not
44 solely for the purpose of demonstrating that this map
45 is not of much assistance, if any, but also to
46 demonstrate that the extent of the overlap suggested
47 to your lordships is not as characterized by Canada.

1 And I have set out the overlaps of four of the
2 aboriginal peoples on the boundaries of the Gitksan
3 and Wet'suwet'en, but I intend to refer to only two
4 and I leave the others for your lordships to read.
5 At paragraph four, dealing with the
6 Carrier-Sekani, I make the comment that Canada
7 repeatedly argued that the Court should consider
8 Exhibit 101 as the basis for the claim of the
9 Carrier-Sekani at trial. And this is directly
10 contrary to the evidence called at trial. Prior to
11 the commencement of this action the Carrier-Sekani
12 claim, depicted on Exhibit 101, had been reduced to
13 four specific areas.
14 Mr. Sterritt testified that -- and I am on the top
15 of the next page which is lacking the number two.
16 Nonetheless, he says:
17
18 "... well, if you go by the original map"
19
20 which is Exhibit 101,
21
22 "that was issued by the Carrier-Sekani Tribal
23 Council, just about all of that has been
24 removed."
25
26 This is after the Burns Lake overlap feast in 1987
27 between these two nations. And then he says at the
28 bottom in the bolding:
29
30 "... but in terms of what's -- what remains,
31 there is a, as I know it now, there is -- there
32 may be a smaller area in the northeast."
33
34 Perhaps more significantly is the evidence that was
35 referred to by Canada itself, paragraph six where
36 Edward John, the president of the Carrier-Sekani
37 Tribal Council, spoke on behalf of the Carrier-Sekani
38 Chiefs. And this is what he said. There can be in my
39 submission no other authoritative voice than Mr. John
40 in in respect. The outstanding areas which they could
41 not agree to with the appellants were limited to four:
42 Thutade Lake, Cheslatta Lake, Francois Lake and
43 Whitesail Lake. Canada acknowledged this in their
44 argument.
45 Now, my lords, Thutade Lake, if I can direct you
46 to this, is in the upper northeast portion. It's
47 here. Now, if I can just remind your lordships that

the solid black line is the line of the claim. The dashed line here is purportedly the Carrier-Sekani overlap. If you take, as I am going to with this black felt pen, and I hope Mr. Macaulay will forgive me for marking on his map, and just at the best take off the Thutade Lake area, we take off this area here, my lords. Thutade Lake is right there. Now, if you go to the other two points, Cheslatta Lake, Francois Lake and Whitesail Lake, you are down here at the bottom. Here is the line and here is Whitesail, Ootsa, and at the very best let's take all of Francois Lake. That's the line. Now, assuming that you want to go one step further and go beyond what Mr. John said and say that there is some dispute about Bear Lake -- well, here's Bear Lake, my lords, and let's just put in that. Now, I ask you to compare what in the evidence Edward John and Mr. Sterritt said with the dashed line of what is said to be the extent of the Carrier-Sekani overlap, and there is absolutely no comparison as the extent of the territories that are touched.

My second point with respect to the Tahltan and the Gitksan boundary, I am at paragraph 8. This is -- the evidence of the Gitksan witnesses described a settlement with the Tsetsaut which led to the acquisition of the northern Gitksan territories of Kliiyemlaxha and Geel. It's up at the upper reaches of the Skeena. Now, these settlements occurred before the arrival of the white man. Now, my lords, what we're told by this map is that the yellow line here represents the Tahltan claim. By a question - by answer to a question put to him by his lordship at paragraph ten, the Court said:

> " Mr. Sterritt, is it fair to say that the boundary you fixed by whatever means was also acceptable to the Tahltan people?
> THE WITNESS: That's my understanding."

And the boundary that was fixed, as your lordships know, is the black boundary here. There is no basis on the evidence for a claim like this representing a Tahltan overlap claim in the north of the territory. I make similar points with respect to the Kitwancool claim and with respect to the Nishga claim. I am not going to take you to them. I ask you to read my submissions. And from there, my lords, I will pass to

my third area of my argument and that is Canada's argument on the facts.

TAGGART, J.A.: Would it be appropriate to take five minutes, Mr. Rush?

MR. RUSH: It would, thank you, my lord.

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

_____
Laara Yardley,
Official Reporter,
UNITED REPORTING SERVICE LTD.

Submissions by Mr. Rush

1 (PROCEEDINGS RESUMED AT 3:15 P.M.)
2
3 TAGGART, J.A.: Yes, Mr. Rush.
4 MR. RUSH: I am at tab 13.
5 It says the appellants' reply to Canada's argument
6 on the facts. And I say by way of opening, my lords,
7 that we conclude here our submissions in this appeal
8 in the same way that we began them, with the facts.
9 And our reply here is principally directed at Canada's
10 submissions. Canada devoted much of its speaking time
11 attacking the facts and brought -- that were brought
12 to bear in this trial by the appelants. And at
13 paragraph 1 I note that Canada says that the trial
14 judge's findings of fact are correct and strongly
15 supports them. But the only evidence Canada is
16 prepared to refer to is an arbitrary selection of the
17 available historical documentary evidence, gathered by
18 non-Indians, limited almost entirely to the Hudson's
19 Bay records, missionary accounts, provincial
20 government reports and the Loring reports. Even on
21 this partial record, Canada's account of the facts is
22 frequently incomplete, misleading or simply wrong.
23 At paragraph 2 I say that to judge from the
24 statement of facts in Canada's revised factum, there
25 is no need whatsoever to address the opinion reports
26 of the historical geographers, Professors Ray and
27 Galois, the anthropologists Daly, Mills and Mr. Brody,
28 or the genealogist, Ms. Harris.
29 To judge from their statement of facts there is no
30 need to deal with the appellants' own evidence about
31 their own societies and histories. The evidence of
32 former indian agents Loring, Boys and McIntyre is
33 preferred by them. For Canada, the oral histories and
34 indeed the Indian voice are virtually silent. Any
35 record of Indian assertions on their own behalf, which
36 is reflected in the historical documents, is wished
37 away as land claim rhetoric inspired by the
38 every-present and all-powerful missionary conspiracy.
39 Canada advances the do-it-yourself history and
40 anthropology of the counsel table, without a critical
41 examination of the sources and in complete disregard,
42 we say, of the inconvenient views of real historians
43 or anthropologists.
44 Canada agrees out with 40 out of 168 paragraphs of
45 the statement a facts in the appellants' factum, but
46 it completely fails to engage or deal with the
47 evidence and argument on factual matters on the

Submissions by Mr. Rush

1 balance of the appellants' factum. And I particularly
2 ask your lordships to note the factual assertions and
3 defence of those facts, raised in tab 4 on the
4 ownership and self-government section, and in tab 5 of
5 the appellants' factum on the ownership system beyond
6 the villages.
7 What is surprising, my lords, in reading their
8 response, to emphasize the point, is there is no
9 rejoinder, there is no engagement on those facts.
10 Now, about the Hudson's Bay record. In purported
11 defence of the trial judgment, Canada argues, and I
12 quote:
13
14 "We have no adequate record of the Gitksan or
15 Wet'suwet'en in the 1820s at all. We have just
16 very brief encounters with them, particularly
17 with the Gitksan."
18
19 But that's not how the trial judge viewed the
20 situation, and he called those same records "a rich
21 source of historical information." It was accepted by
22 Prof. Ray, and he accepted Prof. Ray's
23 characterization of them as the only solid description
24 existing of Gitksan, Babine and Wet'suwet'en social
25 political, territorial organization, the earliest
26 complete description that we have.
27 Now at paragraph 8, my lords, I direct your
28 attention in this reply to the significance of
29 conflict, because much was made of it in Mr.
30 Macaulay's submissions. Canada argues that a high
31 incidence of killing and revenge disclosed in the
32 Hudson's Bay record shows that there was no ownership
33 or jurisdiction and no law. Canada made a great deal
34 out of this. But we have responded to it in the
35 following paragraphs, and I set them out there, my
36 lords, at paragraphs 9 right the way through to 12.
37 But importantly, and I take you to paragraph 12, and
38 it's the point I want to make here, that in his
39 evidence Prof. Ray also described the mechanisms in
40 place to minimize and settle conflicts by means of
41 feasting and compensation. This was supported by
42 other evidence referred to in the appellants' factum
43 and reply factum. And if you refer to paragraph 13,
44 this evidence concluded with the following exchange
45 between Prof. Ray and counsel, and I take you to Dr.
46 Ray's response:
47

Submissions by Mr. Rush

1 "I did discuss the whole purpose -- the whole
2 notion of treaty trade, I believe as a kind of
3 native diplomacy that was used to establish
4 trade contacts, negotiate rights of access, to
5 resolve disputes and settle these kinds of
6 conflicts. So this is one of the ways they
7 solved them. Now we've established the fact
8 that they are not always initially successful,
9 but ultimately that is usually the way they
10 were resolved."
11
12 Now, my lords, I add to this that contrary to
13 Canada's attempt to show the significance of this
14 evidence, in that the evidence of violence went to
15 show the absence of jurisdiction and laws. I say that
16 this evidence of Dr. Ray, set out in 12 and 13 and
17 contained in the Hudson's Bay record, demonstrates
18 that a system with the means to peaceably resolve
19 conflict through institutions like the feast, is
20 indeed a system that has laws and is self-governing.
21 I take you to paragraph 16 on page six. Canada
22 says that there is no mention in the Hudson's Bay
23 record of clan connections. It is true that the Bay
24 records only use the term clan once. But the records
25 clearly speak of a larger kinship organization than
26 the family or even the village. Canada does not
27 address, my lords, much less refute, the demonstration
28 in the appellants' factum that the Gitksan and
29 Wet'suwet'en societies, reflected in the Bay records,
30 included the residence of several villages,
31 collectively organized, and described as peoples or
32 nations. These are the words of William Brown.
33 My lords, I add to this, after paragraph 18, that
34 the trial judge does not pay any attention to this
35 type of evidence that's discernable from the judgment.
36 He doesn't say where the evidence went, he doesn't
37 tell us what he makes of the evidence.
38 Furthermore, and I am at 19, Canada does not
39 explain the trial judge's conclusions that the Gitksan
40 and Wet'suwet'en were distinct peoples for centuries
41 or millennia, and that "both plaintiff groups are
42 peoples with common clans, languages and customs." It
43 is clear from the context that the latter references
44 includes pre-contact times. The trial judge does not
45 explain how these findings can be reconciled with his
46 other observations about the appellants' ancestors
47 lacking institutions and acting instead on survival

Submissions by Mr. Rush

1 instincts. Instead, my lords, and I add to paragraph
2 19, Canada wants you to accept that you're dealing
3 only with a traditional nuclear family, and they
4 attempt to show this in paragraph 20 by the so-called
5 census of 1839. That, in our submission, doesn't take
6 them anywhere for the reasons that we set out in that
7 paragraph.
8 Now, over to 22. Here we are dealing with the
9 extent of Gitksan and Wet'suwet'en lands. And at
10 paragraph 22 our argument proceeds on this footing,
11 that Canada argues that, with a single exception, it's
12 impossible to tell from the Hudson's Bay records how
13 far beyond the villages the hunting grounds extended.
14 And there is no description of where the hunting
15 ground is. It says that LeJacq's 1869 account is what
16 they say the first historical record of where their
17 hunting grounds were.
18 Now, my lords, in fact the Bay and other historical
19 records contain a number of references collected in
20 the appellants' factum, showing that the countries, to
21 use the Bay's term, involved were large, far-flung,
22 and bordered on those of other nations. Again, the
23 Bay's term. Canada does not refer to that evidence,
24 and neither did the trial judge.
25 Now, my lords, what the Bay records tell you is
26 that you're not dealing with a small village
27 territory, you're dealing with a very large territory.
28 And I remind you of some of the comments from these
29 records. "Certain tracts of land to which they claim
30 an exclusive right." "The country being parcelled out
31 among certain families whom it descends by
32 inheritance." Those are but two quotes found in the
33 appellants' factum. I again take you back to the
34 submissions that we made more than 30 days ago, there
35 is nothing equivocal if that evidence, my lords.
36 At paragraph 24 I note that Canada argues that in
37 the 1870s the Gitksan were not allowed down the Skeena
38 River to trade at the coast, and the Nisga'a took the
39 same hard line with them. To the extent that this is
40 true, it illustrates the importance which Indian
41 nations attach to their territorial boundaries and
42 trading rights. Other documentary reference to
43 national and tribal boundaries can be found in the
44 appellants' factum.
45 I take you to July of 1888, during the Skeena
46 uprising Magistrate Fitzstubbs wrote to the provincial
47 attorney-general and he said:

Submissions by Mr. Rush

"In dealing with the Indians here the great difficulty is that there is not to be found one who is in favour of the supremacy of any law but their own."

And the next bolded portion:

"The consent of the Indians would be necessary to peaceable occupation, which will not be given until they are disabused of the correctness of the belief almost an insisting in respect of their possessory rights in the land and this I think may require force."

Now, with respect to the trial judgment, or to the trial judge, who dismissed comments of the appellants' ancestors as mere political statements, here Fitzstubbs certainly doesn't think he is dealing with a political statement. He doesn't see this as easy politics.

At paragraph 26, Canada argues that Loring found the southern part of the territory substantially unoccupied by the Wet'suwet'en in 1905. And presumably this is an attempt to cast doubt on the McDougall map of 1910. But there is a great deal of evidence cited in the appellants' factum, which neither Canada nor the trial judge refers to, from Loring and from others, that the areas south from Moricetown to Francois Lake was Wet'suwet'en long before 1905. In 1918 Loring referred to O'Reilly's failures in 1891, and he said:

"...originally, the Indians had holdings and homes exclusive of the present reserves in a sort of prescriptive right. They were held in succession from the time beyond all remembrance. These holdings were, in 1891, that many in numbers and so remotely situated at all dispersions of the compass to be dealt with."

At paragraph 28 we say that in 1890 Loring wrote that the Wet'suwet'en habitations and homes were on the interior lakes. In 1906, cabins at Ootsa Lake. In 1907 he said they cannot do without the localities, habitations and graves on the north shore of Burns

Submissions by Mr. Rush

Lake. In 1917 he referred to Wet'suwet'en living on Elwin Lake.

At paragraph 29 I draw your attention to comments made by Father LeJacq in 1869. He reported that all the Indians fishing and hunting on the edge of Francois Lake were Wet'suwet'en. While in 1879 George Dawson reported that there were no permanent villages on Francois Lake, that part of the country belonged to the Wedzen Kwe, that is the Wet'suwet'en people, who visited periodically.

My lords, Canada argues with respect to the 26 Wet'suwet'en people who addressed Stewart and Vowell in 1909, that, and I quote:

> "It's very difficult to make out who the alloted 26 claimants are, and it's sometimes difficult to locate the precise area that they were talking about."

Now, the map given to McDougall in 1910 shows the many cabins, graves, camps, fishing and hunting stations of the Wet'suwet'en in the Bulkley River system, and the in Ootsa, Francois amd Burns Lake area. And I add to paragraph 31, my lords, that it's plain from the reading of this map that there were villages, winter villages, cabins who were themselves interconnected. And while anthropology will help, in my submission common sense should tell us that this was a connection that was based on organization, social organization.

As for Canada's assertion that it is very difficult to make out who the alloted the 26 claimants are, Mr. Brody's opinion report identified many of these dispossessed people by their English and Wet'suwet'en names. And I will take you through part of this, my lords, because it's not only that they were identified, but it's not hard to see where they were from.

> "The real names that white newcomers ignored included, of course, hereditary chief names, Round Lake Tommy..."

Well, he was from Round Lake,

> "...for example was Wah Tah Kwets of the Laksilyu or Small Frog Clan. The Tom brothers

Submissions by Mr. Rush

1 were also Laksilyu, and held the names of
2 Yahalee, Gowiican and Aldeesinaw. Mathew Sam
3 of Topley held Woos, a high name of the
4 Gitumden. Auguste Pete was Kweese, of the
5 Tsayu or Beaver Clan. Johnnie David is Mugh
6 Lagh Legh, and his father, whose territory he
7 caretakes, was Smogelgem of the Laksamshu, or
8 Fireweed. Belnai was Madeek, Canyon Creek
9 William was Layo and later received Caspit, of
10 the Gilseyhu."
11
12 My lords, my point here is is that Canada never
13 mentions this evidence. Nor, for that matter, does
14 the trial judge. The evidence shows how widespread we
15 say the territories of the Wet'suwet'en were and who
16 the real people were out there on the land living in
17 those territories.
18 Now, I take you to paragraph 33. Canada attributes
19 every suggestion that the appellants have aboriginal
20 rights to land first to the alleged "missionary
21 influence", and then to the equally sinister "lawyer
22 influence." The origins of the idea are traced to a
23 speech made by the governor-general, Lord Dufferin, in
24 Victoria in 1876. This might be referred to, but is
25 not described, as the "governor-general influence."
26 Now, my lords, Canada has raised the missionary
27 conspiracy again, and I say that it doesn't take them
28 anywhere, and it certainly doesn't take them to where
29 they want to go. They try to use it, I say, to debunk
30 the Kitwanga petition. And I am going to take you to
31 that because I think we answer, in paragraph 34,
32 running right the way through to 46, how specious the
33 missionary influence theory really is.
34 So let me take you now to paragraph 47, page 18.
35 Because, in my submission, this is the real point of
36 their attack. Canada argues that the 1884 Kitwanga
37 petition was the missionary and not the chiefs
38 speaking. The chiefs couldn't speak for themselves is
39 the implication. And that "this is Tomlinson and not
40 the Kitwangak." In the first paragraph of its factum,
41 at paragraph 48, I note that Canada adopts the
42 following statement from the appellants' factum with
43 regard to the petition:
44
45 "On October 10, 1884 the Gitwangak chiefs
46 claimed the land from Andemane some 2 1/2 to 3
47 miles above our village [Gitwangak] on the

Submissions by Mr. Rush

1 Skeena River to a creek called Skequin-khaat,
2 which empties into the Skeena about two miles
3 below Lorne Creek. We claim the ground on both
4 sides of the river, as well as the river within
5 these limits, and as all our hunting, fruit
6 gathering and fishing operations are carried
7 on in this district, we can truly say we are
8 occupying it."
9
10 Now, my lords, I say that in this historical record
11 of 1884 you have the statement of the Gitksan from the
12 village at Gitwangak, who not only describe the extent
13 of their territory claimed, but also point to the
14 territorial system that underpins it.
15 It's our submission at 49 that the appellants say
16 that we say that Canada is not entitled in oral
17 argument on the appeal to resile from what its stated
18 position is in its revised factum that the position is
19 that the petition represented evidence the views of
20 the Kitwanga chiefs.
21 At paragraph 50 I note that during Canada's
22 argument on the appeal Justice Hutcheon asked whether
23 the trial judge referred to the petition. The trial
24 judge did refer to the petition, I say, without
25 questioning its authenticity or accuracy. Apparently
26 he included it, however, in the class of political
27 statements which were completely, and the appellants
28 say wrongly, discounted as evidence of possession,
29 control or ownership of territory beyond the village
30 sites. Now, apart from that comment, my lords, the
31 trial judge makes no other comment about the petition.
32 And I say he disregarded or misconceived the
33 importance of this document.
34 Now, Canada has raised the question of the
35 authenticity of the voice in the petition. And we
36 have dealt with it in the paragraphs that follow from
37 paragraph 51 over to 54. But I want to say at
38 paragraph 55, on page 20, that the territorial
39 description given in the petition precisely paralleled
40 the one the chiefs of Kitwanga gave to the reserve
41 commissioner, O'Reilly, when he came in 1891 and 1893,
42 and the one repeated to representatives of the
43 Department of Indian Affairs in 1922. And I say it is
44 not a leap, it's not a great leap for your lordships
45 to take from this petition that the territorial lands
46 of the Gitwangak in place in 1846 were those described
47 by them in 1884.

Submissions by Mr. Rush

1 And I say, my lords, that Dr. Galois said that
2 documents like the petition were shaped by whites but
3 their substance reflects Gitksan values and
4 institutions. His comments on the petition and his
5 views on the historical significance of the events of
6 1888 were included in his report. They were ignored
7 by Canada, they were never mentioned by the trial
8 judge, but ought to be accepted by this court.
9 Now, my lords, I am not going to deal with the
10 section entitled Acceptance of Reserves. This section
11 refers to the supposed acceptance of the reserves by
12 the Gitksan and Wet'suwet'en. Canada makes no
13 argument on these facts. Argument made before the
14 trial judge that the acceptance of reserves
15 extinguished their title were dismissed.
16 Over to page 22 and at paragraph 60, I draw your
17 lordships' attention to the argument made by Canada
18 about the threat of extinguishment in 1888. Here
19 Canada devotes 14 pages of its statement of facts to
20 the events of 1888 which are variously referred to as
21 the Kitwancool Jim Affair or the Skeena Uprising.
22 Again, no argument based on these facts is made in the
23 revised factum, but in oral submission on the appeal
24 Canada advanced for the first time the proposition
25 that these events constituted extinguishment of
26 Gitksan and Wet'suwet'en jurisdiction. And I say
27 there is no support in law for that proposition. This
28 can't be extinguishment in law, nor, for that matter,
29 in fact. And I set out why in paragraph 61 running
30 right the way through to paragraph 64.
31 I am going to ask your lordships now to pass over
32 to paragraph 66. And this deals with the
33 jurisdictional function of the feast. And here I note
34 that Canada relies on the Hudson's Bay records and the
35 Loring reports in support of the proposition that the
36 feast not only had no legislative function, as found
37 by the trial judge, but that it had no jurisdictional
38 function of any kind except in the most limited sense
39 of that word. And what you see in the following
40 paragraphs, what Canada concedes about the feast, and
41 our argument is at paragraph 70, and I will take you
42 to that, we say that on Canada's own argument, at
43 paragraph 70, the feast, at least before 1888, and
44 certainly at 1846, was performing the most important
45 political, legal and economic functions imaginable.
46 Who governed, who owned the land, and how the
47 relationships of the Gitksan and Wet'suwet'en and

Submissions by Mr. Rush

1 their neighbouring peoples were to be conducted.
2 Now I take you to paragraph 74. This deals with
3 the matrilineal system of inheritance and the
4 arguments that Canada raised on this subject. In its
5 revised factum, at paragraph 74, Canada says that
6 Loring noted "problems of matrilineal inheritance."
7 In its oral argument Canada claimed that during
8 Loring's tenure the matrilineal system came to an end.
9 Now, I add to this that the evidence is that the
10 matrilineal successorship system continued, and
11 continues to this day.
12 At paragraph 77, my lords, that I will take you to
13 now, page 29, I say that it is evident that Loring was
14 not more a reliable a reporter on the subject of
15 matrilineal succession than he was on the subject of
16 the continuation of the feast. Canada's argument, and
17 the trial judge's conclusion, that Loring governed the
18 territory, depended solely on Loring's own claims.
19 Now, I would just like to pause here, my lords.
20 You may ask how Loring, on his own, from his chair in
21 Hazelton, could have extended a far-reaching control
22 over the whole of this territory. Yet the chiefs, who
23 were owning the territory in the villages, when they
24 stepped out of the villages were acting only on
25 instinct. It doesn't make sense. How can it be that
26 Loring could have exerted this subtle and far-reaching
27 influence on the characterization of this society,
28 when the characterization of the society is that you
29 couldn't do that with them. And I say that the
30 historical references suggest otherwise and completely
31 controvert this proposition. And it is set out -- I
32 set these out in the subsequent paragraphs.
33 In our submission, my lords, at paragraph 79,
34 Loring was quite wrong about the persistence of two
35 central institutions of governments: The feast and
36 the matrilineal succession. This is not to suggest
37 that Loring and other legal and illegal interferences
38 with the appellants' institutions had no impact.
39 Certainly they did. But I say that Loring's comments
40 have to be carefully scrutinized.
41 And I want to take you now, my lords, to paragraph
42 87, the bottom of page 31. Mr. Boys was also an
43 indian agent, and in 1951 he too proclaimed that the
44 inheritance system was virtually non-existent. And
45 was just as mistaken in '51 as Loring was in 1901 in
46 declaring that the Indian matrilineal system was dead.
47 Robert Atkinson was the district manager for the

Submissions by Mr. Rush

1 Hazelton office of the Department of Indian Affairs
2 from 1985 to 1987. And he held a parallel position to
3 that of Mr. Loring. He gave affidavit and viva voce
4 evidence at trial, and in his affidavit, after stating
5 that the practice of DIA, both before and during his
6 tenure, was to avoid, wherever possible, conflict
7 between tribal laws and the law under the Indian Act
8 with respect to wills and estates. He said:
9
10 "I have attended Gitksan and Wet'suwet'en feasts
11 as well as Haida, Nisga'a and Coast Tsimshian
12 feasts, and am knowledgeable that the Gitksan
13 and Wet'suwet'en people passed chiefly names,
14 title to territory and authority over their
15 house groups from one person to the next
16 through matrilineal succession, which is
17 executed in the Gitksan and Wet'suwet'en feast
18 halls."
19
20 Canada supports the trial judge's finding that
21 during Loring's tenure traditional methods of dealing
22 with ownership and claims to ownership of fishing
23 stations, smokehouses, trapping and hunting grounds,
24 if any, were no longer employed. Yet I note at
25 paragraph 89, my lords, Canada did not cross, did not
26 cross-examine Mr. Atkinson. Neither Canada nor the
27 trial judge referred to his evidence.
28 Now finally, my lords, I want to pass over to our
29 submissions in reply to the amicus's submission on the
30 facts, and this is added as an additional speaking
31 note after tab 13. So it should, in the orderly
32 course of affairs, follow page 32. And if you're with
33 me there, I will refer you first to paragraph 1. And
34 as I say, I am referring to amicus's submissions
35 principally on beaver territoriality and the fur trade
36 influence.
37 The amicus, at paragraph 1, I say, frames the
38 factual issues between itself and the appellants with
39 respect to the European fur trade as being whether or
40 not the beaver trapping territoriality that existed at
41 the time, and fed into the commercial fur trade, was a
42 product of the fur trade, and whether the fur trade
43 materially changed aboriginal life. This
44 characterization at paragraph 2 has built into it a
45 number of assumptions. And we set out the assumptions
46 there and we take issue with these assumptions in
47 paragraph 3, and I have set out how we do that. But I

Submissions by Mr. Rush

1 will pass along to paragraph 4, which is our response.
2 And I say here that the trial judge created a new
3 test, one he called "a further requirement", to use
4 his words, and an additional test to the Baker Lake
5 tests, by which aboriginal rights arise out of
6 occupation or use of specific land for aboriginal
7 purposes for an indefinite or long, long time before
8 the assertion of sovereignty.
9 At paragraph 7 I note this, it was only this
10 legally unprecedented, and we say unprincipled, test,
11 which made the impact of the European fur trade
12 relevant to the trial judge's conclusions. He found
13 that the fur trade converted a Gitksan and
14 Wet'suwet'en aboriginal life into something quite
15 different from what it had been, and accounted for the
16 fact that the appellants' ancestors spread out, he
17 said, from their villages to distant territories for
18 the purposes of commercial trapping. He went so far
19 as to suggest without finding that the social and
20 economic organization of these peoples was likely a
21 response to the fur trade.
22 Now, we say at paragraph 8 that the test that makes
23 the fur trade relevant is wrong in law. But we also
24 say that even if the test is correct, the appellants
25 met it. The appellants say that they proved the
26 existence of their land-owning and self-governing
27 societies and their presence in their territories,
28 even those which the trial judge excluded, for a long
29 time prior to sovereignty. And we show where that
30 argument is set out.
31 What I want to do is take you to paragraph 14.
32 And it moves to a slightly different point, a
33 variation on the theme. The amicus attributes to
34 Prof. Ray evidence that from the perspective of the
35 Bay, when you read about working various lands, you
36 would read about working them for the beaver, and says
37 that Brown, when he got to Babine Lake, noticed that
38 it was beaver only. Now, counsel for the appellants
39 are not aware of anything in either Prof. Ray's
40 evidence or in the Hudson's Bay records, written by or
41 about Brown, which would sustain either of these
42 suggestions. Nor does there appear to be anything in
43 the reference materials provided by the amicus to
44 verify them. And I ask your lordships, if you are in
45 doubt about this issue, to refer to Prof. Ray's
46 evidence and the transcript references that are there
47 set out.

Submissions by Mr. Rush

1 And at paragraph 16 I draw your attention to the
2 fact that Brown noticed, at Babine Lake in 1822, as
3 the appellants have repeatedly pointed out, what he
4 noticed was "heads of families, possessors of
5 particular tracts of country which they claim an
6 exclusive right to...certain tracts of country which
7 they claim an exclusive right to and will not allow
8 any other person to hunt upon them."
9 Prof. Ray inferred from these and other Hudson Bay
10 records that the Gitksan and Wet'suwet'en before
11 contact had, in his words, a fully-articulated
12 feasting system with house territories, family heads,
13 in which access to resources was regulated by a land
14 tenure system in which tracts of land were managed by
15 men of property, the lineage house heads. And I say
16 because of his qualifications and his experience, no
17 other witness and no author of any treatise was in as
18 good a position as Prof. Ray to draw the appropriate
19 inferences from these records.
20 The amicus gives no account, at paragraph 18, and
21 the trial judge gave no account, of why this evidence
22 was rejected. It came from records which the trial
23 judge called "a rich source of historical information"
24 which he had no hesitation in accepting. It was the
25 independent evidence of an eminent expert on these
26 very records who had excellent qualifications and wide
27 experience. And I say his evidence on these matters
28 should have been accepted by the trial judge.
29 Now, my lords, I will leave the balance of our
30 submissions here for you to refer to. And I want to
31 conclude my submissions with the argument that we make
32 in the written reply factum, and I don't ask you to
33 turn that up, but I ask you to note that part one of
34 our written reply to the respondent's factum at
35 paragraphs one to three, I say in response to the then
36 province's statement of facts, apparently supported or
37 continued to be supported by the amicus, I say this:
38 that the then province's position, not the present
39 province's position, adopts the comment by the trial
40 judge that matters of justice are ones that the court
41 of law are frequently unable to respond to as these
42 are subjective considerations.
43 And at paragraph 2 of our submission there, I say
44 that the appellants reply that this is and ought to be
45 a case about justice. The justice the appellants seek
46 in this court is not a subjective consideration, which
47 a court of law is unable to respond to, but I say the

Submissions by Mr. Rush

1 very justice according to law which courts of justice
2 are not only permitted to respond to but also bound to
3 apply.
4 And I say at paragraph 3 there, that the claim by
5 the appellants is for justice in respect of the land
6 that has belonged to them for centuries, justice in
7 respect of their inherent right to govern their land
8 and themselves, and justice to be recognized as the
9 truly distinctive people that they are.
10 And I want to take you back to the words that I
11 spoke at the beginning of this appeal in my brief
12 opening, because there I referred back to the opening
13 of the trial on May 11th of 1987. And at that time I
14 told the trial judge, the appellants told the trial
15 judge, and I reminded your lordships of the following,
16 that the foundations of Gitksan and Wet'suwet'en
17 society are firmly entrenched in their own laws but in
18 the face of provincial and federal disrespect for
19 these laws, and the injustice this has brought, the
20 Gitksan and Wet'suwet'en have come to this court to
21 secure those foundations in Canadian law, law which
22 the provincial and federal governments can be
23 compelled to respect. Only then will the Gitksan and
24 Wet'suwet'en be able to negotiate a just resolution of
25 their relationship with Canada, and this case is
26 therefore about a search for the legal pathways to
27 justice.
28 The trial judge responded, in his lordship's
29 judgment, in a way that was to find that the
30 appellants never had any laws, and to rule that any
31 aboriginal rights that they had were entirely
32 extinguished without their knowledge or consent more
33 than a century ago.
34 But as the trial judge pointed out, my lords, this
35 is a case about land, but not the land he spoke of.
36 The trial judge found that the appellants had rights
37 on land which they already controlled, their reserves.
38 To the lands outside of the villages, and I say, my
39 lords, that this is the nub of this case, the lands
40 outside of the villages, he found they had user
41 rights, like every other citizen of the province, but
42 only in exchange for extinguishment. The appellants
43 were then penned into their meagre reserves. Their
44 land was taken without their knowledge, without their
45 consent, and by a legal construct that is inexplicable
46 to them.
47 Now, the governments of this province have used

Submissions by Mr. Rush

first denial then every device to prevent a recognition of the appellants' land rights. And these appellants, in my submission, have shown the trial judge, and now your lordships, that they were really on the land, really occupying it and possessing it, and, yes, owning it and governing it, in their words, and in our submissions, in their distinctive way. They are not to be dismissed, and their evidence on this is not to be dismissed as mere beliefs. As we said on Tuesday, there is a problem here, and why? Put simply, because a great wrong has been done, and it will take this court to do something about it, to make the kind of declarations of right that will compel the governments to act, to treat these appellants in an honourable way, based on a recognition that they have rights that mean something and it means something on the ground.

And it will mean something, my lords, to these people, if they can leave this courtroom with dignity and knowing that the court's declarations will change their everyday lives.

And I end by saying now what I said at the beginning: This appeal is a continuation of the appellants' search for the legal pathways to justice, and I ask you to show it to them.

Thank you.

TAGGART, J.A.: Thank you, Mr. Rush. We will adjourn now until 10 o'clock tomorrow morning.

(PROCEEDINGS ADJOURNED UNTIL 10 O'CLOCK A.M., FRIDAY, JULY 3, 1992)

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

Wilf Roy
Official Reporter
United Reporting Service Ltd.