

Submissions by Ms. Koenigsberg

Vancouver, B. C.

June 20, 1990.

THE REGISTRAR: In the Supreme Court of British Columbia, this 20th day of June, 1990. Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Counsel won't believe this, but I have to entertain seven Russian jurists for lunch today and I will have to adjourn about quarter after 12. I am sorry. And counsel will remember that I can't be here tomorrow afternoon.

MS. KOENIGSBERG: Yes, my lord and there is a good chance we may come to this particular submission before that time and leaving your lordship plenty of time, because the balance won't be ready until two.

We left off yesterday, my lord, dealing with the area of general law on extinguishment and coming up to the question of who can extinguish or who is the sovereign, as that word is used in relation to the acts of extinguishment. And that begins at page eight at tab 5. We say that following the entry of British Columbia into Confederation in 1871, Section 91(24) of the British North American Act gave exclusive constitutional power to the federal government to legislate in respect of Indians and lands reserved for Indians. The result of this provision is that only the federal government can constitutionally express in explicit terms a clear and plain intent to extinguish aboriginal rights.

The sovereign acted and continues to act in relation to matters that may indirectly affect the survival of aboriginal rights however. Accordingly, the effect on the aboriginal rights to the operation of laws of general application directed neither to Indians nor lands reserved for Indians will now be considered.

Your lordship may recall that Mr. Plant covered this topic, and you might want to make a note that his argument, which is similar and which I in fact adopt, is found in the province's final argument, part nine, sections one and two. And it was a new part that was a replacement.

THE COURT: Are those Roman one and two?

MS. KOENIGSBERG: It's a small one and two on my copy.

THE COURT: Thank you.

MS. KOENIGSBERG: It is our submission that as a general rule --

MR. GOLDIE: That's volume three, my lord.

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1 THE COURT: Thank you.
2 MS. KOENIGSBERG: Thank you, Mr. Goldie.
3 MR. GOLDIE: I should perhaps ask my friend if she adopts our
4 pleadings with respect to this also?
5 MS. KOENIGSBERG: No.
6 MR. GOLDIE: In that case, I may be asking her to point out to
7 me in her pleadings where this argument fits in.
8 MS. KOENIGSBERG: Perhaps I can address that when I get to the
9 end of it if my friend still has a problem.
10 THE COURT: All right.
11 MS. KOENIGSBERG: The sovereign, acted and continues to act -- I
12 read that already. As a general rule, provincial laws
13 validly enacted apply to Indians.
14 And I have -- we have here a quote from Cardinal:
15
16 "A provincial legislature could not enact
17 legislation in relation to Indians, or in
18 relation to Indian Reserves, but this is far
19 from saying that the effect of Section 91(24)
20 of the British North America Act, 1867, was to
21 create enclaves within a province within the
22 boundaries of which Provincial legislation
23 could have no application. In my opinion, the
24 test as to the application of Provincial
25 legislation within a reserve is the same as
26 with respect to its application within the
27 province and that is that it must be within the
28 authority of Section 92 and must not be in
29 relation to a subject matter assigned
30 exclusively to the Canadian parliament under
31 Section 91. Two of those subjects are Indians
32 and Indian reserves, but if provincial
33 legislation within the limits of Section 92 is
34 not construed as being legislation in relation
35 to those classes of subjects (or any other
36 subject under Section 91) it is applicable
37 anywhere in the province, including Indian
38 reserves, even though Indians or Indian
39 reserves might be affected by it. My point is
40 that Section 91(24) enumerates classes of
41 subjects over which the federal parliament has
42 the exclusive power to legislate, but it does
43 not purport to define areas within a province
44 within which the power of the province to enact
45 legislation, otherwise within its powers, is to
46 be excluded."
47

1 That quote can be found in the Cardinal case at
2 page 703. To the same effect can be found those
3 propositions in Hogg on Constitutional Law of Canada
4 at the pages cited.

5 As stated above, all of the judgments in Calder
6 proceeded on the footing that prior to Confederation
7 extinguishment could occur by the "exercise of
8 complete dominion" by the sovereign in a manner
9 clearly and plainly adverse to the continued exercise
10 of the aboriginal right. And we have listed a number
11 of cases which we have canvassed at some length in the
12 previous argument.

13 The sovereign, we submit, for this purpose includes
14 acts under the Imperial Royal prerogative and Imperial
15 legislation prior to 1867, acts of the governors of
16 Vancouver Island and the mainland of British Columbia,
17 1858 to 1871, federal legislation since 1871, and
18 provincial legislation and conduct since 1871. In
19 addition, Section 88 of the Indian Act states
20 expressly that provincial laws of general application
21 not inconsistent with treaty rights or other federal
22 laws, apply to Indians. The courts have accepted that
23 Section 88 will make such provincial laws applicable
24 to Indians even where they impinge on particular
25 Indian rights such as hunting, so long as the
26 provincial laws are of general application. This
27 opinion is also expressed in Dick vs. the Queen per
28 Mr. Justice Beetz. In the present case, the
29 plaintiffs argue that whatever may be the effect of
30 federal legislation, aboriginal rights cannot, as a
31 matter of constitutional law, be extinguished by
32 provincial law. This, however, ignores the
33 well-established constitutional doctrine that neither
34 Indians nor Indian reserves are enclaves immune from
35 the effects of provincial law.

36 On two occasions -- in Kruger at page 111, and
37 Cardinal, page 706 -- the dictum of Mr. Justice
38 Riddell in R. vs. Martin has been expressly adopted by
39 the Supreme Court of Canada.

40
41 "In other words, no statute of the Provincial
42 Legislature dealing with Indians or their lands
43 as such would be valid and effective; but there
44 is no reason why general legislation may not
45 affect them."

46
47 One major consequence of the pith and substance

1 doctrine, in Professor Hogg's words, is that each
2 level of government is entitled "to enact laws with
3 substantial impact on matters outside its
4 jurisdiction." As a general rule, therefore, valid
5 provincial legislation of general application
6 routinely has an effect on matters within federal
7 jurisdiction, including aboriginal rights in the
8 absence of over-riding federal legislation.

9 The full impact of the pith and substance doctrine
10 is of course limited in its application by the
11 constitutional principle of "interjurisdictional
12 immunity", that is, that a province by enacting
13 legislation in relation to valid provincial objectives
14 cannot "sterilize" a matter of federal jurisdiction.
15 For example, provincial laws which sterilize the
16 operation of federally-incorporated companies have
17 been struck down in a number of cases that were
18 referred to in the context of "Indian-ness" in *Natural*
19 *Parents and Superintendent of Child Welfare*. Chief
20 Justice Laskin at pages 762 to 763 of that decision,
21 said the following:

22
23 "I cannot believe that any less care should be
24 taken in analysis before subjecting Indians,
25 coming as they do within a specific head of
26 exclusive federal jurisdiction, to general
27 provincial legislation unless the inclusion of
28 Indians within the scope of the Provincial
29 legislation touches them as ordinary persons
30 and in a way that does not intrude on their
31 Indian character or their Indian identity and
32 relationship."
33

34 In *Dick* and the *Queen* it was held that even so
35 fundamental an aboriginal right as Indian hunting for
36 the purpose of gathering meat for a religious ceremony
37 was not a subject so close to "Indian-ness" as to be
38 within exclusive federal legislation. Accordingly,
39 such Indian hunting activities could be prohibited by
40 provincial law operating either *ex proprio vigore* or
41 more likely through Section 88 of the *Indian Act*. The
42 doctrine of the exclusive federal power to deal with
43 "Indian-ness" has thus been given a limited
44 application by the Supreme Court of Canada.

45 Both "paramountcy" and "interjurisdictional
46 immunity" have been given more restricted scope in
47 recent decisions of the Supreme Court of Canada. The

1 previous view of that court was recently summarized by
2 Chief Justice Dickson in *OBSEU v. Attorney-General of*
3 *Ontario*. He said:

4
5 "The history of Canadian constitutional law has
6 been to allow for a fair amount of interplay
7 and indeed overlap between federal and
8 provincial powers. It is true that doctrines
9 like interjurisdictional and Crown immunity and
10 concepts like 'watertight compartments' qualify
11 the extent of that interplay. But it must be
12 recognized that these doctrines and concepts
13 have not been the dominant tide of
14 constitutional doctrines; rather they have been
15 an undertow against the strong pull of pith and
16 substance, the aspect doctrine and, in recent
17 years, a very restrained approach to
18 concurrency and paramountcy issues."

19
20 It's our submission that the federal Indian Act
21 contains detailed provisions for the regulation of
22 Indian reserves, including the prohibition on sale or
23 other disposition of reserve lands without a valid
24 band surrender. However, there is no equivalent
25 federal regulation of other lands over which Indian
26 people may have aboriginal rights to pursue economic
27 activities such as hunting and fishing. Accordingly,
28 it is only in respect of reserves within the meaning
29 of the Indian Act that the ordinary rules of
30 constitutional paramountcy preclude the application of
31 Provincial laws.

32 I would pause here to say, my lord, that this
33 argument clearly and squarely places the issue on
34 whether lands reserved for Indians can include lands
35 outside reserves and it is our position that they do
36 not.

37 As discussed above, provisions of the laws of
38 British Columbia which could not apply *ex proprio*
39 *vigore* to the federal Crown because of "paramountcy"
40 or "interjurisdictional immunity" are transformed into
41 federal legislation through the device of
42 incorporation by reference in Section 88 of the Indian
43 Act.

44 The Supreme Court of Canada has held that laws
45 regulating the hunting of moose in Cardinal, deer in
46 Dick, and migratory birds in George, are in relation
47 to Indians and not lands reserved for Indians. It is

1 therefore submitted that the exercise of all of the
2 aboriginal rights referred to by Mr. Justice Steele
3 in Bear Island are within the scope of Section 88 of
4 the Indian Act -- your lordship may recall that in the
5 Bear Island case he enumerated the aboriginal rights
6 that he found and they were exclusively use rights --
7 and are thus rendered subject to extinguishment by
8 federal incorporation of valid provincial laws of
9 general application.

10 And here, in support of that proposition, is the
11 quote from Mr. Justice Beetz in Dick, which was also
12 referred to earlier, he said:

13
14 "I believe that a distinction should be drawn
15 between two categories of provincial laws.
16 There are, on the one hand, provincial laws
17 which can be applied to Indians without
18 touching their Indian-ness, like traffic
19 legislation; there are on the other hand,
20 provincial laws which cannot apply to Indians
21 without regulating them qua Indians.

22 Laws of the first category, in my opinion,
23 continue to apply to Indians ex proprio vigore,
24 as they always did before the enactment of
25 Section 88...

26 I have come to the view that it is the laws
27 of the second category that Section 88 refers."

28
29 In the Bear Island case -- and perhaps we should
30 have a look at it, that's in the plaintiffs' volume
31 one of their authorities, and I think we have pulled
32 that out. And it's at tab 8. Do we have the right
33 one?

34 THE COURT: Yes. It is the Court of Appeal, do you want the
35 trial court or the Court of Appeal?

36 MS. KOENIGSBERG: Your lordship is right.

37 Well, we won't look at it.

38 MR. GOLDIE: Tab 9.

39 MS. KOENIGSBERG: The trial judgment is at tab 9.

40 THE COURT: Yes, it is.

41 MS. KOENIGSBERG: And the uses that I made reference to before
42 are at page 392. And it's about, just the beginning
43 down the page, he says:

44
45 "Bearing in mind the decisions in the Calder and
46 Smith cases, I find that the aboriginal rights
47 in these lands existing at the relevant date

1 are as follows: To hunt all animals for food,
2 clothing, personal use and adornment, to
3 exclusively trap fur bearers, which right was
4 enjoyed by the individual family, and to sell
5 the furs, to fish, use herbs, berries, maple
6 sugar and other natural products for food,
7 medicines and dyes, to use ochre and vermillion
8 for dyes, to use turp, quartzite for tools and
9 other implements but not extensive mining, to
10 use clay for pottery, pipes and ornaments, to
11 use trees, bark and furs for housing but not
12 lumbering, and to use trees and bark for fires,
13 canoes, sleighs and snowshoes. All of the
14 above are traditional uses for basic survival
15 and personal ornamentaion existing as of 1763."
16

17 Now, my lord, the range of provincial acts which
18 might affect or even prevent the exercise of obtaining
19 those types of rights, is very broad and as I go on to
20 point out in the next paragraph, those are all acts
21 which are, in effect, and they are comparable acts
22 which have been pleaded and relied on and are before
23 your lordship in this case, which are laws of British
24 Columbia. And it's in that --

25 THE COURT: You would include trapping and selling furs, even
26 though that practice, except, I suppose, for some
27 barter, arose after contact with the Europeans?

28 MS. KOENIGSBERG: With a qualification, yes, my lord. I don't
29 think that one can, looking at trapping and just --
30 there is considerable references in the early
31 explorers to trapping. The point is that trapping, as
32 it has now devolved into what, in our submission,
33 account for the defined boundaries in a large part of
34 the Claim Area, are very recent and not aboriginal
35 source. Trapping itself, within a less precisely
36 bounded area, is more than likely to have been an
37 aboriginal use. The evidence is that trapping for
38 furs -- sometimes referred to as hunting -- was
39 engaged in, that it was used for -- that furs were
40 used for clothing although the evidence suggests that
41 it was not extensive. These were not a people that
42 one would could say were dependent on trapping and
43 hunting but they did utilize the land and therefore I
44 don't think that one can say that it is not an
45 aboriginal use.

46 THE COURT: I don't have any trouble with the trapping, I am
47 only questioning, and it's only a question, the

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1 addition of the words by Mr. Justice Steele, that is,
2 "to trap fur bearers and to sell the furs." Conceding
3 for the purposes of this argument that the right to
4 trap isn't frozen and you can advance, or one can
5 advance technology, do you agree that it goes so far
6 as to convert limited trapping or trapping for the
7 limited purposes to commercial fur trapping?
8 MS. KOENIGSBERG: I think that's a very hard question to answer
9 on these facts. There is no evidence, of which I am
10 aware, of the source, if you will, of commercial fur
11 trading.
12 THE COURT: It depended on the market.
13 MS. KOENIGSBERG: Yes, that's correct. The evidence also is in
14 conflict here. There is evidence, for instance, and I
15 am going back to Brown now, and this evidence has been
16 canvassed before, so you will forgive me if I don't
17 have precise references, but the references in Brown
18 would support the following two propositions that have
19 relevance to this issue. The first is that beaver was
20 not trapped universally, that is, in the early 1820s
21 at least there are indications that the Gitksan may
22 not have trapped beaver and at least not universally,
23 and that the Wet'suwet'en did trap beaver more
24 universally among themselves. There is evidence that
25 hunting other fur bearers, such as marten, was not
26 done exclusively, anyone could hunt them anywhere.
27 Those two factors, in my submission, impact on the
28 findings that your lordship may make as to what
29 constitutes an aboriginal right, what the incident of
30 that aboriginal right is and how broad it is. And,
31 ultimately, I would submit that the evidence is, on
32 the balance of probabilities, would not support
33 commercial fur trapping, pre-contact.
34 THE COURT: All right. Thank you.
35 MS. KOENIGSBERG: In case there might be any confusion, Mr.
36 Goldie has reminded me that in ---if we are relating
37 this to the Bear Island case, he is talking about
38 trapping commercially as an aboriginal right on the
39 facts there, where he is looking at the beginning date
40 as 1763. And I believe that we have -- we actually
41 have evidence in this case, it ranged so far that
42 there would have been commercial trapping going on
43 sensibly in that area of Ontario, what's now Ontario,
44 and it would be on those facts that Mr. Justice Steele
45 found commercial trapping. And Mr. Goldie points out
46 that that is found on page 401 in the judgment on Bear
47 Island.

1 And in the Bear Island case, Mr. Justice Steele
2 examined the following Ontario statutes as being in
3 relation to valid provincial objects but having the
4 effect of extinguishing aboriginal rights in the
5 Temagami land claim area, and I simply set them out
6 because they are comparable acts to those in issue in
7 this lawsuit enacted by the Province of British
8 Columbia.

9 It is submitted that an analysis of effect of
10 comparable British Columbia legislation would have the
11 same effect as that found by Mr. Justice Steele in
12 Bear Island for the following reasons:

13 The legislation relied upon is clearly related to
14 provincial matters in its general application and free
15 of any taint of colourability.

16 Second, the pith and substance doctrine allows for
17 the application of such legislation to activities of
18 all persons, Indian and non-Indian, within the land
19 claim area in the absence of paramount federal
20 legislation. This point becomes important, my lord,
21 in my submission, when we are talking about land
22 outside of reserve law.

23 The operation of the provincial legislation does
24 not touch "Indian-ness" so as to preclude its
25 application to Indians under the principle of
26 "interjurisdictional immunity".

27 Three, there is no conflicting federal legislation
28 within the scope of the paramountcy doctrine as
29 enunciated by the Supreme Court of Canada in the OPSEU
30 case.

31 Any constitutional infirmity of the provincial law
32 in relation to the exercise by Indians of aboriginal
33 rights is met by Section 88 of the Indian Act which
34 incorporates by reference into federal law the
35 provincial laws of general application from and after
36 1951.

37 The Attorney-General of British Columbia's
38 argument, which as I have pointed out is set out in
39 volume three, part nine, sections one and two, and
40 this argument below identifies the trial evidence with
41 respect to non-Indian activity validly authorized by
42 the British Columbia legislation referred to. Such
43 activity, it is submitted, had the effect of
44 extinguishing or diminishing aboriginal rights
45 throughout the land claim area prior to the
46 commencement of these proceedings wherever its
47 application prevented the exercise of an aboriginal

1 right. And it is to these acts, my lord, that we say
2 the test, which we developed yesterday, of looking at
3 the legislative use and assuming it meets all the
4 tests of being valid provincial law of general
5 application and there is no federal legislation
6 occupying the field. And that's in respect to
7 Indians, then it applies but it doesn't perform the
8 extinguishing or diminishing function unless it comes
9 into conflict with an aboriginal right in its
10 exercise.

11 You will be hearing extensive evidence, my lord, a
12 little bit this afternoon and quite a bit more on
13 Thursday and Friday, in which we have attempted to go
14 through using the territories for reference purposes,
15 territory by territory, and looking at what
16 extinguishing acts or diminishing acts have taken
17 place, just from the evidence, and what are the
18 alleged or claimed or where there is any evidence, of
19 the exercise of an aboriginal use. And we have
20 attempted to put those together.

21 I would now like to deal with the general law on
22 abandonment upon which we will be relying. I will not
23 be going into the, what I call the site specific
24 evidence, of abandonment. I will be touching on it
25 generally, that will be dealt with later as well and
26 then I would like to come back to the effective
27 extinguishment in the claim area generally, leaving
28 the specific territory by territory analysis for
29 later. So if we could look at -- and it's tab 8,
30 abandonment, and I handed up a replacement part, and
31 this very small number of pages replaces the very much
32 larger number of pages there.

33 THE COURT: Has that been replaced, Mrs. Thomson?

34 THE REGISTRAR: Yes, it has, my lord.

35 MS. KOENIGSBERG: And your lordship should notice, so there will
36 be no confusion, that I have it replaced now just the
37 law part and the abandonment, or site specific
38 material that was there, will be replaced later by
39 much more extensive analysis.

40 Dealing then with the concept or the principle of
41 abandonment we say, as discussed above the law of
42 Canada recognizes that Indians have a legal right of
43 use and occupancy of traditional lands. Those words,
44 of course, are used variously, and all of the cases
45 that are cited there, and we have talked about them at
46 some length through the course of this trial. It is
47 submitted that when Indians voluntarily abandon, and I

1 would ask to you underline the word voluntarily and I
2 will come back and talk about that, the use and
3 occupancy of traditional lands, all their legal rights
4 or interests in those lands come to an end and are
5 extinguished. Private rights can be lost through non-
6 use and so too will abandonment by original people,
7 aboriginal people, of the traditional uses
8 constituting aboriginal rights lead to a disappearance
9 in law of those rights.

10 The concept of abandonment or non-use or non-
11 occupancy of a traditionally used area resulting in an
12 extinguishment of that right follows, we say, from the
13 very nature of the right as recognized by the Canadian
14 common law. The nature of that right being
15 usufructuary -- a right of occupancy. Implicit in the
16 test of whether an aboriginal right exists as set out
17 in Baker Lake is that there must be a pattern of
18 recognizable continuity of those rights.

19 I think it might be helpful here if we looked at
20 page 559 to 561 in the reasons of Mr. Justice Mahoney
21 in Baker Lake. That's in volume --

22 THE COURT: Isn't that in your book of cases?

23 MS. KOENIGSBERG: I didn't put Baker Lake in. I should have.
24 It's in volume 5 of the plaintiffs' authorities. And
25 unfortunately my copy, it won't be found at page 559
26 but I do have the page reference. It's at tab 29.
27 And this is the Western Weekly Reports law report, and
28 the parts that I wish to make reference to are 227
29 through 230. And this is the section of that judgment
30 in which the test, which is actually set out on page
31 226, is discussed. And with reference to the
32 organized society aspects of that test, beginning at
33 the bottom of page 226, the very first line, and going
34 over to page 227, Mr. Justice Mahoney is talking about
35 organized society and he says:

36
37 "The estimation of the rights of aboriginal
38 tribes is always inherently difficult. Some
39 tribes are so low in the scale of social
40 organization that their usages and conceptions
41 of rights and duties are not to be reconciled
42 with the institutions or the legal ideas of
43 civilized society. Such a gulf cannot be
44 bridged. It would be idle to impute to such
45 people some shadow of rights know to our law
46 and then to transmute it into the substance of
47 transferable rights of property as we know

1 them. In the present case it would make each
2 and every person by a fictional inheritance a
3 landed proprietor 'richer than all his tribe'.
4 On the other hand, there are indigenous peoples
5 whose legal conceptions, though differently
6 developed, are hardly less precise than our
7 own. When once they have been studied and
8 understood they are no less enforceable than
9 rights arising under English law. Between the
10 two there is a wide tract of much ethnological
11 interest, but the position of the natives of
12 Southern Rhodesia within it is very uncertain;
13 clearly they approximate rather than to the
14 lower than to the higher limit.

15 Their lordships did not find it necessary
16 to pursue the question further since they found
17 that the aboriginal rights, if any, that might
18 once have existed had been expressly
19 extinguished by the Crown.

20 It is apparent that the relative
21 sophistication of the organization of any
22 society will be a function of the needs of its
23 members, the demands they make of it. While
24 the existence of an organized society is a
25 prerequisite to the existence of an aboriginal
26 title, there appears no valid reason to demand
27 proof of the existence of a society more
28 elaborately structured than is necessary to
29 demonstrate that there existed among the
30 aborigines a recognition of the claimed rights,
31 sufficiently defined to permit their
32 recognition by the common law upon its advent
33 in the territory. The thrust of all the
34 authorities is not that the common law
35 necessarily deprives aborigines of their
36 enjoyment of the land in any particular but,
37 rather, that it can give effect only to those
38 incidents of that enjoyment that were
39 themselves, given effect by the regime that
40 prevailed before."

41
42 We have looked at that quote so many times, my
43 lord, but I would submit, and I want to go on in this,
44 that what we are looking at here is really, and it's
45 implicit in this, that the activities which are going
46 to form the basis of recognized, recognizable
47 aboriginal rights, had to do with what has otherwise

1 been called harvesting activities, a way of life, a
2 pattern. Walking through a territory once, obviously,
3 does not constitute a recognizable aboriginal right.
4 And that's the very -- but continued use, even
5 intermittent, if it has a pattern, of the use that can
6 be made of that land, will, as it did in the Baker
7 Lake case, constitute a use recognizable. And that is
8 really the issue that Mr. Justice Mahoney was
9 grappling with in developing the organized society
10 test, because he was faced with a people living in an
11 area in which -- which were not called barren lands
12 coincidentally. Nothing grows there. The use that
13 can be made of that land is a wandering use, of being
14 able to take advantage of caribou, which are the only
15 land animals that are there. And, therefore, the
16 actual use of any small tract of land might be once in
17 two years. And yet that is the way in which the Inuit
18 people made their living, that is how they lived on
19 the land and therefore it constituted the only use
20 that could be made of that land for survival.

21 The fact is, as he goes on here:

22
23 "That the aboriginal Inuit had an organized
24 society, it was not a society of very elaborate
25 institutions but it was a society organized to
26 exploit the resources available on the barrens
27 and essential to sustain human life there.
28 That was about all they could do, hunt and fish
29 and survive."

30
31 And I point out here that even fishing was
32 extremely limited. Baker Lake itself is under seven
33 feet of ice in April. There is no fishing. These
34 people subsist on caribou with incidental fishing in
35 one month of the year.

36
37 "That was about all they could do, hunt and fish
38 and survive. The aboriginal title asserted
39 encompasses only the right to hunt and fish as
40 their ancestors did. The organized society of
41 the caribou Eskimos, such as it was, and it was
42 sufficient to serve them, did not change
43 significantly from well before England's
44 assertion of sovereignty over the barren lands
45 until their settlement."

46
47 That occurred in 1952, my lord.

1 "For the most part the ancestors of the
2 individual plaintiffs
3 were members of that society, many of them were
4 themselves members of it. If their society has
5 materially changed in recent years is of no
6 relevance here."

7
8 I stop there to just comment what he means there.
9 Subsistence on caribou remains the basis for survival,
10 physically and culturally, on the barren lands.

11 The way in which one goes about doing that, the way
12 the people live, their groupings is different but the
13 actual use that they make of the land is the same.
14 And, in my submission, this line marries up very
15 nicely with the purpose, the object has to be the
16 same, a traditional use. But it can be exercised in a
17 contemporary manner.
18

19 "The specificity of the territory over which
20 aboriginal title has heretofore been made in
21 reported cases appears not to have been a
22 disputed issue of fact. In the Calder case,
23 supra, the subject territory was agreed between
24 the parties. In the Kruger case, the court did
25 not find it necessary to deal with the
26 questions of aboriginal title and
27 extinguishment and disposed of the appeal on
28 other grounds to which I will return. It did,
29 however, give a clear signal as to what its
30 approach would be in the future. Mr. Justice
31 Dickson for the court says: 'Claims to
32 aboriginal title are woven with history,
33 legend, politics and moral obligations. If the
34 claim of any Band in respect of any particular
35 land is to be decided as a justiciable issue
36 and not a political issue, it should be so
37 considered on the facts pertinent to that Band
38 and to that land, and not on any global
39 basis...'

40 There were obviously great differences
41 between the aboriginal societies of the Indians
42 and the Inuit and decisions expressed in the
43 context of Indian societies must be applied to
44 the Inuit with those differences in mind. The
45 absence of political structures like tribes was
46 an inevitable consequence of the modus vivendi
47 dictated by the Inuit's physical environment."

1 I pause here, it could not be the -- the
2 resources could not be exploited by permanent
3 villages.
4

5 "Similarly the Inuit appear to have occupied the
6 barren lands without competition except in the
7 vicinity of the tree line. That too was a
8 function of their physical environment. The
9 pressures of other people, except from the
10 fringes of the boreal forest, were non-existent
11 and, thus, the Inuit were not confined in their
12 occupation of the barrens in the same way
13 Indian tribes may have confined each other
14 elsewhere on the continent. Furthermore, the
15 exigencies of survival dictated the sparse, but
16 wide ranging, nature of their occupation."
17

18 Then he cites the Mitchell case, Mr. Justice
19 Baldwin:
20

21 "'Indian possession or occupation was considered
22 with reference to their habits and modes of
23 life; their hunting grounds were much in their
24 actual possession as the cleared fields of the
25 whites; and their rights to its exclusive
26 enjoyment in their own way and for their own
27 purposes were as much respected until they
28 abandoned them, made a cession to the
29 government, or an authorized sale to
30 individuals...
31

32 The merits of this case do not make it
33 necessary to inquire whether the Indians within
34 the United States had any other rights of soil
35 or jurisdiction; it is enough to consider it as
36 a settled principle that the right of occupancy
37 is considered as sacred as the fee simple of
38 the whites.'"
39

40 He then goes on to his discussion of the
41 usefulness of American jurisprudence, and then
42 dropping down to the next full paragraph:
43

44 "The nature, extent or degree of aborigines
45 physical presence on the land they occupied
46 required by the law as an essential element of
47 their aboriginal title is to be determined in
each case by a subjective test. To the extent

1 human beings are capable of surviving on the
2 barren lands the Inuit were there. To the
3 extent the barrens lent themselves to human
4 occupation, the Inuit occupied them. The
5 occupation of the territory must have been to
6 the exclusion of other organized societies."

7
8 And here we go into the exclusiveness as a badge
9 but I would caution your lordship again that he is
10 talking about a set of facts in relation to
11 determining if these people were in fact able to
12 continue exploiting the use of caribou, the hunting of
13 caribou in relation to the Indians. And the evidence
14 before him was that where there were Indians, there
15 could not be Inuit, they could not live together.
16 Therefore, if you found that Indians occupied and
17 utilized the resources in a given area, the Inuit by
18 inference would not be there.

19 THE COURT: Do you think that's an accurate use of that word
20 subjective?

21 MS. KOENIGSBERG: It's a very narrow use, I would say, of the
22 word subjective. I don't think he means -- it's one
23 of those odd uses that is perhaps more comparable to
24 the objective/subjective tests developed in tort law.
25 It is subjective in the sense that it emanates from
26 the actual facts or uses of the people that you're
27 looking at. But it's objective in the sense that it's
28 what you infer from the facts.

29 THE COURT: Do you think he means that?

30 MS. KOENIGSBERG: I don't think he means objective in that
31 sense.

32 THE COURT: All right.

33 MS. KOENIGSBERG: And to come back to my point, which is on page
34 one of this abandonment argument, implicit in the test
35 of whether an aboriginal right exists as set out in
36 Baker Lake is that there must be a pattern of
37 recognizable continuity to the exercise of the rights.
38 And I have just taken you through that which I say
39 supports that it is implicit there that there must be
40 continuity, there might be a pattern. There must be,
41 in fact, one must be able to infer that this is the
42 way of life.

43 That abandonment is a concept which applies to
44 aboriginal rights is supported by the judgment of Mr.
45 Justice Baldwin which I just read to your lordship.

46 MR. JACKSON: My lord, may I just interrupt my friend, at an
47 earlier part of her submission which she didn't read

Submissions by Ms. Koenigsberg

1 to your lordship, there is some suggestion in the
2 Federal case that Mitchell is not part of the common
3 law as it's received in Canada. I wonder if my friend
4 can advise me whether or not she resiles from that
5 position. It seems to me she is adopting what you
6 will hear as part of the federal case.

7 MS. KOENIGSBERG: No, and I don't think it's a particularly
8 subtle argument and say in fact it is our position,
9 and I think I did read this part of the argument to
10 your lordship, that those parts of American
11 jurisprudence which have found their way into Canadian
12 cases, and adopted for the purposes for which they
13 were intended, form part of the Canadian jurisprudence
14 today.

15 Our submission on the Mitchell case was that other
16 propositions in the Mitchell case, upon which my
17 friend relies, have never been adopted. I do not go
18 so far in fact as to adopt Mr. Justice Baldwin's
19 statements which I have quoted here. I say that this
20 quote supports the proposition that it follows from
21 the nature of aboriginal rights that abandonment of
22 those rights will result in their extinguishment. And
23 I say that simply because that is the analysis from
24 the nature of the right that Mr. Justice Baldwin has
25 put here.

26 THE COURT: Well, you are adopting his judgment as expressing the
27 submission you're making?

28 MS. KOENIGSBERG: Oh, yes. But he doesn't in fact go on to
29 discuss abandonment, it wasn't an issue. In my
30 submission, it so follows that in fact you find from
31 time to time in cases that do not discuss abandonment,
32 in fact, Bear Island may be the only case that
33 actually makes findings where that issue has been
34 raised and litigated. It simply appears that it seems
35 to flow from the nature of the right.

36 Mr. Justice Steele, and we now quote from what I
37 believe is the only case so far, it deals with the
38 concept of abandonment, certainly in Canada, and I
39 should note that while Mr. Justice Steele's general
40 findings were affirmed in the Court of Appeal, this
41 point, along with several others, was not expressly
42 adopted. His opinion was affirmed, in other words, on
43 other grounds. They didn't say no, they just didn't
44 deal with it and this matter is currently on appeal to
45 the Supreme Court of Canada and the issue of
46 abandonment is an issue before that court.

47 We say, then quoting from Mr. Justice Steele:

1
2 "Finally, from the coming of the railway in
3 1905, major changes in the location of the
4 defendants have taken place, and the evidence
5 indicates that since approximately 1950, the
6 defendants reside either outside the land claim
7 area or within the land claim area on Bear
8 Island or in established white settlements such
9 as the town of Temagami. The last person to
10 live in the Land Claim area, other than on Bear
11 Island or on established white communities,
12 lived at Obabika Lake, in 1962, although it is
13 possible Jack Pierce seasonally occupied a
14 cabin on Duncan Lake until 1963 or 1964. Under
15 these circumstances, even if it were found
16 that the Province of Canada, and subsequently
17 Ontario, exercised complete dominion over the
18 lands in issue and enacted legislation allowing
19 for settlement but erred in law in failing to
20 expressly state its intention to extinguish
21 aboriginal title, I find that such title was in
22 fact extinguished because the Indians have
23 abandoned their traditional use and occupation
24 of the Land Claim area. In other words, there
25 is no evidence of exclusive aboriginal use of
26 any of the lands except the Bear Island reserve
27 continuing to the date of the commencement of
28 the action."
29

30 There are other authorities, none of which deals
31 with it in the same direct way that Mr. Justice Steele
32 does, and I have cited them there. The American
33 authorities --

34 THE COURT: Wasn't there an article in the Canadian Bar Review
35 about two years ago where the learned author said that
36 an abandoned aboriginal right could be resurrected by
37 resuming occupation?

38 MS. KOENIGSBERG: It wouldn't surprise me, my lord, but I don't
39 know on what authority the learned author would have
40 come to that conclusion.

41 THE COURT: I don't either.

42 MS. KOENIGSBERG: I suppose one could argue it either way.
43 However, if it amounts to an extinguishment, I think
44 that that would be clearly wrong and perhaps begs the
45 question as to whether abandonment does amount to
46 extinguishment. We say it does. And I will try to so
47 persuade your lordship.

Submissions by Ms. Koenigsberg

1 The American authorities also hold that
2 abandonment will extinguish aboriginal rights. In
3 Williams and Chicago, the Supreme Court of the United
4 States held that the band could not claim more than
5 the right of continued occupancy, and that when this
6 was abandoned, all legal right or interest which both
7 tribes and its members had in the territory came to an
8 end. Very similar statements are made in the cases
9 referenced there as well.

10 MR. JACKSON: My lord, are those authorities available?

11 MS. KOENIGSBERG: Yes, they are, in my friend's authorities.
12 And I -- I am sure my friend recognizes U.S. versus
13 Sante Fe and Beecher vs. Wetherby and probably even
14 U.S. vs. Cook, and if he has a problem that he thinks
15 I am taking that out of context, I suggest he deals
16 with it in reply.

17 THE COURT: What about Williams and Chicago?

18 MS. KOENIGSBERG: Yes, it's in the authorities as well. And, I
19 am sorry, I just didn't have time to reference this to
20 my friend's books.

21 It is submitted that the voluntary non-use and
22 non-occupation of traditional lands and in the
23 non-exercise of traditional practices for more than a
24 generation, perhaps a minimum of 20 years, constitutes
25 abandonment. It is submitted that changes in economic
26 strategies, demographics and social structure are
27 evidence of abandonment. And I would like to just
28 deal with the topics that I have just raised here.
29 And perhaps I should just back up and say that as far
30 as the American authorities are concerned, they really
31 fall into the category again of our use of the Baldwin
32 quote from the Mitchell case. And that is that they
33 do deal with the issue of abandonment, they do say
34 that if it's a -- if lands are abandoned, they are --
35 rights are extinguished. However, they say it in
36 circumstances which are easily distinguishable one
37 from the other and from the situation here. And it's
38 simply pointed out that it is a concept which again
39 tends to flow from the nature of the right. And the
40 nature of the right has been held to be the same in
41 American jurisprudence as in Canadian, a right of
42 occupancy.

43 Now, dealing with the voluntariness here. It is
44 essential, in our submission, that to find abandonment
45 you have to be able to find that it is voluntary. And
46 in that sense that is why changes in economic
47 strategies, demographics and social structure, are, I

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1 should put there, good evidence of abandonment. They
2 go to the voluntariness of it. If, for instance, my
3 lord, one were to find that Indians no longer occupy
4 the place because they have been illegally
5 dispossessed, in my submission, that would not
6 constitute abandonment in a Canadian -- that a
7 Canadian court would find.

8 THE COURT: Might be something else, I suppose, laches,
9 limitation?

10 MS. KOENIGSBERG: There might be something else but in my
11 submission it would not be abandonment. Abandonment,
12 in my submission, which flows naturally from the
13 analysis of the right itself, it's also implicit that
14 it must be voluntary. The Indian people must be
15 choosing, in the sense that any of us have the right
16 to choose, an alternative way of life and have
17 abandoned the other way of life. And whether it's the
18 whole way of life or a particular area makes no
19 difference. It will -- that will address the issue of
20 whether we are talking about the abandonment of
21 trapping which, in my submission, the evidence is
22 almost overwhelming, that it has been abandoned, and
23 voluntarily, in the sense that we say that the
24 evidence is overwhelming that the reason why the
25 aboriginal people are not trapping is that it is no
26 longer a viable economic, from their point of view,
27 economic alternative.

28 THE COURT: Your argument on abandonment must be related to
29 specific territories?

30 MS. KOENIGSBERG: Yes, it is, and we have done the analysis
31 which we will be presenting to your lordship.

32 Now dealing with this minimum of 20 years, that is
33 nearly an arbitrary number but we have attempted to
34 address the issue of how long is long enough. A
35 generation is often found to be 20 to 25 years. A
36 generation accounts for being able to imply a real
37 intent not to engage in that activity, that it's not
38 just a temporary change, it's a change which has had,
39 which has affected the structure, the entire social
40 structure and that, in our submission again, is what
41 has happened in the Claim Area, particularly in
42 relation to trapping. Your lordship has heard the
43 evidence that many of the younger generation, two
44 generations ago now, the 1950s, that the substantial
45 stoppage of trapping occurred, do not know how to trap
46 any longer. The effect of not trapping has been, has
47 become so pervasive, that the normal ways in which the

1 aboriginal society continued that, have also stopped,
2 the teaching of it, which was part of their way of
3 life.

4 We then go on to say that the evidence at trial
5 demonstrates fundamental changes in the Gitksan-
6 Wet'suwet'en economic and social structure since the
7 time of contact. During the past 150 years the
8 plaintiffs and their ancestors have shifted from a
9 subsistence economy based primarily on the
10 exploitation of the local salmon resource to full
11 integration into the Canadian cash wage economy.

12 And your lordship has heard extensive evidence
13 from my friend, Mr. Macaulay, and of course throughout
14 this trial on that subject.

15 THE COURT: That's not what Dr. Daly says.

16 MS. KOENIGSBERG: Yes. But, in my submission, Dr. Daly's
17 evidence, when he deals with this subject, remains at
18 the generality and does not hold up in relation to the
19 actual evidence.

20 THE COURT: Thank you.

21 MS. KOENIGSBERG: We say since the time of contact the
22 plaintiffs and their ancestors have taken advantage of
23 the new economic opportunities that have arisen as a
24 result of the Claim Area's integration into the larger
25 regional economy. As the plaintiffs and their
26 ancestors have taken up jobs in the commercial
27 fishing, packing, railroad, forestry and other
28 industries, their reliance on traditional foods, such
29 as salmon, and traditional economic activities, such
30 as fishing, hunting and trapping, declined. Also
31 knowledge of traditional practices and places was
32 lost. It's at this point that the evidence of some
33 becomes relevant. It is evidence, and in my
34 submission, incredibly cogent evidence, that stopping
35 a particular way of life, that is, going to a
36 particular place en masse to fish and then stopping
37 doing that sometime after 1920, the place as a place
38 known to these people, on the evidence, appears to
39 have vanished. Because it is undisputed and
40 uncontradicted that not one witness, even those who
41 would have had a connection, as best we could tell, to
42 that place, mentioned it. And I think it's
43 significant, my lord, that the name Xsun that's
44 referred to by Loring, is obviously an Indian name.

45 A corollary of this shift in the local Indian
46 economy was a migration of people from remote villages
47 such as Kuldo and Kisgegas to settlements closer to

1 the new job sources in the growing transportation and
2 resource industries of the region. As such, the
3 abandonment of these villages is perhaps the best
4 example of the change from the traditional to the new.

5 Now we don't say that abandonment has any relevance
6 in fact to those sites because they have been made
7 into reserves, but it has to do with the evidence of
8 the, if you will, of the voluntary aspect of
9 abandonment of a way of life. Your lordship will
10 probably recall that Mr. Justice -- Mr. Macaulay went
11 through the migrations or the leaving of Kisgegas and
12 Kuldo, and from Mr. Loring documented, and these were
13 the traditional villages in the Sessional Paper
14 reports --

15 THE COURT: I didn't think Kuldo was a reserve, is it?

16 MS. KOENIGSBERG: Yes, it is. It was allocated by Vowell in the
17 late 1890s. It was so far north that there wasn't any
18 concern about settlement until later. Subsequently,
19 of course, it dwindled in population around '30 or
20 '31, before the last contingent of those people moved
21 into, I believe, Hazelton by and large.

22 And it's important in the context of the argument
23 on abandonment to put Kuldo and Kisgegas in a
24 particular context. I believe it was in 1902 in the
25 Sessional Report of Mr. Loring, he gives the
26 occupations of the Indian people, their general and
27 most predominant pursuits, and for all the other
28 Indian villages the pursuits are already shifted into
29 the cash, white regional economy, not Kuldo and
30 Kisgegas. Those were remote and those were still very
31 traditional, fishing, hunting, trapping. And it is
32 the abandonment of those villages for places closer to
33 the services and jobs, that is the evidence as to the
34 reason why they were abandoned, is important. The
35 sites themselves are irrelevant in this particular
36 lawsuit.

37 Abandonment of rights should not be lightly
38 inferred but the law does not support aboriginal
39 claims to a territory larger than that reasonably
40 relevant to the current use and occupation of
41 aboriginal peoples. The resurgence of interest in
42 traditional practices and territories arising out of
43 the Land Claims process should not be accepted as
44 evidence of continued traditional use. It is the
45 submission of the Attorney-General of Canada that the
46 change in the plaintiffs' entire way of life has led
47 to the general abandonment of occupation of village

Submissions by Ms. Koenigsberg

1 sites and camps -- and I draw your lordship's
2 attention actually to all of the winter camps which
3 were described by Mr. Loring -- other than reserve
4 lands, an abandonment of use of many remote areas
5 within the Claim Area.

6 And an actual territory by territory analysis of
7 that will be engaged in at the end of this week. And
8 that's going to take me into a new part, which is
9 relatively short, but now would be a convenient time
10 to take the morning adjournment.

11 THE COURT: All right. Thank you.

12
13 (PROCEEDINGS ADJOURNED FOR SHORT RECESS)
14
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16
17
18

19 I hereby certify the foregoing to be
20 a true and accurate transcript of the
21 proceedings herein to the best of my
22 skill and ability.
23
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27 Wilf Roy
28 Official Reporter
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Submissions by Ms. Koenigsberg

1 (PROCEEDINGS RESUMED AT 11:20)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Miss Koenigsberg.
5 MS. KOENIGSBERG: Thank you, my lord. I would like now to come
6 back to Part VI. And there will be more of this
7 coming, but there is no replacement for it, and
8 without being facetious, this is the general specific
9 argument on extinguishment, and Miss Russell will this
10 afternoon deal with the evidence of specific -- the
11 specific evidence of extinguishment. In the Statement
12 of the Attorney General of Canada's position on
13 extinguishment, diminution or abandonment of
14 aboriginal rights in the claim area filed with this
15 court December 11, 1989 and by addendum filed with the
16 court December 18, the Attorney General of Canada
17 submitted that the following types of use and
18 occupation rights have been extinguished, diminished
19 or abandoned where the evidence indicates activities
20 necessarily inconsistent with traditional use and
21 occupation or discontinuance of traditional use and
22 occupation. And we should stop there and put "clearly
23 and plainly necessarily inconsistent".
24 THE COURT: Clearly and --
25 MS. KOENIGSBERG: And plainly, and I would ask your lordship to
26 simply put in there our submissions on the difference
27 between the Hall and the Judson test as we say it now
28 has been developed in Sparrow. And that's to reflect
29 that if "necessarily inconsistent" had any ambiguities
30 in it, then those ambiguities must now be resolved in
31 favour of preserving the Indian interest, which should
32 make it clear and plain that there's been
33 extinguishment. We list there --
34 THE COURT: Do you mean ambiguities or do you mean
35 uncertainties, or both?
36 MS. KOENIGSBERG: I think I mean both, and I think it would
37 depend on the context of using that, but if there's
38 any ambiguity about what I mean, and of course I don't
39 think this is meant by the Supreme Court of Canada to
40 be a word play, but there is a danger that I'm sure
41 we're all, especially in this trial, aware of, of
42 making pronouncements, general pronouncements, and
43 using words when we're not on the ground and applying
44 them to see --
45 THE COURT: Certainly hasn't bothered the Supreme Court of
46 Canada.
47 MS. KOENIGSBERG: No, it certainly hasn't. And I'll just

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1 venture into that territory for a moment, if your
2 lordship is interested.
3 THE COURT: Yes.
4 MS. KOENIGSBERG: It's our submission that Sparrow does not
5 override or discount the Baker Lake test, and your
6 lordship will recall that Mr. Justice Mahoney
7 attempted to reconcile Judson and Hall's differing
8 descriptions. And in my submission, at bottom what he
9 did, Mr. Justice Mahoney, was to take the two and
10 marry them by applying them. When you're on the
11 ground and having to determine whether a legislative
12 purpose extinguishes the exercise of an aboriginal
13 right, call it a use-to-use conflict, that which is
14 necessarily inconsistent becomes clear and plain. And
15 that's not a word play when one takes examples. So,
16 for example, the one done by Mr. Justice Mahoney in
17 Baker Lake, he --
18 THE COURT: Well, you started out by you said "on the ground
19 when legislative purpose extinguishes a right on
20 use-to-use basis", what, depends on --
21 MS. KOENIGSBERG: Depends on whether the right can live with the
22 effect of the legislative purpose.
23 THE COURT: All right.
24 MS. KOENIGSBERG: Mr. Justice Mahoney put it, I'm going to
25 paraphrase a little bit, but he put it as it becomes
26 clear and plain that that's the intention of the
27 sovereign if the legislative purpose is necessarily
28 inconsistent. If you -- and another way of looking at
29 it, in the Sparrow decision, and that's in our book of
30 authorities, and it might be helpful to look again at
31 where they deal with -- the way the court deals with
32 the extinguishment test, and it's on page 16.
33 THE COURT: 16?
34 MS. KOENIGSBERG: 16.
35 THE COURT: Yes.
36 MS. KOENIGSBERG: They go through, interestingly, the two cases
37 where the tests have been applied, and that is Baker
38 Lake and Bear Island, and then they go back to Mr.
39 Justice Judson's view, which was developed, albeit, in
40 relation to looking at specific statutes, but not on
41 the ground in the sense that there was not evidence of
42 actual -- the actual exercise of aboriginal rights in
43 the Calder case. And Mr. Justice Judson's view, which
44 is I think fairly rejected in the Sparrow decision, in
45 applying "necessarily inconsistent" was prepared to
46 see that a series -- as he says:
47

1 "...a series of statutes evinced a unity of
2 intention to exercise a sovereignty
3 inconsistent with any conflicting interest,
4 including aboriginal title."
5

6 There was no analysis in Mr. Justice Judson's test of
7 given that the sovereign may have evinced an intention
8 to sell off -- to settle an area, could aboriginal
9 right still be exercised consistently with that
10 right -- with those -- that legislative purpose. And
11 in my submission, when Mr. Justice Mahoney looked at
12 the Judson test and looked at the Hall test, he said
13 that they can be put together, because when you look
14 use to use, you find it raises the issue of can the
15 right be exercised and the legislative purpose have
16 its effect and live together, and if they can, there's
17 no extinguishment, and if they can't, then there is
18 extinguishment. And I think Sparrow helps us this
19 far, that when we're applying the test, which I say in
20 fact Mr. Justice Mahoney did in Baker Lake, they're
21 saying to us "You must resolve any uncertainty or
22 ambiguity in favour of the Indian interest surviving".
23 And in my submission, there is assistance in an
24 analysis of the Sioui case, as we went through
25 yesterday, of the extent frankly to which the court is
26 prepared to go, albeit that was in relationship to a
27 treaty right, and there are differences and the
28 standards are higher, but still, it's instructed, in
29 my submission, that they looked and looked and looked
30 for a way to make those two uses, which appear to be
31 in conflict, live together so as not to diminish
32 either one. And it's in that sense that I say that
33 the Baker Lake test has not been overturned or
34 distinguished away, it's been put in a context that
35 requires the emphasis to be put on clear and plain.

36 THE COURT: Does -- Mr. Justice La Forest doesn't deal with
37 Baker Lake in this context, does he?

38 MS. KOENIGSBERG: You mean in Sparrow?

39 THE COURT: Yes.

40 MS. KOENIGSBERG: Yes, he does, just above there.

41 THE COURT: Mm-hmm, oh, yes.

42 MS. KOENIGSBERG: On page 16.

43 THE COURT: Yes, I see.

44 MS. KOENIGSBERG: He says:

45

46 "In the context of aboriginal rights, it could
47 be argued that, before 1982, an aboriginal

1 right was automatically extinguished to the
2 extent that it was inconsistent with a statute.
3 As Mr. Justice Mahoney stated in Baker Lake at
4 page 568:
5 'Once a statute has been validly enacted, it
6 must be given effect. If its necessary
7 effect is to abridge or entirely abrogate a
8 common law right, then that is the effect
9 that the courts must give it. That is as
10 true of an aboriginal title as of any other
11 common law right.'

12
13 See also Bear Island."

14
15 Which quotes Mr. Justice Mahoney. Then he goes on to
16 Mr. Justice Judson's view in Calder and says they're
17 adopting the words "clear and plain" from Mr. Justice
18 Hall. And in my submission, they don't quote --

19 THE COURT: Well, if it's clear and plain, then it's not
20 different from Judson's judgment, is it?

21 MS. KOENIGSBERG: Well, in my submission, again, it's a question
22 of application.

23 THE COURT: Mm-hmm.

24 MS. KOENIGSBERG: And that's why I say that Mr. Justice Mahoney
25 has the right idea of saying well, if we are actually
26 going to look at use to use and not on a more abstract
27 general level, we will require that it be clear and
28 plain. They can't -- it's really, I think, a part of
29 the words of Mr. Justice Mahoney, what is its
30 necessary effect, that is the statute in action. And
31 that's the effect the courts must give it. Now, I
32 don't think that that in any way takes away from the
33 test propounded by Hall that the intention must be
34 clear and plain.

35 Coming then down to the areas that will -- we will
36 be asking your lordship to apply that to, we say to
37 apply that test you will be looking at village and
38 fishing sites outside reserves, and I'm back onto page
39 1 of Part VI.

40 THE COURT: Yes.

41 MS. KOENIGSBERG: 2, fishing itself, outside reserves; 3,
42 hunting and trapping; and 4, berry picking. Those are
43 the traditional activities which have been identified
44 as forming the basis of the aboriginal rights of these
45 people.

46 Dealing then with village sites. All traditional
47 village sites have been made into reserves. Thus the

1 issue of extinguishment is not a relevant one in this
2 lawsuit.

3 Some traditional village sites, however, were
4 abandoned and not made into reserves. And we will be
5 dealing with those very specifically later on.

6 To the extent that any part of what is now
7 Hazelton was part of a claimed traditional village
8 site and was not made into a reserve, such part has
9 been extinguished by the cumulative effect of
10 settlement and land transfers in the area. Your
11 lordship will recall that the evidence is a bit
12 confusing on that, but there's quite a bit of evidence
13 on that subject.

14 Dealing with fishing, it is our position that
15 fishing as an aboriginal right has two distinct
16 components, the right to fish and the right to
17 continued use of fishing sites.

18 Dealing with the right to fish: Fishing in the
19 claim area is subject to the jurisdiction of the
20 Federal government. There is no issue raised in this
21 lawsuit impugning the Federal power over Indian
22 fishing, and therefore no argument is addressed to
23 this issue or the issue of its extinguishment. In any
24 event, that topic, except for its site specificity,
25 has been dealt with in Sparrow.

26 THE COURT: Yes.

27 MS. KOENIGSBERG: Dealing with fishing sites: Most claimed
28 fishing sites are covered by the reserve system.
29 Again, there is no issue in this lawsuit regarding the
30 right to fish at those sites.

31 Off-reserve sites have been claimed as traditional
32 Indian fishing sites. And those are set out on
33 Exhibit 358-22, and I believe Mr. Macaulay dealt with
34 those as well. These sites fall into two categories
35 to which this Defendant addresses its argument. Both
36 abandonment and extinguishment as concepts will apply.

37 There is no evidence of actual present use for
38 aboriginal food fishing at sites on the Kispiox,
39 Kitwanga or Kitsegukla Rivers or on the Upper Bulkley
40 or Upper Skeena River systems. There is evidence that
41 these are areas where active sports fishing takes
42 place. And your lordship will recall the testimony of
43 the fisheries officers in that regard, and we'll be
44 coming to that a little more specifically.

45 It is this Defendant's position that where all
46 fishermen have access to fishing sites, any exclusive
47 aboriginal right is extinguished.

1 Dealing then with hunting, and we canvassed this
2 in the context of it being a variation on the theme of
3 extinguishment that we set out yesterday, the
4 aboriginal right to hunt wherever, whenever or by
5 whatever means the Plaintiffs choose has been
6 extinguished by provincial legislation. The "right to
7 hunt over unoccupied Crown lands" is a right enjoyed
8 by all members of the general public, without special
9 rights accorded to Indians. Hunting regulations have
10 universal application: See the Wildlife Act.

11 In Colonial times, during the reserve allocation
12 process, the Governor assured the Indians that they
13 could hunt over unoccupied Crown lands. And I make
14 reference there to those references to Douglas'
15 speeches, and in particular Cayoosh and others. This
16 policy was continued during the post-Confederation
17 reserve allocation in the claim area. And I gave you
18 sites for all of those yesterday.

19 Thus, hunting in the claim area is not a classic
20 "aboriginal right" recognized by the common law, and
21 by that we mean an exclusive hunting right. It lacks
22 the necessary exclusivity. According to the evidence
23 anyone, including the Plaintiffs, could and did hunt
24 anywhere on unoccupied Crown lands. And we cite
25 examples from the evidence.

26 In addition, the granting of Guide Outfitter
27 certificates throughout the claim area is inconsistent
28 with such an exclusive aboriginal right to hunt.
29 Guide Outfitter certificates afford exclusive rights
30 to guide hunting parties in areas claimed as
31 traditional hunting grounds: See, for example, Mr.
32 Steciw's certificate. This is further evidence of a
33 use inconsistent with recognition of an exclusive
34 aboriginal right to hunt.

35 And here again is perhaps another illustrative
36 example of how when you try to put together a use
37 that's legislated, that is an exclusive right to
38 commercially hunt in a given area, a defined area, and
39 you put that next to the exclusive claimed exclusive
40 right to hunt, generally they cannot live together.

41 Other legislated uses have affected traditional
42 hunting lands in ways largely or entirely incompatible
43 with hunting. Examples of such activities are:
44 Grants of land in fee simple; Dedication of land for
45 public uses such as highways, railways, public
46 utilities, parks, townsites, game reserves; leases for
47 certain forms of resource tenure such as tree farm

1 licenses, grazing permits, petroleum and natural gas
2 permits, and mineral leases. See the site specific
3 analysis of extinguishment, which is coming later
4 today.

5 Dealing with the topic of trapping: Where
6 trapping has been continuous since the time of contact
7 it is still subject to extinguishment by inconsistent
8 uses. And I might say that, at this point, the
9 continuity of it is in very few places. For example,
10 where a tree farm license has been granted under the
11 Forest Act, and clear cut logging is the form of
12 logging required under the terms of that tree farm
13 license, then by the Plaintiffs' evidence, such a use
14 is inconsistent with the continuation of trapping. A
15 number of lay witnesses testified to the detrimental
16 effect of clear cut logging on their traplines. And
17 we've listed them there with their cites to their
18 transcripts.

19 While evidence of the extent of clear cut logging
20 is not entirely defined by the evidence in the case,
21 it is a fair statement that a number of the
22 territories have been affected by clear cut logging.
23 And we give examples from the evidence of the
24 Plaintiffs.

25 THE COURT: What would you say about an aboriginal right to hunt
26 and trap in an area that is clear cut, 15 years later
27 when there's a new forest is there a right to continue
28 during that time?

29 MS. KOENIGSBERG: That brings up, my lord, one of the issues
30 that is difficult but not, in our submission,
31 impossible of resolution, and we come back again to
32 defining the incidence of the aboriginal right. If
33 you say, and I think now it's clear on the law that
34 these rights have no proprietary aspect to them, if it
35 is a right to hunt or trap, that is, in fact,
36 non-exclusive in the sense that it can be done on
37 unoccupied Crown land, and you have a use, a
38 legislated use which is inconsistent temporarily, and
39 there's no evidence that it's going to be repetitious,
40 then in my submission the aboriginal right continues,
41 because to say that you can hunt here but not here in
42 year 1 does not mean that you've extinguished the
43 right to exercise that right or the ability to
44 exercise that right, you've only stopped it or
45 diminished it in the sense that you have stopped it
46 from being exercised here. If five years later you
47 can exercise that right there because there is no use

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1 that competes with it, in my submission you have not
2 extinguished that right, but it very much depends on
3 the actual analysis. What is the nature of the right
4 and what is the nature of the use. And in my
5 submission, what you see is a real spectrum of
6 evidence, most of it unfortunately, as will be brought
7 home to your lordship I believe when we take you
8 through the analysis of the actual evidence and trying
9 to apply it, these are not points that are easy of
10 resolution. Nevertheless, they depend essentially for
11 resolution on defining the right precisely and its
12 incidence and then looking at the actual legislated
13 use. Some legislated uses are very, in nature, quite
14 temporary. I don't think clear cut logging happens to
15 be one, because it takes quite a while for
16 regeneration. On the other hand, certain aboriginal
17 uses will live with the clear cut --

18 THE COURT: Well, take the case of an aboriginal right to trap,
19 and leaving out for the moment the exclusive part of
20 the equation, if Indian A has an aboriginal right to
21 trap on block 1 and government gives a trapline permit
22 to B for block 1, you would say that extinguishes the
23 aboriginal right, would you?

24 MS. KOENIGSBERG: Yes.

25 THE COURT: So breaching the aboriginal right extinguishes it?

26 MS. KOENIGSBERG: If it's clear and plain, and in that instance
27 I would say it's clear and plain, those two rights
28 cannot live together.

29 THE COURT: It seems to me that your proposition means that
30 there have been practically no aboriginal rights since
31 British Columbia entered Crown Colony status, because
32 from that time on the legislative purpose was
33 inconsistent with the continuation of the aboriginal
34 rights wherever they applied.

35 MS. KOENIGSBERG: Well, yes and no, my lord. We haven't done a
36 map to actually look and see. We've done the
37 analysis, and referencing it is a large enough task.
38 We haven't done that last part, and I don't think it
39 would be possible for us to do actually in the time
40 allowed, but to look at a map and see how much is
41 left, but I bring you back to two different kinds, if
42 you will, of aboriginal right. We can put them into
43 two different categories, and one of those categories
44 are the aboriginal rights that are related to
45 permanent occupation of areas. Now, the fact is that
46 those areas where the aboriginal rights reserves have
47 been made and they're there in their reserves, period,

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1 but there are also the places where aboriginal rights
2 have been exercised. Then there are the kinds of
3 rights which have a strongly amorphous quality about
4 them, that is they are not exercised over discreet
5 defineable parts of land, hunting. Trapping --
6 trapping becomes one which you could sort of, between
7 hunting and occupied site, in that you can define it
8 by a trapline, but it's a huge area, and within that
9 you can be doing a lot of things and not come into
10 conflict with settlement purposes. Those amorphous
11 type of rights are rights which can be exercised in a
12 wide area, today here and tomorrow there, and in my
13 submission if you look at them, if you define them
14 that way, then they continue in at least what I would
15 call a core area of this claim area. I believe that
16 those uses have in fact been abandoned where they're
17 far away.

18 THE COURT: But the aboriginal right that you're describing
19 there is one that is held in common with every other
20 citizen.

21 MS. KOENIGSBERG: Yes, with some exceptions.

22 THE COURT: Do you need a trapline license -- do you have to
23 have a registered trapline in order to trap in areas
24 that are not the subject of a previous trapline
25 license?

26 MS. KOENIGSBERG: I don't think I can answer that question. I
27 would expect you do. I'm getting nods from the
28 Province.

29 THE COURT: Yes.

30 MS. KOENIGSBERG: I believe you do.

31 THE COURT: Assuming you do, then the Indians' aboriginal right
32 to trap is extinguished on that basis, by your
33 argument, anyway.

34 MS. KOENIGSBERG: I don't --

35 THE COURT: The legislature says thou shall not trap without a
36 license.

37 MS. KOENIGSBERG: Well, in my submission, that would not
38 extinguish it, if we look at it as a right to trap.

39 THE COURT: They can trap.

40 MS. KOENIGSBERG: You can exercise that right to trap, yet
41 that's the argument about regulation.

42 THE COURT: Without a license?

43 MS. KOENIGSBERG: No. But you can do it with a license. You're
44 controlling it, but you're not doing away with the
45 ability to do it.

46 THE COURT: Then you're not better off than anybody else.

47 MS. KOENIGSBERG: Maybe, except that there probably is this

Submissions by Ms. Koenigsberg

1 residual part where it is -- well, at least after
2 1982 -- not possible or almost not possible to deny
3 that right to an Indian, but it's imminently possible
4 to deny it to a white person.
5 THE COURT: All right.
6 MS. KOENIGSBERG: And I perhaps could just pause here to
7 illustrate these kinds of problems, as I think, as I
8 said, they will become apparent to your lordship when
9 we go through this material territory by territory.
10 The way in which this case has been pleaded and
11 developed in evidence by the Plaintiffs and
12 responsively to that pleading and that evidence by the
13 Province, the actual evidence of the use-to-use level
14 is not very great. And we will be addressing your
15 lordship --
16 THE COURT: Actual evidence of use to use what?
17 MS. KOENIGSBERG: Conflict.
18 THE COURT: Conflict, yes.
19 MS. KOENIGSBERG: We've attempted to deal with what there is,
20 and it will certainly have, in my submission,
21 illustrative impact, but there can be no actual
22 inch-by-inch resolution on the basis of the evidence.
23 THE COURT: Well, some of the Indian witnesses said that "When
24 we're trapping, we're trapping pursuant to our
25 aboriginal right", and the Defendants have been saying
26 "You're trapping pursuant to your trapline license".
27 MS. KOENIGSBERG: Yes.
28 THE COURT: It comes -- on the ground it becomes the same thing.
29 MS. KOENIGSBERG: Well, in my submission, that's not --
30 THE COURT: But in the other view, that's a conflict.
31 MS. KOENIGSBERG: Yes. And it is our submission that on the
32 law, particularly as Sparrow has developed it, it is
33 not clear and plain that the registration requirement
34 of a trapline extinguishes the underlying right. It's
35 quite analogous to the fishing right.
36 THE COURT: Well, you told me a moment ago that granting a
37 trapline license would extinguish the right if granted
38 to a third party.
39 MS. KOENIGSBERG: Yes. I'm sorry, I must have misunderstood
40 your lordship. I thought you were saying that if an
41 area is given exclusively to someone else, a
42 non-Indian, then you've extinguished the Indian right.
43 THE COURT: But if there's aboriginal right to trap on
44 Blackacre, and the owner of that right requires a
45 trapline license for Blackacre, then he would say that
46 the extinguishment is not clear and plain and he can
47 trap under either umbrella.

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1 MS. KOENIGSBERG: I might have missed part of what your lordship
2 said. I'm sorry, can you repeat that.
3 THE COURT: If there's an aboriginal right to trap on Blackacre
4 and then he requires a trapline license for Blackacre,
5 then he can trap under either aegis or --
6 MS. KOENIGSBERG: And both at the same time.
7 THE COURT: And both at the same time.
8 MS. KOENIGSBERG: Yes.
9 THE COURT: And not be clear and plain that the aboriginal right
10 is extinguished.
11 MS. KOENIGSBERG: That's correct. In my submission, if you take
12 the test, if you adopt the test, that it has to
13 prevent -- to be clear and plain it has to prevent the
14 exercise of the right.
15 THE COURT: Yes.
16 MS. KOENIGSBERG: Then registration of trapline controls the
17 right, it does not extinguish it.
18 THE COURT: Yes, thank you.
19 MS. KOENIGSBERG: And coming back to the clear cut logging and
20 trapping conflict, there is a potential of conflict,
21 and there is the legislative purpose, which has a
22 definite effect on the ability to exercise the right.
23 And here what is interesting is one can speculate, as
24 we are left to do quite frequently in this case, about
25 whether we get down to a use-to-use analysis, and the
26 speculation would be well, probably you could trap in
27 a clear cut, but the Plaintiffs' evidence is that they
28 cannot. And in my submission there, you would have on
29 that evidence a clear and plain extinguishment, but
30 there is going to be substantial evidence of
31 substantial clear cutting where there is no evidence
32 of the Plaintiffs' actual trapping and no evidence of
33 the Plaintiffs saying that they've been interfered
34 with or that they've stopped trapping because of the
35 clear cutting. The instances where we actually have
36 evidence are small.
37 Dealing then with berry picking, we say that berry
38 picking is the only claimed aboriginal right which is
39 not subject to specific regulation. Therefore berry
40 picking, where the evidence indicates continued
41 exercise of the right, may subsist as an aboriginal
42 right in certain parts of the claim area. As a use,
43 berry picking would only be extinguished where all
44 other aboriginal rights are extinguished as well. And
45 that's because it can basically be done in a lot of
46 different areas, and unless the people -- any use of
47 the area has been extinguished or the area has been

1 abandoned and thus extinguished, it's very likely that
2 berry picking is still exerciseable. It would be
3 inconsistent with any legislated right to a use under
4 which the holder of that right can lawfully prevent
5 others from access to the area. Such uses would be a
6 grant of land in fee simple, dedication of lands for
7 use such as townsites, and resource tenures which are
8 inconsistent with the exercise of the right to pick
9 berries. For example, a tree farm license which
10 results in clear cut logging, one of the terms of
11 which is to require the holder of the tree farm
12 license to replant the area after logging, may also
13 require the license holder to use herbicides to
14 inhibit the natural growth of brush including the
15 desirable species of berry bushes. Such a forestry
16 management practise would remove the ability to
17 exercise the right to pick berries in a continuous
18 fashion. And by "continuous" we're again looking at a
19 considerable period of time, and this is just another
20 example of the relationship between the amorphousness
21 or ephemerality of the right and its ability to
22 continue in the face of conflicting uses.

23 Berry picking is a right which is, on the
24 evidence, largely non-exclusive among the Plaintiffs
25 themselves, but it can be done almost anywhere, and
26 therefore defined an instance in which that right
27 cannot be exercised because of conflicting legislation
28 on much of this area. You simply will not find that.

29 As a general proposition, it cannot be said that
30 all limited forms of resources tenures can be taken to
31 extinguish aboriginal rights. However, for the
32 duration of some resource tenures, it may be
33 impossible to exercise any aboriginal right. It must
34 also be pointed out that the cumulative effect of such
35 leases renewed over a long period of time could
36 extinguish aboriginal rights where, as illustrated
37 above, those leases are necessarily -- and I say there
38 again clearly and plainly -- inconsistent with or
39 adverse to the exercise of the aboriginal right. Many
40 of the acts dealing with limited resource tenures
41 provide for renewal.

42 And it's a matter of evidence whether -- and it
43 would be a balancing of is it so likely to be renewed,
44 has it been historically so, that it's going to
45 continue to be an area which is totally inaccessible
46 to the exercise of the right. And I end there with
47 the general -- leaving the issue of some of the

1 specific evidence which I think will again illustrate
2 these points that I've tried to generally put before
3 your lordship.
4 And I would just close that segment by saying that
5 if it was possible before the most recent Supreme
6 Court of Canada decisions to imagine making decisions
7 about the exercise of aboriginal rights and
8 extinguishment on a general basis, I think those
9 cases, both Sioui and Sparrow, dictate that we must
10 engage in this particular activity at looking at use
11 to use, albeit general statements can be made in the
12 sense that one can set out the principles of what has
13 to occur without determining it on the ground on
14 Blackacre it has occurred, and we will attempt to deal
15 with that issue, if you will, your lordship's wish for
16 a form of order, we will attempt to deal with that
17 when we put one before you.
18 THE COURT: All right. Well, let me leave this with you, and
19 you don't need to answer it now, but with relation to
20 Section 35, if an aboriginal right is one which, on
21 your submission, was inherently capable of being
22 extinguished or diminished by clear and plain
23 legislative interference, is that -- is that an
24 impediment in the right, or is that an inherent vice
25 in the right to use commercial language which existed
26 at the time of the Charter and the right is preserved
27 only subject to that inherent vice.
28 MS. KOENIGSBERG: Yes.
29 THE COURT: So Section 35, in your submission, doesn't freeze
30 these aboriginal rights forever?
31 MS. KOENIGSBERG: Those kind of aboriginal rights.
32 THE COURT: Yes.
33 MS. KOENIGSBERG: But it tells us, that decision goes on, I
34 believe, to make broader and to raise the standards,
35 if you will, of when that will have occurred.
36 THE COURT: Yes, all right.
37 MS. KOENIGSBERG: And Mr. Jackson has brought to my attention
38 that on page 2 of tab 8, where I have referred to a
39 series of American decisions, he can't find two of
40 them.
41 THE COURT: Which one?
42 MS. KOENIGSBERG: Sorry, it's tab 8, the abandonment argument.
43 THE COURT: Yes.
44 MS. KOENIGSBERG: Page 2, I refer -- I refer there to American
45 authorities, Williams and Chicago, U.S. and Cook, and
46 a few others. He has advised me that he's looked and
47 he cannot locate Williams and Chicago and U.S. and

Submissions by Ms. Koenigsberg

1 Cook in the Plaintiffs' authorities, and I will
2 double-check him simply because the plethora of their
3 authorities is so great and oddly described that he
4 might have missed it, but if not, we will make copies
5 of those and provide them to the court and they can be
6 inserted in our authority binder.

7 THE COURT: Yes, all right, thank you. You want to adjourn then
8 until two o'clock?

9 MS. KOENIGSBERG: Two o'clock, yes.

10 THE COURT: Yes, all right, thank you.

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

12

13

(PROCEEDINGS ADJOURNED AT 12:05)

14

15

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

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Submissions by Ms. Koenigsberg
Submissions by Mr. Macaulay

1 (PROCEEDINGS RESUMED PURSUANT TO LUNCHEON RECESS)
2
3 THE COURT: Ms. Koenigsberg.
4 MS. KOENIGSBERG: Yes, my lord. I have a copy of the two cases,
5 the American cases that had not been included in the
6 plaintiffs' authorities, and they should be added to
7 the Attorney General of Canada's binder of
8 authorities. And I believe I've handed that up, and
9 that will give you a new index.
10 THE COURT: Yes.
11 MS. KOENIGSBERG: And the tabs with the cases.
12 THE COURT: All right. Thank you.
13 MR. MACAULAY: My lord.
14 THE COURT: Go ahead, Mr. Macaulay. We can do at least two
15 things at once here.
16 MR. MACAULAY: I had made some submissions regarding the
17 evidence of Mr. Boys, the Indian agent in Hazelton in
18 1946 to '51, and Mr. McIntyre, who had that same
19 position in Burns Lake in the early '60s, and I had
20 referred to the evidence of Richard Benson, one of the
21 plaintiffs' witnesses. It was my -- up to that time I
22 had handed up submissions regarding these little --
23 the discussion of the various witnesses evidence. And
24 I would like to hand up -- I'm not going to make you
25 read it or make any further submission, but it puts
26 perhaps in a better organized form what my submissions
27 were in Volume 359 of the transcript. That should go.
28 Now, I'll give -- give you another group of unmarked
29 tabs. That's just for convenience, my lord.
30 THE COURT: All right.
31 MR. MACAULAY: Because I'll hand up something else. This is
32 simply a repetition of some of the submissions I made.
33 Now, my lord, I have to turn to the two other
34 federal witnesses we are not going to deal with. And
35 I don't think we have to deal with the evidence of Mr.
36 Palmer, but I had not mentioned the two fisheries
37 witnesses and I'm going to make brief submissions
38 concerning their brief evidence, and I will hand up
39 since there's --
40 THE COURT: Mr. Macaulay, I'm sorry, I've just looked at this
41 submission about Mr. Boys and Mr. McIntyre.
42 MR. MACAULAY: Yes.
43 THE COURT: I thought you said this had something to do with Mr.
44 Benson.
45 MR. MACAULAY: Yes. I refer in there to Mr. Benson.
46 THE COURT: He's mentioned in the second paragraph. There are
47 no references.

Submissions by Mr. Macaulay

1 MR. MACAULAY: He was referred to if you look in that tab, the
2 tab concerning Boys.
3 THE COURT: Yes.
4 MR. MACAULAY: The evidence of Boys.
5 THE COURT: Yes.
6 MR. MACAULAY: You'll see that at the last paragraph.
7 THE COURT: Oh, yes.
8 MR. MACAULAY: Paragraph number 12. What I say is right after
9 he left.
10 THE COURT: All right.
11 MR. MACAULAY: There was a fall in prices and traffic stopped
12 but didn't revive. And I have the references there.
13 That's simply the submissions following on those 12
14 paragraphs, really. It's the submissions following on
15 both Boys and --
16 THE COURT: Yes.
17 MR. MACAULAY: -- McIntyre.
18 THE COURT: Thank you.
19 MR. MACAULAY: Now, may I hand up just a single page plus
20 attached the references on Mr. Woloshyn. Your
21 lordship may recall Mr. Woloshyn was, and is, the
22 fisheries officer at Hazelton. Woloshyn is in charge
23 of the Hazelton sub-district. And his companion Mr.
24 Turnball was, and is, in charge of the Smithers
25 sub-district. They work together, and their two
26 districts cover the claim area. He has been there
27 since 1978. And the reference is there and the page
28 is there behind it. I don't think I need to refer to
29 the page though. Pages 22661-2.
30 And his duties include monitoring the fish
31 habitat, the sports fishing and the Indian food
32 fishing. And the reference is given there as well.
33 Because of the fact that the Kispiox River is a --
34 he described it as a major salmon producer in that
35 sub-district, Woloshyn pays particular attention to
36 the tributaries of the river, of the Kispiox River,
37 and he's concerned about the effect on the fishery of
38 the large beaver population there. And he mentioned
39 log jams and other things as well. So he knows that
40 river well, and he has to.
41 He says -- he gave evidence at page 22661-2 that
42 there has been no food fishing on the Kispiox River to
43 his knowledge, and that it's a sports fishing river.
44 Steelhead, I believe.
45 Loring identified 12 fisheries on the Kispiox
46 River. And I have that attached. That's the same
47 document we were using when we were calculating

Submissions by Mr. Macaulay

1 mileages.
2 THE COURT: Yes.
3 MR. MACAULAY: Well, the second half of the page that we were
4 using lists the Kispiox fisheries. That is the
5 Kispiox village fisheries on the Kispiox River. And
6 some of the names that were given by Loring correspond
7 with names on Mr. Morrell's map, map 22. That's
8 358-22. And I have the excerpt from that map here
9 too. You see that map, it goes sideways rather than
10 north, but that's how the Kispiox River is laid out on
11 that map.
12 THE COURT: Now, that map is the one you gave me earlier this
13 week which was put --
14 MR. MACAULAY: Now, Mr. Grant handed up another section of this
15 same map.
16 THE COURT: Yes. And I put it in --
17 MR. MACAULAY: You put it in this book.
18 THE COURT: I don't think I put it in this book.
19 MR. MACAULAY: I thought --
20 THE COURT: I may have. Let's see. Oh, yes. You're quite
21 right. I have it, yes.
22 MR. MACAULAY: This is another section of the same map, map 22.
23 It's 18 inches by two feet, or something like that.
24 THE COURT: All right.
25 MR. MACAULAY: And I've included this particular segment because
26 it shows the Kispiox River. And to the left --
27 actually to the north of Kispiox.
28 THE COURT: Well, did you intend to hand up a copy of that map
29 that you're looking at with these documents?
30 MR. MACAULAY: Yes, my lord.
31 THE COURT: Oh, yes, there it is. I found it. Yes.
32 MR. MACAULAY: See to the left of Kispiox we have a whole lot of
33 fishing sites along the Kispiox River. And a number
34 of them, not all, but a number of them correspond with
35 Loring's list. And I've set out the corresponding
36 ones there on page two of my little memo. For
37 instance, the very last, or almost the last one
38 anyhow, Luu'andilgon, and the one above it, Skonsnat.
39 THE COURT: Yes.
40 MR. MACAULAY: And Nadaat and Wiluuwak, all those four appear
41 on -- appear on Mr. Loring's list, albeit with
42 slightly different spellings.
43 THE COURT: Yes.
44 MR. MACAULAY: In fact the famous fishing, winter fishing place
45 at what Loring called Gotguidon, G-O-T-G-U-I-D-O-N,
46 appears here as Katgaiden, K-A-T-G-A-I-D-E-N. Others
47 don't correspond with the names given by Mr. Loring in

Submissions by Mr. Macaulay

1 1910, and that's about the time he produced that list.
2 There is no evidence of food fishing at any of the
3 Kispiox fisheries listed either by Loring or by Mr.
4 Morrell on his map 358-22 was given by any of the
5 plaintiffs. There was no evidence of use of those
6 stations.

7 And that's the only comments I wish to make about
8 Woloshyn's evidence.

9 THE COURT: All right.

10 MR. MACAULAY: It's interesting to note that Loring if you add
11 up the figures, you know, he does it the same way as
12 he had, but for the Skeena he starts at eight miles
13 above the village and then he goes another half mile,
14 another mile and a half, and so on. He locates
15 Gotguidon at 22 and a half miles. And it goes up many
16 miles beyond that his list of fisheries, 70 miles I
17 make it, into areas where there doesn't seem to be
18 anything there today.

19 And, finally, may I refer to Mr. Turnbull's
20 evidence. And that's equally brief. I'll hand up to
21 your lordship another page. If I can hand one up, my
22 lord, and I'll leave one on the registrar's desk.

23 THE COURT: All right.

24 MR. MACAULAY: Turnbull was Woloshyn's opposite number farther
25 south in the Smithers sub-district. Although, as I
26 call it, his sub-district included the west of the
27 claim area. I'm sorry, the east of the claim area as
28 well as the southern part of the claim area, and it
29 included the Morice Bulkley River system.

30 Of course, Turnbull's duties included the
31 controlling of the sports fishery and the Indian food
32 fishery.

33 And he gave evidence that the Indians do not fish
34 in the Smithers sub-district on the Bulkley River
35 upstream from Trout Creek. The food fishing he said
36 was done on the Bulkley River between Trout Creek
37 which is near Evelyn, Evelyn is just north of Smithers
38 and north of Catherine Lake, and Porphy Creek, which
39 is near Beament. That's the stretch in which the food
40 fishing is done.

41 The plaintiffs show fishing sites on the
42 Bulkley-Morice River systems south of Trout Creek on
43 Exhibit 358-22. That's that same map. And I've
44 included in here, my lord, another section of the same
45 map. And although it goes from right to left it's
46 actually showing the north to south. You can see
47 Smithers --

Submissions by Mr. Macaulay

1 THE COURT: Yes.
2 MR. MACAULAY: On it --
3 THE COURT: It doesn't have the Fourth Avenue Cafe.
4 MR. MACAULAY: It doesn't seem to, no.
5 But the southern end of that stretch would be
6 north of Smithers. But as you can see there are many
7 on the -- on the Bulkley-Morice system there are a
8 number of fishing sites listed by Mr. Morrell. That
9 is apparently outside the area where food fishing is
10 done today. And there is no evidence of any food
11 fishing on those sites on the Bulkley-Morice system.
12 The plaintiffs also show several fishing sites in
13 the McDowell Lake area and on the Burnie Lakes. Well,
14 there is no evidence of food fishing on or near
15 McDowell Lake, at least, following the obstruction of
16 the Copper River in the 1890's. And in that
17 connection I've attached Helgeson's, the fishery
18 officer, the original fishery officer Helgeson's
19 report of October 25th, 1905 in which he describes the
20 landslide that had blocked the Copper River or Zymoetz
21 River. Same thing. And he notes the abandoned smoke
22 houses. Of course there wouldn't be any salmon there
23 after that, or steelhead.
24 THE COURT: This Copper River is the one that runs more or less
25 across the bottom of the map, isn't it, or is that --
26 MR. MACAULAY: The Copper River doesn't show I don't think very
27 well in that map. The Copper River starts outside the
28 claim area below Kitwanga.
29 THE COURT: Yes.
30 MR. MACAULAY: And it rises into the claim area. And at the end
31 of that, the Copper River system, are McDowell Lake
32 and two other lakes.
33 THE COURT: I think this heavy line I see here, that's the
34 external boundary, I think.
35 MR. MACAULAY: The external boundary, yes, my lord.
36 THE COURT: I think that's what it is. Yes, all right. So the
37 Copper River runs from the McDowell Lake area down the
38 Skeena near Kitwanga.
39 MR. MACAULAY: That's right, my lord. The mouth is actually
40 outside the claim area I seem to remember, but it was
41 apparently at one time a salmon river, and is again.
42 They have cleared it now, I gather.
43 THE COURT: But it's shown here -- I'm sorry. It is shown here
44 just up into the document and slightly to the right
45 from Terrace is the Zymoetz, Z-Y-M-O-E-T-Z, River.
46 It's shown on this map.
47 MR. MACAULAY: Yes, that's the Copper River. It enters the

Submissions by Mr. Macaulay
Submissions by Ms. Russell

1 claim area and ascends to -- of course McDowell Lake
2 isn't the term used.
3 THE COURT: Nope.
4 MR. MACAULAY: But that's in behind below Smithers on this map.
5 THE COURT: Yes. It's behind Hudson's Bay --
6 MR. MACAULAY: -- Hudson's Bay --
7 THE COURT: -- Mountain from Smithers.
8 MR. MACAULAY: And in 1905 Mr. -- in this report Mr. Helgeson
9 noticed -- reported on in detail the slide. The rock
10 slide it was. And he noted that there had been
11 abandoned fishing camps. On the last page, now I
12 assume he's talking about the same area, he says in
13 the middle of the last page of his report:

14
15 "The Indians then stopped fishing there, and
16 have since taken their supply of salmon from
17 the Kitselas Canyon on the Skeena."
18

19 But whether those are Tsimshian that he's talking
20 about or they're Gitksan is impossible to tell. At
21 any rate, anybody -- and remember they were
22 Wet'suwet'en that were claiming -- it's either Wah tah
23 Ke'ght or Wah tah Ke'ghts, John Namox, who's claiming
24 McDowell Lake. And they used to go in presumably from
25 Moricetown. And they certainly wouldn't have done
26 that in that area after the rock slide. About Burnie
27 Lake there is no evidence at all of food fishing in
28 the Burnie Lakes.

29 My lord, those are my submissions concerning the
30 fisheries officers evidence. And I'll ask Ms. Russell
31 now to --

32 THE COURT: All right.

33 MR. MACAULAY: -- Deal with another aspect of the claim and the
34 issues before your lordship.

35 THE COURT: Yes. Ms. Russell.

36 MS. RUSSELL: Thank you, my lord.

37 My lord, I have handed up a new section to be
38 added into the Attorney General of Canada's final
39 argument. I can see them sitting right here.

40 THE COURT: Oh, all right. This replaces your present Section
41 VI?

42 MS. RUSSELL: No, it doesn't replace it, my lord. It will go in
43 behind the existing material behind Section VI, Roman
44 numeral Section VI.

45 THE COURT: Thank you. You go ahead. I can follow you.

46 MS. RUSSELL: Thank you, my lord. You should have tabs VI-A to
47 D.

Submissions by Ms. Russell

1 THE COURT: Yes, I do.

2 MS. RUSSELL: Good. And this is material dealing further with
3 the effect of extinguishment in the claim area. And
4 at tab VI-A you'll find an introduction to the
5 material which I intend to lead.

6 THE COURT: You go ahead. I'm almost there.

7 MS. RUSSELL: At tab VI-A I would ask you to refer to that
8 addendum.

9 This is an introduction regarding the legislative
10 activity taken from British Columbia's alienations
11 series of maps and supporting documents.

12 I would begin, my lord, by adding one qualifier,
13 and that is that throughout these materials we have
14 referred to the plaintiffs' named territories. That
15 is, of course, for reference purposes only. I would
16 not wish it to be taken as any kind of acknowledgement
17 or admission.

18 Under paragraph one I've noted we have not
19 included in the materials federal presence documents
20 relating to airports, Indian Reserves, communication
21 sites, et cetera, because we say they are not at issue
22 in this action.

23 In this material we've not included all purely
24 administrative alienations such as school districts
25 since we say such designations do not extinguish any
26 use and occupation rights. To meet the test for
27 extinguishment, my lord, we say the test must be use
28 to use. It also must be actual and not potential
29 extinguishment.

30 We have dealt with traplines separately from the
31 bulk of this material by listing non-plaintiff holders
32 of traplines in the claim area. This defendant
33 submits that where a trapline is held by a
34 non-plaintiff, through legislation, and that's section
35 42 of the Wildlife Act, that trapline holder or his
36 permitted designate has the exclusive right to trap in
37 the area defined by the trapline. We say, as well,
38 the sale of a trapline by a plaintiff constitutes an
39 abandonment and will be dealt with in our argument on
40 abandonment.

41 However, where a trapline in the claim area is
42 acquired by a non-plaintiff, it constitutes a clear
43 extinguishment of any aboriginal right to trap. This
44 legislative purposes of awarding exclusive trapping
45 rights in a given area under the Wildlife Act cannot
46 live with the exercise of any aboriginal right to
47 trap. They are clearly and plainly inconsistent with

1 each other.

2 And, my lord, I will not go through this for you,
3 but for your reference at Tab VI-C following in this
4 material there is an addendum there which sets out
5 traplines registered to non-Indians within the claim
6 area. And we have listed this by registered holder
7 alphabetically with a reference to the relevant
8 territory affected on the left-hand side under
9 territory. And then we've done the same index a
10 second time within that tab hoping that this will make
11 it more useful to you. Have you got it there?
12 There's a second -- it's the same index, my lord, but
13 in that second index we've simply organized the
14 non-plaintiff traplines in geographical order simply
15 attempting to go north to south. So you should have
16 two indices within that same tab.

17 The column on the right deals with the exhibit
18 from which the trapline number and holder have been
19 derived. Mr. Jackson has just asked that I clarify
20 that.

21 MR. JACKSON: I was interested, my lord, in under description
22 where there is a percentage is that percentage of the
23 trapline which is affected by the --

24 MS. RUSSELL: Thank you, Mr. Jackson. It is the percentage of
25 the territory approximately which is covered by the
26 trapline listed beside it.

27 THE COURT: Percentage of the territory within the trapline
28 licence?

29 MS. RUSSELL: Yes, that's right. Thank you, my lord.

30 MR. JACKSON: I take it that is your best estimate of the --

31 MS. RUSSELL: It is.

32 MR. JACKSON: Is that based upon the official count or is it
33 your own assessment?

34 MS. RUSSELL: My lord, it's based on such an official count at
35 looking at the size of the territory and trying to
36 gauge the amount of territory covered by the trapline.
37 So it is not official.

38 THE COURT: If I dug out Exhibit 995-41A-182 I could eyeball it.
39 And I might have to look at one of the other maps, I
40 suppose.

41 MS. RUSSELL: Yes, my lord. I believe that's correct. But I
42 think you would be able to find it from that exhibit
43 number.

44 THE COURT: This is counsel's estimate as --

45 MS. RUSSELL: Absolutely. To borrow a term from my colleague,
46 it is our submission. I'm sorry. I should have
47 specified that.

Submissions by Ms. Russell

1 THE COURT: All right.
2 THE COURT: What does the ATN stand for?
3 MS. RUSSELL: The ATN is the trapline number. Assigned trapline
4 number.
5 THE COURT: Yes. All right. Well, now, there's an overlay that
6 shows the traplines, isn't there?
7 MS. RUSSELL: Yes, there is, my lord.
8 THE COURT: Superimposed on 9A and 9B?
9 MS. RUSSELL: Yes, there is.
10 THE COURT: Or underimposed?
11 MS. RUSSELL: It's superimposed. I believe it is an overlay, my
12 lord. I should clarify, as I said, in my submission
13 this is the non-plaintiffs in the -- in fact that
14 title is incorrect. It's not Traplines Registered to
15 Non-Indians Within Claim Area, it is Traplines
16 Registered to Non-Plaintiffs within Claim Area.
17 MR. JACKSON: One more question. What does minus one percent
18 refer to in terms of that column?
19 MS. RUSSELL: My lord, I'm sorry, I don't know. That may indeed
20 be a typographical error. I don't know what that is.
21 I will find out and inform my friend.
22 THE COURT: Well, there is another one at the bottom of page
23 two.
24 MR. MACAULAY: And at the top, my lord.
25 THE COURT: Minus one percent. I think you have a macro problem
26 with your computer.
27 MR. MACAULAY: It's the ultimate in extinguishment, my lord.
28 MS. RUSSELL: I'll ascertain that at the break, my lord, and let
29 you know how that was judged.
30 I'm carrying on, my lord, back at page two of the
31 introduction, and I'm at paragraph number four. This
32 is under tab VI-A.
33 THE COURT: Yes.
34 MS. RUSSELL: Page two, paragraph 4.
35 We will deal with the four municipalities in the
36 claim area separately. And I have a short submission
37 at tab VI-D, but I will do that following this
38 material, my lord.
39 My lord, in many cases, it is impossible to state
40 whether a particular legislated use has acted to
41 extinguish an aboriginal right. The evidence is
42 insufficient.
43 However, where a legislated use is shown to be
44 present in the claim area and could have the potential
45 to extinguish aboriginal rights, a reference to the
46 registrar would be required to deal with each site to
47 determine a factual base from which to decide if the

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1 rights exercised could exist with the legislated
2 activity.

3 THE COURT: All right. Well, now, I've got to take you back to
4 paragraph 2 where at the end of that paragraph you say
5 "it must be actual not potential extinguishment."
6 MS. RUSSELL: Yes, my lord.

7 THE COURT: What do you mean by that, please?

8 MS. RUSSELL: My lord, I think it has to be a use to use. We
9 say, for example, a legislated use such as, oh, where
10 a tree farm licence has been granted perhaps, but
11 never used, never exercised, that until the time that
12 tree farm licence is acted upon there cannot be any
13 extinguishment. It's, I suppose, like a floating
14 charge; it sits there, but it has not been acted upon.
15 It has not extinguished the two uses as they are not
16 yet in conflict.

17 THE COURT: So legislation that permitted a tree farm licence in
18 an area, but with no licence yet granted would not in
19 your submission amount to legislation -- to
20 extinguishment?

21 MS. RUSSELL: No, my lord. That is our submission.

22 THE COURT: But if there is a licence issued -- well, not that.
23 If there's a licence issued, but the licensee doesn't
24 do anything pursuant to the licence then still there
25 wouldn't be extinguishment?

26 MS. RUSSELL: Yes, my lord, I agree.

27 THE COURT: If the licensee entered into some kind of occupation
28 and management of the area then you say there would be
29 extinguishment if the two couldn't be reconciled?

30 MS. RUSSELL: Yes, my lord.

31 THE COURT: With the tide going to the Indians.

32 MS. RUSSELL: Yes, my lord.

33 Going on at paragraph 7, my lord. Our listings
34 have been taken from the province's alienation series.
35 We have not tried to list such items as -- there are
36 such things as special use permits, woodlot licenses
37 or timber sale licenses, which were too small to be
38 depicted graphically. These items are listed in
39 Exhibit 50B of the supporting documentation to the
40 Provincial Forests Map which is Exhibit 50A. Such
41 alienations do exist in the claim area as has been
42 indicated in Exhibit 50B and would require locating
43 and examining on the ground to ascertain the extent of
44 use and compatibility with any asserted or
45 aboriginal -- any exercised aboriginal rights, I
46 should say, my lord.

47 My lord, the next section in this material is

1 simple, and I hope a summary of legislation of some of
2 the legislated uses which have come from the
3 alienations maps. And I have set out these
4 explanations to, I hope, marry with the following
5 chart. But I will go through these alienations and
6 their explanation, I hope, very quickly.

7 The timber supply designation which is set out on
8 Exhibit 48A is issued under section 6 of the Forest
9 Act. This is really a designation only and intended
10 to assist with planning for timber management, timber
11 resource management. It is in itself, we say, not an
12 extinguishment, it's simply a designation.

13 The next heading is Provincial Forest, and it
14 comes under section 5 of the Forest Act. And it again
15 is used to establish boundaries of forest lands and to
16 exclude areas not suited for forest uses. And forest
17 uses include such things as management of fish and
18 wildlife, water, grazing, general environmental
19 control and timber production. Again, this is a
20 designation, my lord, and is in itself not an
21 extinguishment. The same is true of public sustained
22 yield units.

23 Tree farm licenses are issued under section 27 of
24 the Forest Act. This is a tenure of Crown land and
25 sometimes private lands in combination where the
26 licensee may harvest timber in accordance with a
27 management plan approved by the Ministry of Forests.
28 A grant of such a licence may constitute an
29 extinguishment of aboriginal rights to hunt and trap
30 where clear cutting is a term of the management plan.
31 The plaintiffs' evidence is that clear cutting is
32 highly detrimental to trapping. There are references
33 to the plaintiffs' evidence on clear cutting at page 6
34 of Part VI of our summary of argument. In addition to
35 those references, my lord, concerning the effect of
36 clear cutting there are additional references in the
37 evidence, and I have set some of those additional
38 references out following in the top of page four and
39 top of page five and through page five.

40 I should add, my lord, that my source for this
41 material on tree farm licenses and other designations
42 is taken from the provincial supporting material as
43 I've indicated under each item.

44 We say, my lord, that a fair summation of the
45 evidence supports a submission that clear cut logging
46 under forest tenures which allow it is a legislated
47 use which is not consistent with trapping and which

1 may also be inconsistent with hunting, according to
2 the evidence of Alfred Mitchell and of Dr. Hatler.
3 And those references are contained in the ones I set
4 out there.

5 I've also listed forest chart areas as one of the
6 alienations which is listed in the series. And this
7 again is another designation to indicate forest
8 status. And it's not, we say, a -- does not have
9 extinguishing characteristics.

10 There are other cutting tenures that we have not
11 listed on the charts provided. These are: Timber
12 sale licenses, woodlot licenses, both of which involve
13 the right to harvest timber. And these tenures may
14 provide for clear cutting, and the comments under our
15 material and tree farm licenses apply.

16 In addition, my lord, we say that difficulty
17 exists with the forest tenures material. We have
18 little evidence of the actual on-the-ground locations,
19 territory by territory, of logging activity. Again, a
20 reference may be necessary to consider for each
21 territory where aboriginal rights have come into
22 conflict with the legislated use to determine if
23 extinguishment has taken place.

24 Forestry recreation sites are set out on the map
25 which is Exhibit 44A and the supporting documentation
26 is contained in Exhibit 44B. These are dealt with in
27 section 104 of the Forest Act.

28 Section 105 of the act says that such a site shall
29 not be used for a purpose which is incompatible with
30 recreation. And, again, my lord, this is really a
31 question of fact. Certainly I don't believe that
32 berry picking, and we submit, is not incompatible with
33 recreation. Hunting and trapping could be
34 incompatible with recreation, but if the rights can
35 co-exist then we say there is no extinguishment
36 through its use. Each site and its use will require
37 examination.

38 The next topic is grazing permits. And grazing
39 permits are mapped on Exhibit 54A and the supporting
40 documentation is in Exhibit 54B. These are issued
41 pursuant to the Range Act and administered by the
42 Ministry of Forests.

43 A grazing lease is -- the grazing permits exist
44 mainly in the southern areas of the claim area.
45 Grazing licenses are not shown separately but under
46 the Range Act provide for longer tenures than do
47 grazing permits.

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1 These may not be inconsistent with aboriginal
2 rights to hunt or trap if such hunting or trapping
3 takes place at a time when cattle are not present.
4 The Wildlife Act prohibits hunting on Crown land
5 subject to a grazing lease while the land is occupied
6 by livestock. This provision would act to diminish an
7 aboriginal right to hunt but not necessarily to
8 extinguish it.
9 Under section 5 of the Range Act it is clear that
10 grazing permits are to be part of a multiple use plan
11 for the area in which the licence or permit is issued.
12 Again, berry picking may not be affected unless by
13 the Trespass Act, section 4, which deals with the
14 enclosed lands.
15 Provincial highways. Well, my lord, I say that on
16 lands actually dedicated to public roads and highways
17 no aboriginal rights can be exercised. The same is
18 true for forest service roads. On those lands
19 themselves no aboriginal rights could be exercised.
20 Section 11 at the top of page nine are the areas
21 designated for use, recreation and I should say
22 enjoyment, not employment.
23 THE COURT: Where are you?
24 MS. RUSSELL: Page nine, item 11.
25 THE COURT: Oh, yes.
26 MS. RUSSELL: Areas designated for the use, recreation and
27 enjoyment of the public. I think our staff must enjoy
28 employment.
29 THE COURT: Yes.
30 MS. RUSSELL: These are contained in Exhibits 36A and 36B. And
31 these are simply areas set aside for recreational
32 purposes such as picnicking and camping.
33 And, again, we have no evidence of actual
34 competing or conflicting uses.
35 Again, we submit that recreational uses may be
36 inconsistent with hunting and trapping but again not
37 with berry picking.
38 Licenses of occupation are licenses granted
39 pursuant to the Land Act on terms set out within the
40 licence.
41 A holder of a licence of occupation under section
42 60 of the Land Act has the remedy of trespass
43 available against an unauthorized entry, so would be
44 able to prohibit the exercise of aboriginal rights on
45 the property covered by the terms of the licence to
46 the extent of the trespass to the interest held. This
47 right is also available to a holder of a right-of-way.

1 The terms of each licence of occupation would
2 require scrutiny to ascertain whether aboriginal
3 rights could co-exist.
4 Rights-of-way, my lord, are dealt with in the
5 Land Title Act. And, again, each right-of-way would
6 require examination to ascertain the extent of use
7 which each entails and its consistency with the
8 exercise of aboriginal rights.
9 Guide outfitter territories you've heard a great
10 deal of evidence about. The right to issue guide
11 outfitter licenses is set out in section 52 of the
12 Wildlife Act.
13 This legislation confers exclusive right to guide
14 for specified game species in a specific area for a
15 defined period of time and the right to guide in that
16 area as well.
17 We say, my lord, that such a use is inconsistent
18 with an exclusive aboriginal right to hunt and, if so
19 claimed, would extinguish it.
20 THE COURT: Why is that inconsistent?
21 MS. RUSSELL: It's the exclusivity, the nature of exclusivity of
22 that right which would be extinguished by the guide
23 outfitter right simply because the guide outfitter has
24 the clearly legislated right to be in the territory.
25 THE COURT: So it's the exclusivity of the claimed aboriginal
26 right that --
27 MS. RUSSELL: Yes, my lord.
28 THE COURT: That cancels it out rather than any exclusivity of
29 the guide outfitter licence?
30 MS. RUSSELL: Yes, my lord, that's correct. And you'll see, my
31 lord, we say that berry picking, trapping and fishing
32 could certainly co-exist with the issuance of a guide
33 outfitter certificate. Hunting could as well as long
34 as it's not claimed to be an exclusive right.
35 THE COURT: Well, you say -- I think Ms. Koenigsberg did say it
36 was claimed to be exclusive in the pleadings.
37 MS. RUSSELL: I think that's correct, my lord, in the pleadings
38 it is claimed to be exclusive.
39 THE COURT: Well, I guess the plaintiffs' evidence says it's
40 exclusive too.
41 MS. RUSSELL: I think they have tried to assert that, my lord,
42 you're correct.
43 THE COURT: Yet there is evidence that says these hunting rights
44 are not exclusive. Stanley Williams I think said it
45 wasn't exclusive. But that would go to the question
46 of whether it was a right at all then.
47 MS. RUSSELL: Yes, that's true, it would.

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1 MR. MACAULAY: Both Indian agents gave that evidence, my lord,
2 that it was non-exclusive. That Indians and
3 non-Indians alike hunted.

4 THE COURT: Yes.

5 MS. RUSSELL: Provincial parks --

6 THE COURT: Aren't you then saying that the claim to sovereignty
7 itself has wiped out the exclusive nature of the
8 aboriginal rights? If Governor Douglas had -- if you
9 can take him as the law at the time. I don't remember
10 now if he was governor then or not. I think he was.
11 And if he was governor and his word is law at that
12 time, if he said anybody in British Columbia can,
13 Indian and European alike, can hunt on the waste lands
14 of the colony then your argument would wipe out the
15 aboriginal right to hunt, would it not?

16 MS. RUSSELL: Yes, it would, my lord. As an aboriginal right,
17 as a separately claimed aboriginal right, that is
18 correct. Those rights are enjoyed by every citizen in
19 British Columbia. I believe the only qualification in
20 favour of the Indians at this time is that they hunt
21 without hunting permits. And I say that tentatively,
22 but I believe that to be the case.

23 THE COURT: Yes. All right. Thank you.

24 MR. JACKSON: My lord, in relation to the plaintiffs' evidence,
25 just for clarification, as my understanding of our
26 submissions in relation to the exclusivity, in talking
27 about exclusivity in relation to hunting, or to any
28 other incidence of aboriginal rights, we are talking
29 about exclusivity vis-a-vis other aboriginal peoples.

30 THE COURT: Well, I'm not sure. I suppose there's a merger that
31 comes to you, because you're also saying ownership.
32 If you say ownership that's exclusive as against
33 everyone.

34 MR. JACKSON: Yes, my lord. In claiming ownership we have said
35 that the pre-contact nature of the rights bespeak an
36 exclusivity vis-a-vis other aboriginal people.

37 THE COURT: Yes. All right.

38 MS. RUSSELL: We would say, my lord, of course the evidence
39 indicates other aboriginal people hunt in the claim
40 area as well. The evidence supports that.

41 THE COURT: I have a problem there, because I don't know whether
42 a claim to exclusivity that isn't always honoured is
43 any less a claim to an aboriginal right. The fact
44 somebody breaches it surely doesn't extinguish what is
45 claimed as an exclusive right.

46 MS. RUSSELL: Okay. I have to think about that, my lord. I
47 would bring your attention, my lord, that the Burns

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1 Lake people and the Sekanis hunt in the claim area as
2 well.

3 THE COURT: Okay. Thank you.

4 MS. RUSSELL: Moving along to provincial parks.

5 Provincial parks are dedicated to the preservation
6 of their natural environments for inspiration, use and
7 enjoyment of the public. That's set out in the
8 beginning of the Park Act, my lord. I believe it's
9 about section 3.

10 We say there, an analysis would be required to
11 ascertain if the assertion or the exercise of any
12 aboriginal right would be inconsistent with this
13 legislative purpose. Again, berry picking can
14 co-exist, while hunting, trapping and fishing in a
15 provincial park may be prohibited by regulation as
16 provided in section 33 of the Park Act.

17 This regulation set out in section 33 of the Park
18 Act can also apply to recreation sites.

19 And, again, we simply do not have the evidence of
20 specific regulations governing each park in the claim
21 area, nor do we have evidence of conflict with park
22 use.

23 Survey district lots. This provision in the Land
24 Act, section 64, provides for unregistered Crown lands
25 to be surveyed into district lots.

26 It's a survey designation to indicate land has
27 become part of the land registry system, usually for
28 purposes of alienation.

29 And, again, in and of itself, the designation does
30 not extinguish. Where the lots are alienated then
31 those alienations extinguish, among other things
32 unauthorized entry.

33 Hunting is prohibited on cultivated land without
34 authorization.

35 The Trespass Act prohibits unauthorized entry to
36 enclosed land.

37 Where private land is held within a municipality
38 the municipality has power to make bylaws restricting
39 use of firearms which would restrict the ability to
40 hunt.

41 The granting of title in fee-simple conveys with
42 it a common law right to quiet enjoyment of the
43 benefit of that title. This overriding private
44 property right, recognized in law, supersedes
45 aboriginal rights.

46 The grant of previously unalienated lands in
47 fee-simple post-1982 will be dealt with in our

1 argument on section 35 of the Constitution Act.

2 Mineral, placer and coal tenures. Again, each
3 tenure is going to have to be considered individually
4 to ascertain if it is being exercised, if the exercise
5 of the legislated use interferes with aboriginal
6 rights, and the extent to which the opposing uses can
7 co-exist.

8 The simple presence of the mineral tenure
9 indicated on a map, we say, does not demonstrate
10 sufficiently whether such tenure acts to extinguish
11 such aboriginal rights.

12 We do have evidence, my lord, in the case of the
13 existence in Equity Silver. And certainly on the site
14 of Equity Silver Mine and its surrounding settling
15 ponds, et cetera, I think it's safe to say that that
16 tenure would have acted to extinguish aboriginal
17 rights in the immediate area of the mine.

18 THE COURT: You mean they can't trap on the tailing pond?

19 MS. RUSSELL: Nor can they catch fish in the tailing pond, my
20 lord.

21 Water licenses are issued under the Water Act.
22 And, we say, they could the effect of extinguishing a
23 right to fish or to trap if the water diversion were
24 substantial. However, here we simply do not have
25 sufficient evidence to assert a wholesale
26 extinguishment through the issuance of water licenses.

27 The final alienation I'll deal with is historic
28 sites and the telegraph trail. And this is set out in
29 Exhibit 49. The existence and designation of a
30 historical site can, we say, co-exist with aboriginal
31 rights unless the site so affects habitat as to
32 preclude aboriginal use.

33 There is no evidence concerning historical sites
34 and use or interference with the exercise of
35 aboriginal rights.

36 Now, my lord, I hope that will serve as an
37 introduction to the next set of material which I have,
38 and I would like to take a moment just to explain it
39 to you.

40 MR. JACKSON: Before Ms. Russell does that, could she be so kind
41 to explain on page 12 she read to your lordship that
42 in relation to surveying lots that the granting of
43 title in fee-simple, "This overriding private property
44 right, recognized in law, supersedes aboriginal
45 rights". That word has appeared in a number of
46 federal government documents. Am I right in
47 concluding that it is in fact interchangeable for

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1 extinguishes?

2 MS. RUSSELL: Yes, certainly. I'm simply trying to vary my
3 vocabulary, Mr. Jackson. Thank you.

4 THE COURT: Are you talking now about VI-B?

5 MS. RUSSELL: I'm talking about VI-B, yes, my lord. Thank you.

6 My lord, this next long section, and I promise not
7 to read it to you, is our attempt to take the
8 alienation series and to set them out by territory in
9 a series of lists. The first index that you see
10 before you, my lord, is called a Map/Chart Index, and
11 in this index you will see on the left-hand side the
12 name of the plaintiff. The first one listed there,
13 it's listed in alphabetical order, is Amagyet/Wii
14 Eelast.

15 THE COURT: Is that a chief's name or is that territory or both?

16 MS. RUSSELL: I'll get to that. That is a plaintiffs' name,
17 chief's name Amagyet/Wii Eelast. Under that you will
18 see 24(a) L-A-X H-L-A G-A-N-T. Lax Hla Gant. And
19 then over to the right you'll see page 62. This is
20 the name of the territory, my lord, Lax Hla Gant
21 claimed by the plaintiff Amagyet/Wii Eelast. Over on
22 the right-hand side of the page you'll see a page
23 number. If you turn into the body of this material
24 you will see we have listed -- we have -- on the
25 bottom left-hand side of this material we have set out
26 page numbers. I have no idea why they didn't hit the
27 right-hand side of the page, but they're down at the
28 bottom left-hand side you see a page number. If you
29 turn to page 62 you will see 24(a). Amagyet/Wii
30 Eelast - Lax Hla Gant, which is the name of the
31 territory.

32 We have put the territories in the order set out
33 here, my lord, because this is the order in which they
34 have been dealt with by the plaintiffs in Volume VI of
35 their final argument. And if you turn one, two,
36 three, four, five, six -- following page 6 of the
37 index you will see a list of houses and territories.
38 This is simply the list taken from Volume VI of the
39 plaintiffs' argument, and in the order which the
40 plaintiffs have set the plaintiff's name and the
41 territory dealt with in argument out in that volume of
42 their argument. We have followed that format so that
43 when you are writing your decision, my lord, you will
44 have both sets of material following the same format.
45 When Mr. Wolf presents his argument on abandonment
46 tomorrow he will also follow this same order dealing
47 first with the territory of Gitludahl at Naadax De'et,

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1 Twin Lakes, second with Delgam Uukw with the territory
2 at Xsu Willie Wakw, Ironsides Creek, Gwinageese and
3 Sax Ge'en, et cetera as set out down that page.
4 THE COURT: So there are 60 plaintiffs.
5 MS. RUSSELL: And a whole bunch of territories.
6 THE COURT: Yes. All right.
7 MS. RUSSELL: And, my lord, as I promised I won't read this to
8 you.
9 THE COURT: Yes.
10 MS. RUSSELL: But I will take you just to the first page --
11 they're daring me to read it to you.
12 The first page, my lord, which says "Gitludahl -
13 Naa Dax De'et or Twin Lakes Territory". This is page
14 one of the body of material. And you'll see, my lord,
15 we set out there the judge's series tab number, the
16 overlay exhibit number, which is 1247(8) for the first
17 alienation, and the map -- the six by three map
18 exhibit number which is 50A for the first category
19 there. So that for provincial forests you can look at
20 tab 8 of your judge's series. If you wish to check
21 both sets of maps you can look at 1247(8), which is
22 the overlay exhibit number, and you can look at the
23 big base map, six by three map at Exhibit 50A. The
24 category of alienation is provincial forests. And
25 under comments, my lord, these are subjective
26 submissions on what these alienations mean or titled
27 or in this case 40 percent excluded means 40 percent
28 of the territory is not included in the Skeena
29 Provincial Forest.
30 THE COURT: Gitludahl is not the one, because that's the order
31 the plaintiffs dealt with it?
32 MS. RUSSELL: Yes, my lord.
33 THE COURT: But Amagyet which is first in alphabetical is at
34 page 62 because that's the way the alphabetical list
35 co-ordinates it.
36 MS. RUSSELL: That's correct, my lord.
37 THE COURT: But I take it that on the alphabetical list when I
38 get to Delgam Uukw I'll have page one?
39 MS. RUSSELL: No, you'll get Gitludahl. Gitludahl is page one.
40 You see down the index.
41 THE COURT: Yes. Thank you. So the two indexes refer to the
42 same body of material?
43 MS. RUSSELL: Yes, they do, my lord.
44 THE COURT: All right.
45 MS. RUSSELL: And I hope you that will find this helpful. You
46 will note as you flip through it that some areas, of
47 course, have very few alienations and some have

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1 dozens. Not dozens, a dozen.

2 THE COURT: Well, looking at 2(a), page two, Delgam Uukw -- oh,
3 I see. Yes. The two pages there are all -- are
4 all -- the first page is the Ironsides Creek. The
5 second one is Kwinageese?

6 MS. RUSSELL: Yes, my lord.

7 THE COURT: And the third one is Tenas Mountain?

8 MS. RUSSELL: Tenas Mountain. Yes, my lord.

9 THE COURT: All right.

10 MS. RUSSELL: My lord, would this be a convenient time to take
11 the break?

12 THE COURT: Yes. All right.

13 MS. RUSSELL: Thank you.

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

16

17

(PROCEEDINGS ADJOURNED)

18

19

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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Peri McHale,
Official Reporter,
UNITED REPORTING SERVICE LTD.

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1 (PROCEEDINGS RESUMED AT 3:20)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Thank you. Miss Russell.
5 MS. RUSSELL: My Lord, I had a couple of items I wished to
6 mention. First of all, the figures that show as minus
7 one percent.
8 THE COURT: Oh, yes.
9 MS. RUSSELL: I believe mean less than one percent. In other
10 words, the trapline or the grazing permit or whatever
11 the alienation shown is -- just touches the territory.
12 THE COURT: Where was that again?
13 MS. RUSSELL: It's in a number of places, my lord. You'll find
14 it -- I'm way over on page 70, but you'll find it in a
15 number of different places.
16 THE COURT: You're on page 70?
17 MS. RUSSELL: On page 70 there's a minus one percent.
18 THE COURT: Oh, yes, all right.
19 MS. RUSSELL: Grazing permits minus one percent.
20 THE COURT: Yes, all right, thank you.
21 MS. RUSSELL: I also wish to mention, my lord, that as far as
22 railways go, we have not listed railways, but the
23 right-of-way -- the railway itself is not an issue,
24 but the right-of-way is a Provincial Crown grant, and
25 I think is under rights-of-way. I'm informed that by
26 my colleague, Mr. Wolf.
27 THE COURT: Yes.
28 MS. RUSSELL: I also wish to mention that this format, in the
29 way that we have set this up and the order that we
30 have set it up, is the format which Mr. Wolf will use
31 tomorrow, I did mention that, but he will be dealing
32 with the Plaintiffs' evidence on use and occupancy,
33 and we are hopeful, my lord, that this will allow you
34 to take the Plaintiffs' argument and to then have
35 evidence of extinguishment by alienation to follow
36 through on -- with these charts and to follow through
37 as well with the use and occupancy evidence which Mr.
38 Wolf will present in the same format in the same
39 order.
40 My lord, at tab VI(D) I have a short submission on
41 municipalities in the claim area.
42 The following incorporated municipalities are
43 found in the claim area. The very small central
44 territory of Nikateen, the name of the territory is
45 Tam Gan Gyuuxs, and this territory touches on part of
46 the district of New Hazelton. The rest of the
47 district of New Hazelton falls within the territory of

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1 Spookw, and that territory is Stekyawdenhl territory.
2 It's also known as Roche de Boule.
3 The town --
4 THE COURT: Where do I find a map of -- the most convenient
5 place to find a map of the territory of Nikateen?
6 MS. RUSSELL: That would show up on --
7 THE COURT: If I go to 9A?
8 MS. RUSSELL: Yes. If you looked at 9A you will find that.
9 THE COURT: But 9A wouldn't show the incorporated municipality
10 of New Hazelton, would it?
11 MS. RUSSELL: No, my lord, you would also need the overlay which
12 shows the municipalities. sorry, I don't have that.
13 THE COURT: There's no overlay for municipalities.
14 MS. RUSSELL: Yes, there is, my lord. I have it at the end of
15 the submissions Exhibit 41A and 41B. I believe 41A is
16 the map of the municipalities. I will get the
17 reference number for the appropriate overlay, I
18 apologize for not including that.
19 THE COURT: Yes, all right. And 41A and B are maps of the
20 municipalities, are they?
21 MS. RUSSELL: The map is 41A, I believe, my lord. 41B is the
22 supporting documentation regarding the municipalities.
23 THE COURT: All right.
24 MS. RUSSELL: The town of Smithers is entirely within the area
25 claimed by Woos. The village of Telkwa is also within
26 the Woos territory. Houston is within the southern
27 territory of Wah Tah Kwets, and it also touches on the
28 claimed territory of Madeek, which lies almost
29 directly west of that southern Wah Tah Kwets
30 territory.
31 The southeastern territory of Hagwilnegh, the
32 Tseel K'ez, contains the village of Burns Lake. Of
33 course, the Municipal Act is the relative statute
34 here, my lord.
35 On page 2: Within the claim area, of the bundle
36 of use and occupation rights exercised by the
37 Plaintiffs, certainly hunting would be contrary to the
38 purpose of the Municipal Act, i.e. to provide for
39 orderly administration of a settled area, and allowing
40 hunting within the municipal boundaries would prevent
41 the realization of that legislative purpose. The
42 Municipal Act provides in Section 933 (1A) that the
43 Municipality may also by bylaw regulate or prohibit
44 the discharging of firearms. That would seem amicable
45 with hunting.
46 If trapping is asserted as an aboriginal right,
47 the same analysis would follow as with hunting. The

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1 use of traps within the boundaries of a settled area
2 would be dangerous to the inhabitants.

3 Fishing would be unaffected by the Municipal Act
4 since such an activity could be carried on on public
5 property inside municipal boundaries without
6 interfering with the legislative regime outlined in
7 the Act.

8 Berry picking, too, would be permissible,
9 although, as with fishing, it could not be exclusive
10 in nature.

11 Within the municipal boundaries of the area of the
12 district of Houston, the district of New Hazelton, the
13 town of Smithers, and village of Hazelton, and the
14 villages of Burns Lake and Telkwa, the aboriginal
15 right to hunt and trap has been extinguished. The
16 rights to fish and to pick berries may not continue on
17 private property within a municipality. As we say,
18 they may continue on public property.

19 I've also set out for your convenience, my lord,
20 other settled areas and their corresponding
21 Plaintiffs' claimed territory along side that. We
22 find that on page 3.

23 THE COURT: You haven't got places like South Hazelton here.

24 MS. RUSSELL: I don't have --

25 THE COURT: And Carnaby.

26 MS. RUSSELL: I believe those are -- oh, Carnaby I did miss.

27 I'm sorry, I just threw those in in the last moment to
28 try to list the other settled areas. I could
29 certainly add Carnaby.

30 THE COURT: I should add Carnaby?

31 MS. RUSSELL: Yes, do, please.

32 THE COURT: And what about South Hazelton?

33 MS. RUSSELL: And South Hazelton. I assumed South Hazelton was
34 included within the district of Hazelton.

35 THE COURT: Oh, it might, yes.

36 MS. RUSSELL: My friend, Mr. Plant, informs me that is correct.

37 THE COURT: All right.

38 MS. RUSSELL: But I will get the reference for Carnaby tomorrow.

39 THE COURT: It may not be an incorporated area.

40 MS. RUSSELL: No, none of these areas is an incorporated area.

41 THE COURT: Just settled areas.

42 MS. RUSSELL: Just settled areas. That's why I called them
43 that.

44 THE COURT: Is the sawmill at Houston within the village of
45 Houston? I suppose it is.

46 MS. RUSSELL: Houston is an incorporated area, of course, the
47 district of Houston, and as I understand it from

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1 reading the supporting documentation, it was largely
2 incorporated because of the sawmill.
3 THE COURT: What about all the sawmills at Burns Lake?
4 MS. RUSSELL: I don't know the answer to that, my lord.
5 THE COURT: Mm-hmm.
6 MS. RUSSELL: I'll find that out for you too.
7 THE COURT: All right. I suppose the Fulton River --
8 MS. RUSSELL: Pardon me?
9 THE COURT: I suppose the Fulton Fishery is on the -- no, that's
10 outside.
11 MS. RUSSELL: That's good, because I didn't know the answer.
12 THE COURT: No. It's outside the area. All right, thank you.
13 MS. RUSSELL: And the airport, of course, my lord, my colleague
14 asked me to mention, is not included. It is there, of
15 course, and it is on someone's territory, I suppose
16 probably Woos, but we say it is not in issue.
17 THE COURT: Yes.
18 MS. RUSSELL: The last item to which I wish to refer my lord is
19 at tab VII of our summary of argument. And these are,
20 in a narrative form, the evidence of alienations,
21 which you will find also in the chart.
22 We begin with the territory of Delgamuukw, and
23 there are three territories -- three of Delgamuukw
24 territories described in evidence. They are, as you
25 know, Kwinageese, the Ironsides Creek territory, and
26 the Tenas Mountain territory.
27 THE COURT: What's the difference between this and the chart
28 that you referred to?
29 MS. RUSSELL: There is no difference, my lord. This is simply a
30 narrative form.
31 THE COURT: All right.
32 MS. RUSSELL: And I've attempted to set it out and reference it
33 in many cases to the evidence of witnesses.
34 THE COURT: The chart, as you call it, is 7B, is it?
35 MS. RUSSELL: It's 6B, my lord.
36 THE COURT: I'm sorry, 6, yes. Thank you.
37 MS. RUSSELL: In Kwinageese the only significant alienation
38 appears to be a guide outfitter certificate issued to
39 a Mr. McGowan.
40 The Ironsides Creek territory has been logged
41 extensively, according to Mr. Muldoe, and there are
42 approximately eight registered traplines which cover
43 parts of this territory. Of the eight, only one is
44 registered to a member of the House of Delgamuukw.
45 Additional logging has taken place in the Ironsides
46 Creek territory around Mitten Lake and on the west
47 side of the Kispiox River. Jeff Harris stated in a

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1 1987 letter to Rae McIntyre that one reason he had to
2 stop trapping his trapline recently was because of
3 excessive logging. Mr. Muldoe also admitted that
4 there are many farms in the valley in this area and
5 that there is a recreation site at Mitten Lake.

6 A number of alienations have been made within the
7 Ironsides Creek territory, since it lies within the
8 Kispiox Valley and is not particularly remote. Some
9 of the land along the Kispiox River is privately owned
10 and there is a highway along the river known as the
11 Kispiox Road. A forest service road follows the route
12 of the old telegraph line as far as Deep Canoe Creek.
13 The Yukon Telegraph Trail is an historic site.

14 There are three recreation sites: One at
15 Elizabeth Lake and two on the Kispiox River on the
16 southern border of the territory.

17 There is a guide-outfitter certificate issued
18 which affects the Ironsides Creek area, to Dr. Igor
19 Steciw. Given the large amount of logging in this
20 territory, it is safe to assume that there are many
21 logging roads constructed off the main Kispiox
22 Highway.

23 Tenas Mountain. Mr. Muldoe testified that there
24 are farms in the area.

25 Much of this territory is taken up by Indian
26 Reserves, but there is heavy use of the territory by
27 both Indians and non-Indians. The main Kispiox Road
28 up the valley travels along the left bank of the
29 Kispiox River through this territory. Exhibit 43A,
30 the map of the provincial highways, depicts a number
31 of other roads in the area. Most of the territory not
32 covered by Indian Reserves is divided into district
33 lots, many of which are privately owned. There is a
34 forest recreation site on the lower Kispiox River,
35 which comprises nine acres. Dr. Igor Steciw holds the
36 guide-outfitter rights to the area and there is a
37 forest service road leading to a fire lookout on Tenas
38 Mountain.

39 THE COURT: Well, now some of those farmers in that area, does
40 the Love(?) family live there? I think they do.

41 MS. RUSSELL: I'm sorry, I don't know.

42 THE COURT: Would that be that you referred to --

43 MS. RUSSELL: The district lots.

44 THE COURT: Yes. Would it show whether they've been alienated
45 or not?

46 MS. RUSSELL: I don't believe so, my lord.

47 THE COURT: That's Exhibit 39A. You say survey district lots,

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1 that wouldn't show.

2 MS. RUSSELL: It doesn't indicate actually alienation of each
3 district lot. And I'm afraid that's another of those
4 situations where there would probably have to be some
5 sort of reference.

6 THE COURT: All right.

7 MS. RUSSELL: The next house is Luutkudziiwus, and he claims two
8 territories: The Madii Lii, Suskwa River territory,
9 and the Xsigwinha'uums, Hazelton Creek territory.
10 About the Suskwa River territory, Walter Wilson
11 testified that there is a forest service road up
12 Natlan Creek to "near the ridge". His evidence
13 indicated as well that there has been logging in the
14 general area of the Luutkudziiwus territory, but there
15 is no direct evidence of logging on the land claimed
16 by Luutkudziiwus.

17 The evidence in the provincial alienation series
18 of maps indicates that "Nine Mile Road" crosses part
19 of this territory. There are a small number of lots
20 along the Suskwa River across from the mouth of Harold
21 Price Creek. Dr. Igor Steciw has guide-outfitter
22 rights to this area. There are forest service roads
23 in the area of the Suskwa River.

24 The second territory is the Hazelton Creek
25 territory. Due to its proximity to Hazelton and the
26 Skeena River, the Hazelton Creek territory has
27 sustained a moderate to a high level of development.
28 The eastern third of the territory is surveyed into
29 district lots. Logging has occurred on this territory
30 and there is no evidence of consent to this by
31 Luutkudziiwus. Neil J. Sterritt gave evidence about
32 his grandfather's cedar pole operation in the area.
33 Mary Moore testified that Thomas Brown was on the land
34 making poles. There are numerous roads in the
35 southern and eastern portions of the territory,
36 including Highway 37 on the right bank of the Skeena
37 River. The alienations maps indicate, among others,
38 the following instances of extinguishment: There are
39 two recreation sites, one on the bank of the Skeena
40 and one at Keynton Lake. There are also two
41 rights-of-way granted. District lots cover about
42 one-third of the territory. Dr. Igor Steciw has
43 guide-outfitter rights to the area. And there is a
44 mineral tenure which has been granted in a small area
45 along the bank of the Skeena.

46 Moving on to the House of Wii Gaak. Wii Gaak
47 claims two territories: The An Gil Galanos and Xsu

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1 Wii Ax, or the Mosque Mountain/Sustut River territory,
2 and Xsi Min Anhl Gii, the Barker Creek territory.

3 THE COURT: You're just sampling some of these here, are you?

4 MS. RUSSELL: Yes, my lord, I am. Mr. Wolf's evidence tomorrow
5 will be much more detailed but will set out the
6 evidence of abandonment from the evidence in this kind
7 of format.

8 The major alienation in the Mosque Mountain/Sustut
9 River territory is the right-of-way of the British
10 Columbia Railway, which goes along the north bank of
11 the Sustut River and the left bank of the Skeena
12 River. James Morrison testified that the rail line
13 goes as far as the Mosque River. Neil B. Sterritt was
14 also aware that the B.C. Railway travelled through the
15 Xsu Wii Ax area. Mr. Sterritt testified to the
16 existence of a fishing lodge on the Sustut River and
17 of a cabin in the Birdflat Creek area. Thomas Wright
18 testified that he travelled with whites who were
19 prospecting in this territory. Provincial map 14
20 shows that there are four significant blocks of land
21 in the Motase Lake/Squingula River area subject to
22 some form of mineral tenure.

23 Dr. Steciw's guide-outfitting territory includes
24 the north-eastern and northern section of the Xsu Wii
25 Ax area. He reacquired rights to this territory in
26 1977.

27 Dr. Steciw testified that Reg Collingwood, another
28 guide-outfitter, has a camp at Sicintine Lake. Dr.
29 Steciw has also seen another of Collingwood's cabins
30 at Motase Lake.

31 There are a number of other alienations indicated
32 on the maps. There is a license of occupation at
33 Motase lake. D. Robertson, in addition to Dr. Steciw
34 and Reg Collingwood, has a guide-outfitter certificate
35 for part of this area.

36 The next one is the Barker Creek territory. Dr.
37 Steciw's guide-outfitter area includes the Barker
38 Creek area. The certificate which was marked as
39 Exhibit 1082 gives Dr. Steciw the exclusive right to
40 guide in the named area. He acquired this area in
41 1977 and began flying hunters into the area
42 immediately. He used the Chipmunk Creek landing strip
43 to gain access to this remote area, which has no roads
44 into it. In 1978, he flew in and prepared a camp at
45 the mouth of Foster Creek. That same year, Dr. Steciw
46 said he built trails up Foster Creek and, in addition,
47 built a small "fly camp" at the headwaters of Foster

1 Creek. In the spring of 1978, he flew in clients and
2 hunted along the shores of the Skeena River between
3 Foster and Chipmunk Creeks. In the spring of 1979, he
4 guided hunters into the Chipmunk Creek area and in the
5 spring of 1980 he guided bear hunters along the same
6 area he had guided on in 1978. In 1984, he conducted
7 a spring bear hunt on Foster Creek. He also said that
8 he flew up Barker and Cutfoot Creeks many times. At
9 no time was he told that he needed the permission of
10 Neil B. Sterritt to use this area.

11 The next house is Smogelgem, and, of course, it is
12 a Wet'suwet'en house.

13 There are five territories claimed by the House of
14 Smogelgem. They are Harold Price Creek, the Perow
15 territory, Parrott Creek, McQuarrie Lake, and Clore
16 Creek.

17 In the Harold Price Creek area, the only use
18 listed on the provincial alienations maps is shown on
19 map 13 and indicates that a G.M. McTague holds the
20 guide-outfitter certificate for the area comprised of
21 the Harold Price Creek territory.

22 In the Perow territory, as you would guess, my
23 lord, there is substantial alienation that has taken
24 place. There is a grazing permit issued for the
25 south-west corner and guide-outfitter certificates
26 issued to Barnet and Fontaine. These divide the
27 territory. There are two highways close to the
28 southern border, a number of district lots and a
29 license of occupation in the south-east corner of the
30 territory. In addition, there is a petroleum and
31 natural gas permit issued for the north-west corner
32 and another issued for the eastern portion of the
33 territory. A small area of the south-west corner is
34 subject to a minerals tenure. Finally, there is a
35 registered trapline held by two non-Indians -- two
36 non-plaintiffs that should read, my lord -- that
37 covers approximately 20 percent of the territory. The
38 holders' names are Gerald and Glen Ewald.

39 The next territory is the Parrott Creek territory.
40 The alienations evidence for this territory indicates
41 that grazing permits cover a large area along Parrott
42 Creek and part of the south-east portion. A
43 guide-outfitter certificate is held by H.S. Cowan.
44 There are two highways indicated, both on the north
45 shore of Francois Lake. District lots and a
46 recreational site are located on the north shore of
47 Francois lake. Also, there are three licences of

1 occupation along the north shore of Francois Lake. A
2 minerals permit has been granted for a small area in
3 the west-central portion of the territory. This area
4 is entirely taken up by traplines owned by
5 non-plaintiffs. The holder names are Westgard, Cowan,
6 Husband, and the following three overlap the territory
7 somewhat: Mentzner, Harrison, and Henson and Fuller.

8 A review of the McQuarrie Lake territory indicates
9 that substantial portions through the middle of the
10 territory have been alienated. Approximately 40
11 percent of the central area is taken up in district
12 lots. Most of the western half of the territory is
13 taken up with grazing permits and there is, as well, a
14 small one located in the central area. Two
15 guide-outfitters, Barnet and McIntyre, have rights
16 which comprise the entire area. There are five
17 highways indicated. There are six recreational sites,
18 one license of occupation and seven rights-of-way. A
19 large area in the east central portion of the
20 territory is covered by a minerals claim. H.W. Kerr
21 and Terry Olson are non-plaintiffs who hold a
22 registered trapline which overlaps part of the
23 territory.

24 Clore Creek is the next territory, my lord. This
25 is a very isolated territory on the western boundary,
26 as you will recall, my lord. The area is divided
27 between two guide-outfitter certificates held by
28 McGowan and D.W. McIntyre. However, the territory is
29 completely subsumed by a non-plaintiff trapline, the
30 rights to which Mr. Charles Skinner holds. He
31 acquired the trapline by sale from Rose Brown, the
32 Indian holder of rights, in 1945.

33 The next house, my lord, is Goohlaht. Goohlaht
34 has claimed six territories and they're listed below:
35 Uncha Lake, Whitesail Lake, Andrews Bay, Tahtsa Lake,
36 Nanika Lake, and Blunt Creek.

37 The Uncha Lake territory reveals a large number of
38 uses and alienations inconsistent with the continued
39 assertion of an aboriginal right. There are 20
40 recreational sites indicated in the alienations maps.
41 There are six licenses of occupation and one
42 right-of-way. Ninety percent of the territory around
43 Uncha Lake is divided into district lots. Again, this
44 is our assessment. There are four highways in the
45 area. Three guide-outfitter certificates intersect
46 the Uncha Lake territory. There are several grazing
47 permits issued. The Federal Government has

1 Departments of Fisheries and Transport wharves on
2 Francois Lake. Since this is a large territory, there
3 are 17 traplines registered. Of those 17 traplines,
4 only four appear to be held by Native trappers. These
5 Native traplines cover approximately five percent of
6 the Uncha Lake territory.

7 Whitesail Lake. Thomas K. Morris gave evidence
8 about this territory. The alienations indicated on
9 the map series are as follows: There are two licenses
10 of occupation, some district lots indicated in the
11 north-east portion of the territory on the lake, a
12 guide-outfitter license issued to H.B. Van Horlick,
13 and five traplines indicated, only one appears to be
14 held by a Native person.

15 Mr. Morris indicated at page 13 of Exhibit 671A
16 that the last remaining trapline, Native trapline, had
17 been sold in 1987 by his nephews to a non-Indian
18 person.

19 The next territory is the Andrews Bay territory.
20 The alienations map which covers the territory to
21 which Mrs. Irene Daum gave testimony, indicates the
22 following uses and alienations which would be
23 inconsistent with the exercise of aboriginal rights.
24 There are three recreation sites listed on map 3 in
25 the alienations series, with one license of occupation
26 shown. There are a few district lots indicated in the
27 south-east corner of the territory on Ootsa Lake. Two
28 guide-outfitter certificates have been issued for the
29 territory and are held by J.R. Goudreau and S.
30 Blackwell. There are seven traplines which cover the
31 claim area, of which three are held by non-plaintiffs.

32 Tahtsa Lake. The alienations evidence on the
33 territory testified to by Elizabeth Jack is as
34 follows: There is one license of occupation located
35 on the territory and four small district lots.
36 Guide-outfitter licenses to this area are held by S.
37 Blackwell and H.B. Van Horlick. Approximately 30
38 percent of the area is covered by mineral permits.
39 There are four traplines listed as on the area, three
40 of which appear to be held by non-plaintiffs.

41 Nanika Lake is the next territory, my lord. Jimmy
42 and Stanley Morris provided evidence about this area.
43 The alienations indicated on the map series show a
44 guide-outfitter certificate held by Barbara Peden and
45 a minerals permit which covers approximately 15
46 percent of the territory. Of the four traplines held
47 in the territory, one is held by a non-Native by the

Submissions by Ms. Russell

1 name of Harvey Scott.
2 THE COURT: Does that mean non-plaintiff?
3 MS. RUSSELL: Non-plaintiff, sorry.
4 Blunt Creek. The alienations maps for this area
5 indicate the presence of a small number of district
6 lots, a highway, and a guide-outfitter certificate
7 held by G.M. McTague. Clear-cut logging took place in
8 the 1960's along the western and southern parts of the
9 territory. This is from the evidence of Alfred
10 Mitchell. Logging continues in the area.
11 That concludes my submissions, my lord.
12 THE COURT: All right, thank you. What time do you want to
13 start tomorrow?
14 MS. RUSSELL: At ten o'clock tomorrow, my lord, please.
15 THE COURT: All right. And you know we have to adjourn for the
16 day at 12:30.
17 MS. RUSSELL: Yes, I do, my lord.
18 THE COURT: All right, thank you.
19 THE REGISTRAR: Order in court. Court stands adjourned until
20 ten o'clock tomorrow morning.

21
22 (PROCEEDINGS ADJOURNED)

23
24 I hereby certify the foregoing to be
25 a true and accurate transcript of the
26 proceedings herein transcribed to the
27 best of my skill and ability
28
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30

31
32 _____
33 Graham D. Parker
34 Official Reporter
35 United Reporting Service Ltd.
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