Vancouver, B.C.

May 15th, 1990

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: In the Supreme Court of British Columbia, this 15th day of May, 1990. Delgamuukw versus Her Majesty the Queen, at bar, my lord.

THE COURT: Mr. Plant.

MR. PLANT: My lord, there is one minor matter arising out of my submissions yesterday. When I said in the context of my submissions concerning the plaintiffs' pleadings that I would make reference, or I made reference to a statement which my friend Mr. Grant had made during argument when he said: Quite frankly the Babine are Wet'suwet'en. I wanted you to just make a note of the transcript reference, if you wouldn't mind, in the context of Part II, section 2.

THE COURT: I'm sorry. It's in Part II, section 2?

MR. PLANT: Yes. It was in the context of my submission on the pleadings and the characterization of the plaintiffs' case. Somewhere around page 19 is where I made the submission about the difficulty with the jurisdictional claim. And I did make reference to a statement which Mr. Grant had made in argument. The statement is that the Babine are Wet'suwet'en. And the transcript reference is 24832. That's the page. That's Volume 326, and it's around about line 24.

THE COURT: All right. Thank you. Well, while we're cleaning up yesterday's debris, I looked very briefly, and this morning I came across a passage, and I'm sorry I didn't get the date. I'm going to have it printed. But I think it was February 1988 in the course of submissions leading to the reasons for judgment I had given at that time Mr. Grant really said the plaintiff's position is that they seek a declaration of their aboriginal rights, and that it would be for the court to define those rights. He said they may include ownership or they may include jurisdiction or they may include something else. That it's a matter of definition rather than that we're seeking ownership and jurisdiction only.

Now, I haven't found it, but I think there's another clearer statement by Mr. Rush to the same effect, and that's what I wanted to say again that at least the course of the trial suggests that the -- that it is not an all or nothing proposition.

1 Now, as I say, you've got lots of time to persuade
2 me otherwise, Mr. Plant, but that seems to me to be
3 what the course of the trial indicates.
4 MR. PLANT: Well, if I can just say this, my lord, my submission
5 yesterday was directed to the question of what claim
6 can be supported on the pleadings.
7 THE COURT: Yes.
8 MR. PLANT: And as to what counsel have said ought to be
9 inferred from the pleadings. That is really a matter
10 of argument, and it certainly is a matter that the
11 plaintiffs have argued at some length, and we are
12 going to argue it again when it comes time to address
13 the question in the larger sense. That is beyond just
14 the pleadings what can your lordship do in this case.
15 THE COURT: Yes.
16 MR. PLANT: I haven't found the passage where Mr. Rush is
17 reputed to have said what he said. I have found the
18 passages that your lordship has just made reference
19 to. I've also found passages from 1987, June of 1987,
20 I think Volume 28 or 29 in the transcript.
21 THE COURT: I have no doubt Mr. Rush said very clearly up in
22 Smithers in June of '87 that it was all or nothing.
23 MR. PLANT: That's my recollection too from having seen the
24 transcript. I'll leave it at that, if I may, my lord.
25 THE COURT: Yes. All right.
26 MR. PLANT: It is an issue that we'll be returning to.
27 THE COURT: All right.
28 MR. GRANT: Mr. Rush -- if I may say on that point, Mr. Rush and
29 I discussed it, and your recollection is our
30 recollection as well. And we are going to find that
31 reference of Mr. Rush's as well. So I think your
32 characterization of my statement of February of '88 is
33 correct.
34 THE COURT: No doubt about that. I read it this morning.
35 MR. GRANT: Yes.
36 THE COURT: And I even thanked you for such a clear statement.
37 MR. GRANT: Sometimes it happens, my lord.
38 THE COURT: Thank you.
39 MR. PLANT: I was in part II section 3 of the submission and --
40 THE COURT: Oh, just before you get launched, Mr. Plant, can I
41 ask what Saturday was it that Mr. Goldie mentioned
42 that we might consider spending some time here?
43 MR. PLANT: The 26th.
44 MR. GOLDIE: The 26th I believe, my lord.
45 THE COURT: That's not this Saturday, it's the following
46 Saturday.
47 MR. GOLDIE: That's correct. I think we were, I think it was

1 pointed out to us that this coming Saturday is a long
2 weekend.
3 THE COURT: Yes.
4 MR. GOLDIE: And the Saturday that we propose then is Saturday
5 the 26th.
6 THE COURT: Yes. Well, I'd like to say, notwithstanding the
7 long weekend, if everyone else found it more
8 convenient I would rather sit this coming Saturday
9 than the following Saturday, but it's not a matter of
10 the greatest importance.
11 MR. GOLDIE: Yes. The alternative that we had looked at is
12 Saturday the 2nd of June.
13 THE COURT: Well, even that would be better, although -- well,
14 it wouldn't really. I have to fly east the next day
15 and I really would like to have a day off somewhere in
16 here.
17 MR. GOLDIE: I'll consider that, my lord. The scheduling is
18 such and the people involved is such that --
19 THE COURT: Yes.
20 MR. GOLDIE: That we had other reasons for not selecting the
21 19th. I think the reminder about the 19th came
22 from -- from people on our staff and not from counsel.
23 THE COURT: Yes. Well, I understand. If it can be arranged
24 that we sit this Saturday rather than the following
25 Saturday I'd be grateful, but it isn't a matter --
26 MR. GOLDIE: I'll take out Saturday the 26th then, and if we sit
27 on the 19th it will be in place of that, or if we
28 cannot arrange the 19th we'll plan on the 2nd.
29 THE COURT: I don't think I want to sit on the 2nd. I just
30 don't think I should. I have to fly all day
31 Saturday -- Sunday, rather, and sit for the rest of
32 the week in Halifax and fly back and resume here. I
33 think I should take a day off in there somewhere.
34 MR. GOLDIE: I take your lordship's point. We'll look at our
35 timetable and see what we can do about it.
36 MR. GRANT: My lord, was it planned you would be sitting on the
37 1st?
38 THE COURT: I can sit for a couple of hours. If we start at
39 nine I can sit until eleven.
40 MR. GRANT: On the 1st, on the Friday.
41 THE COURT: Thank you. Mr. Plant.
42 MR. PLANT: I had reached page 36 of section 3. I have a couple
43 of --
44 THE COURT: Yes.
45 MR. PLANT: -- Points to make in the context --
46 THE COURT: I'm sorry. Paragraph 36, did you say?
47 MR. PLANT: Part II, section 3, page 36.

1 THE COURT: Oh, page 36. I thought you said paragraph 36. Yes.
2 Thank you. Yes.
3 MR. PLANT: Where I am, my lord, is in the middle of a
4 submission that proceeds on the premise that your
5 lordship finds that oral history is admissible, and
6 then issues of weight arise.
7 There are a couple of points that arise out of
8 what I said yesterday that I should make before I
9 proceed with this submission. The first is this, my
10 lord: I made a distinction yesterday between what
11 I've been calling the adaawk and kugax evidence on the
12 one hand, and on the other evidence which is oral, an
13 oral recollection of historical events that may not
14 have achieved the status of an adaawk. And I gave
15 your lordship some examples of what were in my
16 submission clearly adaawk or kugax evidence, but I may
17 have left your lordship with an erroneous impression
18 about the ease or -- yes, the ease with which one can
19 distinguish among these types of evidence. And I must
20 say that there is evidence that makes it difficult to
21 distinguish or draw a line between where an oral
22 history is an adaawk and where it becomes something
23 else. And I want to make reference to Volume 9 of the
24 transcript where in cross-examination of Mary McKenzie
25 there was a discussion about what was adaawk and what
26 wasn't. In Volume 9, page 534. It might be easier if
27 your lordship had an opportunity to read along.
28 THE COURT: Oh, all right.
29 MR. PLANT: And I can hand up a copy of the transcript.
30 THE COURT: Thank you. I think I know the passage to which
31 you're referring.
32 MR. PLANT: Starting at line five.
33
34 "Q So just changing this subject slightly now,
35 the adaawk includes more than just the
36 history of the House, doesn't it? Does
37 that mean it includes the boundaries of the
38 territory?
39 A Yes.
40 Q And that includes songs, names, crests?
41 A Yes.
42 Q Nax Nik?
43 A Yes.
44 Q Does the adaawk refer to everything that
45 happens at a Feast?
46 A Yes.
47 Q And you -- I think it may have been in your

1 evidence, but when this case, this court
2 case that we are involved in right now,
3 when it's talked about at a Feast, it will
4 become part of the adaawk too, won't it?
5 A Yes. It will be part because all the head
6 chiefs of each House are present and
7 involved in this court case, and it has to
8 be the part of every House that -- who are
9 the plaintiffs here, the witnesses, that
10 has to go on the adaawk of the House.
11 Q If there is a meeting of the chiefs that
12 takes place outside of the Feast Hall, and
13 say they gather together to decide
14 something important, will that be also --
15 will that become part of the adaawks of the
16 various chiefs?
17 A Yes.
18 Q Now you testified on Thursday about a
19 potlatch which -- or rather a Feast, sorry,
20 which John Smith held while you were away
21 in residential school in about 1930; do you
22 remember that?
23 A Yes.
24 Q And as I recall, you said that that Feast
25 became part of the adaawk of all of the
26 Houses that took part, all of the Houses
27 and clans?
28 A Yes."
29
30 So at least Mrs. McKenzie has a view of the adaawk
31 which is broader than the view that I was putting
32 forward to your lordship yesterday, that events as
33 recently as 1930 or afterwards could become part of
34 the adaawk. There is little magic in the distinction,
35 except a magic which is created by the submission that
36 the adaawk by virtue of the sifting process that is
37 said to occur at a feast has some special status. And
38 I've already made the submission with respect to
39 whether there is any sifting process in fact. But the
40 particular point I wanted to make, first of all, is
41 that the line that I drew yesterday is much harder to
42 draw in the evidence than I may have suggested
43 yesterday.
44 The second point is that the considerations that
45 I'm speaking about, or about to speak about, and spoke
46 about yesterday afternoon, the considerations of
47 weight that I say affect oral history affect all kinds

of oral history, not merely adaawk. And they would affect, for example, the Barbeau-Beynon narratives of the Kitsegukla fire, which I referred to in an earlier part of the submission when I said I wasn't sure those were adaawk or not. Well, whether or not they are adaawk if you are having to consider the weight that should be attached to these oral traditions I say that the criteria that I'm referring to in this part of my written submission are applicable.

So I was about to begin with paragraph 70 of the written submission where I say one of the best examples of the problems of interpreting and using oral history relates to the history of the warrior Nekt. And using the words from the plaintiffs' argument, "of Battle Hill (which) is well told among the Gitksan from the beginning, when Nekt's mother is kidnapped by the Haida, to Nekt's final battle with the Nishga". And Dr. MacDonald has in an article, which is Exhibit 1188-2, attempted to reconstruct the history of Nekt. He was a warrior who allegedly lived at the Kitwanga fortress in proto-historic and perhaps historic times. And this is what Dr. MacDonald has said about the project of historical reconstruction of these kinds of narratives.

> "Formal analysis of the many variants of the Nekt story would undoubtedly produce many conclusions of historical and anthropological significance. A structural analysis should reveal a set of relationships between Gitksan families and villages as well as wider set of relationships to other groups as far separated as the Haida, the Haisla, and so on. In many respects the Nekt story is constructed of architypal elements that occur in many other warrior stories from the North Coast. Undoubtedly there was a historical person called Nekt who did have a fort on the Kitwanga hill, but his existence was sufficiently far back in the past..."

And I pause there to say two or three centuries ago.

> "for the exact localities of his adventures to have been readapted to regional needs. In some accounts his mother comes from Kispiox. In

1 others, she is from Kisgegas or from a Nass
2 River village. Stories also vary as to where
3 Nekt resettles after he leaves the Ta'awdzep at
4 Kitwanga and even to the place where, and the
5 method whereby, he is finally killed."
6
7 My lord, the work of Dr. MacDonald and his
8 eminence as an anthropologist and archeologist was the
9 subject of favorable comment from plaintiffs'
10 witnesses and defence witnesses. Even Dr. MacDonald
11 has here acknowledged the great difficulties one
12 experiences in attempting to reconstruct an accurate
13 picture concerning the events of this individual who's
14 said to have lived in the proto-historic and perhaps
15 even historic period. Dr. MacDonald faced this
16 difficulty even where there was, as there is in the
17 case of Nekt, archeological evidence available to
18 "independently verify" the Nekt story. And the
19 archeological evidence is the dig at the Kitwanga
20 fort.
21 I say, moving from the example of Nekt, that
22 perhaps in the context of this case the most telling
23 evidence, or lack of evidence, corroborating the oral
24 histories is the failure of any archeologist, from
25 Harlon Smith down to Sylvia Albright, to find either
26 Temlaxan or Dizkle.
27 And Mr. Willms will be dealing with that in the
28 section of the argument later, my lord, in some
29 detail.
30 I say, that apart altogether from the rigours of
31 the law of evidence, the evidence of oral histories
32 which the plaintiffs have led fails to meet the
33 rigours of the discipline of ethnohistory.
34 And really in this context the principal witness
35 of the plaintiffs is Susan Marsden, who was called by
36 the plaintiffs, as I set out here in the extract from
37 the submission or the introduction to her evidence.
38 She was called as an:
39
40 "expert witness to give opinion evidence on the
41 history of the Gitksan and, as an aside, to the
42 extent that it is relevant, and related groups,
43 based on their oral histories or Adaawk,
44 including opinion evidence on the history of
45 the migrations of the Gitksan, the major
46 historical events -- and I use that word in
47 terms of oral history -- major historical

events, both pre and post contact and the

development of the laws and the socio-political institutions, through their history."

Now, Ms. Marsden's project, in effect, was to be described as an internal chronology of the adaawks. There is reference to external verification, but I will come back to the extent to which there really was a reference.

I have now in this part of my summary summarized Ms. Marsden's credentials and the fact that she was adopted into a Gitksan House, and that her ex-husband and children, and her father-in-law and mother-in-law are all Gitksan.

In her cross-examination on qualifications, Ms. Marsden acknowledged she was not an anthropologist and she took the position, if I can put it that way, that the study of oral history, and these are her words, I believe, "is not considered one of the subjects in anthropology".

I don't actually think those are her words, but I better just check. No. This reference here is in the yellow book, and I won't take your lordship to it, but the question was:

"Q And, in fact, it's your view that the study of oral history is not considered one of the subjects in anthropology?"

Her answer is:

"A Not as a subdivision of anthropology. However, anthropologists have looked at the oral histories and as you saw this morning, realized that there was meaningful historical content in them and they have worked with them in varying degrees, once they become anthropologists, but not as part of their training in anthropology, to my knowledge.

Q So that the study of oral history is not considered by you to be one of the subjects in anthropology?

A I didn't -- I said it's not available."

MR. GRANT: Well, there's a further explanation.

1 MR. PLANT: Yes. It goes on for the following page and --
2 MR. GRANT: Just the next answer clarifies what she meant.
3 MR. PLANT: Well, your lordship can read that page, and the
4 whole of the next of the page. It all winds up with
5 line 25 on the next page. That's page 16976 where she
6 says:
7
8 "A Yes, as long as you take the word subjects
9 as a -- in the sense of pursuing it as a
10 branch of anthropology. It's been dealt
11 with by anthropologists but you can't apply
12 to take a PhD and specialize in the study
13 of oral history as history."
14
15 And over the page to page 39 Ms. Marsden said that
16 the field of oral history was "something that's
17 starting", and she alleged that "there aren't writings
18 on oral history except for Vansina". But later in her
19 evidence she admitted that she had read Dr.
20 Cruickshank's, or had seen at least, and perhaps had
21 also read, Dr. Cruickshank's book or critical
22 bibliography Approaches To The Analysis Of Oral
23 Tradition. And that's Exhibit 1051-2, my lord. But
24 that when she had seen that that was after she had
25 prepared her opinion report several months before
26 giving her evidence. And I suggest that perhaps Ms.
27 Marsden first became aware of this bibliography after
28 it was referred to in evidence by Dr. Daly and
29 described it in these terms. He said:
30
31 "...there's been a collection of them made by
32 Dr. Cruickshank at the Department of
33 Anthropology at UBC, and she has done an
34 annotated bibliography of most of the major
35 sources, and there must be a couple of hundred
36 titles on that list."
37
38 Well, contrary to Ms. Marsden's contention, in my
39 submission, oral history was admitted by other of the
40 plaintiffs' witnesses to be clearly a "recognized
41 subject in the field of anthropology". And if your
42 lordship reviews the evidence given by Ms. Marsden in
43 her cross-examination on qualifications what you will
44 find is that while certain propositions were put to
45 her with respect to what others have said about the
46 use to which oral history may be put, she was almost
47 completely unfamiliar with the literature that was

being referred to. Ms. Marsden disagreed with the proposition that some kind of independent verification is required before oral traditions can be accepted as historical accounts.

And I do wish to take your lordship to the references in connection with this paragraph of the submission. And that would be in II/3-76. The extract begins on line 34 of this page with Mr. Willms reading an extract from a work of Dr. Trigger's, which I referred to and quoted from yesterday. And Mr. Willms says:

> "Q You accept that, don't you?
> A Not entirely, no.
> Q So it's your view that even in the absence of independent verification, that you can say that traditions can be accepted as accurate historical accounts?
> A I think there are internal, there are ways of analyzing them internally. If you have a version collected in 1898, another one collected in 1915, another one collected in 1970, in different parts of the north coast area, and if they all have the essential elements, you have to begin to assess them as something other than figments of people's imagination."

Now, so what we have is a project that is primarily a project attempting to chronologize this corpus of material, but on the basis of internal matters only, with the exceptions that I will get to in a minute. I say that not surprisingly, given this point of view, some of Ms. Marsden's conclusions can only be reached by ignoring independent verification.

The first example that I want to spend a moment on is the adaawk which mentions bows and arrows. Now, this should be in the next pages of the same tab in the yellow book, my lord. Pages three, four and five, which are Exhibit 1043-1, consist of what I understand to be Ms. Marsden's summary of the adaawk which begins on page six of the tab. And it's the second full paragraph of this adaawk that reads:

> "After a time, a fight broke out, because of the gambling. They uttered challenges and then began to shoot arrows; they used barbed and

1 pointed spears called k'yeen, and they fought
2 bitterly. They had all sorts of weapons, each
3 man his own. A good many used only bows and
4 arrows, others, the hapallar"
5
6 H-A-P-A-L-L-A-R.
7 THE COURT: I think that's an R.
8 MR. PLANT: H-A-N-A-L-L-A-R.
9 THE COURT: Yes. That's an N, is it?
10 MR. PLANT:
11 "a weapon made of bone with pointed blade,
12 club-like. Some had a stone implement called
13 hat'esham"
14 I won't try to pronounce that word.
15
16 "held in the hand and wielded in close
17 fighting. They fought for many days and tried
18 to wipe out each other. All of this was
19 because of gambling."
20
21 Now, this was the subject of cross-examination by
22 Mr. Willms in the pages from the transcript which
23 begin at page 13 of the extracts in this tab in the
24 yellow book, my lord, beginning at line 39.
25 THE COURT: Yes.
26 MR. PLANT:
27 "Q Now, just keeping that open, would you turn
28 to the tab 27 in 1042, which is the
29 Historical Atlas of Canada, and this is
30 plate 6, which is something that you
31 referred to and is consistent with your
32 opinion; is that correct -- plate 8, sorry?
33 A Inasmuch as my opinion covers a certain
34 limited area, yes.
35 Q Yes. And you know that this plate
36 represents or purports to represent
37 cultural sequences from 1000 BC to AD 500?
38 A That's right.
39 Q And so in terms of BP, that's 3000 BP"
40
41 That is Before Present.
42
43 "to 1500 BP, correct?
44 A Yes.
45 Q All right.
46 A Give or take a decade."
47 And then Mr. Willms reads from the text as

"During the period from 1000 BC to AD 500 the diffusion of ideas rather than the migration of people appears to have been the major mechanism for cultural change. Around 1000 BC pottery spread from Asia across northern Alaska to the Yukon coast and from the south to much of eastern Canada. The bow and arrow also spread rapidly, probably from a number of independent sources."

Mr. Willms says this:

"Now, you accept that, don't you?
A Not necessarily, no."

Then Mr. Willms turns to the adaawk which I've just read, and which Ms. Marsden has dated 6000 to 7000 Before Present, and then down at line 41.

"Now, just referring to the bow and arrows; you will agree with me that if this description in the cultural sequence, plate 8, is correct, this adaawk isn't much older than 3,000 years; is that correct?
A I'm not familiar with the work that has led to this conclusion about the bow and arrow, and it's -- as opposed to the work that led to the conclusions that I quoted here. I'm familiar with the sources of the information and why they say that, and I'm comfortable with the conclusions that I used out of this excerpt. I don't therefore adopt everything in this atlas."

Now, my lord, the cross-examination continues.

MR. GRANT: Well, I think it's very germane that my friend refer to that 17266, the answer at line ten, or at least your lordship note it.

THE COURT: I've already underlined it.

MR. GRANT: And the following sequence.

MR. PLANT: I'm happy to read the whole page, because it doesn't help my friend. Line five:

"Well, let's put it this way: Assuming that the atlas is correct, then your dating for

the adaawk is incorrect?

A Not necessarily.
Q Well, so --
A As I said earlier, when I do the dating, it involves not only putting things in chronology but using a number of different versions, and the weight of the descriptions in the different versions and the assessment of the informant also play a part in my conclusions as to why -- whether I put it in a certain chronology or not."

Just stopping there for a minute. We have Ms. Marsden ringing the changes once again on the internal project. That is to say, all you have to do is analyze the 10,000 year history of the Gitksan to read the adaawks in the right way. She continues on.

"Now, the bow and arrow has never used something that I've used as an indication of time-depth, because I'm not sure that we have definitive proof of when the bow and arrow began to be used on the north coast."

Pausing there for a minute. That's the beginnings of some indication of the limitations of Ms. Marsden's knowledge of archeology and other fields of anthropology.

"MR. WILLMS: All right. So I can put it this way: You're unaware of the archeological information on when arrow heads were first located in this area; is that correct?
MR. GRANT: In which area?
MR. WILLMS: The map area.
MR. GRANT: The north coast area generally?
MR. WILLMS:
Q Well, whatever that big map is. Are you aware of any of the archeological information on how old arrow heads are from any of the area that you've mapped on your map, Ancient Times, the arrival about 10000 years BP?
A I know that the heads that are commonly called arrow heads are described as being used for spears and as well as arrows, and I'm not sure that they can define by

1 finding them in a dig whether they're arrow
2 heads or spear heads. Microblades, for
3 example, were used for a number of
4 different purposes. It's not a --
5 MR. WILLMS: The answer is you don't know?
6 MR. GRANT: Just hold on. I think she was in
7 the middle of a sentence.
8 MR. WILLMS:
9 Q If you do know, please let me know which
10 digs?
11 A I'm not conversant with the archeological
12 data on that, no."
13
14 Now, the next aspect of the -- there is an
15 additional -- no. I guess I've already done that.
16 The next example I want to refer to, and this is
17 in subparagraph (b) on page 40 of my submission, there
18 was evidence from Dr. Matthews that the year ascribed
19 as the year of the great snowfall might refer to the
20 year without a summer identified as 1816 in eastern
21 Canada. Ms. Marsden did not consider this simply
22 because for the purposes of her framework, it didn't
23 work, wouldn't work.
24 If your lordship would turn the page in the yellow
25 book to page 16. I'll only read the extract at the
26 bottom, line 40:
27
28 "Just pausing there; have you ever heard of
29 that, 'The Year Without a Summer'?
30 A Yes, I have.
31 Q And had you ever considered that perhaps
32 the 'Great Snowfall' took place at the same
33 time as the 'Year Without the Summer'?
34 A No. Because it didn't work, wouldn't
35 work."
36
37 In other words, it wouldn't fit within the project
38 of internal analysis of the adaawks, so Ms. Marsden's
39 response is to ignore the external evidence where it
40 doesn't work, where it won't work.
41 Turning the page over to another example. This is
42 the example -- the one clear example where Ms. Marsden
43 does rely on or purport to rely on external
44 verification. And this is Dr. Gottesfeld's dating of
45 a land slide to date the Mediik adaawk. And more will
46 be said about this later. But Dr. Gottesfeld in his
47 early work on behalf of the plaintiffs also dated

1 another event, the Carnaby Debris fan.

2 And I think the best way to do this, my lord, is
3 to refer to page 18 in the yellow book, first of all,
4 which is the Gottesfelds' draft report. And then page
5 19 where in the second and third paragraphs Dr.
6 Gottesfeld relates -- summarized two separate events.
7 One is the account of the one-horned mountain goat of
8 Temlaxan, which in the oral tradition culminates with
9 the destruction of the people of Temlaxan, and the
10 landslide on the mountains where the goats invited the
11 people to feast.
12 MR. GRANT: I think my friend may have mischaracterized that
13 with the snowfall, not the Mediik, didn't destroy
14 Temlaxan. My friend mentioned that yesterday. I
15 think he's in error on that.
16 MR. PLANT: I see. For the moment I'm reading from Dr.
17 Gottesfeld. So the point I wanted to make about this
18 account is that this is an account which within the
19 oral tradition mentions landslides. There was a
20 separate event which summarized here the -- as being
21 the coming of the Mediik. And that is the grizzly
22 bear adaawk. And what Dr. Gottesfeld does in his
23 draft report, as I understand it, is that there is a
24 suggestion that the one-horned mountain goat adaawk
25 may be verified by reference to the evidence of the
26 Carnaby Debris fan. And that's summarized on page 21.
27 That is to say the report of Dr. Gottesfeld's initial
28 research on the Carnaby Debris fan is on page 21 and
29 then the Chicago Creek Debris fan is the one that has
30 been the subject of the -- or is related to the
31 grizzly bear adaawk. The discussion of that begins on
32 page 22.
33 Now, so there are two different adaawks. And for
34 the purposes of the present point the one that I'm
35 interested in is the Carnaby Debris fan. And there
36 are -- there was carbon dating done to date the work
37 that Dr. Gottesfeld did here to try and date this
38 Carnaby Debris slide. And the carbon dating data is
39 later on in the yellow book at tab II/3-81, pages 22
40 and 23 where -- I'm going to be coming back to the tab
41 I was at, my lord, but if you can just turn briefly to
42 page 23 of the material at tab --
43 THE COURT: 81?
44 MR. GRANT: 3-81.
45 THE COURT: Yes.
46 MR. PLANT: My understanding of the report here is that the
47 first three numbers relate to the Carnaby Debris fan

1 yielding conclusions that that debris fan can be dated
2 to anywhere from about 190 Before Present to something
3 like 1210 Before Present. So there's the range. It
4 could be as recent as 200 years ago.
5 THE COURT: And the most distant would be 500 AD -- no.
6 MR. PLANT: 200 years ago would be 17 -- or 1790.
7 THE COURT: Yeah. But the most distant one, 1140, would be 900
8 years ago. 900 AD
9 MR. PLANT: Yes. Well, roughly speaking, yes.
10 THE COURT: Yes. All right.
11 MR. PLANT: Now, the point here is simply to -- to take this
12 external scientific evidence and put it back in the
13 context of Ms. Marsden's evidence. And that is done
14 in the -- back at tab 76 and page 17, which is just
15 before the Gottesfeld report.
16 THE COURT: Yes.
17 MR. PLANT: And this again is Mr. Willms' cross-examination of
18 Ms. Marsden. The page relates to the Carnaby Debris
19 fan. And I'm interested in the answers at the bottom,
20 line 42.
21
22 "Q All right. But 250 years ago wouldn't fit,
23 would it, because that would -- the
24 mountain goat adaawk comes before Mediik,
25 doesn't it?
26 A That's correct."
27
28 So there's another instance of an inability to
29 correlate the reconstruction of the oral tradition
30 with the available scientific or external evidence.
31 Now, I'm not going to refer to the materials in
32 subparagraph (d) on page 41, but they indicate the
33 difficulties and disparities between the linguistic
34 evidence and the evidence of Ms. Marsden.
35 Turning over the page there is another reference
36 to linguistic evidence which I do want to take your
37 lordship to, and that is the very last piece of paper
38 in the tab 76 that we were looking at. Here beginning
39 at line four:
40
41 "MR. WILLMS:
42 Q Now, I will just put a proposition to you,
43 and I want you to tell me if you can fit
44 that into your chronology. And, my lord,
45 I'm reading from Exhibit 883, tab 2, page
46 6.
47 'The fur trade seems to have spurred

and especially the upper Nass and upper Skeena territories.'"

THE COURT: What is that from?
MR. PLANT: It's from a report or a treatise by Dr. Rigsby, as I recall.
THE COURT: Thank you.
MR. PLANT: It's not from his expert report in this case, it's from some other work.
THE COURT: Exhibit 883.
MR. PLANT: Yes. Mr. Willms asks this question:

"Q Can you fit into that that in your chronology?
A Can I see that, please. By the middle Nass, what are you referring to, what is this person referring to?
Q Well, let's make it simple. Let's say anywhere on the Nass, and anywhere on the Skeena, can you fit -- let me -- I'll just rephrase it:"

And Mr. Willms restates the quote in these terms:

"'The fur trade seems to have spurred the Gitksan occupation on parts of the Nass and parts of the Skeena territories.'. So I haven't got upper or lower or middle, just parts. Can you fit that into your chronology based on the oral histories?
A Not unless you're talking about the very upper reaches of the Skeena River."

Now, in paragraph 77 I summarize the evidence relating to an example of a contradiction between Ms. Marsden's opinions and those of Marius Barbeau. And the transcript references there indicate that Ms. Marsden is not prepared to accept, for the reasons that she gives, a reconstruction of the adaawk which was offered by Dr. Barbeau.

Paragraph 78 I say that Ms. Marsden often ignored what can only be described as obvious historic clues within oral history. One example of some interest, my lord, is the example that I've already referred to, the bows and arrows example. And in the first three pages of the material at II/3-76 page three you have

1 Ms. Marsden's summary of this adaawk, and it doesn't
2 incorporate the reference to bows and arrows.
3 Another example is the reference in the adaawks to
4 copper shields. And I do want to ask your lordship to
5 look at this. We're now at II/3-78. It's the first
6 page of that tab. Mr. Willms cross-examined Ms.
7 Marsden.
8
9 "Q You mean notwithstanding -- you knew that
10 there is scientific discussion that copper
11 shields are historic, you knew that;
12 correct?
13 A Yes.
14 Q All right. Notwithstanding yhat you knew
15 that there is scientific discussion that
16 copper shields are historic you did not
17 when you reviewed the adaawks bring that
18 knowledge to bear in assessing the date of
19 what was going on in the adaawk; is that
20 correct?
21 A In order to do the chronology I focused on
22 the evidence in the oral histories and the
23 Duff files and in what the people
24 themselves said. It was an internal
25 analysis. The only example I suppose I
26 could say was an exception to that was the
27 gun, because I guess that's just something
28 that nobody would argue about."
29
30 There are other examples later in her evidence
31 concerning reference in the adaawks to people with red
32 hair and the use of soap. These are, in my
33 submission, the kind of clues which an ethnohistorian
34 applying the criteria referred to by people such as
35 Dr. Trigger in the references I've made would look for
36 and look to in order to attempt to date the oral
37 tradition.
38 Now, Ms. Marsden admitted that she does not take
39 each adaawk as being literally accurate, and
40 acknowledged that there are a large number of the
41 adaawk --
42 THE COURT: Excuse me, Mr. Plant.
43 MR. PLANT: -- Certainly in the proto-historic --
44 THE COURT: Mr. Grant, would you be good enough to see if you
45 can pin that map down. I think that the wind is
46 rattling it and disturbing the court reporter.
47 THE REGISTRAR: I can get it.

1 THE COURT: Thank you, Ms. Thompson. Perhaps it can face the
2 wall because we are not using it at the moment.
3 All right. Thank you. We blame everything on the
4 reporters.
5 MR. PLANT: I'm at paragraph 79, my lord, which I've read. And
6 it's not been irretrievably lost in the flapping of
7 the mylar plastic.
8 THE COURT: No. I have it.
9 MR. PLANT: Paragraph 80 I say, perhaps the best example of Ms.
10 Marsden's expertise as evidence in this case is the
11 difference between the draft map, which my
12 recollection is map one in Exhibit 358-1, the map
13 entitled "Ancient Times", which in its final form
14 reads -- is entitled "Ancient Times - the arrival
15 about 10000 years BP" while the draft map was entitled
16 "Ancient Times - the arrival 10000 BP to 250 BP"
17 indicating perhaps more accurately the range of dates
18 that can realistically be imputed to the oral
19 tradition. And as we'll be seeing in a later section
20 of the argument that Mr. Willms will be seeing to,
21 it's our submission that based on the evidence the
22 population movement within the north coast area and
23 the claim area, the words in the drafts "to 250 BP"
24 could easily be replaced by the words "to today". Ms.
25 Marsden's chronologies are devoid of any attempt at
26 independent verification other than the Chicago Creek
27 landslide and, as I say, accordingly are entitled to
28 no weight.
29 Now, there is one --
30 MR. GRANT: That last statement, my lord, I just want to say for
31 the record, that I think that's a mischaracterization,
32 because there is extensive reliance by her on the
33 archeological material at Kitselas as well as the
34 archeological material -- some reliance on the
35 Kitwanga fort. But the Kitselas archeological
36 material of Copeland was relied and referred to
37 extensively by Ms. Marsden in her evidence.
38 MR. PLANT: Well, what I have here, my lord, is this statement
39 from Volume 232 at page 16990. I'm just going to get
40 that. Yes. Page 16990, Mr. Willms in
41 cross-examination.
42
43 "Q I will just ask again: On a review of your
44 report, you will agree that except for the
45 recent, the relatively recent past, there
46 is very little independent dating, and by
47 that I mean, dating from scientific

1 evidence, of the oral histories that you
2 have used?
3 A That was not considered to be the focus of
4 my report, information that would
5 independently corroborate this could come
6 from another expert but I have familiarized
7 myself with the opinions of other experts
8 and I feel that archeological information,
9 for example, does corroborate this.
10 Q That's your feeling, but I am talking about
11 what you actually wrote in your report and
12 not your feeling. What you wrote in your
13 report does not contain independent
14 verification from scientific evidence for
15 your dating, except for the relatively
16 recent past?
17 A I could have included it in the report if
18 it had been asked.
19 Q But it isn't there, is it? Well, is it
20 there or not?
21 A No."
22
23 And I'm content with that reference to the
24 evidence, my lord.
25 Now, just a digression for a moment from the
26 thrust of this submission. Ms. Marsden's evidence at
27 page 17006 of the same volume of the transcript,
28 transcript 232, lines ten to 17, was that as of 1985
29 she had attended 30 feasts. This was part of the
30 basis for Ms. Marsden offering opinions with respect
31 to the Gitksan social organization. And it is
32 significant in this context, my lord, that when she
33 gave evidence at trial here she admitted that she had
34 never heard the adaawk of her house recited at a
35 feast. And her house is the House of Gwinuu. Which I
36 have spelled here GW-I-N-U-U. And the transcript
37 reference there is Volume 233, page 17015, lines 28
38 over to the next page, line one.
39 Now, my lord, there is one further and perhaps
40 larger point about the conceptual problem with the
41 project of an internal chronology of the adaawks. And
42 this arises, or is the subject of the submission in
43 paragraph 81, out of the attempt to link the grizzly
44 bear adaawk to a landslide near Chicago Creek, where I
45 say a number of observations should be made. First,
46 notwithstanding Dr. Gottesfeld's creative
47 reconstruction of what the Chicago Creek landslide

1 might have looked like, and here I want to take your
2 lordship to the material in support of paragraph 81.
3 And it would be in the yellow book in the first page
4 of II/3-81. And I am starting at line 20 in response
5 to Ms. Mandell's question if you were looking at this
6 event when it happened what would you have heard and
7 seen. Dr. Gottesfeld says:
8
9 "A Well, if you could say the mountain from
10 where you were standing, there would be
11 tremendous noise, overwhelming loud noise,
12 a great cloud of material, swaths of
13 forests being cleared as the debris slide
14 came down across the Chicago Creek fan.
15 The -- continuing down Chicago Creek, I
16 envisioned the debris tarring where lots of
17 water was incorporated and debris and there
18 would be this great mud-charged mess of
19 material coming down the valley, great
20 rolled wall of brown material, trees tossed
21 around, just a swath of countryside being
22 cleared that would come towards you, I am
23 sure you would be frightened and run away.
24 That's the time where you make sure you are
25 standing up on a good hill or something."
26
27 Now, that's Dr. Gottesfeld's characterization of
28 the event which Mary Johnson described in her evidence
29 in the extracts from the plaintiffs' argument which
30 are quoted in the following pages. And I don't think
31 it's necessary to read them, but there is no doubt
32 that the adaawk says that this event was the result of
33 the activity -- it's not a landslide. It's a great
34 huge bear, grizzly bear that they had never seen
35 before. A giant grizzly bear. One capable of
36 uprooting trees. Of snapping giant trunks.
37 These words here, "the snapping of giant trunks",
38 are the words that appear in Walter Wright's book Men
39 of Madiik, which is Exhibit 898, where the Mediik
40 adaawk also appears. And at some point he says:
41
42 "At last a bear came out on the river's margin.
43 A bear - but it was unlike any bear the people
44 had ever seen. A giant grizzly bear; one
45 capable of uprooting trees; of snapping giant
46 trunks as though they were blades of grass.
47 The bear paused and glared at Tum-L-Hama. Then

1 he moved down the bank and into the river."
2
3 And so on.
4 My point is that while Dr. Gottesfeld may have
5 accurately described a landslide, he did not describe
6 a grizzly bear. And there is, I say, a large problem
7 at the conceptual level which arises when your
8 lordship is being asked to take the adaawk as
9 historical truth. And that's on the one hand. And on
10 the other hand your lordship is being asked to find
11 that there is independent scientific verification of
12 these events. I say that you can't have it both ways.
13 It's either a landslide or it's a grizzly bear.
14 And that summarizes the point down to about the
15 sixth or seventh line on page 44, but the balance of
16 that I'm going to leave to my friend Mr. Willms.
17 Moving then to paragraph 82, page 45, I say that
18 the best that can be said for Ms. Marsden's evidence
19 requires recognition that she is Gitksan and as a
20 matter of faith has accepted that the oral traditions
21 are true. Therefore, just as with the Gitksan or the
22 Wet'suwet'en chiefs who gave evidence concerning their
23 oral traditions it's not necessary to find that Ms.
24 Marsden was being untruthful in order to discard her
25 evidence completely. But, my lord, I say it is clear
26 that in a field where academic training would seem to
27 be an essential prerequisite for informed analysis,
28 she has none, and that her project of chronologizing
29 the adaawks based on a theory of internal
30 reconstruction is fundamentally ahistorical. Seeking
31 internal consistency alone, I say, she has
32 conscientiously avoided recourse to the independent
33 corroborative evidence which is essential to any
34 attempt to understand history. Her theory is novel,
35 it's not been subject to academic scrutiny, and for
36 these reasons her evidence and the evidence of oral
37 history as history ought to be given no weight at all.
38 That concludes my submission on that section, my
39 lord. And the next section of argument is entitled
40 "Onus of Proof and Rules of Construction". The first
41 part deals with onus of proof. And I have not heard
42 the plaintiffs to make any particular submission with
43 respect to onus of proof of facts, and for that reason
44 I don't propose to spend any time on that section of
45 this argument, but I do leave it to your lordship --
46 leave it with your lordship for review.
47 And I would go to page 14 where I have a

Submissions by Mr. Plant

1 submission about the effect which should be given to
2 the case of Nowegijick v. The Queen. That's
3 N-O-W-E-G-I-J-I-C-K. Paragraph 20.
4 Nowegijick is an authority for a rule of
5 construction expressed by the court at page 36 of the
6 Supreme Court report in the following terms.
7
8 "...treaties and statutes relating to Indians
9 should be liberally construed and doubtful
10 expressions resolved in favour of the Indians."
11
12 I say that the phrase "relating to Indians" is an
13 important qualification. And that there is no reason
14 in policy or principle, or authority for that matter,
15 why statutes, including constitutional instruments, of
16 general application should be given a different
17 interpretation when applied to Indians than when
18 applied to other Canadians.
19 Equally important, in my submission, is the fact
20 that the Nowegijick rule of construction operates only
21 where there is ambiguity. If the statutory language
22 is clear the Nowegijick principle does not come into
23 play. You do not use the Nowegijick principle to
24 distort otherwise clear language of a draftsperson.
25 Cases in which Nowegijick has being applied
26 include Simon, Sparrow, Claxton, Metlakatla Ferry
27 case, and Bartleman. All these cases are referred to
28 and relied upon by my friends, with the exception of
29 Sparrow -- and I should add to the list the Horseman
30 case, my lord. With the exception of Sparrow all of
31 these cases concern the interpretation of treaties or
32 the provisions of the Indian Act. Sparrow concerned
33 the interpretation of section 35 of the Constitution
34 Act 1982. And I'll come back to that later, my lord.
35 I do have this submission which really is an issue
36 that hasn't arisen, so far as I can see, on the case
37 law because of the context in which the Nowegijick
38 principle has arisen.
39 I say that the Nowegijick principle or rule of
40 construction has no application to the construction of
41 statutes or other legal instruments in the Province.
42 It is further submitted that with respect to statutes
43 or other legal instruments of Canada after 1871, such
44 instruments cannot be construed, as between British
45 Columbia and Canada to the detriment of British
46 Columbia. These limitations flow from propositions
47 that I've set out here which really have to do with

the constitutional relationship between British Columbia and Canada, and Canada's obligations under the Constitution to Indians.

And stated here they are, firstly, that after 1871 the Province lacked the capacity to make laws directly relating to Indians.

And, secondly, that the Provincial instruments which form part of the sequence of events leading to Order-in-Council 1036 of 1938, that is to say the sequence of statutes and Orders-in-Council which lead, form the chain, as it were, from 1871 to the conveyance of reserves were enacted pursuant to British Columbians obligations to Canada under term 13 of the Terms of Union. British Columbia having after 1871 no other constitutional responsibility for, or obligation towards, Indians as Indians.

Thirdly, that at all times after Confederation British Columbia was entitled to assume that Canada was acting in the full and proper discharge of its obligations to Indians pursuant to Head 24 of Section 91 of the Constitution Act.

So you have a situation where British Columbia dealing with Canada where Canada has the constitutional obligation for Indians, I say British Columbia is entitled to assume, unless there is compelling evidence to the contrary, that Canada is doing its job. And for that reason the Nowegijick principle doesn't apply to the statutory instruments of British Columbia.

And the next and different point arises out of a submission made by the plaintiffs in Volume 7, Part IX of their summary. It reappears in Volume 8. What we have is Volume 8 of their final argument in the context of their submissions on the historical evidence and on the principles of construction of historical materials at pages 78 and 9. What the plaintiffs say is this:

> "...To the extent that historical documents are records, made by officials of the defendants, of acts of the plaintiffs which the Province now claims had decisive legal significance for the plaintiffs' rights, the plaintiffs submit that the principles of Nowegijick, and other cases, apply. They apply because these documents, like statutes and treaties affecting Indians, are written by white officials, often

1 without the Indians' knowledge or
2 participation, but are said to contain or
3 affect the Indians' legal rights and duties.
4 This, the plaintiffs submit, requires that the
5 documents be construed: (1) so as to preserve
6 the honour of the Crown by sanctioning no
7 appearance of sharp dealing; (2) so as to give
8 effect to the representations of
9 representatives of the Crown in the way in
10 which they would naturally be understood by the
11 Indians; and (3) so as to resolve ambiguous or
12 doubtful expressions against the drafters and
13 in favour of the Indians."
14
15 So what the plaintiffs are seeking to do is to
16 take the Nowegijick principle which applies to
17 treaties and statutes and import it into the
18 consideration of historical evidence. And I say that
19 this is mixing apples with oranges. The plaintiffs'
20 submission confuses two distinct categories of legal
21 materials on the one hand; documents, historical
22 record relied upon as evidence, and (b), on the other
23 hand, legal instruments. There are a host of factors
24 which bear upon a consideration of historical
25 documents so far as they're tendered as evidence. In
26 the case at bar all of the parties are relying on the
27 historical record in support of propositions that
28 derive from a consideration of a large number of
29 documents no one of which is likely to be decisive on
30 any particular point. The historical record is also
31 relied upon by the Province to provide context. And
32 that is particularly applicable to the Province's
33 argument in the counterclaim. Historical records, in
34 my submission, as documents carry weight according to
35 the position and the responsibility of the writer; the
36 opportunity for observation; the reason or requirement
37 for the record, and so on. And that's just the
38 beginning of a list of factors that could come to bear
39 on a determination of the weight of an historical
40 document. Obviously for the purpose of the inquiry
41 into context some documents will be more important
42 than others. Few are likely to be critical. But the
43 court's assessment of the historical record as
44 evidence ought not, in my submission, to be governed
45 by rules of construction which have evolved for the
46 purpose of interpreting legal instruments such as
47 treaties and statutes that create, define or modify

legal relations.

Those are my submissions in relation to that section of the argument, my lord. And the next part of the argument will be spoken to by Mr. Goldie.

THE COURT: Okay.

MR. GOLDIE: Does your lordship have the second volume of the yellow --

THE COURT: No.

MR. GOLDIE: -- Books? I'll ask Mr. Plant to hand out the second volumes.

I'm going to be dealing, my lord, with Part 1, I should say Part III in Volume 1 of the summary, which is entitled "The Source of Aboriginal Interests".

My lord, when we speak of aboriginal rights, title or interests we are not, in my submission, speaking of moral or political entitlements. We are speaking of those claims, advantages, liberties and immunities possessed by the aboriginal peoples of Canada which are recognized and protected by law. That is to say we are, in effect, examining the extent to which the aboriginal peoples enjoy a privileged position in the Canadian legal system. That is to say enjoy claims, advantages, liberties and immunities which other members of the Canadian -- of Canada do not enjoy.

I say, the justification for such a position is said to lie in the fact as stated by Mr. Justice Judson in Calder. And I quote:

> "...that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries".

Now, that fact was substantially admitted in Calder. And whether it's disputed or admitted is immaterial for the purposes of the inquiry that we go into here. The question is: By what process may such a fact lead to legal rights?

It is submitted that rights become legal rights only when they are given effect within the prevailing legal system. Aboriginal rights in a legal sense do not pre-date the establishment of legal order. They come into existence as a result of the establishment of legal order.

Now, prior to the assertion of sovereignty over what is now the mainland of British Columbia the Crown

had no jurisdiction over the territory or its aboriginal inhabitants. And that has some significance, my lord, when we come to talk about the Royal Proclamation.

In 1763 the Crown neither had jurisdiction over British Columbia, nor did it have jurisdiction over the people who lived here at the time, nor did they owe any allegiance to the Crown.

I say that although "the Indians were there organized in societies and occupying the land as their forefathers had done" it cannot be said that the activities of the Indian peoples of British Columbia prior to the assertion of sovereignty were carried on, so far as the Crown is concerned, as a right within the legal system emanating from the Crown, and administered by this court and its predecessors, aboriginal rights in British Columbia did not exist.

That must be understood in this context, that the society we assume was there, that it had its own order within itself, but so far as the predecessor of this court was concerned they did not exist because it was not part of the system which was administered by the laws of the Crown.

THE COURT: What do you say was the predecessor of this court?

MR. GOLDIE: The Kings Bench or the Queens Bench.

THE COURT: Of England?

MR. GOLDIE: Yes. Or in one particular instance the Superior Courts of Lower Canada. By the acts of 1803 and 1821 there was a criminal jurisdiction conferred upon those courts in respect of what is now the mainland of British Columbia.

THE COURT: All right.

MR. GOLDIE: But those acts in themselves were assertions of sovereignty. I'm speaking going back beyond that.

THE COURT: Yes. All right.

MR. GOLDIE: When sovereignty was asserted, and we'll deal with that in a separate section, the native peoples here became subjects of the realm and a legal order was imposed upon a newly acquired territory. Now, again we'll enlarge on the question of when the legal order does become imposed upon a newly acquired territory. And that depends on whether the territory is ceded, conquered or settled. But aboriginal rights did not come into existence necessarily. Any rights which the Indians might thereafter have could be only with what the law of the new regime accorded them.

And I make reference there to the case of Warman

1 and Francis, my lord. And the relevant section in
2 that is found under tab III/1-7. This is a judgment
3 of the New Brunswick Court of Queens Bench. It is
4 referred to in the Bear Island case. And I will be
5 referring to it again. The excerpt is pages 630 and
6 631. And on page 631 the paragraph one, two, three,
7 four, the last sentence in the paragraph beginning
8 with the words:
9
10 "Following on the Treaty of Utrecht the Micmacs
11 did not remain as a foreign nation (in the
12 international sense) dwelling on British
13 territory, but became British subjects."
14
15 That was the result in that particular case of a
16 colony which was ceded. Continuing:
17
18 "If a treaty was made with the tribe it was in
19 the nature of a special agreement based on
20 goodwill and expediency made by the Crown with
21 a body of inhabitants."
22
23 Then the reference, and then the last sentence:
24
25 "As subjects of the Crown they came under the
26 law of the country, and any interest they might
27 thereafter have in land was only what the law
28 of the new regime afforded them."
29
30 Now, that conclusion, in my submission, applies
31 irrespective of whether the aboriginal rights depends
32 on "treaty, executive order or legislative enactment".
33 That was the phrase of Mr. Justice Hall in Calder at
34 page 390. Or arises at common law as referred to by
35 Mr. Justice Mahoney at page 556, which is under the
36 next tab in the yellow binder, that page 556.
37 And then reference is made to a judgment of the
38 Judicial Committee in Vajesingji Joravarsingji v.
39 Secretary of State for India, a judgment of the --
40 which I will come back to again at a later point, but
41 that -- the extract from that judgment is found under
42 the next tab.
43 And I can tell your lordship that the background
44 of it was that in 1860 the domain of the Maharajah of
45 Gwalior was ceded to the Crown, namely the government,
46 in this case the Government of India, and three
47 landholders brought an action in the 1920s to

1 determine whether the rights they held were
2 proprietary interests, or as the Crown or the
3 Secretary of State for India contended, they were
4 merely tenants at will. And at page 360 of the report
5 the judicial committee said this:
6
7 "Their Lordships will have occasion presently
8 to inquire into the circumstances of an earlier
9 date, but, for the moment, they pause at this
10 date, because what happened in 1860 determines
11 the law of the case. This law was most clearly
12 laid down in the judgment of the board
13 delivered by Lord Atkinson in the case of
14 Secretary of State for India v. Bai Rajbai.
15 Their Lordships do not propose to repeat what
16 was there said. It was no new law that Lord
17 Atkinson laid down. The same had been held in
18 Secretary for State of India v. Kamachee Boye
19 Sahiba and Cook v. Sprigg. But a summary of
20 the matter is this:"
21
22 And then there begins the quotation which is found
23 in my argument.
24
25 "When a territory is acquired by a sovereign
26 state for the first time that is an act of
27 state. It matters not how the acquisition has
28 been brought about. It may be by conquest, it
29 may be by cession following on treaty, it may
30 be by occupation of territory hitherto
31 unoccupied by a recognized ruler."
32
33 Just pausing there. That's a settled colony.
34 Continuing:
35
36 "In all cases the result is the same. Any
37 inhabitant of the territory can make good in
38 the municipal courts established by the new
39 sovereign only such rights as that sovereign
40 has, through his officers, recognized. Such
41 rights as he had under the rule of predecessors
42 avail him nothing."
43
44 And a reference is made in the argument to the
45 Oyekan case.
46 THE COURT: You'll come to it no doubt, but is that not in
47 conflict with Campbell and Hall?

1 MR. GOLDIE: No, my lord. I think it is consistent with it. In
2 Campbell and Hall the court held that in the case of a
3 conquered colony the Royal prerogative enabled the
4 King to determine what the law is. The issue there
5 was whether his promise to set up a legislature
6 precluded the exercise of the Royal prerogative, and
7 it did.
8 THE COURT: So you say the distinction is as subtle as whether
9 the colony is ceded or conquered or a settled colony?
10 MR. GOLDIE: Yes. But for -- and it wasn't in the proclamation
11 of 1763. In Campbell and Hall I think it was in a
12 proclamation about a year later, but for the assurance
13 made in that second proclamation that a legislature
14 would be set up in the colony the King's right to
15 continue to legislate would have prevailed. And the
16 duties which were laid on the export of sugar would
17 have been valid. But there is a very important
18 distinction that is most relevant to the case at bar,
19 which your lordship has perceived, and that is that
20 where you have a settled colony there is no room for
21 the Royal prerogative at all. The law of England
22 follows the settlers. And, of course, in the case of
23 British Columbia the law of England was introduced as
24 the second proclamation issued by Douglas in 1858.
25 The Vajesingji case is referred to by Mr. Justice
26 Blackburn in the Milurrupum case, and I'll be
27 referring to that again.
28 Turning back to my summary I say, the common law
29 aboriginal rights do not spring out of the air; they
30 are as much a product of, and dependent upon, legal
31 order under the Crown as any other right. As the
32 Supreme Court of Canada stated in the May case:
33
34 "All exceptions, therefore, to the full and
35 complete power of a nation within its own
36 territory must be traced to the consent of the
37 nation itself given as a general rule by
38 treaty, convention or statute."
39
40
41 Now, this, of course, has reference to the fact
42 that in the case at bar the claims are being made
43 against the Crown, and they are claims which, in my
44 submission, in their totality consist of claims
45 asserting sovereignty as against the Province.
46 THE COURT: The other question that springs immediately to mind
47 is whether what you're submitting is consistent with

what the court said in Guerin.

MR. GOLDIE: There are two cases that I want to deal with in that regard, Guerin and Roberts v. Canada.

THE COURT: Yes. All right. In your own time.

MR. GOLDIE: Yes. And, of course, there is -- there is another aspect of the case to which I've just referred to, and that is whether it is consistent with the Simons case in New Zealand. Mr. Justice Blackburn comments on that and comes to the conclusion that it may be that Simons is inconsistent with the Judicial Committee's pronouncement in this case I've just referred to.

Now, I say in paragraph 11, misconceiving the process by which aboriginal rights comes into existence leads to difficulties of analysis. And the example I gave is that of Mr. Justice Mahoney in the Baker Lake case where he refers to the Royal Charter of 1670, that is to say the Charter granting Rupert's Land to the Hudson's Bay Company, under heading in his reasons for judgment of "Extinguishment Before 1670". I don't think I have that in there. He considers whether the Charter extinguished aboriginal title, and finds that it did not. But the Charter in itself is an assertion of sovereignty over Rupert's Land. Arguably, the making of the Charter marks the origin of aboriginal rights that is flowing from the very analysis that he made. Viewed then correctly, the Charter is thus part of the delimitation of the aboriginal rights themselves. The point is this: The terms on which sovereignty is asserted should not be viewed as acts of extinguishment, but acts of creation.

Aboriginal -- I'm in paragraph 12, my lord. Aboriginal rights come into existence as a product of the relationship between the Crown and the aboriginal inhabitants of a territory over which the Crown is sovereign. This in part is, in my submission, is what Lord Watson meant when in St. Catherine's Milling he said, and I quote:

> "The tenure of the Indians was dependent on the goodwill of the sovereign."

My lord, those particular pages are found under tab III/1-12. And the particular language is found towards the bottom of the page about ten lines from the bottom.

> "It was suggested in the course of the argument

1 for the Dominion, that inasmuch as the
2 proclamation"
3
4 And that's the proclamation of 1763.
5
6 "recites that the territories thereby reserved
7 for Indians had never 'been ceded to or
8 purchased by' the Crown, the entire property of
9 the land remained with them. That inference
10 is, however, at variance with the terms of the
11 instrument, which show that the tenure of the
12 Indians was a personal and usufructuary write,
13 dependent upon the goodwill of the Sovereign.
14 The lands reserved are expressly stated to be
15 'parts of Our dominions and territories;' and
16 it is declared to be the will and pleasure of
17 the sovereign that, 'for the present,' they
18 shall be reserved for the use of the Indians,
19 as their hunting grounds, under his protection
20 and dominion."
21
22 And then the tenure of the Indians, as he says,
23 was dependent on the goodwill of the sovereign. And
24 your lordship will appreciate that tenure here means
25 the creation and nature of the interest as well as its
26 term. That is to say at will. Tenure is a word that
27 foreshadows a description of the nature as well as a
28 description of the time within which the interest is
29 held.
30 THE COURT: Is it convenient to take the morning adjournment,
31 Mr. Goldie?
32 MR. GOLDIE: Yes. That's fine, my lord.
33 THE COURT: Okay.
34 THE REGISTRAR: Order in court. Court stands adjourned for a
35 short recess.
36
37 (PROCEEDINGS ADJOURNED)
38
39 I hereby certify the foregoing to
40 be a true and accurate transcript
41 of the proceedings transcribed to
42 the best of my skill and ability.
43
44 _____
45 Peri McHale, Official Reporter,
46 UNITED REPORTING SERVICE LTD.
47

1 (PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)
2 THE REGISTRAR: Order in court.
3 THE COURT: Mr. Goldie?
4 MR. GOLDIE: Yes. Thank you, my lord. I was at page 5 of
5 Section 1 of Part III, my lord.
6 THE COURT: Yes.
7 MR. GOLDIE: And I say in paragraph 13 of my summary, it is
8 axiomatic that the source of a right which is
9 enforceable against the Crown must be found in an
10 acknowledgement of the existence of such a right,
11 whether express or from necessary implication.
12 Express acknowledgement may be found in an exercise of
13 the Royal Prerogative or in an Act of Parliament.
14 Necessary implication may arise from a course of
15 conduct by the executive on behalf of the Crown.
16 MR. JACKSON: My lord, I'm just wondering if I might by way of
17 clarification ask Mr. Goldie if that proposition in
18 paragraph 13 is a different proposition from that
19 advanced by the court of appeal in Calder.
20 MR. GOLDIE: Well, my friend can read the court of appeal in
21 Calder and he can read what I'm saying and he can form
22 his own conclusions, my lord.
23 THE COURT: It does differ.
24 MR. GOLDIE: Yes. Now, when I say by necessary implication,
25 that doesn't have to coincide in time with the
26 founding of a colony, but it must be referable to the
27 colony.
28 Now, the question then is: When the Crown
29 asserted sovereignty over a territory, what legal
30 rights, if any, were conferred upon the Indians as
31 against the Crown or its non-Indian subjects? In
32 answering that question it is important to emphasize
33 that the content of the relationship between the Crown
34 and the aboriginal inhabitants of a particular
35 territory at a particular time is neither historically
36 nor (as a matter of constitutional principle) legally
37 predetermined. To the extent that the Imperial
38 government delegated authority over the administration
39 of Indian affairs to local officials, uniformity of
40 policy or practice could hardly be expected.
41 Now, they -- Mr. Justice Blackburn in Milirrpum
42 noted that it is sometimes difficult to reconcile the
43 cases which came out of India with the cases that came
44 out of Africa. And if anything can be said of New
45 Zealand, it is that it stands in a class by itself
46 because it started out as what appeared clearly to be
47 a ceded colony and yet at a later point was determined

1 by law to be a settled colony.

2 And I say that is why it is insufficient to
3 describe the Indians' historic occupation and
4 possession of their tribal lands as the sole factual
5 pre-condition for the creation of aboriginal title or
6 rights. And that I take to be, my lord, and that is
7 intended to be an observation on the position taken by
8 the plaintiffs' case. That is to say, that in their
9 submission, as we understand it, the factual issue of
10 historic occupation and possession is the sole
11 pre-condition that is required for the creation of
12 aboriginal title or rights. In my submission, the
13 picture is incomplete without an understanding of the
14 relationship between the Crown and the aboriginal
15 inhabitants of the territory in question.
16 And I made reference earlier, my lord, to the case
17 of Warman and Thomas -- Warman and Francis, which is
18 under Tab III/1-7, where Mr. Justice Anglin is dealing
19 with -- with an issue arising in New Brunswick, a part
20 of Canada in which there was no treaties or cession or
21 surrender. And on page 630 -- does your lordship have
22 that?
23 THE COURT: Yes.
24 MR. GOLDIE: At page 630 in the beginning of the second
25 paragraph:
26
27 "As to the defences on the main issue: First,
28 as to what are called aboriginal rights. The
29 nature of the interest in land once or now
30 vested in a tribe or band of Indians differs
31 throughout Canada, and each instance depends on
32 its historical background."
33
34 And he notes that -- towards the bottom of that page
35 he's quoting from Cameron's Annotation in 13 S.C.R.,
36 and I quote:
37
38 "In the treaties before Confederation cession
39 of the lands (by the Indians) was uniformly
40 made in general terms to His or Her Majesty.
41
42 (Footnote) No surrender of aboriginal rights
43 has been made by the Indians in the Province of
44 Quebec or the Maritime Provinces."
45
46 And then Mr. Justice Anglin goes on to say:
47

1 "So far as we are concerned with the Micmacs
2 this can only mean that there was no surrender
3 because there were no proprietary rights in our
4 law in the circumstances."
5
6 And then he goes on to make reference to the American
7 colonies, and I'll come to that.
8 Going back to paragraph 15 of my summary,
9 sovereignty over what is now Canada by the Crown in
10 right of the United Kingdom occurred at different
11 times in different places and in different ways. The
12 history of relations between the aboriginal
13 inhabitants of Canada and the Crown differs across the
14 country. There was no such thing as uniform Imperial
15 practice. Since, at least prior to 1982, aboriginal
16 rights were unquestionably "dependent upon the good
17 will of the sovereign", it cannot, with respect, be
18 correct to say, as Professor Slattery does in his
19 article "Understanding Aboriginal Rights" that, and I
20 quote: "The common law of aboriginal rights is
21 uniform across Canada", and I add to that, my lord,
22 unless he is to be understood as referring to
23 reserves.
24 THE COURT: Surely reserves are not an incident of common law or
25 uniform of common law, are they?
26 MR. GOLDIE: No. But if one can say that there is a common law
27 that is uniform across Canada, it is confined to
28 reserves. I don't mean the creation of reserves. I
29 mean the law which governs the relations between the
30 members of the band in respect to whose interest the
31 reserve is held and the Crown in Right of Canada.
32 THE COURT: All right.
33 MR. GOLDIE: And indeed that's the -- that's the substance of
34 remarks made by Madam Justice Wilson in the Roberts
35 Case, a reserves case, as was Guerin.
36 Now, I say that understanding aboriginal rights in
37 British Columbia requires understanding the process by
38 which sovereignty came to be asserted over what is now
39 the mainland of British Columbia and the evolving
40 relationship between the Crown and its Indian
41 subjects.
42 When that process is examined in Part VII it will
43 be seen that there never was in the colony of British
44 Columbia any concept of aboriginal rights analogous to
45 the claim advanced here for ownership and
46 jurisdiction.
47 What was created and protected was an interest of

1 the native peoples of British Columbia in their
2 occupied village sites and, where they had adopted an
3 agrarian way of life as in the southern interior,
4 cultivated fields and as much land in the vicinity of
5 each as they could till, or was required for their
6 support, together with the right to free exercise and
7 enjoyment of fishing in the lakes and rivers and
8 hunting over all unoccupied Crown lands in the colony.
9 Now, that language is a paraphrase of the Governor
10 Douglas in 1860, and I will be dealing with that at
11 greater length.
12 Now, of course the right of the protection of the
13 interest in the village sites and fields was the
14 protection of an exclusive right, exclusive right of
15 occupation and possession. The right of fishing and
16 hunting was in common with all others. It was not an
17 exclusive right. And in my submission the acts of the
18 colony -- and I should be more precise there. The
19 acts of the governor, who was in his own person both
20 the executive and the -- and the legislature until
21 1863, translated a matter of political grace into a
22 matter of legal entitlement. And, of course, we will
23 come to the -- to the ordinances which reflect that.
24 During the course of my friend's argument you were
25 referred to the Indian Reserve Ordinance of 1869,
26 which allowed stipendiary magistrates to settle
27 boundary disputes between people who owned land
28 contiguous to a reserve and the natives on the
29 reserve. And that created a legal interest
30 enforceable by the stipendiary magistrates and the
31 people for whose benefit that reserve was set aside
32 and in whose name and the title of which was in the
33 Crown in Right of British Columbia.
34 From the outset -- I'm at paragraph 19 -- the
35 aboriginal interest had the essential characteristic
36 of non-alienability otherwise than to the Crown. This
37 attribute was not predetermined, but rather was
38 created by the Crown when it declared its ownership of
39 all lands in the mainland colony by proclamation and
40 thereafter withdrew from settlement those portions
41 which comprised Indian villages and sites.
42 The plaintiffs have admitted that the interest
43 which they claim is alienable only to the Crown. They
44 have admitted that their interest which they claim is
45 alienable only to the Crown. That was in the lis
46 pendens appeal.
47 Now, the colony gave effect to its policy by,

Submissions by Mr. Goldie 1 among other things, setting aside reserves for the use
2 and benefit of the native peoples. In addition the
3 Indians were afforded what Douglas described as "the
4 enjoyment of that natural freedom and liberty of
5 action without which existence becomes intolerable".
6 And that statement was made in the context of a -- of
7 policies being enforced elsewhere, and namely in the
8 adjacent American territories which had for their
9 object the segregation of native peoples.
10 I say that reserve allocation gave territorial
11 definition to the areas where the Crown had determined
12 to protect Indian occupation. The policy of reserve
13 allocation became the central element of the process
14 by which the colonial legal order acknowledged and
15 gave effect to the fact of aboriginal presence.
16 Rights of hunting and fishing were -- nonexclusive
17 rights of hunting and fishing were extended subject to
18 the laws from time to time in force in relation to
19 those matters.
20 Now, upon confederation in 1871, the practice of
21 reserve allocation was made a continuing obligation of
22 the parties to the Terms of Union. As part of the
23 division of legislative powers Canada assumed
24 constitutional responsibility for Indians and lands
25 reserved for Indians and Term 13 of the Terms of Union
26 defined British Columbia's responsibility upon this
27 transfer of legislative power. The result was that an
28 aboriginal interest in village sites and lands
29 actually used and occupied by them continued to be
30 protected.
31 Now, the considerable significance of this
32 protection became apparent when it was held that as
33 constitutional guardian for the welfare of the
34 Indians, Canada could be made legally responsible for
35 its actions when reserve lands were dealt with other
36 than in accordance with the terms of surrender. And
37 that's the Guerin Case.
38 The law in British Columbia long ago protected the
39 Indian interest in reserve lands set apart for their
40 use. In 1985 Chief Justice Begbie enjoined entry of
41 contractors, purportedly authorized by the Dominion
42 Government, on to an Indian reserve to construct an
43 immigration shed.
44 My lord, that -- the extracts in relation to that
45 are under the Tab III/1-25. And what is found there
46 is a typescript of the Bench Book which was entered
47 at -- as Exhibit 1057-36. And I think all parties are

Submissions by Mr. Goldie

agreed that the typescript is a reasonable -- is a reasonable attempt to reproduce Judge Begbie's rather sketchy entries.

Now, in making his order -- and I note that he was a Chancery-trained lawyer -- he applied the principles applicable to a trustee and beneficiary and in this respect anticipated Guerin by some 99 years. He said, from page 128 of his Bench Book, after noting that control and management of Indian lands is vested by statute in the Minister of the Crown, and I quote:

> "Those words do not mean that the land and property are delivered over to the arbitrary will of any minister emancipated from all provisions of statutes and doctrines of the court which relate to proceedings between trustees and cestuique trust."

Now, on the other hand when, a year later, a claim of Indian title in a proprietary sense was raised, he dismissed it in equally strong language. And that's at the next tab, my lord. Again, this is a typescript. At page 448 of his Bench Book, he said:

> "No proposition respecting land anywhere or in any occupation could be more decisively or clearly or consistently established than this, that until a reserve had been duly established, the Indians (not being enfranchised had no rights to the land nor could acquire any rights much less transfer any rights."

Now, the opening portion of his Bench Book is found at Exhibit 1057 Tab 52. I needn't refer to that. The application in question grew out of the Metlakatla controversy, the first occasion on which, so far as we have been able to ascertain, an Indian right of a proprietary nature was asserted in a British Columbia court.

My lord, I take it that it is clear that the distinction we make between a proprietary claim and a nonproprietary claim is the nonproprietary claim is the usufruct, that is to say the personal right to use something belonging to another. The proprietary claim is the claim to ownership, which was made by Mr. Duncan in the Metlakatla controversy, and we take it as what is being made here.

1 Now, he said with respect to such a claim that

2 the -- the chief justice made explicit reference to
3 what we contrast with that, the nonproprietary rights,
4 and I have set out the language which is found at
5 Exhibit 1040 Tab 98. And he was -- he was addressing
6 counsel for the -- who really represented the -- the
7 point of view that was being put -- asserted on behalf
8 of Mr. Duncan and the natives who supported him. He
9 said, and I quote:
10
11 "The very book, the very case from which you
12 cite the unsuccessful advocate's view contains
13 quite a long historical chain of authorities.
14 (I took the book from him and read at pages
15 206-209, 229-30 et cetera) showing the negation
16 of all Indian rights to the land, or to any
17 land, before reserves have been duly made and
18 that the only right recognized by our law (and
19 I believe the law of all civilized nations) is
20 merely a right of occupation, on the land at
21 the will of the Crown. The decision equally
22 refused to recognize any individual Indian
23 right, or any transferrable tribal right, to
24 the land even when reserved (they certainly
25 have some definable, enforcible rights on such
26 reserves, as I held, even against in the
27 Emigrants' home case)."
28
29 Now, if I -- two comments, my lord. The
30 Emigrant's home case is the one I referred to just a
31 minute ago in which Begbie enjoined the contractors
32 authorized by the Dominion from going on a reserve.
33 The second comment is noted in the footnote, and
34 that is our footnote, that he was referring to the
35 reported trial, that is to say Chancellor Boyd's
36 judgment of St. Catherine's Milling. I think I might
37 demonstrate that by going to the report of Chancellor
38 Boyd and to the pages in question. I'll get your
39 lordship a reference in the grey books to the
40 judgment. It's the grey book, my lord, Volume 4 at
41 Tab S, as in sugar, 7, and page 206, which is the
42 first of the -- page 206 to 209, first of those
43 referred to by the chief justice. The third paragraph
44 on that page begins with the words "The colonial
45 policy of Great Britain".
46 THE COURT: Page 196?
47 MR. GOLDIE: 206, my lord.

1 THE COURT: This is the trial judgment, is it?
2 MR. GOLDIE: This is the trial judgment. This is the -- at the
3 time the chief justice decided the injunction
4 application before him in 1886. This was the only
5 judgment outstanding in St. Catherine's Milling. Does
6 your lordship have page 206?
7 THE COURT: Yes.
8 MR. GOLDIE: Beginning with the paragraph:
9
10 "The colonial policy of Great Britain as it
11 regards the claims and treatment of the
12 aboriginal populations in America has been from
13 the first uniform and well-defined. Indian
14 peoples were found scattered wide-cast over the
15 continent, having, as a characteristic, no
16 fixed abodes, but moving as the exigencies of
17 living demanded."
18
19 I might just pause there and say with all respect to
20 Chancellor Boyd that is what I might call a central
21 Canadian view of things. Continuing:
22
23 "As heathens and barbarians it was not thought
24 that they had any proprietary title to the
25 soil, nor any such claim thereto as to
26 interfere with the plantations, and the general
27 prosecution of colonization. They were treated
28 'justly and graciously', as Lord Bacon advised,
29 but no legal ownership of the land was ever
30 attributed to them. The Attorney-General in
31 his argument called my attention to a joint
32 opinion given by 'a multitude of counsellors',
33 about 1675, touching land in New York, while
34 yet a province under English rule."
35
36 And then footnote D indicates the -- the opinion,
37 which I don't recall my friend Mr. Jackson referring
38 to, but it is one that very definitely supports the
39 statement made by Chancellor Boyd. And he says on
40 page 207:
41
42 "I think it accurately states the
43 constitutional law in these words:
44
45 'Though it hath been and still is the usual
46 practice of all proprietors to give their
47 Indians some recompense for their land, and so

1 seem to purchase it of them, yet that is not

2 done for want of sufficient title from the King
3 or Prince who hath the right of Discovery, but
4 out of prudence and Christian charity least
5 otherwise the Indians might have destroyed the
6 first planters (who are usually too few to
7 defend themselves) or refuse all Commerce and
8 Conversation with the planters, and thereby all
9 hopes of converting them to the Christian faith
10 would be lost. In this the common law of
11 England and the civil law doth agree.'
12
13 Though some planters have purchased from the
14 Indians yet having done so without the consent
15 of the proprietors for the time being, the
16 title is good against the Indians but not
17 against the proprietors without a confirmation
18 from them upon the usual terms of other
19 plantations."
20
21 Now, whatever one may think of that statement, it is a
22 statement by a respectable authority of what the law
23 was and it was obviously one that Chancellor Boyd
24 relied upon and it was one adopted by Chief Justice
25 Begbie.
26 And then at page 209 he goes on to refer to
27 Johnson and McIntosh and quotes from that case what
28 supports his conclusion. And then after doing so, in
29 the second-to-last paragraph he says:
30
31 "This right of occupancy attached to the
32 Indians in their tribal character. They were
33 incapacitated from transferring it to any
34 stranger, though it was susceptible of being
35 extinguished. The exclusive power to procure
36 its extinguishment rules was vested in the
37 Crown, a power which as a rule was exercised
38 only on just and equitable terms. If this
39 title was sought to be acquired by others than
40 the Crown, the attempted transfer passed
41 nothing and could operate only as an
42 extinguishment of the Indian right for the
43 benefit of the title paramount."
44
45 Now, that -- that was one section that the chief
46 justice referred to. The other section's at 229-30
47 and I -- I think the part that he is referring to as

1 relevant to the judgment he gave is found at the
2 bottom of page 229. When I say he, I'm, of course,
3 referring to Chief Justice Begbie. And at this part
4 of his judgment, Chancellor Boyd was referring to the
5 change in relations between the government and the
6 Indians upon the establishment of reserves. And he
7 said again -- this is at the last paragraph, and I
8 quote:
9
10 "Again: The relations between the government
11 and the Indians change upon the establishment
12 of reserves. While in the nomadic state they
13 may or may not choose to treat with the Crown
14 for the extinction of their primitive right of
15 occupancy. If they refuse the government is
16 not hampered, but has perfect liberty to
17 proceed with the settlement and development of
18 the country, and so, sooner or later, to
19 displace them. If, however, they elect to
20 treat they then become, in a special sense,
21 wards of the State, are surrounded by its
22 protection while under pupillage, and have
23 their rights assured in perpetuity to the usual
24 land reserve."
25
26 And then down a few sentences or lines:
27
28 "Before the appropriation of reserves the
29 Indians have no claim except upon the bounty
30 and benevolence of the Crown. After the
31 appropriation, they become invested with a
32 legally recognized tenure of defined lands; in
33 which they have a present right as to the
34 exclusive and absolute usufruct, and a
35 potential right of becoming individual owners
36 in fee after enfranchisement."
37
38 Your lordship will see the relevance of that to the
39 statements made by the chief justice.
40 Turning back to paragraph 28 of my summary, I say
41 these statements by Begbie in 1885 and 1886 have the
42 character of both reasons for judgment and of the
43 colloquy which takes place between judge and counsel.
44 Their importance is not confined to an exact legal
45 perception of two distinctly different kinds of claim.
46 They are also statements by one whose experience with
47 the Indian peoples of British Columbia was exceeded

only by that of Sir James Douglas himself.

I say it is here emphasized that the "... right recognized by our law"... referred to by the Chief Justice is a right enforceable against third parties. It is not one enforceable against the Crown and could not be when it exists "... at the will of the Crown..."

Now, such was the view of Sir John A. Macdonald in the exhibit referred to in paragraph 29 and in the relevant portion of the -- of the -- of the yellow binder. He -- Sir John A. was responding to a letter from the Reverend Alexander Sutherland. And the letter is dated the 28th of February, 1887. And he says:

> "Dear Doctor Sutherland,
> I have your private note of the 25th instant respecting the Indian reserves in British Columbia, for which I am much obliged. The position of the Indians in that province is in a very unsatisfactory state."

Your lordship will bear in mind that this is very close to the time when the -- the Metlakatla controversy was coming to a head. The -- continuing:

> "The British Government, when B.C. was a Crown colony, treated the Indians with liberality, but did so merely as a matter of grace. The Indian title to the soil had never been admitted there, and before and since the union with Canada Reserves were laid out by the Government there for various tribes or bands of Indians according to the government's discretion."

Now, I'm not citing that as an example of accuracy. What I am saying is that the -- it was perceived at that time that the -- that the -- the actions of the Crown -- the Imperial Crown during the colonial period was a matter of grace. We don't -- we will be submitting to your lordship that whether it is correct to state that the actions of Douglas were a matter of grace is -- is a precise or accurate description is beside the point. We will be submitting that in doing what he did, he went beyond any requirement, whether of law or policy of the day.

1 Then I say as will be seen below, such too appears
2 to have been the view of Chief Justice Marshall in
3 Johnson and McIntosh. And I analyse that at some
4 length. But I say only here that the relevant passage
5 was quoted by Chancellor Boyd in his judgment in St.
6 Catherine's Milling.
7 And then I note that it was also the view of the
8 Secretary of State for the colonies, Earl Grey, in
9 1846, when he instructed the then newly-appointed
10 Governor of New Zealand on the subject of the
11 aborigines of that colony. And the extract is set out
12 under Tab 30. And the part that I am quoting from is
13 on page 67. These are instructions from the Secretary
14 of State for the colonies to the Governor of New
15 Zealand in 1846. And I -- I think it's introduced by
16 the -- the -- about midway down the page, Earl Grey
17 says -- in the paragraph beginning with the words
18 "Believing that the instructions, as thus prepared",
19 he says in the second sentence:
20
21 "I turn to other topics on which it seems
22 indispensable that on the present occasion I
23 should convey to you explanations for which, of
24 course, no appropriate place could be found in
25 the legal instruments already mentioned. I
26 avdvert especially to what relates to the
27 aborigines of New Zealand, and the settlement
28 of the public lands in those islands.
29 I cannot approach this topic without
30 remarking that the protracted correspondence to
31 which it has given rise, the public debates and
32 resolutions which have sprung from it, and the
33 enactments and measures of your predecessors in
34 the Government, have all contributed to throw
35 into almost inextricable confusion the
36 respective rights and claims of various classes
37 and individuals amongst the inhabitants of New
38 Zealand, to render very embarrassing the
39 inquiry in which you must doubtless be engaged
40 respecting the line of conduct which Her
41 Majesty's Government expect you to pursue, and
42 at the same time to make it almost impossible
43 for us to determine, with any confidence, what
44 that conduct ought to be, and how far, in a
45 state of affairs so complicated, it is possible
46 now to act upon the principles to which, in the
47 absence of these difficulties, I should have

1 prescribed your adherence. I will not attempt

2 any retrospect of those documents and
3 proceedings. I should but be adding to the
4 perplexity which I acknowledge and regret. It
5 shall be my attempt rather to explain, as
6 briefly as the nature of the subject admits,
7 what is the policy which, if we were
8 unembarrassed by past transactions, it would be
9 right to follow, and which (so far as any
10 freedom of choice remains to us) ought still to
11 be adopted, regarding the right of property in
12 land which should be acknowledged or created,
13 more especially as affecting the aborigines of
14 New Zealand."
15
16 Now, that's his introduction to what he's going to
17 say, and I needn't enlarge upon it. It is clear
18 that -- that -- this is continuing the -- a
19 description of the situation that New Zealand found
20 itself in as a result of the confusion over the manner
21 in which that colony was brought into being and the
22 actions which were taken by the New Zealand company
23 before there was a colony.
24 Now, turning to what he would have had done in
25 which he asks the new governor to do as much as he
26 can, he says, and I quote:
27
28 "I enter on this topic by observing that the
29 accompanying statute, repeals the Australian
30 Land Sales Act, as far as relates to lands
31 situate in New Zealand. Thus there is a
32 complete absence of any statutory regulations
33 on this subject. The Queen, as entitled in
34 right of her Crown to any waste lands in the
35 colony, is free to make whatever rules Her
36 Majesty may see fit on the subject. The
37 accompanying Charter accordingly authorizes the
38 Governor to alienate such lands. The
39 accompanying instructions direct how that power
40 is to be used. I proceed to explain the
41 motives by which those instructions have been
42 dictated.
43 The opinion assumed, rather than advocated,
44 by a large class of writers on this and kindred
45 subjects is that the aboriginal inhabitants of
46 any country are the proprietors of every part
47 of its soil of which they have been accustomed

1 to make any use, or to which they have been
2 accustomed to assert any title. This claim is
3 represented as sacred, however ignorant such
4 natives may be of the arts or of the habits of
5 civilized life, however small the number of
6 their tribes, however unsettled their abodes,
7 and however imperfect or occasional the uses
8 they make of the land. Whether they are
9 nomadic tribes depasturing cattle, or hunters
10 living by the chase, or fishermen frequenting
11 the sea-coasts or the banks of rivers, the
12 proprietary title in question is alike ascribed
13 to them all.
14 From this doctrine, whether it be
15 maintained on the grounds of religion or of
16 morality or of expediency, I entirely dissent.
17 What I hold to be the true principle with
18 regard to property in land is that which I find
19 laid down in the following passage from the
20 works of Dr. Arnold, which I think may safely
21 be accepted as of authority upon this subject,
22 not only on account of his high character, but
23 also because it was written not with reference
24 to passing events, or to any controversy which
25 was at that time going on, but as stating a
26 principle which he conceived to be of general
27 application."
28
29 And then he quotes from Dr. Arnold. And I'm not going
30 to read that, except to say that what it comes down to
31 is that the aboriginal right is a claim limited to the
32 possession of lands actually occupied, that is to say
33 inhabited.
34 THE COURT: Dr. Arnold's some philosopher, was he?
35 MR. GOLDIE: I think he was a legal commentator like -- he may
36 even have been, for all I know, the headmaster of
37 rugby. There was a famous Dr. Arnold who has achieved
38 some prominence in that regard. But whoever he was,
39 the Secretary of State is adopting his views and is
40 instructing the Governor of New Zealand accordingly.
41 And those instructions are consistent with the -- with
42 the observations and conclusions reached by Chancellor
43 Boyd.
44 THE COURT: I sense that the quotation on the bottom of page 13
45 of your argument is not a complete quote. I think
46 there's a couple of sentences --
47 MR. GOLDIE: No, it isn't, my lord. It doesn't -- doesn't

1 provide the introductory part which I read at some
2 length.
3 THE COURT: But even what's here isn't complete, I don't think.
4 MR. GOLDIE: Oh, you mean under Tab --
5 THE COURT: Yes.
6 MR. GOLDIE: No. It's much longer. The exhibit itself is much
7 longer.
8 THE COURT: Yes, but even the passage -- you mentioned a Charter
9 and I don't see that. I just followed it very
10 quickly. It just struck me that it wasn't complete.
11 MR. GOLDIE: Well, I'll check that, my lord. It was intended to
12 be a reproduction of the paragraph beginning at the
13 bottom of page 67 of the exhibit, part of which is
14 found under Tab 30 and which is sidelined in the
15 yellow one.
16 THE COURT: All right.
17 MR. GOLDIE: And the -- it ends with the words "I entirely
18 dissent", which is the first sentence of the second
19 paragraph on page 68.
20 And I say that what his views were and the
21 instructions he gave, because this was a letter
22 accompanying the instructions, will be examined later.
23 My lord, the aboriginal interest described above,
24 with its essential characteristis of non-alienability
25 and the fiduciary obligation arising upon surrender to
26 the Crown, is not the interest claimed by the
27 plaintiffs. The characteristics of the rights claimed
28 and the availability of such rights as a matter of
29 law, now we propose to examine.
30 And that brings me to Section 2, ownership and
31 jurisdiction.
32 The rights claimed by the plaintiffs are described
33 in the Statement of Claim as rights of ownership and
34 jurisdiction. The proposition that such rights are
35 not simply "aboriginal title otherwise so-called"
36 starts with the analysis of the pleadings in Part II
37 Section 2 above, from which it has been seen that the
38 Statement of Claim distinguishes between ownership and
39 jurisdiction on the one hand, and aboriginal title on
40 the other.
41 As Mr. Plant said to your lordship this morning,
42 we intend to as part of our conclusion try to bring
43 the statements of counsel made in the course of the
44 trial together with the -- and in argument together
45 with the pleadings into one -- one analysis so that we
46 are able to say, as I believe we can say with
47 confidence, that the claim that is made here does not

1 include the Calder type nonproprietary claim.

2 Now, I make reference to the opening and in the
3 last five lines of what is quoted, I have
4 emphasized -- or I do emphasize now these words:
5
6 "We are not interested in asserting aboriginal
7 rights - we are here to discuss territory and
8 authority."
9
10 Now, my lord, page 2 I provide some statements or
11 definitions of the word 'ownership' and Jowitt's
12 Dictionary of English Law defines ownership as:
13
14 "... the most extensive right allowed by law to
15 a person, of dealing with a thing to the
16 exclusion of all other persons, or of all
17 except one or more specified persons. It is
18 therefore a right in rem."
19
20 And then about midway down that paragraph, my lord,
21 beginning with the words "So long, however":
22
23 "So long, however, as the grantees"...
24
25 That is to say the grantees of the purported owner.
26
27 "... have only definite rights of user over the
28 thing, and the original owner retains an
29 indefinite right, he is still owner."
30
31 In my submission the plaintiffs in this case have put
32 forward a claim under which they wish to be the owner,
33 and the only right of user in the Crown is the right
34 of pre-emption, which the province no longer
35 possesses.
36 And then the -- and then he goes on:
37
38 "But if he parts with the indefinite right and
39 retains only a definite one, (for example a
40 right of way in the case of land) he ceases to
41 be owner.
42
43 Ownership is said to be absolute when it is
44 subject only to those restrictions which are
45 imposed by law on all owners, and are therefore
46 implied in the idea of ownership."
47

Submissions by Mr. Goldie 1 And we say at this point, my lord, that the only
2 restrictions which the plaintiffs appear to be
3 prepared to acknowledge are those imposed by their own
4 law save in respect of areas that are Crown granted
5 before October, 1984.
6 And the -- these extracts are all in the -- in the
7 yellow binder. The reference to Halsbury is under Tab
8 III/2-5, page 4. And the learned authors state there,
9 and I quote:
10
11 "Ownership consists of innumerable rights over
12 property, for example the rights of exclusive
13 enjoyment, of destruction, alteration and
14 alienation, and of maintaining and recovering
15 possession of property from all other persons.
16 Those rights are conceived not as separately
17 existing, but as merged in one general right of
18 ownership."
19
20 Now, ownership as we take it to be advanced here
21 implies property in the thing possessed. It implies
22 the right to make decisions with respect to use, the
23 right to exclude others from use and the right of
24 alienation or disposal. And when I come to examine
25 the attributes of the plaintiffs' claim as made by my
26 friend Mr. Jackson, it will be seen that at the heart
27 of it is exclusive possession.
28 Continuing with my summary at page 4, ownership
29 implies identification of the thing owned with
30 sufficient certainty to permit the exercise of the
31 described rights and their enforcement as against
32 others. But the exercise of rights of ownership is
33 usually a private act; thus, when we speak of
34 ownership rights, we are speaking of what are
35 conventionally described as private rights.
36 Then I go on to refer to jurisdiction and with
37 the -- the conventional definitions are set out there
38 and they're in the relevant pages of the yellow
39 binder.
40 And paragraph 10 I note that the plaintiffs'
41 conception of jurisdiction clearly goes beyond that
42 jurisdiction which is necessarily incidental to
43 ownership of property.
44 And I say in paragraph 11, to summarize, the
45 plaintiffs' claim -- that should be s apostrophe --
46 fuses private law rights of ownership and public law
47 rights of governments. Neither, allegedly, is subject

Submissions by Mr. Goldie 1 to the general law. In substance, if not in form, the
2 claim amounts to an assertion of sovereignty.
3 While they purport to recognize the underlying
4 title of the Crown, that title is said to be burdened
5 by and subject to their rights. And I won't -- I
6 won't repeat the -- our submissions with respect to
7 the extensive nature of the rights claimed and what
8 they are in reality as opposed to what they may be
9 qualified and by statements of counsel here. And Mr.
10 Plant has discussed a number of the matters which are
11 touched upon here.
12 I note on page 7 that the -- that our political
13 and legal system accords tremendous liberty to its
14 citizens and I make the appropriate references there.
15 Now, in paragraph 18 I say that all subjects of
16 the realm, and at least up until now (the plaintiffs
17 are included in that category) have considerable
18 freedom to organize their lives as they please and
19 within such structures as they choose. These
20 structures may be newly-created, or may be part of a
21 religious or ethnic heritage. And there are many
22 examples of that: Families, churches, political
23 parties, trade unions, clubs, professional
24 associations. The members of privately constituted
25 organizations have such rights, amongst themselves, as
26 they are prepared to confer upon one another. The
27 Lakeside Colony Case, my lord, is a decision of the
28 Manitoba Queens Bench and it's found in Volume 2 Tab
29 L-1. That -- the judgment in that case recognized the
30 right -- recognized -- it's L-1, my lord.
31 THE COURT: Yes. Thank you.
32 MR. GOLDIE: Recognized the right of the Hutterian Brethren
33 Church, which under whose constitution all property of
34 its members were held in common to expel a member for
35 repeated refusals to adhere to the principles of the
36 church's constitution. And the issue that arose was
37 to whom did the property in which the plaintiff lived
38 and which he had improved belonged? And the Court
39 held -- and I should note the judgment is under
40 appeal, or at least a leave application was sought or
41 will be heard in May of this year, this month. But
42 the judgment recognized the communal right and said
43 that unless the procedure which the community followed
44 in expelling the member and in stripping him of his
45 rights was a denial of natural justice, that his
46 membership in the community carried with it an
47 acceptance of the consequences of his defiance of the

1 community's laws and customs.
2 THE COURT: This is a trial judgment?
3 MR. GOLDIE: This is a trial judgment.
4 THE COURT: When you said leave will be sought --
5 MR. GOLDIE: The footnote on page 473 --
6 THE COURT: All right.
7 MR. GOLDIE: -- is leave to appeal to the Manitoba Court of
8 Appeal was filed in December of 1989. I would have
9 thought that leave would have been granted as a right.
10 THE COURT: I wouldn't have thought it would have been required.
11 MR. GOLDIE: Yes. I shouldn't say leave was granted as of
12 right. I would have thought that he would have had an
13 appeal as of right, but -- but the point is that the
14 Court was prepared to give effect to a consensual
15 arrangement after satisfying itself that there was
16 nothing unfair in the procedure. But the arrangement
17 was -- was binding upon the plaintiff only because it
18 it was at -- in its origin consensual and one that he
19 had participated in.
20 Now, my lord, applying some of these observations
21 to the case at bar, it may be suggested that when
22 non-Indians first came to British Columbia, the
23 plaintiffs' ancestors governed themselves in some part
24 or parts of what is now the claim area. And today,
25 within the sphere of relations circumscribed by the
26 feast system, clearly some of the plaintiffs still
27 conduct their affairs in a manner different from what
28 might be called the mainstream Canadian society. That
29 much is obvious from the evidence. But to admit this
30 does not constitute the plaintiffs' feast hall as a
31 sovereign authority which is superior to and immune
32 from the legal institutions of the Canadian
33 Constitution and Federal system of government.
34 Now, my lord, I want to at this point deal with
35 with the characteristics of the ownership as discussed
36 by my friend Mr. Jackson at transcript 327, page 24932
37 to page 24987. And I propose handing up an addendum
38 which --
39 THE COURT: That's upwards of 40 pages.
40 MR. GOLDIE: Beg your pardon?
41 THE COURT: Upwards of 40 pages, 24932 to 24987.
42 MR. GOLDIE: That's what the discussion is.
43 THE COURT: All right.
44 MR. GOLDIE: But my -- my comments are much shorter.
45 THE COURT: Thank you.
46 MR. GOLDIE: And perhaps they might be inserted in the book
47 at -- to follow paragraph 19, which I have just read.

1 THE COURT: Yes. All right.
2 MR. GOLDIE: The characteristics of the claim that is made were
3 set out by my friend Mr. Jackson in his written
4 argument and there are two pages which are attached to
5 this addendum. They're pages at the top headed page
6 10 and 11.
7 THE COURT: Yes.
8 MR. GOLDIE: And there my friend Mr. Jackson put it this way:
9 He said the Court raised the question at volume 325,
10 pages 247912 whether the plaintiffs' claim to
11 ownership is something different from aboriginal
12 rights or whether it is another way of describing
13 aboriginal rights. The Court also asked whether the
14 plaintiffs are saying they have proprietary interests
15 equivalent to fee simple. The plaintiffs' response
16 can be summarized in this way. And then Mr. Jackson
17 has set out eight propositions, which I'm going to
18 refer to briefly. And the first one is that the
19 ownership of the territories is split. The Crown in
20 right of the province has the underlying title. The
21 plaintiffs have an aboriginal title. Both the Crown
22 and the aboriginal titles are co-existing forms of
23 ownership.
24 The second proposition is the plaintiffs'
25 aboriginal title is a sui generis common law. And I
26 ask your lordship to note those words, common law,
27 proprietary interest distinct from an estate in fee
28 simple. The plaintiffs do not claim an estate in fee
29 simple.
30 I'm just going back to the beginning of my
31 addendum. I say taken as a whole, these propositions
32 confirm the concept of ownership derived from the
33 pleadings. Such a concept reduces the Crown in right
34 of the province to a virtual nonentity as it is even
35 denied the exclusive right of pre-emption: Such a
36 right, the plaintiffs say, may be exercised only by
37 Canada with the plaintiffs' consent.
38 The central feature of the plaintiffs' concept is
39 exclusive possession. Number four on the list, and
40 that's on page 11, reads, and I quote:
41
42 "The plaintiffs' interest extends to the full
43 and exclusive enjoyment of the territory and
44 all its resources."
45
46 Number 3 states:
47

1 "The plaintiffs' interest is based on their
2 possession pre-existing the assertion of Crown
3 sovereignty."
4
5 And number 6 is:
6
7 "The plaintiffs' interest, so analyzed, has the
8 essential hallmarks of ownership and not merely
9 use and occupancy."
10
11 Now, I take it that the words "and not merely use and
12 occupancy" is a reference to the Calder type of
13 declaration.
14 Now, turning back to my addendum, paragraph 19B,
15 although the ownership is claimed to be sui generis,
16 it is said in proposition number 2 to be a "... common
17 law proprietary interest distinct from a fee
18 simple...". Now, if any sense can be made of this --
19 and I don't mean to be disrespectful, my lord, but I'm
20 trying to -- I am trying to reconcile what I say are
21 contradictory propositions, namely common law
22 proprietary interests distinct from a fee simple. I
23 say if any sense can be made of this, the interest of
24 the plaintiffs must be one which the common law
25 recognizes as proprietary, that is to say an interest
26 in real property which is an interest other than a fee
27 simple.
28 Now, there is no estate known to the common law
29 which is based on possession prior to the assertion of
30 sovereignty, and I should say no estate in land, that
31 is to say proprietary estate. All interests in land
32 in British Columbia must derive either mediately or
33 immediately from the Crown. In other words, every
34 interest in land has to start with a Crown grant,
35 which is the terms upon which the Crown recognizes the
36 ownership of a private person. Reference will be made
37 to this again, but in substance the point is this:
38 When the civil and criminal laws of England, as the
39 same existed at the date of the proclamation of
40 November 19th, 1858, and so far as they were not, from
41 local circumstances, inapplicable to the colony of
42 British Columbia, became in full force and effect in
43 the colony, the principle that the basic title to all
44 land was vested in the Sovereign was the law in
45 British Columbia. The effect of the proclamation was
46 to extinguish, by denying recognition to, any claim
47 (if such existed), including aboriginal title, but

1 extending to all others, which did not derive from a
2 grant by the Sovereign.
3 Now, if I may interject at this point, we will see
4 when we come to analyse the historical development
5 that Douglas was at pains to deny both miners' law --
6 which had an understood meaning amongst the California
7 miners, to deny both the existence of miners' law and
8 Indian law in British Columbia one and the same time.
9 Now, this was not, so far as I can make out, a
10 point argued in Calder and in itself, in my
11 submission, it is fatal to an interest described in
12 propositions 1, 2 and 3.
13 Now, I want to interject one other reference here,
14 and that is to Milirrpum, which where Mr. Justice
15 Blackburn looked at much the same sort of proposition.
16 That's Volume 2 of the grey books, my lord, Tab M-2.
17 THE COURT: Which volume?
18 MR. GOLDIE: Volume 2 Tab M-2.
19 THE COURT: Yes. Quite a short one as I recall.
20 MR. GOLDIE: Yes. He touches virtually every base. Well, about
21 100 pages into his judgment he examines the
22 consequence of -- that follows from a colony being a
23 settled colony. And this bears directly upon the
24 effect of the introduction of English law. And at
25 page 244 --
26 THE COURT: Yes. Sorry. Yes?
27 MR. GOLDIE: It's the way the pages are photographed. It's on
28 the left-hand side. It's about the fourth paragraph
29 beginning with the words "What follows from this
30 rule".
31 THE COURT: Yes.
32 MR. GOLDIE: And this rule was the categorization of colonies.
33 What he says is this:
34
35 "What follows from this rule, as I have already
36 shown, is that in principle from the moment of
37 the foundation of a settled colony English law,
38 so far as it was applicable, applied in the
39 whole of the colony. English law, as applied
40 in England, certainly did not, for obvious
41 reasons, include a rule that communal native
42 title had to be respected. The question
43 whether English law, as applied to a settled
44 colony, included, or now includes, a rule that
45 communal native people where proved to exist
46 must be recognized, is one which can be
47 answered only by an examination of what has

1 happened in the laws of the various places
2 where English law has been applied."
3
4 And then he goes on in the next page, the top of the
5 page, the paragraph beginning:
6
7 "There is, however, much additional authority
8 from which, in my opinion, the same conclusion
9 must be drawn."
10
11 The same conclusion is that the doctrine of communal
12 native title does not exist in English -- in English
13 law. He says:
14
15 "There is, however, much additional authority
16 from which, in my opinion, the same conclusion
17 must be drawn. This includes all the
18 Australian cases to which I was referred on
19 this aspect of the case. None of them either
20 expressly or impliedly refers to any doctrine
21 of communal native title; the issues in all of
22 them arose between non-aboriginal subjects, or
23 between such subjects and the Crown. They all
24 affirm the principle, fundamental to the
25 English law of real property, that the Crown is
26 the source of title to all land; that no
27 subject can own land allodially, but only an
28 estate or interest in it which he holds
29 mediately or immediately of the Crown."
30
31 And I have expanded my reference there, my lord,
32 because I want to emphasize that the claim that is
33 made by the plaintiffs in this case is a proprietary
34 interest, which means an estate in real property.
35 Now, continuing.
36 THE COURT: I think we'll adjourn, Mr. Goldie.
37 MR. GOLDIE: Yes. Thank you, my lord.
38 THE COURT: Just a moment, please.
39 MR. GOLDIE: That would be at the end of the first paragraph on
40 page 19 -- page 9(3).
41 THE COURT: Yes. All right. Two o'clock, please.
42 THE REGISTRAR: Order in court. Court stands adjourned until
43 two o'clock.
44
45 (PROCEEDINGS ADJOURNED)
46
47

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

_____

Kathie Tanaka, Official Reporter
UNITED REPORTING SERVICE LTD.

1 ⊥h2 Submissions by Mr. Goldie
2 (PROCEEDINGS RESUMED PURSUANT TO LUNCHEON ADJOURNMENT)
3
4 THE REGISTRAR: Order in court.
5 THE COURT: Mr. Goldie.
6 MR. GOLDIE: My lord, before I continue, I'm assured that the
7 quotation from the despatch of the Secretary of State
8 for Colonial Affairs to the new Governor of New
9 Zealand which is found at page 13 of part 3, Section
10 1, that that quotation is a correct transcription of
11 what purports to be --
12 THE COURT: Well, I just didn't hear you right then. As I
13 followed, it didn't seem to me that I could find all
14 the words that I heard you say.
15 MR. GOLDIE: That would not surprise me, my lord. Sometimes
16 the --
17 THE COURT: Where is it, on page 13?
18 MR. GOLDIE: Page 13 is paragraph 30.
19 THE COURT: Of Roman I?
20 MR. GOLDIE: Roman III, Arabic 1, page 13.
21 THE COURT: All right.
22 MR. GOLDIE: What the eye sees and what the tongue repeats is
23 sometimes two different things.
24 THE COURT: Well, I will take your word for it. Thank you.
25 MR. GOLDIE: I suppose the correct -- the correct conclusion to
26 draw from it is that your lordship shouldn't do
27 anything other than go to the original exhibit.
28 THE COURT: I thought you were going to say that I shouldn't
29 listen to what you are saying.
30 MR. GOLDIE: Well, I might even go as far as that, my lord, if I
31 could be assured that you are going to read all the
32 exhibits.
33 THE COURT: All right. Where are you now, Mr. Goldie?
34 MR. GOLDIE: I am at the addendum to paragraph 19 of Roman III,
35 Arabic 2.
36 THE COURT: Yes.
37 MR. GOLDIE: And I was on page 9(3) of that addendum.
38 THE COURT: Yes.
39 MR. GOLDIE: And, my lord, I had mentioned that the proposition
40 that flows from the introduction of English law into a
41 settled colony was one that was well known in the
42 constitutional law of England. But it was made -- it
43 was put beyond doubt in the case of the mainland
44 colony with the second Proclamation of Douglas which,
45 as I said earlier, was drafted in England and sent out
46 to him and which he proclaimed on November 19th, I
47 think it was, 1858.

Now, the proposition that that in itself was fatal to an interest of the kind put forward here was not, of course, argued in Calder. I assume because the interest was not of the kind that we are faced with here. But I say that it is fatal to the proposition set out in items 1, 2 and 3 of the Plaintiffs' argument that the ownership of the territories is split; that the Plaintiffs' aboriginal title is a sui generis common law proprietary interest; and that their interest is based on their possession pre-existing the assertion of Crown sovereignty. I say that that can't stand in the face of the introduction of English law which is based on the bedrock principle that all interests in land stem from the Crown either mediately or immediately.

Now, going on with paragraph 19C. My friend, Mr. Jackson, after referring to proposition number 6 which is that "the Plaintiffs' interest, so analyzed, has the essential hallmarks of ownership and not merely use and occcupancy" went on to suggest by reference to the evidence of Dr. Daly how that ownership is translated into present day terms. And that discussion begins at page 24988 of transcript 327. And there is a preceding discussion about the usefulness of that. And your lordship said that you need not trouble Mr. Jackson to read what the Encyclopedia Britannic said about the matter. But at the top of Dr. Daly's list is, and I'm now reading from that transcript, my lord, line 24. This is my friend Mr. Jackson. And I quote.

> "Dr. Daly suggested the following common elements of a system of ownership:"

And then he quotes from Dr. Daly's evidence which was objected to. But Mr. Willms' objection was noted.

> "A broad explanation of ownership in any culture would include the following aspects. First, ownership implies the concept of exclusive possession."

Now, when we look at the proposition number 3, namely that "the Plaintiffs' interest is based on their possession pre-existing the assertion of Crown

sovereignty." And we seek to reconcile that with exclusive possession. Exclusive possession prior to the assertion of sovereignty would obviously be an assertion as against other aboriginal peoples. But the order that is sought here translates exclusive possession from as against other aboriginal peoples to the Crown.

And I say that whatever may have been the fact of possession at the time sovereignty was asserted with respect to other aboriginal peoples, the evidence in this case negates in every sense exclusive possession as a matter of fact as against the Crown on October 25, 1984 of any lands except reserves. Evidence, in my submission, which might be appropriate in deciding competing land claims as between the subjects of the Crown is irrelevant as against the Crown. The Plaintiffs' case, as put forward, depends on placing the Crown on the same basis as the surrounding, and sometimes adverse claims of native peoples. I am referring there, of course, to the so-called Overlands.

Proposition number 5 which reads as follows:

> "The precise legal character of the Plaintiffs' interest is determined by an analysis of the laws and usages of the Plaintiffs in the context of their organized society."

Now, in my submission, that is a shorthand way of saying that assertions of possession intelligible only to an inner circle of what amounts to a club constitutes assertions against the Crown. My lord, the references that are in that paragraph are, of course, not in the yellow binder. But my use of the word "club" comes from my friend Mr. Grant's cross-examination of Mr. Hobenshield. And you'll find that in the extract that I have referred to. But the other references are I think best illustrated by what I set out from transcript 327 at page 25007, lines 10 to 19 where Mr. Grant describes how Mr. Mathews' possession of his territory "came together" with his presence on the territory. And this is what my friend Mr. Grant put it in argument:

> "... they have possession ... through the

> knowledge of place names, and their going on the territory with respect to those place names, and through the confirmation of the territory in the feast."

Now, I say that apart from the difficulty this creates for chiefs like Mary McKenzie who have never been on the territory they claim, it is bordering, I submit, on fantasy and unsupported by any authority say that the common law of England or British Columbia ever recognized such internal gestures as constituting indicia of exclusive possession of any kind, much less that against the Crown.

And I refer again to the Milurrupum case which is the tab M-2, I believe it is, in volume 2 of the grey books. And the reference is to page 217. And your lordship may recall that Mr. Justice Blackburn goes through in rather painstaking detail the case law from a number of jurisdictions including the United States. And he concludes at page 217:

> "I am well aware of my inexperience in American law, yet I cannot help concluding that despite the force and eloquence of the dicta in them, none of these cases is authority for the proposition that the mere fact of communal occcupancy gives a title enforceable in the sovereign's courts against the sovereign or one claiming under him."

Now that, of course, is the heart of the Plaintiffs' case in this case. And I say the later Oneida case is not inconsistent with this.

Continuing, even assuming that adverse possession could be asserted against the Crow, the Plaintiffs' claim of exclusive possession based upon recitals at feast, etc., works in my submission against them. Whatever illusions the native inhabitants may have had at the time about the role of fur traders or even Mr. Downie in 1859 they could not reasonably believe that "exclusive possession" could be maintained by such devices against the miners travelling to and from the Omineca or working at Lorne Creek; or against Dewdney and Hankin at Hazelton or more importantly, as against the work crews of the Overland Telegraph.

I mean by that, my lord, that the fur traders were people with whom the native peoples were trading. They might reasonably conclude that Downie was simply a traveller. I don't think there could be any illusions as to what the miners were doing, or as what Dewdney and Hankin were doing. But when we come to the work crews of the Overland Telegraph who were forbidden to trade with the native peoples who were cutting a trail through the countryside, a right of way, and cutting down trees and doing all other things that are totally inconsistent with the ownership of other people in that land, there couldn't be any illusions on their part as to the meaning of the acts that these people were undertaking.

Nor did they ever say, until now, that these customs constituted possession against the Crown. And this is without consideration of the dramatic instances, bordering on confrontation with representatives of the Crown, when the ancestors of the present Plaintiffs elected to avoid conflict. And, of course, I'm referring there to the instances which a number of witnesses have referred to, the Kitsegukla fire, the Kitwancool Jim matter and so on. And I say as a matter of logic, the sharper the confrontation the less the effective, for example, the recitals at feasts at which there were no representatives of the Crown. In other cases the ancestors sought non-native assistance to resolve conflict between and among themselves. And I say that that is in and of itself a contradiction of any indicia of exclusive possession.

THE COURT: What do you mean by that?

MR. GOLDIE: Well, for instance, trapline disputes. They enlisted the assistance to settle as between -- as amongst themselves the example of Thomas George and Mathew Sam.

THE COURT: Well, do you say that a failure to object to the Collins Overland Telegraph, which may have thought not to interfere greatly with their exclusive possession, must be deemed to disprove exclusive possession?

MR. GOLDIE: It is not so much a question of failure to object. It is simply indicative of the lack of efficacy of their own methods of demonstrating amongst themselves possession. Whatever the efficacy of the recitation of adaawks at feasts may have with respect to other

1 aboriginal peoples, these what I call internal
2 gestures could not have any effect on complete
3 strangers who are not invited to the feasts. And when
4 those strangers were doing what the people who built
5 the telegraph were doing, nobody amongst the
6 Plaintiffs' ancestors at that time could reasonably
7 believe that they were maintaining exclusive
8 possession.
9 THE COURT: Well, I thought the recitation of possession or
10 ownership at the feasts were put forward as evidence
11 of their knowledge and as proof of their history or
12 the duration of their ownership rather than as
13 gestures against the Crown.
14 MR. GOLDIE: Well, I am taking the propositions that my friend
15 Mr. Jackson was good enough to set out in point form.
16 And I trust I have demonstrated that exclusive
17 possession is at the heart of all of them. And from
18 there I passed on to the proposition that:
19
20 "The precise legal character of the Plaintiffs'
21 interest,"
22
23 and I interject here, whatever that interest is it is
24 based upon exclusive possession,
25
26 "...as determined by an analysis of the laws
27 and usages of the Plaintiffs in the context of
28 their organized society."
29
30 Now, I took that to mean that exclusive possession
31 against the Crown is to be taken -- is to be
32 determined by what the plaintiffs did at the time.
33 MR. JACKSON: My lord, perhaps that is not a fair
34 characterization by what was intended by proposition
35 number 5. Proposition number 5 was a reference to the
36 Amodu Tijani case and was intended to be the
37 referential incorporation of the court looking at the
38 particular laws of the Plaintiffs in order to
39 characterize the nature of the interest without
40 necessarily reducing it to the incidents which would
41 be appropriate to a rendition of ownership at common
42 law. My friend is referentially incorporating
43 gestures which certainly was not the meaning of that
44 proposition.
45 MR. GOLDIE: Well, I took what my friend has just said to apply
46 to number 5 which is a sui generis common law
47 proprietary interest. I was talking about item number

6. I am now going back to paragraph 20 of my main summary, my lord.

THE COURT: Yes.

MR. GOLDIE: And I say whatever the situation was in British Columbia at the time of the assertion of sovereignty it is different today. In the Sparrow case, and I think the excerpt that I refer to is in fact found in the yellow binder. Yes, it is, my lord.

THE COURT: Yes, III/2-20?

MR. GOLDIE: Yes. The Court responded to a submission that section 35(1) of the Constitution Act precludes government regulation of the Indian salmon fishery, by saying at page 272:

> "The constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its competing complexities and competing interests -- with all of its complexities and competing interests."

Now, of course that case is under appeal. And the judgment is pending. Nevertheless, in my submission it simply states a common-sense proposition. Common sense and constitutionally common sense.

I go on to say in a different context, but to similar effect, is the following observation of Lord Sumner on behalf of the Privy Council in Re Southern Rhodesia. That's in the next tab, my lord. Now, it may be recalled that in that judgment or in that case the native peoples were unable to retain counsel to speak on their own behalf. Although the principal issue was between the local legislature and the Southern Rhodesia Company. And at page 234 the Court or the Committee examines the submission of the native peoples in that case that they had a proprietary

interest. And that Lobengula who was the chieftain who had died was merely a trustee. And about midway down the page, or about a third of the way down the page beginning with the words "Lobengula's duties", it reads:

> "Lobengula's duties, if describable as those of a trustee, were duties of imperfect obligation. Except by fear or force he could not be made amenable. He was the father of his people, but his people may have had no more definite rights than if they had been the natural offspring of their chieftain. According to the argument..."

and this is the argument put forward on behalf of the native peoples,

> "...the natives before 1893 were owners of the whole of these vast regions in such a sense that, without their permission or that of their King and trustee, no traveller, still less a settler, could as much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council."

THE COURT: Well, that's a might is right argument, isn't it?

MR. GOLDIE: But that was in response, though, my lord, that the natives were the total -- were the owners of the country in total. It was not a might is right argument except in response to the proposition that there was a proprietary right that encompassed the whole of the country.

THE COURT: In response to whether might.

MR. GOLDIE: Exactly. And when I come to what was done here, it will be seen that the response of British Columbia was responsive to what was considered to be the appropriate interest of the natives at the time. It was not a might is right argument or policy that was adopted in British Columbia.

1 But what the judicial committee is saying is that
2 there is an inconsistency between that degree of
3 ownership, which is what my friends are asserting, and
4 settlement. The two are inconsistent. And your
5 lordship will see when we come to it that the policy
6 of the Imperial Government with respect to the Colony
7 of British Columbia was settlement. Douglas was
8 constantly being urged to make things agreeable to the
9 settlers. And a good deal of his efforts were devoted
10 to encouraging settlement. Not for the purpose of
11 defeating any native claims because they weren't made
12 in any such terms as was made here until this case.
13 But for the purpose of ensuring that the country would
14 not be taken over by alien elements, that is to say
15 the miners.
16
17 Now, the plenary rights of governance which are
18 claimed by the Plaintiffs in this action are
19 unsupported by authority. Such rights would be
20 inconsistent with the sovereignty of the Crown which
21 is acknowledged, purportedly acknowledged, in
22 paragraph 72A of the Statement of Claim.
23
24 Now, the Madzimbamuto case is referred to under
25 tab III/2-22. And that case arose as a result of the
26 unilateral Declaration of Independence on the part of
27 Southern Rhodesia. And the issue was: What effect
28 did that have? And the answer was: In law, nothing.
29 At the top of page 722, the Privy Council said this:
30
31 "If The Queen in the Parliament of the United
32 Kingdom was Sovereign in Southern Rhodesia in
33 1965, there can be no doubt that the Southern
34 Rhodesia Act 1965, and the Order in Council
35 made under it were of full legal effect there.
36 Several of the learned judges have held that
37 Sovereignty was divided between the United
38 Kingdom and Southern Rhodesia. Their Lordships
39 cannot agree. So far as they are aware it has
40 never been doubted that, when a colony is
41 acquired or annexed, following on conquest or
42 settlement, the Sovereignty of the United
43 Kingdom Parliament extends to that colony, and
44 its powers over that colony are the same as its
45 powers in the United Kingdom."
46
47 I say that that is a fatal proposition. Or I should

say that statement is fatal to the proposition that there was a divided sovereignty in the colony in 1858. The Sobhuza case is not in the yellow binder, but it is in the grey books, tab S-6. I think it is volume 2. And the page numbers for the Sobhuza case in the citation would be pages 525 and 528. Perhaps I ought to look at that.

THE COURT: In the grey binder?

MR. GOLDIE: It is in the grey binder, my lord, it is tab S-6.

The particular circumstance under which this case arose was that Swaziland before the Boer War was an independent native state so far as great Britain was concerned. And it was treated as a protected dependency of the republic, the South African Republic, before the conflict with the Boers and the British. The question that arose was whether the nature of the change which took place both in respect of the Boer colonies which became conquered colonies and Swaziland itself which eventually became incorporated, what the legal significance was of those changes.

At page 525 beginning in the first paragraph:

> "In the Southern Rhodesia case Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially similar. He held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power."

Now, if I may pause there to note the word unallotted. Those were lands which were held not to be occupied by the nomadic native peoples.

> "Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable."

1 And then he goes -- Viscount Haldane goes on to say:
2
3 "Such being the principle, it remains to
4 ascertain whether it has been put in operation
5 in the case under consideration. To answer
6 this question it is first necessary to recall
7 the true character of the native title to land
8 throughout the Empire, including South and West
9 Africa. With local variations, the principle
10 is an uniform one. It was stated by this Board
11 in the Nigerian case of Amodu Tijani v.
12 Secretary, and is explained in the report made
13 by Rayner Chief Justice on Land Tenure in West
14 Africa, quoted in the case referred to. The
15 notion of individualownership is foreign to
16 native ideas. Lands belongs to the community
17 and not to the individual. The title of the
18 native community generally takes the form of a
19 usufructuary right, a mere qualification of a
20 burden on the radical or final title of whoever
21 is sovereing. Obviously such a usufructuary
22 right, however difficult to get rid of by
23 ordinary methods of conveyancing, may be
24 extinguished by the action of a paramount power
25 which assumes possession or the entire control
26 of the land."
27
28 And the action of the paramount power in this case
29 was Orders in Council. And that is made here, I
30 believe, at page 528, the second paragraph.
31
32 "The principles of constitutional law laid down
33 in the earlier part of their Lordships'
34 judgment rendered in their opinion impossible
35 to maintain the argument submitted for the
36 appellant. That argument is that the Crown has
37 no powers over Swaziland, except those which it
38 had under the conventions and those which it
39 acquired by the conquest of the South African
40 Republic. The limitation in the Convention of
41 1894 on interference with the rights and laws
42 and customs of the natives cannot legally
43 interfere with a subsequent exercise of the
44 sovereign powers of the Crown, or invalidate
45 subsequent Orders in Council. But if this be
46 true it makes an end of the appellant's case."
47

1 It goes on to construe the effect of the Order in
2 Council -- the Orders in Council.
3
4 Now, I say, my lord, that it is in the name of the
5 reigning monarch that this Court is seized of the
6 matters that come before it and what purports to
7 displace that relationship is unenforceable in this
8 Court. And I refer to Coe v. Commonwealth, which is
9 in the -- an excerpt of this is under tab III/2-23.
10 And in the grey books in tab C-6. My lord, in that
11 case which was in the High Court of Australia, four
12 judges sat on a direct appeal from what we would call
13 a judge in chambers who, by agreement, was dealing
14 with an Amended Statement of Claim as if the motion
15 before him was to strike it out. While the four
16 judges sitting in the High Court split two to two on
17 whether the whole of the revised Statement of Claim
18 should be struck out. Two of them being for striking
19 them out in its entirety, and two being for striking
20 it out in part only. They were at one in the part to
21 which I am going to refer.
22
23 Now, the reference on page 132, which is the
24 excerpt in the tab in the yellow binder, is to the
25 Judgment of Mr. Justice Jacobs who was one of the
26 dissenting judges. And if your lordship would turn to
27 page 132. I think I should ask your lordship to look
28 at the grey book which is volume 2, tab C-6. And the
29 reason I do that is that Mr. Justice Jacobs makes
30 reference to paragraphs in the Statement of Claim.
31 And to see the text of those paragraphs, one will have
32 to look at the judgment of Mr. Justice Gibbs starting
33 at page 121.
34
35 Now, however, I will go through that item by item.
36 The paragraph in question on page 132 is the last on
37 the page. And it begins with these words:
38
39 "The proposed amended statement of claim seeks
40 to raise a number of issues which can be
41 regarded separately. The first part is
42 apparently intended to dispute the validity of
43 the British Crown's and now the Commonwealth of
44 Australia's claim to sovereignty over the
45 continent of Australia in the face of a
46 sovereignty alleged to be possessed by the
47 aboriginal nation. Paragraphs 2A and 3A are in

> much the same form as the original statement of claim but the word "wrongfully" has been added, thus disputing the validity of the Crown's proclamations of sovereignty and sovereign possession."

Now, if your lordship would now turn to page 121. At the top of the page in the second paragraph is amended paragraph 2A. And the next is amended paragraph 3A. And the amended put in the word "wrongfully" in the second line of each of the two paragraphs. And transformed it from an allegation of fact which was not -- could not be objected to, to one which disputed the validity of the possession in sovereignty.

Now, if I could go back to page 132 where Mr. Jacobs speaks to the effectiveness.

> "These are not matters of municipal law but of the law of nations that are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged. As such, they are embarrassing and cannot be allowed. I would therefore strike out of the proposed amendments the word "wrongfully" where it appears in paras 2A and 3A. I would also strike out (or, strictly, refuse to allow) para 3B."

And if one goes back to 121, one sees what 3B is. And that alleges:

> "The claims of Captain Cook, Captain Phillip and others on behalf of King George III and his heirs and successors were contrary to the rights, privileges, interests, claims and entitlements of the aboriginal people both individually and in tribes and of the aboriginal community and nation as more fully set out in para 8A hereof."

So he would have struck out, and in this he was at one with the rest of the court, the whole of paragraph 3B. And he says:

> "Paragraph 3C suffers from the same defect."

And I am now back at the top of page 133. And he continues, and I quote:

> "...and, so far as it states the coming into existence of the Commonwealth of Australia, it is unnecessary, and the same is true of para 3D. Paragraph 8A appears also to be directed to the question whether under the law of nations Australia was terra nullius in 1770 and 1778. Further, it seeks to impugn the proclamations taking possession of New South Whales on behalf of the British Crown. This is not permissible in a municipal court. Paragraphs 13A and 14A suffer in the same way. Paragraphs 15A, 16A and 16B are also directed to a claim of international sovereignty and cannot be allowed. The same is true of paras 11A and 12A in their context. Thus what I have called the first branch of the proposed statement of claim cannot be allowed because generally it is formulated as a claim based on a sovereignty adverse to the Crown."

My lord, I am aware, of course, at a relatively late time in the day that the Plaintiffs purported to acknowledge the sovereignty of the Crown in right of the province. My submission in this part is that when one takes the proposition stated by my friend Mr. Jackson, and those are just shorthand for what the principal argument was, one finds that they are asserting interests alleged to be common law interests co-existing with that of the Crown, and which are based upon exclusive possession as against the Crown.

Now, again I reiterate, and I will be doing so on other occasions, that the question of whether British Columbia was a settled colony or a conqueted or ceded colony was settled by the Act of 1858 and is not open to question here. Not that the plaintiffs could contest it. They say that they were never conquered, nor did they cede their lands. The matters, therefore, to be on the footing that this is a settled colony.

THE COURT: What are you reading from there?

MR. GOLDIE: That is an interjection, my lord. I should have signalled that.

1 THE COURT: All right.
2 MR. GOLDIE: Now, my lord, that brings me to page 11. And I
3 have wanted, in much the same way as I have done with
4 the claim to ownership, to deal with the question of
5 jurisdiction as we understand it. And I have a
6 section to hand up.
7 THE COURT: Well, is it accurate to summarize what you are
8 saying up to this point then, Mr. Goldie, that if
9 the -- if the law of England was incorporated into the
10 mainland colony on November 19, 1858 at that point
11 there was not thereafter any possibility of aboriginal
12 ownership of a proprietary sense?
13 MR. GOLDIE: In a proprietary sense and outside the village
14 sites.
15 THE COURT: Yes. All right. But you say the same thing about a
16 non-proprietary interest?
17 MR. GOLDIE: Yes, I do, my lord. Because so far as we can
18 determine, what the New Zealand Select Committee
19 referred to as colonial law recognized an interest
20 confined to settlements, or as what the lands actually
21 occupied and reduced to agricultural use.
22 THE COURT: Well, then the whole case turns on whether the claim
23 to possessory aboriginal title in a proprietary sense
24 outside village sites or a mere usufructuary right
25 outside the proprietary sense depends whether those
26 rights pre-existed the establishment of the colony or
27 not.
28 MR. GOLDIE: Well, I think with respect to the question of
29 pre-existing is a red herring. What I have sought to
30 extract from the authorities is the proposition that
31 the -- and as a matter of logic, is a proposition that
32 before the Crown asserts sovereignty, it has no
33 interest in what exists, and conversely those who are
34 there have no interests in what exists elsewhere.
35 There has to be some -- either something specific such
36 as an act of parliament or an executive act or a royal
37 proclamation or something to be implied from a course
38 of conduct which allows the courts to say: This is
39 where an interest is recognized.
40
41 In fact, the judicial committee judgment in the
42 Vajesingji case that I referred to this morning says
43 that unless there is an Act of State there is no
44 pre-existing -- there is no recognition of anything
45 pre-existing. I don't go that far. I say that there
46 can be a recognition through a course of conduct. It
47 so happens in British Columbia, as I will seek to take

your lordship through the various steps, that there was an Act of State on the part of the Governor. There were actually two. One was the proclamation of the November 19, 1858. And the other was the declaration of the Governor setting aside reserves. Those declarations were, in themselves, both the creation of the interest and the protection of the interest.

THE COURT: And also the denial of any other interest?

MR. GOLDIE: Yes.

THE COURT: In your argument?

MR. GOLDIE: In my submission.

THE COURT: Well, then what you are saying, if I understand you, is that pre-existing or not is a red herring because there is no context in which to deal with it. It can't exist until there is a context?

MR. GOLDIE: Exactly, my lord.

THE COURT: Such as if a tree falls in the forest, there is no sound unless there is an ear to hear it.

MR. GOLDIE: That's correct. If British Columbia -- well, let me take an extreme but not impossible hypothesis. If Douglas had not succeeded in controlling the influx of miners and keeping the miners and the native peoples apart, and there had been the kind of conflicts which Bancroft in his history suggest almost came about, the chances are that the American forces would have followed their nationals across the border and that would have been that.

Now, as to rights against the British Crown, the whole business would have been academic. Well, worse than academic. It would have been nothing. So the context in which the interest of the native peoples comes to be created and protected is the context of the colony which is a settled colony created by an act of parliament in which full legislative and executive powers are delegated through the Crown to the Governor. Now, the fleshing out of that proposition depends very much upon following the facts, the historical facts through.

THE COURT: Well, I have to say that I am troubled by your submission because of a fuzzy recollection I have of what Chief Justice Dickson said in Guerin.

MR. GOLDIE: Oh, I will come to both that and a similar statement in Robert's v. Canada by Madam Justice Wilson. And I don't want to embark upon that at this point. But I do emphasize the proposition that in

1 both cases they were talking about reserve lands.
2 THE COURT: But he said it didn't make any difference.
3 MR. GOLDIE: In British Columbia it doesn't make any difference
4 because the extent of the reserve lands was the extent
5 that the law recognized required protection. Village
6 sites, settlements and adjoining agricultural lands.
7 Now, a different proposition arises in other parts of
8 Canada where a surrender was taken and reserves were
9 then created. And the reserves might have been any
10 place, without particular regard to existing village
11 sites. But if your lordship will look back on what
12 the Select Committee said was undoubted colonial law,
13 that is, in my submission, the extent of the law that
14 was recognized in 1858. And in my submission, we will
15 find that Douglas went beyond that.
16 THE COURT: All right.
17 MR. GOLDIE: My lord, this insert is headed Part III, Section 5,
18 A Response to the Plaintiffs' Arguments, A
19 Jurisdiction, Self-Government and Sovereignty. And it
20 could conveniently be put in following Part 4 or
21 Section 4, although I do want to deal with it at this
22 point.
23 THE COURT: All right. So it will precede -- no, it will follow
24 Part 4, will it?
25 MR. GOLDIE: Yes, it will follow 4.
26 THE COURT: It will be at the end of Roman III?
27 MR. GOLDIE: Yes. It is my submission that the claims to
28 ownership and jurisdiction not only as pleaded but as
29 we now understand them, and I have to say that our
30 understanding may be imperfect, has no substance in
31 the law administered in this court. And I now wish as
32 I have dealt with ownership to say something about
33 jurisdiction. And that is the part that I have just
34 handed up. And I start off by making reference, my
35 lord, to the summary which -- the written summary
36 which my friends provided us with.
37
38 And I say that in the written summary at page 639
39 in Volume 2, Part 3, the Plaintiffs submitted as
40 follows:
41
42 "The Plaintiffs' asserted rights are not, as
43 the defendants have sought to characterize
44 them, rights to sovereignty. The jurisdiction
45 which the Plaintiffs assert is one exercised
46 within the framework of Canadian Confederation
47 as part of Canadian law. The Plaintiffs'

1 jurisdiction is sui generis and based upon the
2 evidence before this court, can be analyzed
3 under the following heads."
4
5 And then follow some 11 items beginning with: To
6 harvest, manage and conserve the resources of the
7 territory; and going through the transfer of
8 territory, the granting of access; determination of
9 citizenship; to regulate family relations; supervise
10 internal affairs; conduct feasts; resolve disputes;
11 enter into and conduct international relations and
12 settle disputes with other nations; make and enforce
13 laws in relation to the above. And I take it that is
14 the above being items 1 to 8. To protect and affirm
15 the ownership of the territory and the authority of
16 the house; and to jointly maintain the Gitksan
17 institution and laws and the Wet'suwet'en institution
18 and laws.
19 THE COURT: Go ahead, Mr. Goldie.
20 MR. GOLDIE: In their final argument, under the heading "The
21 Plaintiffs' Right to Jurisdiction", and I believe that
22 is introduced in transcript 328 page 25119. I
23 shouldn't say "introduced". I should say they are
24 identified. And identified somewhat differently at
25 pages 4 to 5 of their final argument. And I am not
26 sure what the section is, but it is final argument.
27 And I quote:
28
29 "The areas of jurisdiction exercised by the
30 Gitksan and Wet'suwet'en Houses include
31 jurisdiction."
32
33 And then it goes through some nine items. And items 2
34 and 10 from the first list appear to be dropped. That
35 is:
36
37 "To transfer the territory and to grant rights
38 of access in accordance with Gitksan and
39 Wet'suwet'en laws."
40
41 And the 10th item is:
42
43 "To protect and affirm the ownership of the
44 territory and the authority of the House."
45
46 And in item 9 which is:
47

1 "To make and enforce laws in relation to the
2 above,"
3
4 the word "enforce" has been changed to "implement".
5 Now, it is my submission that the changing terminology
6 and the changing content of the Plaintiffs' claimed
7 jurisdiction highlight the ambiguity of the
8 Plaintiffs' position. Significantly, neither list
9 purports to be complete, which leads naturally to the
10 question: what else is there? And maybe the answer
11 to that is found in our study of the statement made by
12 the Chiefs yesterday.
13
14 Now, my lord, under paragraph 4.
15
16 MR. GRANT: Excuse me. With respect to this point which I have
17 just received this supplement, I just want your
18 lordship to note that in the course of final argument
19 if there is a comparison of the content as opposed to
20 the listing, for the purposes of argument, items 2 and
21 10 were encompassed in item E. And it was in terms of
22 presentation of argument, my lord, a decision of
23 counsel as to how to present the argument. So items 2
24 and 10 from the first list, the content were dealt
25 with under the supervision of the internal affairs of
26 the house.
27 MR. GOLDIE: Be that as it may, my submission remains. And I
28 wish to go on to look at it in a somewhat more general
29 terms. I say that sovereignty is the condition of
30 autonomy free of external control. And I say the
31 debate here over terms is not a matter of wordplay.
32 It is part of the continuing struggle to give some
33 focus to the generally-expressed claims of the
34 Plaintiffs. If the Plaintiffs' jurisdiction, and I
35 quote "is one exercised within the framework of
36 Canadian Confederation as parts of Canadian law", then
37 the position is clear: the Plaintiffs are subject to
38 all federal laws and also to all provincial laws of
39 general application. And I say that is the present
40 constitutional situation. I say that absent specific
41 legislation to the contrary, and I give the example of
42 the Provincial Act, the Sechelt Indian Band
43 Self-Government Act, and the Federal Act, the
44 Cree-Naskapi Act, the laws of Canada and British
45 Columbia do not recognize an inherent power in the
46 Gitksan or the Wet'suwet'en, or any other group, "to
47 make and enforce laws" -- now, my friend tells me that

the change of the word "enforce" to "implement" is of no significance, so I will stick with enforce -- in relation to any matter which from sheer force of enactment become binding upon and enforceable against third parties, including the Crown.

My lord, I appreciate that there is some changing focus here, too. Just as the ownership of Crown grants prior to October 1984 is said to be excluded from the Plaintiffs' claim of ownership, so it appears now that the claim of jurisdiction over persons may be affected by ownership of the land. I took it from what my friends have said that the owners of the fee granted before October 1984 are not subject to jurisdiction. But I understood that the owners of permits or licences would be subject to the jurisdiction of the Plaintiffs. Whatever the powers that the Plaintiffs seek in respect of jurisdiction are rights which are related to sovereignty.

And at page 5 I point out that the Plaintiffs' Prayer for Relief continues to include as the 8th declaration sought the following:

> "A declaration that the Defendant Province's jurisdiction over the Territory, the Plaintiffs and members of the Houses represented by the Plaintiffs is subject to the Plaintiffs' right to ownership and jurisdiction."

Now, to describe this "jurisdiction" as "sui generis", or equally to suggest that the Province's jurisdiction can be determined on a case-by-case basis as a result of a general declaration is, in my submission, an unhelpful distraction. The phrase "sui generis" used in cases such as Guerin simply means that the character of aboriginal interests ought not to be exclusively expressed in English property law terms. It does not mean that aboriginal interests are undefinable. At some point they must be defined.

For the same reason, the repeated reference to Amodu Tijani as justifying the reluctance to define the Plaintiffs' alleged rights in terms familiar to Canadian law is equally unhelpful. Sooner or later the question must be asked and answered: What exactly is it that the Plaintiffs claim? Now, the Amodu case

which is referred to a number of times by my friends is found in the Plaintiffs' Volume 1 at tab 14, and was a case of a ceded colony. Now, that's the first point of distinction. Furthermore, it was a case for compensation under a statutory taking. The terms of cession were construed to leave intact a "communal usufrutuary occupation". That's the phrase used in the report.

THE COURT: What was it again?

MR. GOLDIE: "Communal usufructuary occupation."

Now, the statute deemed that to be the equivalent of a fee simple for the purposes of compensation if it was taken. And the compensation was to be payable to the chief and distributed under supervision to the members of the community. Now, all of that was done by statute. It was simply assumed or taken as a given that no compensation was payable to a chief in respect of unoccupied lands. And I want to -- I am going to refer to the report or the case at greater length, my lord. It is not in the grey books.

THE COURT: All right.

MR. GOLDIE: It is in the Plaintiffs' authorities at volume 1 at tab 14.

THE COURT: Oh, I have got it down as number A-14. Is it not in your grey book?

MR. GOLDIE: No. That is the Plaintiffs' authority, Volume 1, tab 14.

THE COURT: There it is.

MR. GOLDIE: Page 410, my lord. The contest was over the question of the nature of the compensation to be paid. That is indicated in the headnote at page 39. But at page 410, beginning with the first sentence in the second paragraph with the words "The Crown". That's line 4 in the second paragraph.

> "The Crown is under no obligation to pay anyone for unoccupied lands as defined. It will have to pay the chief for family lands to which he is individually entitled when taken. There may be other portions of land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments he will have to be compensated for the loss of it. And if the allottees have had valid title conferred on

1 them they must also be compensated."
2
3 And then at page 411, the first complete paragraph:
4
5 "Their Lordships will accordingly humbly advise
6 His Majesty that the judgment of the Courts
7 below should be reversed, and that declarations
8 should be made: (1) That the appellant, for
9 the purposes of the Public Lands Ordinance No.
10 5 of 1903 is entitled to claim compensation on
11 the footing that he is transferring to the
12 Governor the land in question in full
13 ownership, excepting insofar as such land is
14 unoccupied."
15
16 THE COURT: That doesn't mean that he is not transferring the
17 land that is unoccupied.
18 MR. GOLDIE: Oh, no. But he gets no compensation, my lord.
19 THE COURT: Yes. I think that's what it means.
20 MR. GOLDIE: And that's because he has no -- he has no title in
21 that land.
22
23 Now, that case is cited by my friends as
24 justifying the reluctance to define the Plaintiffs'
25 alleged rights in terms familiar to Canadian law. And
26 I say if one looks at the case, one sees that the
27 court came to grips with precisely that question. It
28 looked at what was there and it said: This is what
29 fits the statutory definition of a deemed fee simple
30 for purposes of compensation.
31
32 Now, I say at the top of page 5 of this insert --
33 THE COURT: Well, what do you say about the dicta that your
34 friend relied upon? He said that I should disregard
35 it on the basis that it applies only to that deemed
36 statutory scheme, or do you agree that the dicta has
37 any general usefulness or relevance?
38 MR. GOLDIE: Well, it has the general usefulness for which it is
39 cited for on many occasions. And that is that you
40 should be careful in the inquiry that you make as to
41 the nature of the interest. But it doesn't ever go so
42 far as to say that that care translates into ambiguity
43 when you come to determine what that interest is.
44 THE COURT: Or to an interest against the Crown?
45 MR. GOLDIE: It is not, of course in this case, dealing with an
46 interest against the Crown in except in this sense.
47 What the chiefs in that case have was taken under a

1 statute for a public purpose. The statute --
2 THE COURT: To that extent it was a claim against the Crown?
3 MR. GOLDIE: Oh, yes, for compensation.
4 THE COURT: Yes.
5 MR. GOLDIE: My point is that the court had to grapple with the
6 question of just what that interest was for the
7 purposes of determining to which the statutory
8 direction of compensation was applicable.
9
10 Now, I do note this, my lord, that when we come
11 to -- when in our submission we come to define what
12 the proper scope of interest is, we will be assisted
13 by a greater degree of precision than my friends have
14 provided you with so far. I am not quite sure what my
15 friend Mr. Grant meant on Saturday when he said
16 "pigeon holes are for pigeons". If he meant that the
17 judicial committee had in mind that it was an exercise
18 in something other than legal logic to define
19 interest, I think, with great respect, he is wrong.
20 The judicial committee grappled with the problem. And
21 it can be grappled with here. Not in the terms put
22 forward by my friends who: Well, give us a general
23 declaration and we will sort things out afterwards.
24 That is not what the Amodu case provides, or even
25 suggests.
26
27 Now, continuing at page 6 --
28 THE COURT: Well, you are starting a new paragraph. And you are
29 not close to the end of the section?
30 MR. GOLDIE: Not close enough, my lord.
31 THE COURT: No. I think we should take the afternoon
32 adjournment.
33 THE REGISTRAR: Order in court. Court stands adjourned for a
34 short recess.
35 (PROCEEDINGS ADJOURNED AT 3:15)
36
37 I hereby certify the foregoing to
38 be a true and accurate transcript
39 of the proceedings transcribed to
40 the best of my skill and ability.
41
42
43
44 _____
45 Lisa Franko,
46 Official Reporter,
47 UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RESUMED PURSUANT TO A SHORT ADJOURNMENT)

2 THE REGISTRAR: Order in court.

3 THE COURT: Mr. Goldie?

4 MR. GOLDIE: Thank you, my lord. I was at page 5 of the -- page
5 6, I should say, of Section 5. My lord, I submit that
6 to deny sovereignty in the terms we say is -- are
7 claimed by the plaintiffs is not to deny them the
8 right to internal, private autonomy, but it is to
9 subject that autonomy to the general law. I referred
10 your lordship to the Hutterite Case where the Court
11 gave effect to the internal, but there was judicial
12 review of that. It was not law which was beyond the
13 reach of the Court. I say the following submissions
14 with respect to the plaintiffs' claimed heads of
15 jurisdiction illustrate this point. First,
16 jurisdiction to harvest, manage and conserve the
17 resources of the territory.
18 These rights are among the rights incidental to
19 the beneficial ownership of land. They flow from the
20 fact of ownership. But within Canadian law the land
21 owner's proprietary rights are subject to regulation,
22 both federal and provincial.
23 And as I understand the position first taken by
24 Mr. Sterritt and his cross-examination and by the --
25 by counsel here for the plaintiffs, the -- in respect
26 to the declaration sought and in respect of the way in
27 which their beneficial ownership of land would be
28 worked out, it is -- it is based upon exclusive
29 possession and based upon the right to preclude the
30 application at least of provincial law.
31 Now, jurisdiction to transfer the territory and to
32 grant rights of access to the territory in accordance
33 with Gitksan and Wet'suwet'en laws. My friend, Mr.
34 Grant, says that is now to be taken as included. So
35 when I say deleted, I'm in error. In any event, it is
36 my submission that it is uncertain whether the
37 plaintiffs continue to claim this jurisdiction as
38 jurisdiction or whether it is now said to be an
39 incident of the right of ownership, but it is
40 nonetheless important to observe that members of the
41 public have a general right of access to Crown lands
42 subject to whatever restrictions may be in force with
43 respect to particular uses of particular lands. If,
44 within the community of the Gitksan and Wet'suwet'en,
45 there are recognizable rules governing access to what
46 are said to be traditional territories, and if there
47 is evidence of consent to such rules, then they may be

1 enforceable against the members of the community who
2 have expressly agreed to be bound by them. As to such
3 people it is unnecessary to obtain the Court's
4 assistance either to describe these rules or to
5 enforce them. But such rules have no application to
6 persons who have not expressly agreed to be bound.
7 The plaintiffs may regulate or restrict their own
8 access to lands but (apart from reserves), they may
9 not regulate or restrict the rights of access of
10 others. If what they seek is the right to regulate or
11 restrict such access they ask this Court to declare
12 that in a significant part of British Columbia the
13 Legislative Assembly of the Province may not legislate
14 under heads 5 and 13 of the Constitution Act, 1867.
15 Such a denial is a denial of sovereignty.
16 Now, if I may comment a bit on that, my lord. It
17 is clear that head 24 of Section 91 of the
18 Constitution Act precludes the application of
19 provincial laws or the -- under heads 5 and 13 to
20 reserve lands. But once you step outside those
21 reserve lands, you are within the exclusive
22 legislative authority in respect of matters such as
23 access, regulation and use of the lands of the
24 province, and what the plaintiffs are asking for here
25 is to deny to the province the right granted it under
26 the Constitution Act of 1867 to legislate with respect
27 to public lands and matters of local importance.
28 Then continuing on page 8, jurisdiction to
29 determine citizenship, including clan and house
30 membership. The plaintiffs point to no law of the
31 province which denies them the freedom to organize
32 their affairs in this way. There is, I submit on this
33 point, no lis inter partes. The jurisdiction claimed
34 is analogous to club membership: Members of a club
35 are free to choose who they agree to admit as members,
36 subject perhaps to Charter considerations, if, for
37 example, club membership is a prerequisite to earning
38 a livelihood.
39 (iv) Jurisdiction to regulate family relations,
40 including marriage and divorce. As an internal matter
41 the Gitksan and Wet'suwet'en may choose not to
42 recognize the validity of marriages and divorces which
43 have not taken place pursuant to the rules recognized
44 within and consented to by members of the community.
45 They are free to do so. But if, for example, a
46 divorce has not been granted pursuant to the Divorce
47 Act, then it will not be recognized as a valid divorce

in Canadian law.

Now, I want to comment on that, my lord. The Derrickson v. Derrickson held that a division of property, where that property was part of a reserve, could not be undertaken in accordance with the provincial law. If I understand the plaintiffs' position, if there are people in the Gitksan/Wet'suwet'en nation who choose to live off reserve, and there are a great many of them, the plaintiffs ask that this -- that provincial laws relating to family matters be inapplicable. That is a denial of sovereignty.

Page 9 I deal with items (v), (vi) and (vii) altogether, jurisdiction to supervise the internal affairs of the house, to conduct feasts and carry out feast obligations and responsibilities in accordance with Gitksan and Wet'suwet'en law, and jurisdiction to resolve disputes within the house and between houses. I say with respect to all of these that each is an internal matter with respect to which there has been no joinder of issue. The analogy of club membership also applies here. Clubs have rules. Club members have rights and responsibilities inter se, and clubs may have procedures for resolving internal disputes. The plaintiffs already enjoy the freedoms claimed under these headings, but such freedom is not accompanied by immunity from the general law. To say that the plaintiffs have the capacity to resolve disputes between house members is not to say that the plaintiffs have a constitutional right to execute trespassers. That's an extreme example. But, nevertheless, it's one that we have heard of in the course of this trial.

Page 10, the jurisdiction to enter into and conduct international relations and settle disputes with other aboriginal nations. I don't want to comment on that, my lord. This was drafted at a time when we were -- it was not clear to us what the position was that my friends were taking on international law and we'll refer to that before we conclude our submission.

(ix) Jurisdiction to make and enforce laws in relation to the above. As an internal matter, the plaintiffs already enjoy the freedom to regulate their activities inter se by means of ascertainable rules. Such jurisdiction is consensual. And that is the root of it. The laws in question bind no one save those

1 who agree to be bound by them, and they are subject to
2 the general law.
3 Now, to the extent -- if I may enlarge upon that,
4 to the extent that these laws are not consensual, then
5 the Court is being asked to supersede the authority of
6 Canada with respect to the Criminal Code. And I
7 acknowledge that the plaintiffs say they are making no
8 such claim in this case. But a general declaration to
9 make enforced laws in relation to all of the above
10 matters is one which leads very close to saying that
11 if not today, then certainly tomorrow both Canada and
12 British Columbia laws relate to enforcement of the
13 resolution of disputes. And what happens if disputes
14 cannot be resolved peacefully will be that
15 jurisdiction will be superseded.
16 Now, my lord, I wanted to include a reference
17 which doesn't precisely fit here but is referable to
18 the matters which are in this Part III, and that is
19 with respect to Blackstone. The plaintiffs assert a
20 variety of fundamental principles said to have become
21 well-established rules of the common law by the time
22 of the Royal Proclamation of 1763. If the principles
23 contended for -- and this reference, my lord, to
24 Volume 1, Part II, page 21 is to the plaintiffs'
25 argument. So if the principles contended for at that
26 reference were well established by 1763, it is to be
27 expected that they would find expression in
28 Blackstone's Commentaries. They do not. Instead what
29 is discussed is the important distinction (ignored by
30 the plaintiffs in their argument) between settled
31 colonies and colonies acquired by conquest or cession.
32 And I have attached to this extract the relevant
33 pages from Blackstone, being pages 104 and 105 to the
34 introduction. And if I could refer your lordship to
35 page 104, last paragraph on that page, Mr. Justice
36 Blackstone had made reference -- had referred to the
37 islands of Jersey, Guernsey, Sark, Alderney, and their
38 appendages. And then he goes on in the last
39 paragraph, and I quote:
40
41 "Besides these adjacent islands, our more
42 distant plantations in America, and elsewhere,
43 are also in some respects subject to the
44 English laws. Plantations, or colonies in
45 distant countries, are either such where the
46 lands are claimed by right of occupancy only,
47 by finding them desert and uncultivated, and

1 peopling them from the mother country; or

2 where, when already cultivated, they have been
3 either gained by conquest or ceded to us by
4 treaties. And both these rights are founded
5 upon the law of nature, or at least upon that
6 of nations. But there is a difference between
7 these two species of colonies, with respect to
8 the laws by which they are bound. For it is
9 held, that if an uninhabited country be
10 discovered and planted by English subjects, all
11 the English laws are immediately there in
12 force. For as the law is the birthright of
13 every subject, so wherever they go they carry
14 their laws with them. But in conquered or
15 ceded countries that have already laws of their
16 own, the king may indeed alter and change those
17 laws; but till he does actually change them,
18 the ancient laws of the country remain, unless
19 such as are against the law of God, as in the
20 case of an infidel country."
21
22 And then he goes on to say:
23
24 "Our American plantations principally of this
25 latter sort, being obtained in the last century
26 either by right of conquest and driving out the
27 natives (with what natural justice I shall not
28 at present enquire) or by treaties. And
29 therefore the common law of England, as such,
30 has no allowance or authority there; they being
31 no part of the mother country, but distinct
32 (though dependent) dominions."
33
34 The effect of this was commented upon by Mr. Justice
35 Blackburn.
36 THE COURT: What year is Blackstone writing this?
37 MR. GOLDIE: I thought it was 1865.
38 THE COURT: 1765.
39 MR. GOLDIE: 1765.
40 THE COURT: M.DCC. would be 17.
41 MR. GOLDIE: That's what I was working out rather painfully, but
42 Mr. Plant was good enough to tell me what the answer
43 was.
44 THE COURT: Well, I think M.DCC is 1700.
45 MR. GOLDIE: That's correct. And then 65 is --
46 THE COURT: 50, 10, 5.
47 MR. JACKSON: I think the first page of the commentary is -- at

1 the first line there's a reference to 1765.
2 MR. GOLDIE: Thank you.
3 THE COURT: First page of the commentary.
4 MR. GOLDIE: Yes. At page 104, my friend Mr. Jackson points
5 out, being completed in this present year 1765.
6 I want to bring your lordship's attention once
7 again to the comments of Mr. Justice Blackburn in
8 Milirrpum. And that's at page 8 -- or paragraph 8.
9 And I say in this context observations of Mr. Justice
10 Blackburn in Milirrpum at pages 206-7 are of
11 assistance. And he says:
12
13 "You must regard as of some significance the
14 fact that there is no trace of any doctrine of
15 communal native title in Blackstone's
16 Commentaries, first published in 1765. I do
17 not think it is sufficient to reply that
18 Blackstone professed to treat only of English
19 law. The title of the fourth section of his
20 introduction is "Of the countries subject to
21 the Laws of England" and with proper
22 qualifications in each case he deals
23 successively with Wales, Scotland, Berwick upon
24 Tweed, Ireland, the Isle of Man, the Channel
25 Island, and "Our more distant plantations in
26 America, and elsewhere". It is true that he
27 makes only cursory reference to the differences
28 between English law and the laws of those
29 places. But to explain the absence from
30 Blackstone of any mention of a doctrine which
31 is said to be a doctrine of the common law in
32 1788, or in our case 1763, it is necessary to
33 say either that the doctrine did not exist in
34 1765 and yet had become established in 1788, or
35 alternatively to say that Blackstone made a
36 significant error of omission.
37
38 "A possible line of reasoning from the doctrine
39 that in settled colonies English law applies so
40 far as it is applicable, is as follows. If
41 that is correct and exhaustive, then the
42 doctrine of communal native title does not
43 apply in any territory as a doctrine of the
44 common law. "
45
46 That emphasis is, of course, mine.
47

1 "It does not apply in a settled colony because
2 ex hypothesi it is not part of the law of
3 England. It does not apply in a conquered or
4 ceded colony unless it is either part of the
5 existing law which the conqueror is bound to
6 respect, or it is expressly applied by the
7 conqueror as an act of State; in either case it
8 is ex hypothesi not a doctrine of the common
9 law. The conclusion is that if it applies in
10 any territory, it applies otherwise than as a
11 doctrine of the common law."
12
13 Now, I go to Section III, and I refer firstly
14 to --
15 THE COURT: I'm sorry. You mean Section 4?
16 MR. GOLDIE: No. I dealt with Section 4
17 THE COURT: You went to 5, yes.
18 MR. GOLDIE: I dealt with 5 in III and I'm now in II, my lord.
19 I'm now going to deal with Section III. And I skip
20 down to paragraph numbered 3 on the first page. As
21 has been submitted, the position of the province is
22 that any aboriginal interest in British Columbia
23 consists of the Indian interest in the lands set
24 aside.
25 THE COURT: I'm sorry, Mr. Goldie. I'm not with you. Where are
26 you?
27 MR. GOLDIE: The heading is Part III, Section 3, aboriginal
28 title.
29 THE COURT: Yes. I have that.
30 MR. GOLDIE: And I jumped down to paragraph numbered 3.
31 THE COURT: Oh, I see. All right. Yes. Thank you.
32 MR. GOLDIE: And I'm taking -- starting with the second
33 sentence.
34 THE COURT: Yes. I'm with you now.
35 MR. GOLDIE: As has been submitted, the position of the Province
36 is that any aboriginal interest in British Columbia
37 consists of the Indian interest in the lands set aside
38 as reserves for their use and benefit. It is clear
39 that the members of the bands in the claim area have
40 an interest in the reserves set aside for them. But
41 apart from their rights as ordinary citizens, and
42 apart from the limitations on provincial legislative
43 jurisdiction imposed by head 24 of Section 91 of the
44 Constitution Act, (which constrain, among other
45 things, the Province's ability to legislate directly
46 with respect to Indian hunting and fishing), the
47 plaintiffs have no rights, aboriginal or otherwise, to

1 lands and resources outside the reserves. Subject to
2 regulation, they enjoy hunting and fishing rights over
3 unoccupied Crown lands. And I say with respect to
4 such rights, that those are shared with all others,
5 whether aboriginal or non-native. Now, the method of
6 sharing is determined by the regulation, but it is
7 nonexclusive.
8 And I say that it is respectfully submitted that
9 Calder, read carefully, is not authority to the
10 contrary.
11 The judgments of Mr. Justice Judson and Mr.
12 Justice Hall are the bases for the claim that a
13 non-proprietary aboriginal right may arise under the
14 common law of Canada. This was the conclusion reached
15 in Baker Lake and by Mr. Justice Dickson (as he then
16 was) in Guerin.
17 THE COURT: I think he was chief justice then, wasn't he?
18 Guerin is only a few years ago.
19 MR. GOLDIE: I'm beginning not to trust any recollection of
20 mine.
21 THE COURT: Well, I'm not either. Doesn't really matter. I
22 don't think he will be offended.
23 MR. GOLDIE: It just adds to the errata. Yes. The chief
24 justice, my colleague tells me, was still Chief
25 Justice Laskin, but he took no part in the judgment.
26 THE COURT: That's how quickly the years have gone by.
27 MR. GOLDIE: The -- I -- before I go on, I should point out that
28 in Baker Lake, Mr. Justice Mahoney said that if the
29 claim had been proprietary, it would have been
30 extinguished by virtue of the Charter. He makes that
31 distinction between non-proprietary and proprietary.
32 Perhaps I ought to refer your lordship to where he
33 says that. It's -- it is B-2. It's Volume 1 of
34 the -- of the defendant's authorities, Tab B-2. It's
35 in the -- this is at page 577. And it's in the
36 context of determining whether the mining laws
37 applicable to the Northwest Territories must be taken
38 as extinguishing the native title, which he found was
39 not affected by the Royal Charter, of the grant to the
40 Hudson's Bay Company of 1670. And on page 577 after
41 reciting Section 8 of the Territorial Lands Act, he
42 said, and I quote:
43
44 "Canadian courts have, to date, successfully
45 avoided the necessity of defining just what an
46 aboriginal title is. It is, however, clear
47 that the aboriginal title that arises from the

2 If the aboriginal title that arose in Rupert's
3 Land independent of the Royal Proclamation were
4 a proprietary right, then it would necessarily
5 have been extinguished by the Royal Charter of
6 May 2, 1670, which granted the Hudson's Bay
7 Company ownership of the entire colony. Their
8 aboriginal title does not make the Inuit
9 'holders of surface rights' for purposes of the
10 section."
11
12 Now, that's consistent with another observation he
13 makes, which is that a grant by the Hudson's Bay
14 Company to a third party is inconsistent with
15 aboriginal title of the non-proprietary sense -- the
16 non-proprietary type that he found.
17 THE COURT: I'm having some difficulty. You're reading a
18 different report, I think.
19 MR. GOLDIE: Well, it should not --
20 THE COURT: What --
21 MR. GOLDIE: Does your lordship have B-2 two in Volume 1 of the
22 grey book?
23 THE COURT: No, I don't. I have B-1. Oh, that's --
24 MR. GOLDIE: B-1 --
25 THE COURT: B-1 is an earlier judgment.
26 MR. GOLDIE: B-1 is an interlocutory judgment.
27 THE COURT: That's my problem.
28 MR. GOLDIE: The Federal Court judgment that is referred to in
29 the text is at 556, is his analysis of the Calder --
30 Calder judgment, my lord.
31 THE COURT: Yes.
32 MR. GOLDIE: He says at the bottom of that:
33
34 "While it appears that the judgment of Pigeon
35 J. embodies the ratio decidendi of the Supreme
36 Court, the clear agreement of the other six
37 judges on the point is solid authority for the
38 general proposition that the law of Canada
39 recognizes the existence of an aboriginal title
40 independent of the Royal Proclamation or any
41 prerogative act of legislation. It arises at
42 common law."
43
44 That's what I now wish to examine. I -- my digression
45 was simply to refer to the effect that he would have
46 found if the -- he considered the claim made in Baker
47 Lake to be proprietary in nature.

Submissions by Mr. Goldie

I'm back to paragraph 6 on page 2. In Calder the British Columbia Court of Appeal concluded, as stated in the headnote at (1970) 74 W.W.R. -- and that is in the -- in the yellow binder under Tab III/3-6:

> "... there was no"...

And I'm quoting in part from the headnote.

> "... there was no treaty, statute, or agreement having statutory effect... conferring upon them (plaintiffs) title to the lands in question... The onus was on the appellants"...

Which were the Nishga at this point.

> "... to establish that by some prerogative act could be inferred, the Crown had ensured to the Nishga Nation aboriginal rights in the lands in question which could be enforced in the courts of the province; the appellants had failed to discharge this onus."

The ratio of the outcome of the appeal to the Supreme Court of Canada is that the action could not be brought for want of a fiat to proceed under a Petition of Right.

The aboriginal title issue in Calder was defined by the terms of the declaration sought "that the aboriginal title, otherwise known as Indian title, of the plaintiffs to their ancient tribal territory hereinbefore described has never been lawfully extinguished". And that is a quotation from -- from page 313 of Calder, which is found in the next tab in the yellow book. The plaintiffs did not directly ask the Court whether they had such title but rather, assuming they had, was it ever extinguished. That was the question before the Court.

The allegation that the area claimed in the action was in fact the ancient tribal territory of the Nishga was admitted.

For the purpose of adjudicating with respect to the relief sought it was unnecessary to determine whether aboriginal title existed, let alone its form or content.

The judgment of Mr. Justice Judson responded to the issue before the Court as follows at S.C.R. page

1 344. And that's in the next tab of the yellow book.

2 And I quote:

3

4 "In my opinion, in the present case, the
5 sovereign authority elected to exercise
6 complete dominion over the lands in question,
7 adverse to any"...

8

9 And I emphasize the word "any".

10

11 "... any right of occupancy which the Nishga
12 tribe might have had, when, by legislation, it
13 opened up such lands for settlement, subject to
14 the reserves of land set aside for Indian
15 occupation."

16

17 I say that he accepts the hypothesis of the
18 question -- the hypothesis of the declaration sought,
19 which was that there was an aboriginal title.
20 In paragraph 12 I say the evidence in the case at
21 bar has shown the frailty of the admission with
22 respect to the occupancy of the claim -- occupancy of
23 the land in the claim made by the Nishga. It was
24 disputed at the time and is disputed still.
25 Now, the references to that, my lord, occur in the
26 next tabs in the yellow binder beginning with Tab 12.
27 And the first item is a letter addressed to His
28 Majesty's privy council, Port Simpson, March -- I
29 think it's March, 10th, 1919, signed by Henry D.
30 Pierce on behalf of the United Tribes of B.C. And he
31 starts off in paragraph one saying that:

32

33 "I was requested by the representatives of the
34 United Tribes of B.C. to forward to you the
35 dispute between the Nishgas and the Tsimsheans.
36 This dispute is a stumbling block in the way of
37 the Tsimsheans, and the other eight tribes
38 connected with the Port Simpson by agreement.
39 The Port Simpson with the other tribes cannot
40 agree in making the Nishga petition a test
41 case, because in the said petition the Nishgas
42 in setting forth a description of the land
43 which they claim as theirs lay claim to land
44 which the Port Simpson people include in their
45 own tribal claim."

46

47 Now, your lordship may recall that the land in

1 question in the Calder case was based upon the 1913
2 petition. And then at the bottom of the page they say
3 they met with the chiefs and representatives but could
4 come to no settlement re the -- I think it's the Nass.
5 THE COURT: Yes.
6 MR. GOLDIE: And then over the page about midway down the first
7 paragraph:
8
9 "The United Tribes of B.C. are afraid that
10 should the Nishga petition be successful before
11 the Privy Council, that the description of the
12 Nishga land as therein set forth would be more
13 or less binding, and that the Tsimsheans would
14 be powerless to present their counterclaim."
15
16 And then at the beginning of the next paragraph:
17
18 "Mr. O'Meara assured the meeting ..."
19
20 That was a meeting that -- well, I should say your
21 lordship has probably heard of Mr. O'Meara, but he was
22 a very active advisor to the Northern Indians for a
23 period which extended from well before 1919 right
24 straight through to shortly after 1927. At any rate,
25 in the second paragraph:
26
27 "Mr. O'Meara assured the meeting that he could
28 guarantee that the Nishga would agree to any
29 suggestion he made to them in reference to
30 meeting the objections of the Tsimsheans."
31
32 But in fact they say -- Mr. Pierce said that they
33 hadn't. So, as I say, that's an indication of the
34 frailty of the admission that was made.
35 And then following that, my lord, beginning at
36 page 4, our -- substantially the extracts from Exhibit
37 454 followed, and following that are transcript
38 references from the cross-examination of Mr. Sterritt
39 on those extracts from Mr. Sterritt's notebooks. And
40 the -- the particular episode in question was a
41 meeting with the -- with the Nishga and the Gitksan
42 and the Kitwancool in October of 1984. And Mr.
43 Sterritt heads up the first page with the words
44 "Nishga Feast, October 27th, 1984, opening ceremony",
45 then attributes to Mr. Gosnell, whom he identified as
46 Mr. Jimmy Gosnell, quote, "overlap is not serious",
47 unquote. And I'm not going to take your lordship

1 through that, but the -- the whole tenor of the
2 meeting was the complaints basically on the part of
3 the Kitwancool; that they had stood by while the
4 Nishga were in Court in the Calder case, saying
5 nothing about the fact that in their eyes a portion of
6 the claim area fell within lands historically and
7 traditionally claimed by the Kitwancool. And I say
8 that from the -- from the evidence that appears in
9 these notebooks, the Kitwancool view was that they had
10 connived at misleading the Court as to the true and
11 lesser extent of Nishga occupancy, and I add so as not
12 to embarrass the Nishga when their claim was in the
13 courts in the Calder action.
14 Now, in any event, in paragraph 13 --
15 THE COURT: Was there not a letter about that?
16 MR. GOLDIE: Beg your pardon, my lord?
17 THE COURT: Was there not a letter about that somewhere?
18 There's a letter in evidence that describes that
19 unusual situation.
20 MR. GOLDIE: The only letter that I -- that I recall is the
21 earlier one, but I'll look for that.
22 THE COURT: I'm sure there's a letter somewhere.
23 MR. GRANT: Yes. And I also -- my friend doesn't refer to this,
24 but Mr. Marsden was questioned on this and explained
25 that it was a question that they understood the issue
26 of Calder was extinguishment. He was examined on that
27 and my friend in saying this -- he cross-examined a
28 Kitwancool chief on the very point and makes no
29 reference to that. And my recollection is that Mr.
30 Marsden did explain it in its context as to why the
31 Kitwancool did not intervene in the Calder case and
32 clarified that.
33 MR. GOLDIE: I rely upon the statements recorded by Mr. Sterritt
34 at the time.
35 THE COURT: All right.
36 MR. GOLDIE: And the explanation that was given at the time --
37 at the time of this feast was that they did not want
38 to embarrass the Nishga.
39 THE COURT: I'm sure there's a letter about that.
40 MR. GRANT: Yes.
41 MR. GOLDIE: I have no doubt, my lord, but I'm relying upon the
42 contemporaneous evidence as acknowledged by Mr.
43 Sterritt, who was there.
44 I am at paragraph 13. Based on the key admissions
45 of fact, Mr. Justice Judson -- oh, I should add, which
46 I assume was obvious, that the claim area in this case
47 includes lands claimed by the Nishga in Calder. Now,

1 the -- my recollection of my friend's submission here,
2 and I am again adding to what is at paragraph 12,
3 is -- my recollection of Mr. Grant's submission is
4 that there is no proof that the Nishga have the right
5 to claim aboriginal rights or interests. Now, at this
6 feast their right to do so is not questioned by the
7 Gitksan. The issue was the overlap as recorded by Mr.
8 Sterritt on the first page of his notes of Exhibit
9 454. Mr. Gosnell said the overlap is not serious. It
10 was later characterized by the head of the Kitwancool
11 as aggression.
12 Now, based on the key admissions of fact, Mr.
13 Justice Judson held that the right, the existence of
14 which was implied in the declaration prayed for by the
15 plaintiffs, was an equitable one dependent on the good
16 will of the Sovereign - that is to say, that its very
17 existence was dependent on the Crown's recognition of
18 it.
19 I say that he made no finding that the Crown had
20 in fact recognized the non-proprietary claim that was
21 before the Court. He proceeded upon the premise of
22 the British Columbia Court of Appeal, stated at S.C.R.
23 at page 329, which is under Tab 14, in these words.
24 It was the opinion of the British Columbia courts
25 "...that this right, if it ever existed, had been
26 lawfully extinguished..." And that was the premise
27 upon which he proceeded to examine the case. And he
28 came to the conclusion that if it ever existed, it had
29 been lawfully extinguished, but not for the same
30 reason that the court of appeal based its judgment on,
31 at least in part.
32 Now, after reviewing the limited material before
33 the Court, which, as to the pre-1871 colonial
34 material, was basically limited to the yellow book -
35 Exhibit 1182 in the case at bar - and the 13 Colonial
36 Ordinances, so-called Calder 13, he applied the
37 reasoning of the Supreme Court of the United States in
38 Tee-Hit-Ton Indians v. United States. And that
39 becomes evident from the -- his judgment at page 344,
40 which is under the Tab 14. He says in the middle of
41 the page there, the top half of the page:
42
43 "In my opinion in the present case the
44 sovereign authority elected to exercise
45 complete dominion over the lands in question,
46 et cetera, adverse to any right of occupancy
47 which the Nishga tribe might have had, et

cetera."

Then he goes on to say:

> "We were not referred to any cases subsequent to Tee-Hit-Ton and the question of compensation for claims arising out of original Indian title. The last word on the subject from the Supreme Court of the United States is therefore that there is no right to compensation for such claims in the absence of a statutory direction to pay."

Then he says:

> "I note the concluding paragraph in the reasons for judgment in Tee-Hit-Ton. In my opinion it has equal application to the appeal now before us."

And then I go down to the quotation about midway through it beginning with the words "Our Conclusion". And that reads:

> "Our conclusion does not uphold harshness or as against tenderness towards the Indians, but it leaves with congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy and government owned land rather than making compensation for its value a rigid constitutional principle."

Now, I can find nowhere in his judgment a finding that the common law of Canada recognized, in a manner enforceable in a court of law, the non-proprietary claim of the Nishga to the use and occupancy of the lands they claimed.

Now, in contrast, my lord, Mr. Justice Hall, I say in dissent -- I should say more accurately the other view -- would have found for the Nishga. He was clearly of the opinion that the Nishga had aboriginal title in respect of the ungranted portions of the claimed area, both by reason of the admitted fact of historic occupation and by reason of the application, in his view, of the Royal Proclamation of 1763 within British Columbia.

Now, I submit that Mr. Justice Hall's reasons on the aboriginal title issue may, properly speaking, be

1 obiter. However, he observed that the Supreme Court
2 Report, page 352 --
3 THE COURT: What do you say the ratio of his judgment was?
4 MR. GOLDIE: Well, the application to the Royal Proclamation.
5 THE COURT: You think that's what he based his judgment on?
6 MR. GOLDIE: I think so, my lord, because the admitted fact of
7 historic occupation, I think, was -- was accepted by
8 him without -- without examination.
9 THE COURT: Well --
10 MR. GOLDIE: He dealt with -- of course he had to deal with
11 the -- the submission with respect to the colonial
12 ordinances and with respect to them, in my submission,
13 his conclusion was based upon the proposition, very
14 broadly speaking, that those ordinances so far as they
15 purported to extinguish title were ultra vires.
16 THE COURT: But surely assuming -- surely on the basis of the
17 admission at least he -- he found aboriginal title,
18 did he not, apart from the Royal Proclamation?
19 MR. GOLDIE: Yes. I think that's so, my lord.
20 THE COURT: Based on the admission?
21 MR. GOLDIE: Yes. Perhaps I skipped one element of my answer to
22 your lordship.
23 THE COURT: All right.
24 MR. GOLDIE: And that was that the -- the ratio is founded upon
25 the admission -- the judgment so far as occupation is
26 founded on an admission. And I was about to draw your
27 lordship's attention to his observation at page 352,
28 which is under Tab 17. And he observed this, and I
29 quote:
30
31 "... The exact nature and extent of the Indian
32 right or title does not need to be precisely
33 stated in this litigation."
34
35 Now, I'm not sure what he refers to in the words "and
36 extent", but be that as it may, he continues:
37
38 "The issue here is whether any right or title
39 the Indians possess as occupants of the land
40 from time immemorial has been extinguished.
41 They ask for a declaration that there has been
42 no extinguishment...."
43
44 And it will be submitted that his lordship's
45 judgment contains errors of historical fact which
46 undermine its authority, particularly with respect to
47 the application within British Columbia of the Royal

The conclusion of Mr. Justice Hall that Indians in British Columbia have an undefined right over tribal territories by virtue of their occupancy of such lands from time immemorial relies on much jurisprudence from other jurisdictions, including, in particular, the celebrated decisions of the U.S. Supreme Court in Johnson v. McIntosh and Worcester v. Georgia. Reliance on American jurisprudence also appears in the judgments in Baker Lake and Guerin. And indeed if I may add to that, the plaintiffs here rely upon the same sources, not in support of the non-proprietary claim of ownership, but in support of their proprietary claim.

I say in paragraph 20 it will be seen that the U.S. courts have propounded a doctrine of aboriginal title which, for present purposes, has these essential characteristics: The nature and extent of the aboriginal interest falls to be determined in accordance with an analysis of the historical relations between the Crown (or its successors) and its Indian subjects. Thus, in my submission, the U.S. doctrine of aboriginal title is historically contingent.

THE COURT: Contingent upon a relationship with the Crown?

MR. GOLDIE: Contingent upon an analysis of the historical relationship.

THE COURT: Yes.

MR. GOLDIE: The Indian interest recognized by the U.S. courts is a possessory right in respect of lands actually used and occupied by them. Once recognized, it is a legal right. Indians holding land on the basis of aboriginal use and occupancy have no alienable interest in such lands.

The American doctrine of aboriginal title offers no support for the claim to ownership and jurisdiction -- that is my submission and I'll develop it at some detail -- and is fully consistent with the proposition that it is open to the Crown as sovereign to attribute such rights to the aboriginal inhabitants of a newly-acquired territory as it chooses.

If the view of Calder expressed above be correct, then the cases which have purported to follow Calder must be re-examined. For example, the statement of Mr. Justice Mahoney in Baker Lake at 556, that, and I quote, "the clear agreement" of six judges is authority for the proposition that aboriginal title

1 arises at common law, with respect, reads too much
2 into the judgment of Mr. Justice Judson. Bear Island
3 builds on this error, as, with respect, so does that
4 of Mr. Justice Dickson, as he then was, in Guerin.
5 Now, in Guerin it was decided that the interest of
6 a band in reserve lands held for its use under the
7 "Indian Act" of Canada gave rise to a fiduciary
8 responsibility on the part of Canada when the band's
9 wishes were disregarded in the disposition of the
10 reserve lands surrendered to the Crown under the
11 provisions of that Act. Of the eight judges who
12 decided the case, three joined Mr. Justice Dickson in
13 his description at page 382. I think that comes
14 later. Anyway, at any rate, at that page he describes
15 the sui generis Indian interest in reserve lands as
16 characterized by two features: General inalienability
17 and a fiduciary obligation arising upon surrender to
18 the Crown. Two joined with Madam Justice Wilson in
19 describing the band's interest in its reserve lands by
20 reference to the above-quoted excerpt from St.
21 Catherine's Milling and one, Mr. Justice Estey, agreed
22 that the personal nature of the interest was settled
23 by St. Catherine's Milling and Ontario Mining v.
24 Seybold, then recently reaffirmed by Smith v. The
25 Queen (1983) 1 S.C.R. 554.
26 Now, Mr. Justice Dickson at page 379 -- and this
27 is under Tab 24 -- said, and I quote:
28
29 "It does not matter, in my opinion, that the
30 present case is concerned with the interest of
31 an Indian band in a reserve rather than with
32 unrecognized aboriginal title in traditional
33 tribal lands. The Indian interest in the land
34 is the same in both cases. See Attorney
35 General for Quebec v. Attorney-General for
36 Canada, (the Star Chrome case). It is worth
37 noting, however, that the reserve in question
38 here was created out of the ancient tribal
39 territory of the Musqueam Band by the
40 unilateral action of the colony of British
41 Columbia prior to confederation."
42
43 Now, just leaving aside for future comment the
44 accuracy of his lordship's observations, I note that
45 his observations with respect to the similarity
46 between the interest of an Indian in a reserve and
47 unrecognized aboriginal title in traditional tribal

1 lands are obiter, having regard to what he was then
2 doing, and that is dealing with the obligations of
3 Canada upon -- to the band upon the surrender of
4 reserve lands in the instance -- in the case then at
5 bar, where Canada did not deal with those lands in
6 accordance with the directions of the band or
7 directions of the circumstances of the surrender.
8 In Kruger and Manuel v. The Queen, his lordship
9 stated, and I quote:
10
11 "... a sound rule to follow is that questions
12 of title should only be decided when title is
13 directly in issue. Interested parties should
14 be afforded an opportunity to adduce evidence
15 in detail bearing upon the resolution of the
16 particular dispute."
17
18 Now, of course, the province was not a party to
19 Guerin and it is difficult to see how the observations
20 of his lordship on aboriginal title can have
21 application beyond the narrow (although significant)
22 question of the source of the federal Crown's
23 fiduciary obligation to Indians.
24 Now, in any event, the passage from his lordship's
25 judgment quoted above is, with respect, not altogether
26 easy to follow. And the interest -- the quotation I'm
27 referring to is the one that is at page 379 of the
28 judgment. By the phrase "the Indian interest in the
29 land" his lordship may have meant only an interest
30 internal to the Indians, as opposed to a legally
31 enforceable right against the Crown. The phrase
32 "unrecognized aboriginal title" is difficult to apply
33 to British Columbia, where a legal interest in lands
34 used and occupied by the natives was created in the
35 colony and given effect by the withdrawal of lands,
36 called reserves, from the category of unoccupied
37 public lands open to pre-emption. The observations of
38 his lordship, with respect, do not amount to a ruling
39 that an unrecognized aboriginal interest in tribal
40 lands exists in British Columbia.
41 In describing the Indian interest in reserves as
42 "the same" as their interest in "traditional tribal
43 lands", his lordship may have had in mind the
44 situation in British Columbia where the lands
45 withdrawn from pre-emption and set aside for the
46 Indian inhabitants were the lands actually occupied by
47 them. And I will be expanding upon that when I come

1 to deal with the creation of the reserves. It would
2 not be an apt description in the case of the numbered
3 treaties on the Prairies where all the lands occupied
4 or used were surrendered and reserves were thereafter
5 created. However, the reference to the Star Chrome
6 case -- and the reference to the Star Chrome Case
7 suggests that his -- that what his lordship had in
8 mind was not all that precise. In the Star Chrome
9 case, Mr. Justice Duff when construing two
10 pre-Confederation statutes of the Province of Canada
11 said the view that the 1850 Act was passed for the
12 purpose of affording legal protection for the Indians
13 in the enjoyment of property occupied by them or
14 appropriated to their use, and of securing a legal
15 status for benefits to be enjoyed by them.
16 And then he goes -- I've set out the -- the -- the
17 quotation. It's not -- it's not sidelined, my lord.
18 And I'm not sure that the correct part is under the
19 tab number. Perhaps I should look at the report of
20 the case itself. That's A.G. Quebec v. A.G. Canada.
21 And it's in the plaintiffs' book of authorities Volume
22 1 Tab 10, yes, at page -- the reference that I have in
23 mine is at page 410. It's the third paragraph
24 beginning with the words "The object of the Act of
25 1850".
26 THE COURT: Yes.
27 MR. GOLDIE:
28 "The object of the Act of 1850"...
29
30 And if I may interject here, that was the Act of
31 appropriation of the reserves in question.
32 Continuing:
33
34 "... as declared in the recitals already
35 quoted, is to make better provision for
36 preventing encroachments upon the lands
37 appropriated to the use of Indian tribes and
38 for the defence of their rights and privileges,
39 language which does not point to an intention
40 of enlarging or in any way altering the quality
41 of the interest conferred upon the Indians by
42 the instrument of appropriation or other source
43 of title. And the view that the act was passed
44 for the purpose of affording legal protection
45 for the Indians and the enjoyment of property
46 occupied by them or appropriated to their use
47 and of securing a legal status for benefits to

1 be enjoyed by them receives some support from

2 the circumstance that the operation of the Act
3 appears to extend to lands occupied by Indian
4 tribes in that part of Quebec which, not being
5 within the boundaries of the Province as laid
6 down in the proclamation of 1763, was subject
7 to the pronouncements of that proclamation in
8 relation to the rights of Indians, a region in
9 which the Indian title was still in 1850, to
10 quote the words of Lord Watson, 'a personal and
11 usufructuary right dependent upon the goodwill
12 of the sovereign'."
13
14 Now, that is a -- not an easy section to follow,
15 especially as the lands in question were in fact
16 within the boundaries of the old province of Quebec.
17 The word not -- I should go back and explain to your
18 lordship my comment.
19 THE COURT: Are you suggesting, Mr. Goldie, that aboriginal
20 title arose in other parts of Canada either or both by
21 reason of possession and -- and the Royal
22 Proclamation?
23 MR. GOLDIE: Well, the Royal Proclamation in respect of the
24 geographic area to which it applied created in one of
25 its provisions a reserve.
26 THE COURT: Yes.
27 MR. GOLDIE: The areas excluded included, if I may put it that
28 way, the new colony of Quebec.
29 THE COURT: Did they exclude all of those colonies?
30 MR. GOLDIE: No, no. Just the new colony of Quebec.
31 THE COURT: It was excluded from the operation of the --
32 MR. GOLDIE: It was excluded from the reserve.
33 THE COURT: All right. Yes. Okay. Yes. Right.
34 MR. GOLDIE: Now, within the reserve there was created for the
35 present a reserve.
36 THE COURT: Within the colony or within the reserve?
37 MR. GOLDIE: Within the reserve.
38 THE COURT: That is outside the colony?
39 MR. GOLDIE: Outside -- it was confined to the ceded or
40 conquered territories except for -- I shouldn't say
41 except for, but it excluded from the reserve, as I
42 say, the new colony of Quebec, which was equally one
43 that was conquered and ceded as a result of the
44 conquest.
45 THE COURT: The land they're talking about in this case, was it
46 within the new colony of Quebec?
47 MR. GOLDIE: Yes, it was. And the word -- the word "not" in Mr.

1 Justice Duff's statement, which I have quoted from, is
2 in error because the -- the lands themselves were in
3 the eastern townships.
4 THE COURT: Where is the reference to "not"?
5 MR. GOLDIE: It is -- does your lordship have the report in
6 front of you?
7 THE COURT: Yes. Page 410.
8 MR. GOLDIE: Page 410. One, two, three, four, five lines from
9 the bottom where he says "Appears to extend to lands
10 occupied by Indian tribes in that part of Quebec,
11 which not being one within the boundaries of the
12 province, was subject to the pronouncements of the
13 proclamation". Now, that would mean that he thought
14 he was talking about the reserve created by the Royal
15 Proclamation.
16 THE COURT: Which had to be outside the boundaries?
17 MR. GOLDIE: Which would have to be outside the boundaries of
18 the colony created by the Royal Proclamation. Now, I
19 think if that --
20 THE COURT: But by 1850 the province had been established.
21 MR. GOLDIE: Oh, the province's boundaries as originally created
22 last only until 1774.
23 THE COURT: Yes.
24 MR. GOLDIE: Then it was greatly enlarged. Then as a result of
25 the American revolution, the boundaries of the -- of
26 Quebec were cut back. And then, of course, the --
27 there was the creation of Upper and Lower Canada, then
28 the province of -- the Province of Canada and finally
29 Confederation. I will bring up -- no. I think I may
30 have it here -- a map which shows the boundaries of
31 the treaties.
32 THE COURT: What I'm trying to get at is are you submitting that
33 outside British Columbia, which I say has a special
34 status because of the way the colony was formed --
35 MR. GOLDIE: Yes.
36 THE COURT: -- that aboriginal rights arose only because of an
37 occupation?
38 MR. GOLDIE: Yes.
39 THE COURT: And possession and the Royal Proclamation?
40 MR. GOLDIE: Yes.
41 THE COURT: You say without Royal Proclamation in the old
42 territories, there would be no aboriginal possessory
43 aboriginal title?
44 MR. GOLDIE: Only in respect of those areas actually occupied.
45 See, the -- the essential thing which the Royal
46 Proclamation did was west of the Appalachians and east
47 of the Mississippi.

1 THE COURT: Creating a large hunting reserve.
2 MR. GOLDIE: It created a large hunting reserve, and it created
3 that out of cededed or conquered territories. Now,
4 the American colonies were never very happy with the
5 proposition that the Royal Prerogative extended as far
6 east as the Appalachians line, and it said that one of
7 the causes of the American revolution was the -- was
8 the reserve that was created. A number of the
9 American colonies said that the reserve was created
10 out of their lands rather than conquered or ceded
11 lands. But that's a -- sort of a by-product of what
12 the purpose was of the Royal Proclamation, which was
13 to settle unrest among the Indian tribes.
14 THE COURT: All right. Well, I think we should adjourn then
15 until 9:30 tomorrow. Thank you.
16 THE REGISTRAR: Order in court. Court stands adjourned until
17 9:30 tomorrow.
18
19 (PROCEEDINGS ADJOURNED UNTIL MAY 16, 1990 at 9:30 A.M.)
20
21 I hereby certify the foregoing to be
22 a true and accurate transcript of the
23 proceedings transcribed to the best
24 of my skill and ability.
25
26
27 _____
28 Kathie Tanaka, Official Reporter
29 UNITED REPORTING SERVICE LTD.
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