

Vancouver, B.C.

May 14, 1990

(PROCEEDINGS RECONVENED AT 9:00 A.M.)

THE REGISTRAR: Order in court. Supreme Court of British Columbia, this 14th day of May, 1990. Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Mr. Rush, it occurred to me over the weekend that none of us mentioned the factor that seems to me to have some relevance to the proceedings that I understand are to take place this morning. And that is that I assume that the -- those who are to speak are plaintiffs.

MR. RUSH: Yes.

THE COURT: Well, if that's so, then it has occurred to me that what they are to say could well be regarded as argument.

MR. RUSH: Yes.

THE COURT: And I think that may resolve the difficulty I had with the status with what was to be given to the proceedings this morning.

MR. RUSH: Your lordship was of a similar mind to myself, my lord. I was going to submit that the statement that the chiefs will be making to you should be inserted as part of the plaintiffs' argument at the end. And I think that there are two characteristics to it: One, it has the character of argument and, secondly, it has the protocol of completing the plaintiffs' case and completing the plaintiffs' argument. And in this respect, this is the way in which we would ask your lordship to receive the closing statement of the chiefs, and we feel that it may be inserted as part of the written argument of the plaintiffs at its end.

THE COURT: All right. Well, that factor that I didn't think of and which I don't think was mentioned -- I hope it wasn't, if it was I overlooked it -- puts the proceedings on a different basis than -- well, it puts it on a basis that I can deal with and which I think your friends can deal with, and I think perhaps we will deal -- we will just proceed from there.

MR. RUSH: Thank you, my lord.

MR. GOLDIE: My lord, may I make a suggestion? My friend has characterized these statements as argument. I would ask, my lord, that we be given the statements which are about to be read so that we may look at them and consider our position. We do not want to make any

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1                   interruption while the chiefs, who are laymen, are  
2                   making their statement, such as I might feel free to  
3                   do so if it was part of my friend's argument. And I  
4                   would suggest, my lord, that we be given these  
5                   statements, be given five minutes to read them and  
6                   that we carry on from there.

7       MR. RUSH: Well, my lord, I don't see any need for five minutes  
8                   to read them. I don't have any objection to that. I  
9                   have copies for the court and for my friends.

10      MR. GOLDIE: No. I mean before they commence.

11      THE COURT: I don't need to hear you, Mr. Goldie. If the  
12                   statements are ready and they are going to be read in,  
13                   I don't see any reason why they shouldn't be shown.  
14                   So we'll take five minutes?

15      MR. GOLDIE: That will be ample, my lord.

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

17

18                   (PROCEEDINGS ADJOURNED AT 9:05 A.M.)  
19                   (PROCEEDINGS RECONVENED AT 9:10 A.M.)  
20

21      THE REGISTRAR: Order in court.

22      MR. RUSH: Thank you, my lord. My friends have read the closing  
23                   statement of the chiefs. I would like to pass a bound  
24                   copy of this up to your lordship. Copies have been  
25                   provided to the reporters.

26                   My lord, I would just like to introduce Alfred  
27                   Joseph, whom you know, Gisdaywa, who is here to my  
28                   left. Earl Muldoe, who is Delgamuukw, successor to  
29                   the name of Delgamuukw, and Dora Wilson-Kenni,  
30                   Yagalahl, and Don Ryan, Maas Gaak.

31                   And my lord, Mr. Joseph and Mr. Muldoe will speak  
32                   to you in respect of the statement, and Mrs.  
33                   Wilson-Kenni and Mr. Ryan will stand by and witness.  
34                   Thank you, my lord.

35      THE COURT: Thank you. Mr. Joseph.

36      MR. JOSEPH: Thank you, my lord.

37                   We, the Gitksan and Wet'suwet'en people, are in  
38                   the court to state the truth of the ownership and  
39                   jurisdiction we exercise over our territories.

40                   Three years have passed since we made our opening  
41                   statement to this court. At that time, you did not  
42                   know who Delgamuukw and Gisdaywa were. Now, this  
43                   court knows I am Gisdaywa, a Wet'suwet'en chief who  
44                   has responsibility for the House of Kaiyexwaniits of  
45                   the Gitdumden. I have explained how my House holds  
46                   the Biiwenii Ben territory and had the privilege of  
47                   showing it to you. Long ago my ancestors encountered

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1 the spirit of that land and accepted the  
2 responsibility to care for it. In return, the land  
3 has fed the House members and those whom the chiefs  
4 permitted to harvest its resources. Those who have  
5 obeyed the laws of respect and balance have prospered  
6 there.

7 MR. MULDOE: My lord, I am Delgamuukw, the third since this  
8 trial started. I also have obligations to my House  
9 and the territories of my House. You have heard oral  
10 histories of the Gitksan and Wet'suwet'en that tell of  
11 the many groups that migrated into our territories.  
12 Many stayed, contributing to our culture,  
13 acknowledging the authority of our chiefs and obeying  
14 our laws.

15 Of all these groups, only the Europeans failed to  
16 recognize our ownership and jurisdiction. This court  
17 now has an opportunity to redress this situation.

18 We, the Hereditary Chiefs, decided against  
19 wearing blankets and regalia in this courtroom because  
20 we believe that our authority would not be respected  
21 by the government lawyers. Under our law, disrespect  
22 for people and for their territory requires  
23 compensation.

24 We, the Gitksan and Wet'suwet'en, must be  
25 compensated for loss of the land's present integrity  
26 and for the loss of economic rents.

27 We ask that the court not only acknowledge our  
28 ownership and jurisdiction over the land, but to  
29 restore it to a form adequate for nature to heal in  
30 terms of restoration. We would like to see clearcuts  
31 and plantations returned to forests, contaminated  
32 rivers and lakes returned to their original pristine  
33 state, reservoirs of drowned forests returned to  
34 living lakes and life-sustaining flows to diverted  
35 rivers.

36 MR. JOSEPH: My lord, we realize that the true financial value  
37 of this compensation for restoration would bankrupt  
38 both the federal and provincial governments.  
39 Compensation must remain an ongoing obligation of the  
40 federal and provincial governments "until our hearts  
41 are satisfied".

42 However, this compensation should not be viewed  
43 by this court as an alternative to the acknowledgement  
44 of our ownership and jurisdiction of our land. We do  
45 not want financial compensation without the  
46 recognition of our authority over our territories.

47 We are asking you to make declarations on the

Submissions by Mr. Muldoe  
Submissions by Mr. Joseph

1           Gitksan and Wet'suwet'en aboriginal title. We, the  
2           Gitksan and Wet'suwet'en people, own our lands.

3           I will identify those areas where the powers of  
4           the province and the federal governments need to be  
5           restrained in order for us to exercise our  
6           responsibilities under aboriginal title.

7       MR. MULDOE: First, we the chiefs must have our authority  
8           recognized in order to exercise our responsibility to  
9           protect the land for the future, and to conserve  
10          resources. We must have the power to manage all human  
11          activity that brings change to the land, air or water  
12          on all of our territories.

13          Second, to enable each House to provide for its  
14          members and all those living in their territory, the  
15          chiefs must have control over the local economy by  
16          managing natural resource allocations within their  
17          territories. This would include licensing, leasing  
18          and permitting. As well, royalties and taxation  
19          payments from resource use on our territories must be  
20          paid to us.

21          It is not our intention to exert any powers over  
22          the non-Gitksan and Wet'suwet'en people living in our  
23          territories. Fee-simple lands held by third parties  
24          as of October, 1984, would be exempt from this  
25          resource allocation.

26          We see the pulling back of these central  
27          government powers as being the minimum required to  
28          restore not only individual self-reliance but also  
29          community self-reliance. We have presented you with  
30          ample evidence of the effects on our land resulting  
31          from government resource management. We have also  
32          given evidence of the effect that centralized economic  
33          management and government welfare has had on our  
34          people. The governments' system does not work. We,  
35          the Hereditary Chiefs, believe we can change the  
36          situation under our laws and practices through our  
37          authority.

38       MR. JOSEPH: My lord, our system of government is as powerful  
39           today and will be as powerful tomorrow, as it was one  
40           hundred or ten thousand years ago. You have heard  
41           both ancient and modern histories tell us of our  
42           system --

43       THE COURT: Sorry.

44       MR. JOSEPH: Tell of how our system has remained relevant  
45           throughout the evolving ecological, cultural and  
46           economic circumstances in which our people have found  
47           themselves. To say we disobey our laws and ignore our

1 chiefs' authority because we change a piece of  
2 technology, or use our land in a different way, is a  
3 desperate argument.

4 This case then is about learning from the past so  
5 we can repair the present and pass on a healthier land  
6 to our grandchildren. It is not about retrieving  
7 frozen rights from a nineteenth century ice-box.

8 Our aboriginal title is found in common law and  
9 takes precedence over the Provincial Crown. We do not  
10 have to, and will not, surrender our aboriginal title  
11 in order to be recognized by the federal government.  
12 We are self-governing.

13 However, we see a layering of responsibilities  
14 among the Gitksan and the Wet'suwet'en, the federal  
15 government, and the Provincial Government being  
16 resolved in an ongoing series of negotiations. Given  
17 the strong imperative for the Gitksan and the  
18 Wet'suwet'en, British Columbia and Canada to have  
19 social and economic activities continue within our  
20 territories, consensus on the necessary political and  
21 administrative framework must be found.

22 We are asking this court to properly apply common  
23 law. We want a declaration of recognition and  
24 affirmation of our continued ownership and  
25 jurisdiction. We will not surrender or diminish our  
26 title and rights. We do not request a "right" to use  
27 and occupy the land, and we refuse to extend reserve  
28 lands. We will decide what our future relationship  
29 will be with Canada and British Columbia on this  
30 basis.

31 We ask nothing more than what should have  
32 occurred prior to confederation, and prior to this  
33 province entering confederation. We are here to right  
34 the wrongs that have been occurring for over one  
35 hundred years. This court has the power to recognize  
36 and affirm Gitksan and Wet'suwet'en ownership and  
37 jurisdiction.

38 Thank you.

39 THE COURT: Thank you.

40 MR. RUSH: Thank you, my lord. I think that concludes the  
41 plaintiffs' argument and in closing.

42 THE COURT: All right. Thank you. I think we will adjourn  
43 until -- I think we will adjourn until ten o'clock.

44 MR. RUSH: Thank you.

45 THE REGISTRAR: Order in court. This court stands adjourned  
46 until ten o'clock.

## Submissions by Mr. Goldie

1 (PROCEEDINGS ADJOURNED AT 9:25 A.M.)  
2 (PROCEEDINGS RECONVENED AT 10:00 A.M.)  
3

4 THE REGISTRAR: Order in court.

5 THE COURT: Mr. Goldie.

6 MR. GOLDIE: May it please the court, the three-volume written  
7 summary will continue to be the basis for our  
8 submissions, supplemented from time to time. And I  
9 will be in Volume 1 this morning.

10 I have had handed up, my lord, a yellow binder,  
11 and I should perhaps explain that. It is to be used  
12 as the argument proceeds and it consists of extracts  
13 of exhibits and authorities. Not the entire exhibit  
14 or case, but sufficient to permit reference in the  
15 summary to be followed. The tab numbers, my lord,  
16 correspond to the tab numbers in the summary, and if I  
17 may give your lordship an example of that: If your  
18 lordship would look at the yellow volume, the first  
19 tab is a Roman one, and that is referable to Part I of  
20 the written summary, which is identified by Roman  
21 letters.

22 Then under that there are separate tabs and they  
23 have three numbers, a Roman number one, followed by a  
24 slash and an Arabic one. Arabic one refers to the  
25 sections within the part. The second Arabic number is  
26 the paragraph in the summary.

27 Now, I can't promise that that system will work  
28 infallibly, but I hope it will be of sufficient use to  
29 your lordship to enable you to follow the references  
30 in the evidence as the references are made in the  
31 summary. The grey binders which are to your  
32 lordship's left are the plaintiffs' authorities. We  
33 have not -- defendant's authorities I should say. We  
34 have not duplicated those which are found in the  
35 plaintiffs' authorities. These are authorities --  
36 cases and authorities which are not found there.

37 THE COURT: This yellow book is not for all of your argument,  
38 Mr. Goldie, is it?

39 MR. GOLDIE: No. That's just --

40 THE COURT: Volume 1?

41 MR. GOLDIE: -- Volume 1 -- well, not even the whole of Volume  
42 1.

43 THE COURT: All right.

44 MR. GOLDIE: On the spine there is an indication of the parts to  
45 which the volume refers.

46 I have also handed up, my lord, and I believe the  
47 Registrar has placed it in your Volume 1 of the

1 summary, a document marked "Introduction".

2 THE COURT: Yes.

3 MR. RUSH: Now, the references in this document are not in the  
4 yellow binder. This was prepared very recently and I  
5 have attached to it certain of the references or  
6 documents to which I wish to make comment as we go  
7 along.

8 Following that introduction, I move into the parts  
9 of the summary and to which the extracts found in the  
10 Volume 1 of the yellow binders relates.

11 Now, my lord, the plaintiffs -- and I'm now  
12 referring to the introduction.

13 The plaintiffs seek to establish that historical  
14 events, characterized according to a particular view  
15 of history, constitute rules of law. In time this  
16 historical perspective has ranged from the mid 16th  
17 century to 1990. Geographically, the court has been  
18 asked to have regard to events in Africa, New Zealand  
19 and South America as well as virtually all of North  
20 America. Sometimes the description of these events  
21 depends on primary sources but in many, many instances  
22 the court is asked to accept someone else's judgment  
23 of the correct meaning of an historical fact.

24 The plaintiffs say that people of European  
25 descent view events and other peoples in an  
26 ethnocentric fashion. Mr. Brody, of course, came here  
27 to tell us this. But, my lord, ironically, it was Mr.  
28 Brody himself who introduced the stereotypes of the  
29 frontier and who ignored the safeguards the law  
30 affords to those who need protection from  
31 stereotyping.

32 The plaintiffs call this re-interpretation of  
33 history "The Historical-Purposive Approach to  
34 Aboriginal Rights". In their summary it is Section A  
35 of Part I, and it is called "The Development of the  
36 Fundamental Common Law Principles of Aboriginal  
37 Rights" and Mr. Jackson introduced that proposition at  
38 transcript 316, page 23705.

39 My lord, in my submission, there is no authority  
40 for coupling these two words together as an excuse for  
41 or justification for setting aside established law or  
42 for invading the realm of the Executive and Parliament  
43 or for considering the meaning of documents in other  
44 than the sense the people who wrote them intended.

45 "Historical" in the phrase -- in the clause, "The  
46 Historical-Purposive Approach to Aboriginal Rights",  
47 is derived, in my friend's submission, from the

## Submissions by Mr. Goldie

1 statement of Mr. Justice Dickson (as he then was) in  
2 Kruger and Manuel, and this was quoted by my friend  
3 Mr. Jackson:

4 Claims to aboriginal title are woven with  
5 history, legend, politics and moral  
6 obligations.

7  
8 What followed, in my submission, is, in his  
9 lordship's reasons, is even more relevant, and I  
10 quote:

11  
12 If the claim of any Band in respect of any  
13 particular land is to be decided as a  
14 justiciable issue and not a political issue, it  
15 should be so considered on the facts pertinent  
16 to that Band and to that land, and not on any  
17 global basis.

18  
19 The plaintiffs would have the facts pertinent to  
20 Spain's 16th century use of slavery in its gold mines  
21 of Central and South America provide some guide to the  
22 law applicable here. The plaintiffs say that from  
23 this factual background principles of international  
24 law developed. In my submission, there is authority  
25 of equal weight in international law to the contrary.  
26 And I refer here to the report of the Indian  
27 Commissioners appointed to inquire into the  
28 application of grants of money paid by the British  
29 Parliament to the Indians of the old pre-confederation  
30 Province of Canada. And an extract from their report  
31 is found attached to this section of my submission.  
32 But they referred to Vattel, who was a Swiss pub -- a  
33 Swiss commentator born in 1714 and died in 1767, who  
34 was a writer of repute in international law. And I  
35 have set out the particular portion which -- part of  
36 which was referred to by the plaintiffs in their  
37 submission, but I will read what is taken from the  
38 report, which is found from the first page of it. And  
39 I quote:

40  
41 The wisdom and justice of this course is most  
42 strongly commended by Vattel in his Law of  
43 Nations, from which the following passage is an  
44 extract:

45  
46 And then this is from Vattel:  
47

1                   'There is another celebrated question to  
2                   which the discovery of the new world has  
3                   principally given rise. It is asked whether a  
4                   nation may lawfully take possession of some  
5                   part of a vast country in which there are none  
6                   but erratic nations, whose scanty population is  
7                   incapable of occupying the whole? We have  
8                   already observed, in establishing the  
9                   obligation to cultivate the earth, that these  
10                  nations cannot exclusively appropriate to  
11                  themselves more land than they have occasion  
12                  for, or more than they are able to settle and  
13                  cultivate. Their unsettled habitation in those  
14                  immense regions, cannot be accounted a true and  
15                  legal possession, and the people of Europe, too  
16                  closely pent up at home, finding land of which  
17                  the Savages stood in no particular need, and of  
18                  which they made no actual and constant use,  
19                  were lawfully entitled to take possession of it  
20                  and to settle it with colonies. The earth, as  
21                  we have already observed, belongs to mankind in  
22                  general, and was designed to furnish them with  
23                  subsistence. If each nation had from the  
24                  beginning resolved to appropriate to itself a  
25                  vast country, that the people might live only  
26                  by hunting, fishing and wild fruits, our globe  
27                  would not be sufficient to maintain a tenth  
28                  part of its present inhabitants. We do not,  
29                  therefore, deviate from the views of nature, in  
30                  confining the Indians within narrower limits.  
31                  However, we cannot help praising the moderation  
32                  of the English Puritans, who first settled in  
33                  New England, who, notwithstanding their being  
34                  furnished with a charter from their Sovereign,  
35                  purchased of the Indians the lands of which  
36                  they intended to take possession. This  
37                  laudable example was followed by William Penn,  
38                  and the colony of Quakers that he conducted to  
39                  Pennsylvania.'

40  
41                   That was Vattel. The report from which I have  
42                   just read an extract is quoted from by Chancellor Boyd  
43                   in Regina v. St. Catherine's Milling and I'll come  
44                   back to that later on.

45                   THE COURT: You mean the report but not this passage?

46                   MR. GOLDIE: Not this passage, no. I mean the Chancellor Boyd's  
47                   judgment.

## Submissions by Mr. Goldie

1                   The report is relied upon by the plaintiffs as a  
2                   summary of the "principles and process embodied in the  
3                   Royal Proclamation..."

4       THE COURT: Again, there you mean -- "it" means Chancellor  
5                   Boyd's judgment?

6       MR. GOLDIE: No. I'm talking about the report of the  
7                   Commissioners --

8       THE COURT: All right.

9       MR. GOLDIE: -- of 1844 inquiring into the application of monies  
10                  appropriated by the British Parliament for use in the  
11                  Old Province of Canada.

12                 Now, my lord, continuing at page 5 of my  
13                 introduction: Mr. Jackson stated at transcript 316,  
14                 page 23702, that, and I quote, "...the legal history  
15                 which we will be introducing..." is intended to  
16                 identify the fundamental principles upon which the  
17                 Gitksan and Wet'suwet'en rights to ownership and  
18                 jurisdiction can be recognized under Canadian law.

19                 Now, prominent in that history is the New Zealand  
20                 case of Regina v. Symonds. Less prominent, to a point  
21                 of virtual invisibility, is the Report from the Select  
22                 Committee on New Zealand ordered printed by the House  
23                 of Commons on 29 July, 1844, and that is attached and  
24                 I am going to refer to it in a minute.

25                 It was from this report that Mr. Barclay of the  
26                 Hudson's Bay Company in his letter to Mr. Douglas,  
27                 quoted, in 1849, and these were the instructions which  
28                 Mr. Douglas applied, or took in his administration as  
29                 agent of the Hudson's Bay Company, dealing with the  
30                 native peoples in Vancouver Island at that time.

31                 Now my friend, Mr. Rush, referred to this report  
32                 as reflecting a "settlers'" point of view and that  
33                 this was why Mr. Barclay adopted the words quoted.  
34                 And in my submission, this is simply not so. Here, I  
35                 wish merely to point out that when Mr. Jackson speaks  
36                 of fundamental principles there are more relevant  
37                 sources than Spain and the United States. The Report  
38                 is all the more significant in its references to the  
39                 Treaty of Waitangi which is so often referred to by  
40                 the plaintiffs and which has shaped the legal history  
41                 of aboriginal rights in New Zealand ever since.

42                 And, my lord, if your lordship would turn to the  
43                 extracts from the report from the Select Committee  
44                 itself, and the whole report is not attached here.  
45                 The whole report is Exhibit 1184, tab 3.

46       THE COURT: Sorry, 1184?

47       MR. GOLDIE: Tab 3. And as I said, the first part of the report

## Submissions by Mr. Goldie

1 I wish to draw to your lordship's attention is on the  
2 first page, and it's the second paragraph beginning  
3 with the words "It appears to Your Committee".

4 THE COURT: Yes.

5 MR. GOLDIE:

6 It appears to Your Committee that the  
7 difficulties now experienced in New Zealand are  
8 mainly to be attributed to the fact, that in  
9 the measures which have been taken for  
10 establishing --

11

12 THE COURT: Sorry, Mr. Goldie. Is this the House of Commons --  
13 the Imperial House of Commons or is there a House of  
14 Commons in New Zealand?

15 MR. GOLDIE: No. This is the Imperial House of Commons.

16 THE COURT: Thank you.

17 MR. GOLDIE: And the circumstances that have given rise to the  
18 report are -- I think will become clearer as we go  
19 along.

20 THE COURT: Is it pre-treaty or post-treaty?

21 MR. GOLDIE: Post-treaty.

22 THE COURT: Thank you.

23 MR. GOLDIE: The -- continuing with paragraph 2 on page 1, and I  
24 quote:

25

26 It appears to Your Committee that the  
27 difficulties now experienced in New Zealand are  
28 mainly to be attributed to the fact, that in  
29 the measures which have been taken for  
30 establishing a British Colony in these islands,  
31 those rules as to the mode in which  
32 colonization ought to be conducted, which have  
33 been drawn from reason and from experience,  
34 have not been sufficiently attended to. When  
35 it was first proposed to establish New Zealand  
36 as a British Colony dependent upon New South  
37 Wales, Sir George Gipps, the Governor of the  
38 latter, in a very able address, laid down the  
39 following principles as those on which he had  
40 framed the Bill, which it was his duty to  
41 submit to his legislative council for the  
42 regulation of the infant colony of New Zealand.

43

44 And your lordship will appreciate that in its  
45 earliest colonial history, New Zealand was a  
46 dependency of New South Wales. Now, quoting the  
47 Governor:

1 "The Bill is founded," he said, "upon two or  
2 three general principles, which, until I heard  
3 them here controverted, I thought were fully  
4 admitted, and indeed received as political  
5 axioms."  
6

7 And now he comes to the words which Mr. Barclay used  
8 in December of 1849:  
9

10 "The first is, that the uncivilized inhabitants  
11 of any country have but a qualified dominion  
12 over it, or a right of occupancy only; and  
13 that, until they establish amongst themselves a  
14 settled form of government, and subjugate the  
15 ground to their own uses, by the cultivation of  
16 it, they cannot grant to individuals not of  
17 their own tribe any portion of it, for the  
18 simple reason, that they have not themselves  
19 any individual property in it. Secondly, that  
20 if a settlement be made in any such country by  
21 a civilized power, the right of pre-emption of  
22 the soil, or in other words, the right of  
23 extinguishing the native title, is exclusively  
24 in the government of that power, and cannot be  
25 enjoyed by individuals without the consent of  
26 their government. The third principle is, that  
27 neither individuals, nor bodies of men  
28 belonging to any nation, can form colonies,  
29 except with the consent, and under the  
30 direction and control of their own government;  
31 and that from any settlement which they may  
32 form without the consent of their government,  
33 they may be ousted. This is simply to say, as  
34 far as Englishmen are concerned, that colonies  
35 cannot be formed without the consent of the  
36 Crown."  
37

38 And then the report continues after that:  
39

40 Referring to the speech of Sir George  
41 Gipps for the argument in support of these  
42 rules, it may be observed, that with reference  
43 to New Zealand, they were, to a certain extent,  
44 infringed by the irregular settlement of  
45 British subjects on the shores of these  
46 islands, which began many years ago; but they  
47 seem to have been first openly and deliberately

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1 departed from, when an attempt was made by the  
2 New Zealand Company to establish a colony, not  
3 only without the sanction, but in direct  
4 defiance of the authority of the Crown.

5  
6 I am not going to read the details of that.

7 I would like to go down to the end of that  
8 paragraph beginning with, oh, about eight lines up  
9 from the end of the paragraph, "In order to avert  
10 these difficulties".

11 THE COURT: Yes.

12 MR. GOLDIE:

13 ...which were soon seen to be likely to arise,  
14 a Charter of Incorporation was afterwards  
15 granted to the New Zealand Company, with the  
16 hope of placing that body in friendly relations  
17 with Her Majesty's Government; but this attempt  
18 was defeated, partly by the jealousies created  
19 between the respective servants of the Crown  
20 and of the Company, by the error originally  
21 committed by the latter; partly by other causes  
22 of difficulty which afterwards arose. These  
23 are chiefly to be traced to the means which  
24 were adopted for establishing the authority of  
25 the Crown in New Zealand.

26 The sovereignty over these islands had, at  
27 an earlier period, been formally disclaimed,  
28 and their independence had been distinctly  
29 recognized, both by the Crown and by  
30 Parliament.

31  
32 Now that's an important factor in the  
33 consideration of the history of New Zealand.

34  
35 This course had been pursued because it was  
36 considered (and by no means upon light grounds)  
37 that it was not advisable to extend British  
38 dominion in these distant regions; but in  
39 adopting this policy it was overlooked, both by  
40 the advisers of the Crown and by Parliament,  
41 that it was impossible to check the tide of  
42 emigration which set so strongly towards the  
43 shores of New Zealand, and that the regular  
44 establishment of British power was the only  
45 practicable mode of guarding against the evils  
46 which could not fail to follow from permitting  
47 a large number of Europeans to settle among its

1 uncivilized inhabitants, without being subject  
2 to any legitimate authority or control.  
3 Looking back at what was then done, with the  
4 light to be drawn from subsequent experience,  
5 there is no room to doubt that it would have  
6 been far better if British dominion over these  
7 islands had been asserted as early as 1832, or  
8 even 1825; but a different policy having been  
9 at that time pursued, it was considered, in the  
10 year 1839, when Captain Hobson was sent out,  
11 that the difficulties which had thus been  
12 created could only be got rid of by obtaining  
13 from the natives their assent to the extension  
14 of the authority of the British Crown over New  
15 Zealand.  
16

17 Now, just pausing there, Captain Hobson was sent  
18 out with instructions to negotiate the consent of the  
19 native peoples to the establishment of British  
20 sovereignty and the Treaty of Waitangi resulted from  
21 that.

22 And then continuing:

23  
24 Acting under the instructions he had received,  
25 Captain Hobson, therefore, immediately on his  
26 arrival in New Zealand, at the beginning of the  
27 year 1840, concluded, with a large number of  
28 the chiefs of the Northern Island a treaty  
29 known by the name of the Treaty of Waitangi, by  
30 which, in return for their acknowledge of  
31 British sovereignty, they were promised  
32 protection, and guaranteed in the possession of  
33 all lands held by them individually or  
34 collectively. The evidence laid before Your  
35 Committee has led them to the conclusion that  
36 the step thus taken, though a natural  
37 consequence of previous errors of policy, was a  
38 wrong one. It would have been much better if  
39 no formal treaty whatever had been made, since  
40 it is clear that the natives were incapable of  
41 comprehending the real force and meaning of  
42 such a transaction; and it therefore amounted  
43 to little more than a legal fiction, though it  
44 has already in practice proved to be a very  
45 inconvenient one, and is likely to be still  
46 more so hereafter. The sovereignty over the  
47 Northern Island might have been at once

1                   assumed, without this mere nominal treaty, on  
2                   the ground of prior discovery, and on that of  
3                   the absolute necessity of establishing the  
4                   authority of the British Crown for the  
5                   protection of the natives themselves, when so  
6                   large a number of British subjects had  
7                   irregularly settled themselves in these  
8                   islands, as to make it indispensable to provide  
9                   some means of maintaining good order amongst  
10                  them. This was the course actually pursued  
11                  with respect to the Middle and Southern  
12                  Islands, to which the Treaty of Waitangi does  
13                  not even nominally extend; and there is every  
14                  reason to presume that, owing to the strong  
15                  desire the natives are admitted to have  
16                  entertained for the security to be derived from  
17                  the protection of the British Government, and  
18                  for the advantages of a safe and well-regulated  
19                  intercourse with a civilized people, there  
20                  would have been no greater difficulty in  
21                  obtaining their acquiescence in the assumption  
22                  of sovereignty than in gaining their consent to  
23                  the conclusion of the treaty; while the treaty  
24                  has been attended with the double disadvantage,  
25                  first, that its terms are ambiguous, and, in  
26                  the sense in which they have been understood,  
27                  highly inconvenient; and next, that it has  
28                  created a doubt which could not otherwise have  
29                  existed, and which, though not, in the opinion  
30                  of Your Committee, well-founded, has been felt  
31                  and has practically been attended with very  
32                  injurious results, whether those tribes which  
33                  were not parties to it are even now subject to  
34                  the authority of the Crown.

35                  Your Committee have observed that the  
36                  terms of the treaty are ambiguous, and in the  
37                  sense in which they have been understood, have  
38                  been highly inconvenient, in this we refer  
39                  principally to the stipulations it contains  
40                  with respect to the right of property in land.  
41                  The information which has been laid before us  
42                  shows that these stipulations, and the  
43                  subsequent proceedings of the Governor founded  
44                  upon them, have firmly established in the minds  
45                  of the natives notions, which they had then but  
46                  very recently been taught to entertain, of  
47                  their having a proprietary title of great value

1 to land not actually occupied; and there is  
2 every reason to believe that, if a decided  
3 course had at that time been adopted, it would  
4 not have been difficult to have made the  
5 natives understand that, while they were to be  
6 secured in the undisturbed enjoyment of the  
7 land they actually occupied, and of whatever  
8 further quantity they might really want for  
9 their own use, all the unoccupied territory of  
10 the islands was to vest in the Crown by virtue  
11 of the sovereignty that had been assumed.  
12

13 Now, my lord, there follows a reference which is  
14 one that I draw your lordship's attention to, because  
15 it makes reference to law as well as policy, and it  
16 begins at the bottom of this page:  
17

18 Your Committee have already mentioned, that  
19 it is one of the fundamental principles of  
20 colonial law and policy, which they believe to  
21 have been correctly laid down by Sir G. Gipps,  
22 that "the uncivilized inhabitants of any  
23 country have but a qualified dominion over it  
24 or a right of occupancy only".  
25

26 And then he goes on to -- the report goes on to  
27 complete the reference to the speech that Sir George  
28 Gipps made and which was quoted earlier. And after  
29 that quotation the report continues:  
30

31 Unfortunately the original instructions given  
32 to Captain Hobson, when he was sent out for the  
33 purpose of establishing British dominion in New  
34 Zealand, were not sufficiently precise upon  
35 this most important point; they contained  
36 directions as to the manner in which he was to  
37 proceed in purchasing land from the natives,  
38 and they did not (as Your Committee think that  
39 they ought to have done) clearly lay down the  
40 rule that sovereignty being established, all  
41 unoccupied lands would forthwith vest in the  
42 Crown, and that, except in virtue of grants  
43 from the Crown, no valid title to land could be  
44 established by Europeans.  
45

46 And the -- going to the end of the next -- of  
47 that paragraph, my lord, reference is made to the

1 Treaty of Waitangi, it's two, four, six, eight lines  
2 up from the bottom:

3 The treaty of Waitangi (which had previously  
4 reached England and been approved), it may  
5 therefore fairly be assumed, must, when this  
6 charter and the instructions which accompanied  
7 it were forwarded to the colony, have been  
8 understood as bearing a meaning not  
9 inconsistent with the terms in which they are  
10 couched. The lands held "collectively", of  
11 which the possession was guaranteed to the  
12 aboriginal inhabitants of New Zealand, must,  
13 therefore, have been regarded as the lands  
14 actually occupied by them, and cultivated in  
15 common by a tribe, in the manner frequently  
16 practised, and the forests as those actually  
17 used for cutting timber.

18 This is the interpretation which,  
19 consistently with the ancient and acknowledged  
20 principles of colonial law as laid down by Sir  
21 George Gipps, and consistently also with the  
22 terms of the charter of the colony and of the  
23 Royal instructions to the Governor, ought to  
24 have been put upon the treaty.

25  
26 Now, I don't want to proceed any further except  
27 to refer to the resolutions that the -- at the  
28 third-to-last page. It's Roman 12 in the upper  
29 left-hand corner.

30 The first resolution -- does your lordship --

31 THE COURT: Yes.

32 MR. GOLDIE:

33 1st. - That the conduct of the New Zealand  
34 Company, in sending out settlers to New  
35 Zealand, not only without the sanction, but in  
36 direct defiance of the authority of the Crown,  
37 was highly irregular and improper.

38  
39 2d. - That the conclusion of the Treaty of  
40 Waitangi by Captain Hobson with certain Natives  
41 of New Zealand, was a part of a series of  
42 injudicious proceedings, which had commenced  
43 several years previous to his assumption of the  
44 local Government.

45  
46 3d. - That the acknowledgement by the local  
47 authorities of a right of property on the part

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1 of the Natives of New Zealand, in all wild  
2 lands in those islands, after the sovereignty  
3 had been assumed by Her Majesty, was not  
4 essential to the true construction of the  
5 Treaty of Waitangi, and was an error which has  
6 been productive of very injurious consequences.  
7

8 And then I skip down to number six:  
9

10 6th. - That means ought to be forthwith adopted  
11 for establishing the exclusive title of the  
12 Crown to all land not actually occupied and  
13 enjoyed by Natives, or held under grants from  
14 the Crown; such land to be considered as vested  
15 in the Crown from purpose of being employed in  
16 the manner most conducive to the welfare of the  
17 inhabitants, whether Natives or Europeans.  
18

19 The Select Committee did not recommend that the  
20 Treaty of Waitangi be in any way repudiated for the  
21 Honour of the Crown. It was bound to be acknowledged  
22 and accepted and in the manner which local  
23 jurisdiction had assumed.  
24

Now, my lord --

25 THE COURT: Do I take it this report is dated 1841?

26 MR. GOLDIE: 1844.

27 THE COURT: There is a date at the very bottom, "See papers  
28 respecting New Zealand, ordered by the House of  
29 Commons" -- oh, that's a reference, is it?

30 MR. GOLDIE: Yes. That is Captain Grey's report.

31 THE COURT: All right.

32 MR. GOLDIE: Your lordship will have seen -- and I'm bringing it  
33 to your attention now only because of the references  
34 in it to colonial law, that the law to which reference  
35 is made is the -- is recognition of a right of  
36 occupancy of lands actually occupied.

37 Now, I'm at page 6 of my introduction.

38 I say, my lord, that while the Select Committee's  
39 report is an historical example directly linked to  
40 British Columbia through the instruction given to  
41 Douglas by Barclay with respect to Vancouver Island,  
42 and thus closer to the Supreme Court of Canada's  
43 direction -- which I have quoted from Kruger and  
44 Manuel -- there are more relevant examples and these  
45 will be looked at in due course.

46 In my submission, the legal history introduced by  
47 the plaintiffs is so remote and arose in the context

1 of facts so different that it is of no assistance in  
2 determining whether as a matter of law justiciable in  
3 a Canadian court, the plaintiffs are entitled to the  
4 declarations of ownership and jurisdiction set out in  
5 the Prayer for Relief in the Amended Statement of  
6 Claim as commented on by Mr. Grant on Saturday, and as  
7 further commented on by some of the individual  
8 plaintiffs, Mr. Joseph and Mr. Muldoe, this morning.

9 Now, my lord, we are not concerned whether Andrew  
10 Jackson was or was not a racist. Now the reference  
11 there is to the history of what happened after the  
12 Cherokee Nation entered into treaties with the United  
13 States and what happened after the judgment in  
14 Worcester v. Georgia. In my submission, the legal  
15 rights of the plaintiffs do not depend upon the  
16 character of politicians or civil servants.

17 Now, the "purposive" aspect of the approach the  
18 court is urged to adopt is said to be supported by a  
19 statement of the Court of Appeal in Sparrow. And in  
20 my submission, the context of that statement is  
21 important.

22 My lord, it's not in my material, but the  
23 statement to which my friends refer, the extract from  
24 Sparrow, is found in their final argument, Volume 3,  
25 page 3 of the section that Mr. -- my friend Mr.  
26 Jackson introduced and spoke to, and it reads as  
27 follows, and I quote:

28  
29 To so construe Section 35(1) would be to ignore  
30 its language and the principle that the  
31 constitution should be interpreted in a liberal  
32 and remedial way. We cannot accept that that  
33 principle applies less strongly to aboriginal  
34 rights than to the rights guaranteed by the  
35 Charter, particularly having regard to the  
36 history and to the approach to interpreting  
37 treaties and statutes relating to Indians  
38 required by such cases as Nowegijick v. the  
39 Queen et al.  
40

41 Now, my lord, what the court in Sparrow was  
42 referring to in that excerpt was a submission -- and I  
43 think there was a submission by the province in that  
44 case -- that the definition of aboriginal rights was  
45 to be achieved by the process of conventions under  
46 Section 37 of the Constitution Act, 1982. That's what  
47 is referred to with the words "To so construe Section

1 35".

2 So it was to the construction of Section 35  
3 itself that the court's words were directed and not to  
4 the identification of aboriginal rights. These are  
5 entirely distinct inquiries.

6 And in my submission, the court's judgment in  
7 Sparrow does not justify reading, for instance, an  
8 Order-in-Council according to how someone suggests the  
9 native peoples would have understand it.

10 Now, my lord, at the end of the day the  
11 proposition put forward by the plaintiffs can be  
12 reduced to this: And I'm asserting this in terms of  
13 how I characterize the plaintiffs' position in its  
14 ultimate sense:

15  
16 When, in 1858, the British Parliament empowered  
17 the Crown to appoint a Governor who was to  
18 provide for the peace, order and good  
19 government of the new Mainland Colony, there  
20 existed law, it is said by the plaintiffs,  
21 co-existing with that enacted by Parliament,  
22 which conferred ownership and jurisdiction in  
23 the terms stated in the Prayer for Relief and  
24 which was enforceable in the Queen's courts  
25 against the Crown and its grantees. Now this  
26 law, so it is said by the plaintiffs, made the  
27 Governor's powers, indeed the power of  
28 Parliament itself, a dead letter over virtually  
29 all of the Province unless exercised with the  
30 consent of the Indian tribes then resident in  
31 the Colony.

32 Now in these terms, this omnipresent law  
33 rendered illegal virtually everything Douglas  
34 and his successors did down to 1871 and, say  
35 the Plaintiffs, enable them to veto the  
36 application -- go so far as to say that it  
37 enables them to veto the application of any law  
38 of the Province to the lands the Plaintiffs say  
39 they own.

40  
41 My lord, it will be this defendant's submission,  
42 no such law exists.

43 It will be this defendant's further submission  
44 that a qualified non-proprietary interest of the  
45 native peoples in lands actually occupied by them was  
46 protected and in a manner which more than met the  
47 recognized principles of the colonial law of the day.

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1                   The history of the colony which does have a  
2                   bearing on the claims made here almost demonstrate, in  
3                   my submission, that the Indian peoples of British  
4                   Columbia were fairly treated in the colonial period  
5                   with the result stated at page 4 of the memorandum of  
6                   the Attorney General of British Columbia dated August  
7                   17th, 1875, which is set out in full in Exhibit 1182.

8                   MR. RUSH: Who is that speaking, please?

9                   MR. GOLDIE: Mr. Walkem.

10                   Now, the background of this, my lord, is, of  
11                   course, the resolution of the serious dispute which  
12                   had arisen between Canada and British Columbia over  
13                   the acreage of reserves to be set aside after 1871,  
14                   and it led to the creation of the Indian Reserve  
15                   Commission. But Mr. Walkem, in this memorandum which  
16                   preceded the creation of that commission but which was  
17                   instrumental in its creation, said this, and I  
18                   quote -- and he is there referring to the principles  
19                   that were followed in colonial times:

20  
21                   Such is but an imperfect sketch of the Colonial  
22                   Indian policy which was founded in 1858 --

23  
24                   Now that date is, of course, the founding of the  
25                   Mainland Colony.

26  
27                   -- and determined in 1871. It was based on the  
28                   broad and experimental principle of treating  
29                   the Indian as a fellow subject. The principle  
30                   was, at least, a lofty one and worthy of an  
31                   enlightened humanity. Like others of its kind,  
32                   it had its trials; but it also had its rewards,  
33                   for, through its influence, the Colony was  
34                   enabled on the day of Confederation to hand  
35                   over to the trusteeship of the Dominion, a  
36                   community of 40,000 Indians - loyal, peaceable,  
37                   contented, and in many cases honest and  
38                   industrious. This fact is in itself the best  
39                   commentary that can be offered upon the policy  
40                   pursued towards the Indians during the 13 years  
41                   preceding Confederation.

42  
43                   Now, my lord, obviously that's a self-serving  
44                   document. Mr. Walkem was saying that the policy  
45                   followed in the colony was one that was, as he  
46                   described it, "a lofty one and worthy of an  
47                   enlightened humanity". It is a fact that unlike the

1 situation in the adjacent territories in the United  
2 States, the history of the colony is completely free  
3 of the kind of warfare that characterized the  
4 situation in the Oregon territory and then the  
5 Washington territory.

6 Now, I note that in 1861 the Governor of the  
7 Mainland Colony -- that is to say, Mr. Douglas --  
8 instructed the Chief Commissioner of Lands and Works,  
9 who at the time was Colonel Moody of the Royal  
10 Engineers -- to mark out proposed Town sites and  
11 Indian reserves throughout the colony so soon as it  
12 may be practicable. The extent of the latter to be  
13 defined, and I quote, "as they may be severally  
14 pointed out by the Natives themselves". That's an  
15 extract from Exhibit 1182

16 Now, in my submission, this was a direction to  
17 execute a policy, and it is my submission that it was  
18 carried out then and thereafter. Mr. O'Reilly at  
19 Kispiox in 1891 said that the government wanted them  
20 to have all the lands they cultivated. By that time  
21 Mr. O'Reilly was an Indian -- was the Indian Reserve  
22 Commissioner. And this was the same man who had laid  
23 out reserves 20 years before at Babine in 1871. In  
24 other words, what was directed to be done was done.

25 The origins of that policy, which in my  
26 submission was an advance on the "fundamental  
27 principles of colonial law" -- that phrase is from the  
28 New Zealand report -- of the day will be traced. It  
29 is, in my submission, a policy of which the people of  
30 this province can and should be proud. It stands in  
31 bright contrast to the historical events from which  
32 the plaintiffs draw their analogies.

33 And I am referring there, of course, to the  
34 analogies drawn from the history of Spain and its  
35 exploitation of the gold mines of the newer world.  
36 I'm referring to the analogies which were sought to be  
37 drawn from the enforceable removal of the Cherokee  
38 Nation after the judgment of Worcester v. Georgia.

39 Now, my lord, I turn to the General Introduction  
40 of the Preliminary Matters.

41 THE COURT: Before you do that, Mr. Goldie, on page 8 -- back to  
42 page 7, you say your characterization of the  
43 plaintiffs' argument, second last line on page 7, "it  
44 is said by the plaintiffs, co-existing with that  
45 enacted by Parliament." That is co-existing with  
46 statutory law?

47 MR. GOLDIE: That's my understanding -- well, that is my

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1                   understanding, my lord.  
2     THE COURT: I'm looking in your analogy to where you would -- or  
3                   your description where you would put the common law.  
4     MR. GOLDIE: I think it falls into the same category.  
5     THE COURT: You say it falls under good government, "for peace,  
6                   order and good government of the new Mainland"?  
7     MR. GOLDIE: Those are the words in the statute.  
8     THE COURT: Yes. You say that includes common law?  
9     MR. GOLDIE: But -- where the common law of England was  
10                  introduced was by virtue of a Proclamation in 1858,  
11                  bringing into the colony the law of England as it then  
12                  stood. Now, that introduced the common law of  
13                  England.  
14     THE COURT: Was the English -- was it November 19th, 1858 or  
15                  '59? I can never remember.  
16     MR. GOLDIE: '58, my lord. It was one of the two Proclamations  
17                  which were sent out from London with instructions to  
18                  Douglas to proclaim. In other words, he -- they were  
19                  drafted for him.  
20     THE COURT: All right.  
21     MR. GOLDIE: The other one was the Indemnity Proclamation.  
22     THE COURT: The difference between you and your friend really,  
23                  then -- and this may be overly simplistic -- is  
24                  whether that common law as modified by local  
25                  conditions, includes this further part that you use on  
26                  page 8 to describe the plaintiffs' claim.  
27     MR. GOLDIE: That certainly is a major difference.  
28     THE COURT: Yes, all right.  
29     MR. GOLDIE: But as I understand the plaintiffs' argument, it is  
30                  not -- their claim to ownership and jurisdiction is  
31                  not something which evolved in the past decades, it is  
32                  something which existed at the time of the -- that the  
33                  colony was erected.  
34     THE COURT: I'm trying -- this may be an unnecessary and  
35                  unproductive effort, but I'm trying to see if I can  
36                  put your characterization of the plaintiffs' argument  
37                  into -- into terms which would make it in conformance  
38                  with their submission, as I understand it. And I'm  
39                  wondering if the top line of page 8 you would say  
40                  after -- after "enacted by Parliament" bracket,  
41                  "including the English Law Act"?  
42     MR. GOLDIE: Including the introduction of English law.  
43     THE COURT: Yes.  
44     MR. GOLDIE: Yes, I would agree with that.  
45                  The Act of 1858, itself, created the colony and  
46                  authorized the Crown to make provision for peace,  
47                  order and good government. And in my submission, that

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1           was a grant by Parliament of all of the legislative  
2           authority needed for the rule within the colony. The  
3           Crown then appointed Douglas with extraordinary powers  
4           of legislation, and one of the first exercise --  
5           amongst the first exercise of that jurisdiction was  
6           the Proclamation of the Introduction of English Law.

7           Now, it is part of the law of the colonies that a  
8           settled colony -- I should put it this way: that in a  
9           settled colony, English law follows the settlers,  
10          whereas in a conquered or ceded colony, the law which  
11          is existing there at the time continues until altered,  
12          and there are a number of examples of that, my lord.

13       THE COURT: What it really comes down to in part then -- or it  
14               might -- this is very preliminary -- as to whether the  
15               principles upon which the plaintiffs rely can be said  
16               to be part of the common law or not.

17       MR. GOLDIE: That is one of the things which I am going to  
18               examine.

19       THE COURT: Yes.

20       MR. GOLDIE: I am going to examine the claims to ownership and  
21               jurisdiction in terms of the law as I will submit  
22               existed at the time, namely 1858.

23       THE COURT: We all run the risk of the Alice-in-Wonderland  
24               concept or warning that perhaps the common law is  
25               whatever anybody says it is. Question, who is to be  
26               the master?

27       MR. GOLDIE: Well, from this side of the bench, my lord, I can't  
28               say that. It lies within your lordship's province to  
29               say that. But the -- it is -- it will be, in my  
30               submission, crystal clear that the common law did not  
31               recognize any title which emanated from any source  
32               other than the Crown. That will be a basic  
33               proposition.

34       THE COURT: All right.

35       MR. GOLDIE: Now, if your lordship would turn to the page headed  
36               "Part I, Section I, General Introduction, Preliminary  
37               Matters". And I note there that the province -- and  
38               I'm sure I speak for all counsel -- welcomes the  
39               conclusion of the evidentiary part of the trial, and  
40               the approaching resolution of legal questions of  
41               provincial and national importance.

42               Now, in submissions with respect to the  
43               resolution of those questions, counsel for the  
44               province will at times be critical of positions taken  
45               by witnesses and conclusions drawn in argument. That  
46               is part of -- indeed, it is a virtue of the  
47               adversarial system which the plaintiffs invoked when

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1           they commenced this litigation, and in that respect,  
2           it is no different than any other lawsuit.

3           Your lordship has pointed out that there are  
4           certain aspects of this lawsuit which mark it off from  
5           other civil proceedings. But nevertheless, the issues  
6           to be resolved are legal issues and they are to be  
7           resolved in accordance with the rules of the court and  
8           the law of the land.

9           Now, my lord, obviously, my criticisms and  
10          criticisms of my colleagues are not intended to  
11          reflect upon the sincerity of the plaintiffs who have  
12          sought the assistance of this court.

13          Now, I note that in June of 1988, your lordship  
14          said, and I quote:

15  
16                   We are here not to conduct a royal commission,  
17                   we are here to determine what the legal rights  
18                   were of the parties at the date of issuance of  
19                   the writ.

20  
21          If I may pause and say the yellow binders are now  
22          applicable to this, and your lordship will find  
23          that -- the page from that transcript is under tab  
24          I/1-4 of Volume 1.

25          Now, in assisting in this task, counsel for the  
26          province have been conscious of the continuing force  
27          of the following observation made by Mr. J.A.J.  
28          McKenna in his long letter to Sir Richard McBride of  
29          July 29th, 1912. Your lordship has had -- that's  
30          the -- that's the inception of the McKenna-McBride  
31          agreement which led to the Royal Commission on Indian  
32          Affairs. And Mr. McKenna said, and I quote:

33  
34                   The easy nonchalance with which loose  
35                   generalizations have been taken for ascertained  
36                   facts is the main source of the  
37                   misunderstandings that have marked the course  
38                   of Indian Affairs in British Columbia.

39  
40          And that was in 1912.

41          Some of the evidence led by the plaintiffs in  
42          this case have consisted of complaints about the  
43          administration of the --

44   THE COURT: Sorry, Mr. Goldie, can I stop you there.

45                  I take it that there is -- there is no reference  
46                  there to the yellow book?

47   MR. GOLDIE: No.

## Submissions by Mr. Goldie

1 THE COURT: You have the exhibit number and you have the  
2 section -- Section VIII is what?  
3 MR. GOLDIE: That identifies the -- where the exhibit is --  
4 where the whole exhibit is found.  
5 THE COURT: Section VIII of what?  
6 MR. GOLDIE: It's -- that's Section VIII of Exhibit 1203-8.  
7 THE COURT: I see. All right.  
8 MR. GOLDIE: Those are the counterclaim documents which consist  
9 of -- I think it was something like 11 or 12 volumes.  
10 THE COURT: Yes.  
11 MR. GOLDIE: And the -- those are arranged according to parts.  
12 But your lordship will find the extract of that letter  
13 under -- in the yellow book under tab I/1-5, and it is  
14 page 21 of Mr. McKenna's letter.  
15 THE COURT: If I see a quotation like that in your outline, does  
16 that mean I can find it in the yellow book?  
17 MR. GOLDIE: Yes.  
18 THE COURT: Yes, all right.  
19 MR. GOLDIE: And even if there is not a quotation, if your  
20 lordship sees a reference to an exhibit, there will  
21 be -- and in some cases I'm going to be --  
22 THE COURT: Yes, all right.  
23 MR. GOLDIE: -- spending a little time on them.  
24 But in turning back to my summary:  
25 Some of the evidence led by the plaintiffs in  
26 this case has consisted of complaints about the  
27 administration of the laws of Canada and British  
28 Columbia. If not wholly irrelevant, such -- and when  
29 I say "irrelevant", my lord, I mean simply this: that  
30 if legal rights existed in 1858, at the time the  
31 colony was founded, which has the effect -- or had the  
32 effect that my friends contend for, then the evidence  
33 with respect to blowing up the fisheries at Hagwilget  
34 and others of comparable nature are irrelevant.  
35 But I say if not wholly irrelevant, such evidence  
36 demonstrates that the plaintiffs and their ancestors,  
37 in the face of such laws, neither exercised  
38 jurisdiction over persons nor possessed right of  
39 ownership of land or resources.  
40 I say that as of July 20, 1871, British Columbia  
41 ceased to have the legislative competence to enact  
42 laws relating to Indians as Indians or to lands  
43 reserved for Indians.  
44 THE COURT: I'm sorry again, Mr. Goldie. I'm not -- there is  
45 something wrong with what you are saying in relation  
46 to what I have here. You see I have got on page 2 --  
47 MR. GOLDIE: Yes.

## Submissions by Mr. Goldie

1 THE COURT: -- paragraph 6 starts -- I see we have a problem. I  
2 jump from paragraph 6 to paragraph 22.  
3 MR. GOLDIE: That is a problem.  
4 THE COURT: All right. I think there is one page perhaps out of  
5 place. Just a moment. No, I'm missing two pages.  
6 Yes, sorry?  
7 MR. GOLDIE: I'm handing up to your lordship the pages one --  
8 page 2, 3, 4 --  
9 THE COURT: I've got three and four and five. My page numbering  
10 is all right, my paragraph numbering is --  
11 MR. GOLDIE: Well, I better give your lordship --  
12 THE COURT: I think when I get to page 6 -- no, when I get to  
13 page 4 I am on paragraph 9. Page 3 has paragraph 22.  
14 MR. GOLDIE: Well, it looks as if there has been a -- pages from  
15 another section have been placed -- erroneously  
16 placed. There are pages two, three, four, five to  
17 ten. If -- and that takes us to the end of Section I.  
18 THE COURT: Yes, all right. I'm with you now.  
19 MR. GOLDIE: I have read paragraph 6 before.  
20 THE COURT: Yes, I followed you to the end of the page.  
21 MR. GOLDIE: Yes. And then over the page the sentence is  
22 concluded with the words, "over persons nor possessed  
23 right of ownership of land or resource."  
24 And then paragraph 7 begins with these words: "As  
25 of July 20"?  
26 THE COURT: Yes.  
27 MR. GOLDIE: 1871, British Columbia ceased to have the  
28 legislative competence to enact laws relating to  
29 Indians as Indians or to lands reserved for the  
30 Indians. The legal obligations and powers which the  
31 Crown in right of the Colony had assumed towards the  
32 Indian peoples passed to Canada by virtue of the Terms  
33 of Union and Head 24 of Section 91 of the  
34 Constitution Act, 1867. To the native peoples as  
35 residents of the province the Executive and  
36 Legislature of the Province continue to have the  
37 responsibilities they have to all residents of British  
38 Columbia but it is in the Parliament of Canada that  
39 their political aspirations, as Indian peoples, must  
40 be sought.  
41 And I note that Canada has provided the machinery  
42 for this in the shape of the Comprehensive Land Claims  
43 process which was referred to by my friends in the  
44 course of the trial.  
45 And I say the purpose of this lawsuit is not to  
46 debate the wisdom of the measures Canada adopted in  
47 the discharge of its obligations, responsibilities and

1 powers under Head 24. We are here to ascertain what  
2 legal rights, if any, existed immediately prior to  
3 July 20, 1871, through which the plaintiffs can claim  
4 an interest as against the province, and whether any  
5 of these rights survived the transfer of  
6 responsibility and power to Canada.

7 In explaining the amendment to the Statement of  
8 Claim set out in paragraph 72A, counsel for the  
9 plaintiffs said at transcript 312 -- and my lord, that  
10 transcript is under tab I/1-8. Counsel for the  
11 plaintiffs said the only authority which can act or  
12 extinguish the plaintiffs' title is the Federal Crown.

13 And I say one is left with the obvious question:  
14 Why, if this is acknowledged to be the exclusive power  
15 of Parliament, was this action brought in this court  
16 against the province?

17 The legal content of Head 24 evolved over the  
18 years as the courts dealt with this subject matter,  
19 but one thing was clear from the outset: Canada, and  
20 Canada alone, spoke for and to the native peoples.

21 This was apparent to Governor Musgrave in 1870 in  
22 his despatch of February 20th to Lord Granville. The  
23 last page -- I set that out, my lord. The relevant  
24 pages are found under tab I/1-10, but the part to  
25 which I wish to draw your lordship's attention at this  
26 time is in paragraph 9:

27  
28 In Lord Granville's Despatch No. 84 of 14th  
29 August which was communicated to your  
30 Excellency, [that is to say the Governor  
31 General of Canada] he mentioned the condition  
32 of the Indian Tribes as among some questions  
33 upon which the Constitution of British Columbia  
34 will oblige the Governor to enter personally.  
35 I have purposely omitted any reference to this  
36 subject in the terms proposed to the  
37 Legislative Council.

38  
39 That is to say, the Terms of Union.

40  
41 Any arrangements which may be regarded as  
42 proper by Her Majesty's Government can I think  
43 best be settled by the Secretary of State, or  
44 by me under his direction, with the Government  
45 of Canada.

46  
47 That, in my submission, properly reflects the

1 constitutional arrangement. But then he goes on to  
2 say, and I quote:

3  
4 But 'Indians and Lands reserved for Indians'  
5 form the twenty fourth of the classes of  
6 subjects named in the 91st Section of the Union  
7 which are expressly reserved to the Legislative  
8 authority of the Parliament of the Dominion.  
9

10 Now, in my submission, it is perfectly clear that  
11 Musgrave was saying in the sentence beginning with the  
12 word "but", that whatever arrangements were  
13 contemplated must be in light of the exclusive  
14 authority which is granted to the central government.

15 Now I note that a half century later, Canada's  
16 conception of its exclusive constitutional obligations  
17 remained unaltered and I set out the history of the  
18 Dominion's -- the Dominion taking exception to  
19 legislation which was passed by British Columbia to  
20 facilitate the adoption of the Royal Commission. And  
21 I quote from Section 3, which is found under the same  
22 tab as Musgrave's despatch. I should say that where  
23 there are a number of references in one paragraph they  
24 are all under the same tab in the yellow binder  
25 separated by a blue separator sheet.

26 And Section 3 of that act, of the Provincial  
27 Legislature provided that:

28  
29 ...the Lieutenant-Governor-in-Council may, for  
30 the purpose of adjusting, readjusting or  
31 confirming the reductions, cutoffs and  
32 additions in respect of Indian reserves  
33 proposed in the said Report of the Commission,  
34 carry on such further negotiations and enter  
35 into such further agreements, whether with the  
36 Dominion Government or with the Indians,...  
37

38 And I emphasize that last phrase.

39 And then I note that the inclusion of the phrase  
40 "or with the Indians" was objected to by the Dominion  
41 Government and the prospect of a disallowance loomed  
42 over any suggestion that British Columbia could  
43 negotiate directly with the Indians. And the Deputy  
44 Minister of Justice wrote to his counterpart in  
45 British Columbia, and he -- not his counterpart but  
46 the Attorney General, and drew his attention in a nice  
47 sort of way to it.

1 But I say it was only upon an understanding of the  
2 clause in question that removed any suggestion of  
3 direct negotiations that the Minister of Justice  
4 directed to the Dominion cabinet that the Act be left  
5 to such operation as it may have subject to the  
6 constitutional incompetence of the Provincial  
7 Legislature to authorize direct negotiations.

8 And that, my lord, is found under tab I/1-10, and  
9 the report of the Minister -- and it's the second to  
10 last page under that -- it's page 18 of the selection  
11 under the tab but it's the second page from the end in  
12 that tab, and this is the report of the Minister of  
13 Justice which was adopted by Order-in-Council,  
14 approved on the 10th of April, 1920. And it reads,  
15 beginning with the second complete paragraph on the  
16 page, he described the British Columbia Act and the  
17 Minister of Justice says: "Upon" -- and I quote:

18  
19 Upon this the undersigned observes that Indians  
20 and Indian reserves are committed by Section 91  
21 of the British North America Act to the  
22 exclusive legislative authority of the  
23 Dominion, and that if there be occasion for  
24 negotiations between the local authorities and  
25 the Indians with respect to reserves, these  
26 should be carried on through the Government of  
27 Canada, as representing the Indians, and not  
28 with the Indians directly, and that insofar as  
29 it be the intent of this section to authorize  
30 direct negotiations upon the subject between  
31 the Lieutenant Governor and the Indians the  
32 provincial Legislature is in the opinion of the  
33 undersigned incompetent to sanction such  
34 proceedings. The undersigned apprehends  
35 however that it should not be presumed and  
36 probably was not the intention that the  
37 negotiations in question should be carried on  
38 with the Indians otherwise than through the  
39 government of the Dominion with which their  
40 affairs are constitutionally charged.

41  
42 Now, my lord, returning to my summary at page 7.

43 I make reference to the Star Chrome case which was  
44 a case dealing with Quebec lands and not the subject  
45 matter of any treaty, but allotted by statute in  
46 respect of which a surrender was taken and, in the  
47 result, the judicial committee applied the reasoning

1 in St. Catherines' Milling to resolve a contest  
2 between the grantee of the province and the grantee of  
3 the Dominion, to whom the surrender was made.

4 And I simply note Mr. Justice Duff's comment  
5 about the exclusive authority of the Parliament of  
6 Canada.

7 And in paragraph 13 I say that the plaintiffs  
8 stated in their opening that they seek relief which  
9 the province and the federal governments can be  
10 compelled to respect and with which they will be able  
11 to negotiate a relationship with Canada. And I say if  
12 such be their aim the constitutional arrangements of  
13 Canada cannot be ignored.

14 Paragraph 14, I note that the openings of the  
15 province's case in May of 1987 -- not the province's  
16 case, but the opening in May of 1987 was in response  
17 to comments made on the province's case by the  
18 plaintiffs, but -- and the opening, July of 1989,  
19 referred to the constitutional setting of this case.  
20 Prior to July 20th, 1871, the policy that prevailed in  
21 what was then the Colony of British Columbia was  
22 stated by Governor Musgrave to be that of treating the  
23 Indians as British subjects under the same protection,  
24 entitled to the same privileges and incurring the same  
25 liabilities as the white population. And the excerpt  
26 from that document, my lord, is found under tab  
27 I/1-15. It's Governor Musgrave's letter of February  
28 15th, 1870 to the Reverend John B. Good.

29 Returning to my summary. Particular matters  
30 affecting the native peoples, such as Indian reserves,  
31 were "affairs of administration".

32 The policy pursued by the Government of Canada  
33 after 1871 differed in many respects from that of the  
34 Colonial Government. That has since undergone many  
35 changes, some of which responded to judicial  
36 interpretation of Head 24. In particular, judicial  
37 explication of that Head determined beyond doubt  
38 that treaty-making powers rested with the Dominion  
39 notwithstanding that the benefit derived by the  
40 removal of aboriginal title might enure to the benefit  
41 of the province. Canada has exercised that power  
42 selectively since 1867. West of the Rockies there are  
43 no treaties of surrender in either what is now the  
44 Yukon Territory or British Columbia nor are there such  
45 treaties in Newfoundland or the Maritime Provinces or  
46 in large parts of the Province of Quebec. This was  
47 clearly a matter of policy determined by Canada and

## Submissions by Mr. Goldie

1 Canada alone.

2 Now, in denying Canada's claim that it was  
3 entitled to recoup the costs it had incurred in  
4 freeing lands in Ontario of the burden of Indian  
5 title, the Judicial Committee in Canada v. Ontario  
6 rejected the argument that Canada was acting in the  
7 province's interest and as its trustee. The extract  
8 from that, my lord, is found under tab I/1-16.

9 And your lordship has now heard a considerable  
10 amount about that so I won't pursue the matter. And  
11 that really brings me to the end of the substance of  
12 the first section.

13 THE COURT: Mr. Goldie, this is an imposition, but you have a  
14 larger staff than I do. Would it be possible to have  
15 a table of concordance between your yellow book and  
16 your argument so that when I am at a certain page in  
17 your argument, I can look to see where I will find the  
18 reference -- or wait a minute, perhaps I missed  
19 something you told me. Perhaps I can get it from the  
20 page number.

21 MR. GOLDIE: You get it from the paragraph number, my lord. For  
22 instance, going back to --

23 THE COURT: All right. So I'm on page 9.

24 MR. GOLDIE: Yes.

25 THE COURT: So there is a reference in paragraph 16, so if I go  
26 to I/1-16 I'll find it?

27 MR. GOLDIE: Yes.

28 THE COURT: Oh, that's fine.

29 MR. GOLDIE: That's how the extracts are tabbed.

30 THE COURT: Yes, by paragraph number.

31 MR. GOLDIE: By paragraph numbers -- well, firstly by the part  
32 which is a Roman, there being ten parts.

33 THE COURT: Yes.

34 MR. GOLDIE: Then by the section within each part and then  
35 finally by the paragraph number.

36 THE COURT: All right.

37 MR. RUSH: My lord, I wonder if I can impose upon my friend as a  
38 matter of clarification, if he wouldn't mind, to  
39 express if it is the province's position that the  
40 pre-1870 policy of the colony was expressed in --  
41 fully or completely as my friend says in Governor  
42 Musgrave's letter of 1870?

43 MR. GOLDIE: No, no, my lord. He is writing a letter and I say  
44 that that -- he is stating a policy. But I will deal  
45 with what the policy was in considerable detail.

46 THE COURT: All right.

47 MR. GOLDIE: And the policy was stated by Governor Douglas long

## Submissions by Mr. Goldie

1 before 1870.

2 THE COURT: All right. Now, I take it then that I can remove  
3 from my book the former pages three to ten, I think it  
4 is.

5 MR. GOLDIE: I suspect -- well, perhaps if your lordship did  
6 that and I could have a look at them I might know what  
7 their proper home is.

8 THE COURT: Yes, I would be glad to give them back to you. All  
9 right. Shall we take the morning adjournment?

10 MR. GOLDIE: That is satisfactory, my lord.

11 THE REGISTRAR: Order in court. Court stands adjourned for the  
12 morning recess.

13  
14 (PROCEEDINGS ADJOURNED AT 11:15 A.M.)  
15

16 I hereby certify the foregoing to  
17 be a true and accurate transcript  
18 of the proceedings transcribed to  
19 the best of my skill and ability.  
20

21  
22  
23  
24  
25 \_\_\_\_\_  
26 Toni Kerekes, O.R.  
27 UNITED REPORTING SERVICE LTD.  
28  
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47

## Submissions by Mr. Goldie

1 (PROCEEDINGS RESUMED AT 11:30 a.m.)

2

3 THE REGISTRAR: Order in court.

4 THE COURT: Mr. Goldie.

5 MR. GOLDIE: My lord, I had completed the first part of -- first  
6 section of Part I and I was going to deal very briefly  
7 with the summary of the defendant Province's position.  
8 The plaintiffs seek declarations of ownership and  
9 jurisdiction. The ownership in its ordinary sense  
10 means the most extensive right allowed by law of  
11 dealing with property. In conventional terms, it  
12 means the fee simple in land - the highest proprietary  
13 interest in land under the Crown. I am of course  
14 aware of the qualifications the plaintiffs put on the  
15 claim in fee simple. They say we don't claim a fee  
16 simple because that's an interest in land which stems  
17 from the Crown. They say their interest is  
18 independent of that. But nevertheless, they claim an  
19 interest which in its scope is comparable to an  
20 interest in fee simple.

21 The jurisdiction is a word which in its ordinary  
22 sense refers to the exercise of judicial or  
23 legislative powers. In her dissenting judgment in Re  
24 Ownership of the Bed of the Strait of Georgia, Madam  
25 Justice Wilson noted that while jurisdiction may flow  
26 from ownership the mere exercise of jurisdiction for  
27 limited purposes does not necessarily amount to a  
28 claim of ownership. And her ladyship, the extract  
29 from her judgment, is found in the yellow binder. I  
30 say that in the pleadings, which is -- which are  
31 collected under tab Roman II, 1/1 and in the evidence  
32 led by the plaintiffs in the case at bar it appears  
33 that they claim as against the province both ownership  
34 and exclusive jurisdiction. Now, I want to  
35 acknowledge that we have not yet fully analysed the  
36 submission made by Mr. Grant on Saturday with respect  
37 to the remedies sought. What is clear, however, is  
38 that basically the underlying relief is still  
39 comprehended in the prayer for relief and I should add  
40 that we have of course not had an opportunity of  
41 analysing the effect of the submission made this  
42 morning on Mr. Grant's claim. There seem to be  
43 certain inconsistencies but we will sort those out by  
44 the time we come to make our final submissions on the  
45 question of remedy. What I do say at this point is  
46 that while exclusive jurisdiction is probably not the  
47 appropriate way of describing the interest that Mr.

1 Grant described on Saturday morning, the declarations  
2 in their wording, even those as suggested by him,  
3 still carry with them very, very substantial claims to  
4 jurisdiction. Now, I say whatever assertions you  
5 take, whether the prayer for relief as set out in the  
6 amended Statement of Claim, the prayers for relief as  
7 modified by Mr. Grant, they do not -- they are  
8 inconsistent with the concept of aboriginal or Native  
9 title which was judicially defined in St. Catherine's  
10 Milling as a personal and usufructuary right,  
11 dependent upon the good will of the Sovereign. I  
12 note, my lord, that not much attention has been paid  
13 in the case so far to the word usufructuary and I can  
14 understand that from my friend's point of view because  
15 usufructuary is the right to use something belonging  
16 to somebody else, and the essential thrust of their  
17 case is that the province owns virtually nothing  
18 because it no longer has the right of pre-emption.  
19 But, my lord, that title, aboriginal title, is defined  
20 in St. Catherine's Milling, is not what is claimed by  
21 the Plaintiffs at bar. If the claim to ownership and  
22 jurisdiction fails then the action must be dismissed.

23 Now, I note that in the text of the summary I may  
24 refer to aboriginal interests as a general statement  
25 rather than one that particularizes the distinction  
26 between aboriginal title as defined in the St.  
27 Catherine's Milling case and the claims that are made  
28 here and I note the same kind of distinction in  
29 paragraph 20.

30 Paragraph 21, I say the lay and expert evidence  
31 led in the case at bar will be examined and it will be  
32 submitted that the Plaintiffs have failed to make out  
33 the allegations of fact which they say constitute  
34 ownership and jurisdiction. In this respect, the  
35 significance of shifting and ephemeral house  
36 boundaries, the disappearance of houses and the  
37 unresolved territorial conflicts with the Plaintiffs'  
38 neighbours will be examined and having regard to all  
39 of the evidence it will be submitted that the claim  
40 made to the Federal Government in 1977 and the  
41 multiple variations that have been produced in this  
42 trial demonstrate the exaggerated nature of and the  
43 fundamental uncertainties underlying the territorial  
44 claims. It will be submitted that these claims have  
45 their roots in beaver traplines created in  
46 proto-historic and historic times in response to a  
47 desire for the trade goods of the white man.

1                   Now, in the event -- and I pause here to say that  
2                   this was drafted at a time when we were not sure of  
3                   what the Plaintiffs' position would be, and I said, in  
4                   the event the Court determines that the Plaintiffs'  
5                   pleadings raise a claim to aboriginal title, the legal  
6                   and factual reasons for concluding that such an  
7                   interest was never acknowledged as existing in the  
8                   Colony of British Columbia prior to July 20, 1871 nor  
9                   since then even in Dominion lands lying west of the  
10                  Rocky Mountains in British Columbia and in the Yukon  
11                  territory will be canvassed. In the course of this  
12                  the errors in the judgment of Mr. Justice Hall in the  
13                  Calder case will be considered and the court will be  
14                  invited to conclude, on the basis of material not  
15                  before the Supreme Court of Canada in Calder, that if  
16                  aboriginal title ever existed in the Mainland of  
17                  British Columbia it was extinguished by July 20, 1871,  
18                  save in respect of course of reserves.

19                  Now, at the present time, it will be the  
20                  Province's submission that the plaintiffs must be  
21                  taken to have abandoned any claim of the kind that was  
22                  canvassed in the Calder case.

23       THE COURT: You mean abandoned by the course of trial.

24       MR. GOLDIE: Yes. The position taken has been, so far as I can  
25                  ascertain it, that the only claim made by the  
26                  Plaintiffs is ownership and jurisdiction of the kind  
27                  described by Mr. Grant on Saturday. That's the only  
28                  claim that I understand they make.

29       THE COURT: Well, I haven't in my mind at the moment absorbed  
30                  all of the Plaintiffs' argument but I have a clear  
31                  recollection that at one stage in the trial Mr. Rush  
32                  said that without resiling in any way from his first  
33                  position that he was seeking as an alternative what  
34                  were then described as -- what were then described by  
35                  me as Calder type claims.

36       MR. GOLDIE: Well, I have been waiting for those to surface, my  
37                  lord, but they -- we have -- I took it to be the last  
38                  word on Saturday as to the claims that are made, and I  
39                  cannot fit the Calder type claims into those. Maybe  
40                  that when I reread them I will come to a different  
41                  conclusion but at the time the basis of the  
42                  Plaintiffs' claim is exclusive possession as against  
43                  the Province.

44       THE COURT: Well, I will have to review the Plaintiffs' argument  
45                  as well and no doubt I will hear from them further in  
46                  reply. I haven't been matching the arguments as they  
47                  progressed specifically with various different

## Submissions by Mr. Goldie

1 categories or kinds of claims, but I have been  
2 proceeding since that statement by Mr. Rush that there  
3 was being advanced an alternative claim.

4 MR. GOLDIE: Well, I have -- I can assure your lordship that my  
5 colleagues and I listened to Mr. Grant with great  
6 interest. We have yet to examine the transcript but  
7 we took that to be the last word and we took it to be  
8 that the last word is still based upon exclusive  
9 possession as against the Province.

10 THE COURT: All right.

11 MR. GOLDIE: And then, my lord, I make reference to the events  
12 which occurred following July 20, 1871, and to the  
13 counterclaim. I say: In order to obtain some  
14 finality in these matters, the Province seeks a  
15 declaration that Canada discharged British Columbia  
16 from all responsibility for aboriginal title that the  
17 same exists and in so doing bound the Plaintiffs in  
18 this action.

19 My lord, that concludes sections 1 and 2, and Mr.  
20 Plant will now deal with Part II section 1, Part II  
21 section 2, and Part II section 3 and 4, all of Part  
22 II.

23 THE COURT: Thank you.

24 MR. RUSH: My lord, before Mr. Plant commences, I wonder if I  
25 could have some clarification from him or my learned  
26 friend Mr. Goldie with regard to the replacement  
27 sections I have been handed and I expect that your  
28 lordship has been handed as well replacement sections  
29 for 1, 2 and 4 of Part II, and are we to expect that  
30 there will be, for the most part, replacement sections  
31 for each of the parts of the Defendant's sections, so  
32 that we can have some idea of whether or not we should  
33 rely upon the summary as a guide or should we wait to  
34 see what the argument will be as we have been provided  
35 the replacement pieces?

36 MR. GOLDIE: Well, I think we are following in my friend's  
37 footsteps. The argument that we make here is the  
38 final argument but there will be replacements and  
39 addenda in order to meet the difference between the  
40 situation we found ourselves when this summary was  
41 prepared and after we have heard my friend's argument.

42 MR. RUSH: Well, do I --

43 MR. GOLDIE: And that is a process which is going on right now.

44 MR. RUSH: May I understand from that then that we can expect  
45 that there will be, for the most part, replacements?

46 MR. GOLDIE: Not for the most part, not at all. My friend will  
47 find that there is more of our written summary that

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1 survives than his summary survived in his final -- its  
2 final appearance.

3 THE COURT: Well, I am not sure what Mr. Rush is referring to in  
4 replacement parts to the moment. Have they been  
5 substituted in my copy?

6 MR. GOLDIE: My friend Mr. Plant will explain that, my lord.

7 MR. PLANT: My lord, if I may, your lordship should now have in  
8 that part of the binder of the summary that is before  
9 you replacement sections for 1, 2 and 4, and they have  
10 been inserted and I have given --

11 THE COURT: In Part II.

12 MR. PLANT: Yes, and I have given my friends copies of the  
13 revisions. The revisions in these three sections are  
14 fairly minor but that is to say the difference between  
15 what your lordship now has and what was in the summary  
16 as delivered the end of March in this part is fairly  
17 minor.

18 THE COURT: Yes, all right.

19 MR. PLANT: There is one particular item that I drew to my  
20 friend's attention in the note which I just mentioned  
21 that there was an appendix to Part II section 2, and I  
22 don't want that appendix to be removed and if things  
23 went according to plan your lordship should still have  
24 the appendix.

25 THE COURT: Yes, I do.

26 MR. PLANT: That appendix survives into the revised version of  
27 Part II section 2.

28 THE COURT: The list of the chiefs or houses.

29 MR. PLANT: That's right.

30 THE COURT: All right. And I suppose then an amended diskette  
31 might be forthcoming?

32 MR. PLANT: Excuse me?

33 THE COURT: An amended diskette will be forthcoming?

34 MR. PLANT: There will be, yes.

35 THE COURT: Can you crowd a little less onto each diskette? My  
36 computer keeps telling me that, in the brief sampling  
37 of them, that every time I want to change directories,  
38 that the disk is full, yet I haven't added to it.  
39 Only the second one has most of the argument crowded  
40 onto one argument and it's meeting some opposition  
41 from my computer.

42 MR. PLANT: I will convey your lordship's concerns to those who  
43 know more about it than I do.

44 My lord, I will be speaking to the further  
45 introductory matters covered in Part II of the  
46 summary, the first of which in Section 1 is entitled  
47 History of Proceedings. There are really three

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1 aspects to this section of the argument: The first is  
2 a brief summary of the history of the action; the  
3 second refers to various amendments which have been  
4 made to the Statement of Claim; and the third, which  
5 would be under the heading of Part C, refers to other  
6 proceedings, that is proceedings other than amendments  
7 to the Statement of Claim and in the other proceedings  
8 which are part of the larger history of this action,  
9 and I have only two points to make arising out of the  
10 statements in this summary. But before I do that,  
11 it's been brought to my attention that I omitted one  
12 proceeding that should be added as a subparagraph (f)  
13 on the 13th page or the last page of this section.

14 THE COURT: Yes.

15 MR. PLANT: And the proceeding which has been omitted can be  
16 described this way: In separate proceedings the  
17 Attorney-General of British Columbia sought an  
18 injunction restraining the Plaintiffs and others from  
19 blockading highways and forest service roads in the  
20 claim area. The injunction application was adjourned  
21 generally after the Defendants in that action agreed  
22 to remove the blockades and not to erect further  
23 blockades. The action, my lord, is A.G.B.C. v. Don  
24 Ryan and others, the action number is C895538, British  
25 Columbia Supreme Court, Vancouver Registry. Now,  
26 that's just by way of completing a survey of other  
27 proceedings which are part of the larger history of  
28 this action. And if I may, the two points that I wish  
29 to spend a moment on are first the reference made to  
30 paragraph -- in paragraph 7(a) on page 3 of the  
31 summary and that is a reference to the Order of Mr.  
32 Justice Taylor as he then was of April 25, 1985, and  
33 if I could just pause there for a minute to say that  
34 here, for example, to follow the yellow binder series,  
35 since this is Part II section 1 paragraph 7(a), there  
36 should be a tab in the yellow binder that contains the  
37 order of Mr. Justice Taylor. Now, this was a  
38 situation where the Plaintiffs amend the Statement of  
39 Claim seeking to claim damages in respect of actions  
40 of third parties exercising rights as grantees,  
41 licensees and lessees of the Province within the claim  
42 area. That claim was denied by Mr. Justice Taylor and  
43 the claim for damages in the action was thereupon  
44 limited to the damage allegedly caused by the Province  
45 and its servants, agents or contractors. And the  
46 Statement of Claim was in due course amended as I  
47 recall to incorporate those words. The importance of

1           this application was that the issue of whether the  
2           Plaintiffs' case was properly constituted as a  
3           representative action within the meaning of Rule 5(11)  
4           of the Rules of Court was raised. In fact, we opposed  
5           their application to amend on the grounds that the  
6           amendment in the terms sought would not come within  
7           the terms of Rule 5(11). The Plaintiffs made  
8           submissions to the court concerning the correct  
9           characterization of their claim for the purpose of  
10          fitting within the rules, and I am going to return to  
11          that submission later.

12          The second item which I do wish to spend a moment  
13          on is paragraph 7(b) also on page 3 of the summary, my  
14          lord. And also as I recall -- no, this would be 1986,  
15          the Plaintiffs sought to amend to claim an injunction  
16          against the Province. That amendment was refused by  
17          the Court of Appeal on the 5th of December of 1986 on  
18          the basis that an injunction against the Provincial  
19          Crown could not be made having regard to Section 11(2)  
20          of the Crown Proceeding Act. And I do want to take  
21          your lordship to the Reasons for Judgment of the Court  
22          of Appeal and you should find them in the yellow  
23          binder at tab II/1-7(b), they are in my binder in any  
24          rate.

25          THE COURT: Looks like them.

26          MR. PLANT: Now, the passages I want to refer your lordship to  
27          begin on page 3 of the judgment where Mr. Justice  
28          Hutcheon, speaking for the Court, said as follows:

29  
30                  "I turn then to the amendments allowed..."

31  
32          That is to say allowed by the Chambers Judge:

33  
34                  "...to the prayer for relief by these  
35                  paragraphs:

36                  9. An interlocutory and permanent injunction  
37                  prohibiting the Defendant Province from  
38                  interfering with the aboriginal rights and  
39                  title, ownership and jurisdiction of the  
40                  Plaintiffs."

41

42          And I won't read the rest of them. Carrying on with  
43          the text of Mr. Justice Hutcheon's judgment:

44

45                  "The action of the plaintiffs is based upon the  
46                  Crown Proceeding Act. By that statute, the old  
47                  remedy of petition of right pursuant to the

1 grant of the fiat was replaced by the statutory  
2 right to sue the Provincial Crown. However,  
3 section 11(2) contains this provision:"  
4

5 And I will leave that for your lordship to read. As  
6 your lordship is undoubtedly aware it provides that  
7 the Court cannot grant an injunction against the  
8 Crown. Then carrying on at the bottom of the page:  
9

10 "Prima facie a claim for an injunction against  
11 the Provincial Crown cannot stand in the face  
12 of section 11(2). The judge in chambers was  
13 persuaded to allow the amendments by a decision  
14 in the Alberta Court of Queen's Bench in  
15 Ominayak. With respect, I consider that case,  
16 which dealt with a statutory provision in the  
17 same language as s. 11(2), to be wrongly  
18 decided. Mr. Justice Forsyth relied upon the  
19 decisions of the Supreme Court of Canada in the  
20 B.C. Power case and the Law Society of B.C.  
21 case."  
22

23 I pause to remind your lordship that those are  
24 cases which are relied on by the Plaintiffs in their  
25 final argument. Then carrying on:  
26

27 "Neither decision involved the question of an  
28 action against the Crown in its own right or  
29 the question of a statutory prohibition that he  
30 we find in s. 11(2). I do not consider them  
31 relevant to the question on this appeal."  
32

33 Skipping a paragraph:  
34

35 "Mr. Grant said that no application has been  
36 made for an interim injunction but that the  
37 plaintiffs are fearful that the necessity for  
38 that relief may soon arise. He cited the  
39 example of the changes being made by Provincial  
40 officials to the trapline system. Mr. Goldie  
41 concedes in his factum that the Crown  
42 Proceedings Act does not bar the remedy of  
43 restraining orders against servants of the  
44 Crown. That and other relief may be available  
45 to the plaintiffs in other proceedings. I need  
46 not decide on this appeal the availability of  
47 an interim declaration such as that granted in

1 Peters v. The Queen in a proceeding under the  
2 Judicial Review Procedure Act.

3 As to the permanent injunction and apart from  
4 the prohibition in s. 11(2) I agree with what  
5 Professor Sharpe said in his book on  
6 'Injunctions and Specific Performance'..."

7  
8 And there is a quote from page 173 of that book. His  
9 lordship continues or concludes on this point by  
10 saying:

11  
12 "For these reasons I would allow the appeal..."

13  
14 That is to say, the Province's appeal from the  
15 chambers judge's order:

16  
17 "...and strike out the amendments made by  
18 Paragraphs 9, 10 and 11."

19  
20 Now, the point I want to make is summarized on --  
21 in paragraph 9 on page 8 of the summary of argument,  
22 going back to that, my lord. I there start with an  
23 observation relating to all of the amendments made by  
24 the Plaintiffs and I say that the granting of leave to  
25 make such amendments, irrespective of whether the  
26 Plaintiffs' applications were opposed or consented to,  
27 does not constitute a finding that the Statement of  
28 Claim discloses any cause of action. However, the  
29 ruling of the Court of Appeal of December 5, 1986  
30 resolved at least one matter: by applying the Crown  
31 Proceeding Act to limit the Plaintiffs' claim for  
32 relief the Court made clear that, contrary to the  
33 allegation in paragraph 73 of the Statement of Claim  
34 (and formerly in paragraph 2 of the prayer for  
35 relief), which I will come to in a moment, the laws of  
36 British Columbia do confer jurisdiction over the  
37 Plaintiffs and the claim area.

38 I want to pause for a minute here because this  
39 argument, and in some of the other arguments that I am  
40 going to be making today, are responsive to the  
41 pleadings, and as Mr. Goldie has said a few minutes  
42 ago, they are not -- we are not yet in a position to  
43 say that they respond completely to the Plaintiffs'  
44 argument as it was articulated on Saturday. But what  
45 I say arises out of this judgment of the Court of  
46 Appeal is that, at the very least, the Court of Appeal  
47 has disposed of the specific question whether the

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1 Plaintiffs have some kind of constitutional immunity  
2 from provincial laws with respect to proceedings  
3 against the Crown, and that will become relevant and I  
4 will make the point again when I submit -- make  
5 submissions with respect to the effect of the Crown  
6 Procedure Act on the Plaintiffs' action. And I say  
7 that it's open to your lordship to read in the  
8 judgment of the Court of Appeal that the Court of  
9 Appeal has disposed here of the larger question  
10 whether provincial laws are capable of applying  
11 incidentally and their incidental effects to the  
12 Plaintiffs and to the claim area by deciding that they  
13 do.

14 THE COURT: Well, are you basing that on the decision of the  
15 Court of Appeal that no injunction lies against the  
16 Crown?

17 MR. PLANT: Yes, by virtue of the decision of the Court of  
18 Appeal that these Plaintiffs, if they want to sue this  
19 Crown, have to comply with a procedure laid down in  
20 the provincial statute.

21 THE COURT: Does it go that far or does it merely say thou shalt  
22 not obtain an injunction against the Crown?

23 MR. PLANT: Well, in my submission and the reading of the  
24 reasons, it's clear that the Court finds that  
25 prohibition not only -- finds the prohibition in the  
26 common law and the modification of it in the statute.  
27 And it is the application of the statute to say to the  
28 Plaintiffs you can't get declaration, you can't get an  
29 injunction against the Crown, that I am relying on  
30 here. In this context, my lord, I do want to open the  
31 door as it were on the jurisdiction claim just a  
32 little bit wider, and I have got some more material  
33 here, the first is an extract from the transcript from  
34 volume 337 which was the 7th of May, 1990, and I  
35 should have one for the registrar and one for the  
36 reporter and one for your lordship.

37 THE COURT: Where do I insert it?

38 MR. PLANT: I beg your pardon?

39 THE COURT: Where do I insert it?

40 MR. PLANT: I would suggest that you insert it at the end of tab  
41 II/1-7b after the judgment of the Court of Appeal in  
42 the yellow book.

43 THE COURT: Yes.

44 MR. PLANT: And I have got some more material to put in the same  
45 place. What I have just handed up to your lordship is  
46 an extract from the Statement of Claim by which this  
47 action was commenced on the 23rd of October, 1984.

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1           Lastly as part of this addition of series, I don't  
2           appear to have enough copies of it, but I am handing  
3           up copies of pages 8284 to 8286 from volume 134 of the  
4           transcript, and these were -- this relates to the  
5           cross-examination of Mr. Sterritt by Mr. Goldie.  
6       THE COURT: Do you know the volume number?  
7       MR. PLANT: 134.  
8       THE COURT: Thank you.  
9       MR. PLANT: Now, if I could refer first to the extract from  
10           volume 337, and that's the submissions of Mr. Jackson  
11           on the 7th of May. Starting at line 15:  
12  
13           "THE COURT: Well, I'm sorry, I thought you said  
14           a moment ago you're not seeking to strike  
15           down laws of general application. Now I  
16           think you're saying that you are.  
17           MR. JACKSON: My lord, the Plaintiffs are not  
18           specifying the particular areas of  
19           jurisdiction which they -- over which they  
20           exercise and govern themselves. They have  
21           articulated a number of particular heads of  
22           jurisdiction upon which we have asked this  
23           court to make deculutory rulings.  
24           THE COURT: Then the note I made a moment ago,  
25           Plaintiffs do not seek an order striking  
26           down the general laws of the province, now  
27           you tell me now that is not an accurate  
28           note of your --  
29           MR. JACKSON: I was referring, my lord, to your  
30           reference to land, education and health.  
31           THE COURT: Public health, yes. What about  
32           traffic?  
33           MR. JACKSON: In relation to lands outside of  
34           reserves, I don't think the Plaintiffs have  
35           ever voiced an objection to the traffic  
36           laws of the province, my lord.  
37           THE COURT: So the province can continue to  
38           regulate the use of the highways and can  
39           continue to impose roadside suspensions and  
40           all those other things that go with the  
41           regulation of traffic?  
42           MR. JACKSON: I don't believe the plaintiffs  
43           have suggested that that would be any  
44           different, my lord."  
45  
46           Now, if your lordship will see, turning over the  
47           page to the extract from the original Statement of

1 Claim, I draw your lordship's attention to paragraph 2  
2 of the prayer for relief which is at the bottom of the  
3 page, and that prayer for relief was in these terms:  
4 the Plaintiffs claim a declaration that the  
5 defendants -- I pause there for a moment. At that  
6 point there was only one defendant, Province, "that  
7 the defendants do not have jurisdiction over the  
8 territory of the Plaintiffs". I read that then and I  
9 read it now, although it's not part of the Statement  
10 of Claim today, as saying that the Province of British  
11 Columbia has no jurisdiction within the territory  
12 which is the subject of this action. And my reading  
13 of that, my lord, is supported by the answers which  
14 Mr. Sterritt gave under cross-examination by Mr.  
15 Goldie in volume 134 of the transcript. I am not  
16 going to read all of the extracts but the germane  
17 passages begin line at 23 of the first page of the  
18 extract and carry on throughout the next page and the  
19 following page and lead to the answer given on line 18  
20 of page 8286 which is the third page of the extract  
21 where Mr. Sterritt said:

22  
23 "A The Gitksan and Wet'suwet'en have aboriginal  
24 title and jurisdiction over their territory.  
25 The -- neither Canada nor the province have  
26 sovereignty within that territory until such  
27 time as these matters have been dealt with  
28 properly, either in court or in negotiation."  
29

30 And I should pause to say there, my lord, that that  
31 evidence was given after the Statement of Claim, the  
32 prayer for relief in particular, had assumed the form  
33 which it assumes or has today. Now, those are the  
34 submissions which I intended to make in relation to  
35 section 1 Part II.

36 THE COURT: Well, what are you seeking to advance here, Mr.  
37 Plant, that the Plaintiffs on the pleadings are  
38 claiming immunity from the general laws of British  
39 Columbia or not?

40 MR. PLANT: As I read the pleadings, my lord, they are.

41 THE COURT: But this paragraph -- you say this paragraph 2 has  
42 been deleted.

43 MR. PLANT: Paragraph 2 has been replaced by the prayers for  
44 relief which are in Part II of the prayers for relief  
45 and paragraph 73 of the Statement of Claim as it  
46 still -- as it is now concluded --

47 THE COURT: 73.

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1 MR. PLANT: Yes, 73.

2 THE COURT: Yes.

3 MR. PLANT: Leaving out the middle part of it, it reads:

4

5 The laws of the Province of British Columbia do  
6 not confer any jurisdiction over the territory  
7 and resources thereon and therein claimed by  
8 the Plaintiffs.

9

10 THE COURT: I am sorry, I thought I had the up-to-date Statement  
11 of Claim.

12 MR. RUSH: I think the whole of the paragraph should be read, my  
13 lord.

14 MR. PLANT: I will be happy to read it all. The part that I am  
15 interested in is the part that I have read.

16 THE COURT: What's the date of the final Statement of Claim?

17 MR. RUSH: It is February 9, 1990, my lord.

18 MR. PLANT: Yes.

19 THE COURT: I was looking at paragraph 73 and it didn't seem to  
20 read what Mr. -- paragraph 73 says:

21

22 "The laws of the Province of British Columbia  
23 are subject to the reservation of aboriginal  
24 title, ownership and jurisdiction by the  
25 Gitksan Chiefs and the Wet'suwet'en Chiefs and  
26 do not confer any jurisdiction over the  
27 Territory and resources thereon and therein  
28 claimed by the Plaintiffs."

29

30 Is that what you read?

31 MR. PLANT: Yes.

32 THE COURT: Then I mislistened to you, Mr. Plant.

33 MR. PLANT: Well, I didn't read all of that. And I don't think  
34 that the -- what I left out takes away from the  
35 submission that there are two aspects of the paragraph  
36 or two aspects of the allegation: one is the  
37 allegation that the laws are subject to the  
38 reservation of the Plaintiffs' rights; and the second  
39 is that they do not confer any jurisdiction over the  
40 territory and resources thereon. That is how they,  
41 the provincial laws, are subject to the reservation of  
42 aboriginal title. They are subject in the sense that  
43 the provincial law does not confer any jurisdiction  
44 over the territory and resources thereon.

45 THE COURT: So what you are asking me to have in mind is that on  
46 the pleadings at least the Plaintiffs are claiming  
47 immunity from the laws of British Columbia?

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1 MR. PLANT: Exactly, my lord.

2 THE COURT: Yes,, all right.

3 MR. PLANT: I have more to say about the pleadings in Part II  
4 section 2 of the summary which is the section that I  
5 am going to turn to now.

6 My lord, I submitted that it is trite law but  
7 fundamental law that the duty of the court is to  
8 decide cases in accordance with the pleadings. And  
9 particular emphasis ought to be placed on an analysis  
10 of the Statement of Claim in this case for a number of  
11 reasons. The claim as pleaded is novel. Second, the  
12 absence of authority prescribing the constituent  
13 elements of the cause of action for ownership and  
14 jurisdiction means that the Plaintiffs have been  
15 afforded considerable latitude to define the case on  
16 their own terms. And I say that the place where the  
17 facts and issues are defined in the ordinary case is  
18 in the pleadings; and this is all the more reason why  
19 this should be so where the legal framework for  
20 adjudicating the claim as presented is unsettled. And  
21 I there set out and in the succeeding passages set out  
22 some reference from the case law and other authorities  
23 on the importance of pleadings, and I would draw your  
24 lordship's attention in particular to the judgment of  
25 Lord Radcliffe in the Esso Petroleum case which is  
26 referred to in paragraph 5, and one of the reasons is  
27 that I have to correct the page reference there, and I  
28 have referred to page 240 as being the place where  
29 your lordship will find the extract of the judgment of  
30 Lord Radcliffe and it's actually 241. Your lordship  
31 should find the complete text of that judgment in the  
32 grey binders of authorities which are organized more  
33 or less alphabetically so that the Esso Petroleum case  
34 would be at tab (e) for Esso - 1.

35 And I am going to move ahead now if I may to  
36 paragraph 7 where there is a lengthy quotation from an  
37 article cited in Bullen & Leake, and I am going to  
38 direct your lordship's attention in particular to the  
39 passages beginning about ten lines down with the  
40 words:

41  
42 "The court itself is as much..."

43  
44 Do you have that, my lord?

45  
46 "The court itself is as much bound by the  
47 pleadings of the parties as they are

1                   themselves. It is no part of the duty or  
2                   function of the court to enter upon any  
3                   inquiry into the case before it other than to  
4                   adjudicate upon the specific matters in  
5                   dispute which the parties themselves have  
6                   raised by their pleadings. Indeed, the court  
7                   would be acting contrary to its own character  
8                   and nature if it were to pronounce upon any  
9                   claim or defence not made by the parties. To  
10                  do so would be to enter the realms of  
11                  speculation..."

12  
13                  And I won't bother reading the rest of it. I think  
14                  much of it is -- would in ordinary litigation be taken  
15                  for granted and it's my submission that it deserves to  
16                  be taken for granted in this case. I want to move to  
17                  the next proposition which is part of this submission,  
18                  and that is to analyse the pleadings so as to draw to  
19                  your lordship's attention the proposition that there  
20                  is no claim for aboriginal title in the pleadings, and  
21                  your lordship has a copy of the February 6, 1990  
22                  Amended Statement of Claim, that would be helpful to  
23                  have before you. There is another copy of it in the  
24                  yellow book at tab 2 -- Roman numeral II/2-8, and the  
25                  first proposition is to identify -- the first task is  
26                  to identify the essence of the claim and this can be  
27                  done fairly quickly. Your lordship knows that from  
28                  paragraphs 1 to paragraph 55 the plaintiffs are  
29                  identified. Then we have the first substantive  
30                  assertions of rights, and those are in 56 and 56(a)  
31                  where there is an assertion that they, the Plaintiffs,  
32                  own and exercise jurisdiction over a defined area.  
33                  And this is a claim of present ownership and  
34                  jurisdiction but it includes a claim of past ownership  
35                  and jurisdiction, and that claim is developed in  
36                  paragraph 57 by a -- by a list of the facts which  
37                  comprise, although not exhaustively, apparently the  
38                  constituent elements of the assertion of ownership and  
39                  jurisdiction, and the claimed ownership and  
40                  jurisdiction is further elaborated on up to paragraph  
41                  63, and then from paragraph 64 to 71, and I am now  
42                  referring to subparagraph (d) on page 5 of my  
43                  submission.

44                  THE COURT: You say (d) covers paragraphs what?

45                  MR. PLANT: 64 to 71, and that's where the plaintiffs draw on  
46                  the additional sources of their rights, that is the  
47                  Royal Proclamation Section 91(24) and 109 of the

1 Constitution Act 1867 and so on. And then just for  
2 reference, subparagraph (e) has three parts: The  
3 first part is a reference to paragraph 73 of the  
4 Statement of Claim, that's the assertion that the laws  
5 of British Columbia are subject to their rights, I  
6 read that to you a moment ago; the admission of  
7 underlying title is in 72(a); and then the abandonment  
8 or the decision to make no claim in respect of lands  
9 held by third parties in fee simple as of October 23,  
10 1984 is in paragraph 79; and lastly, there is the  
11 damage claim and the facts in support of that are in  
12 paragraphs 75 to 77.

13 Now, I say that the core of the claim is the  
14 assertion of ownership and jurisdiction which is  
15 contained in 56 to 63, and your lordship will find no  
16 mention of the phrase aboriginal --

17 THE COURT: Oh, yes, I have it, thank you.

18 MR. PLANT: I am now in paragraph 9 of my submission. Your  
19 lordship will find no mention of the phrase  
20 "aboriginal title" in any of paragraphs 1 to 71, and  
21 in particular the phrase "aboriginal title" does not  
22 appear in those crucial paragraphs 56 to 63 which are  
23 the heart of the claim to ownership and jurisdiction.

24 Your lordship will see in paragraph 72 the phrase  
25 "aboriginal title" and that phrase -- I am going to  
26 come back to this in just a second, it reappears in  
27 72(a), 73, 74, and 74(a), and then it disappears again  
28 for the balance of the body of the Statement of Claim.  
29 That should be the -- I should have qualified it  
30 because "aboriginal title" is referred to in the  
31 prayer for relief.

32 Now, in each of paragraph 72 to 74(a), that phrase  
33 "aboriginal title" appears in conjunction with a claim  
34 to ownership and jurisdiction as if aboriginal title  
35 was something different than ownership and  
36 jurisdiction, and I say that the only way you can read  
37 those paragraphs is that aboriginal title must be  
38 something different from ownership and jurisdiction,  
39 otherwise the phrase in the context is redundant. If  
40 it were as simple as saying that aboriginal title  
41 equaled ownership and jurisdiction, which is certainly  
42 something that could be argued up to paragraph 72,  
43 then why in paragraph 72 does an exercise in drafting  
44 include aboriginal title, and that's really the  
45 question.

46 That leads then to the appearance of two distinct  
47 claims in the Statement of Claim, the claim to

## Submissions by Mr. Plant

1 ownership and jurisdiction, and a claim to aboriginal  
2 title, and the claim to damages was characterized by  
3 my friend Mr. Grant I believe on Saturday as a  
4 subsidiary claim, and that -- I think that's a correct  
5 characterization. But if your lordship reads  
6 paragraphs 72 through to 74(a), I say that you will  
7 find no facts alleged in support of the claim of  
8 aboriginal title which is described or referred to  
9 there.

10 The facts that are alleged in paragraphs 56 to 63  
11 are alleged in support of the claim to ownership and  
12 jurisdiction, not aboriginal title, and I say both on  
13 the pleadings and as will be developed in argument by  
14 my colleague, Mr. Goldie, there are two quite  
15 different ideas.

16 Paragraph 14 on page 7 of my summary --

17 THE COURT: Well, Mr. Plant, at one point, and it was late  
18 during our time in Smithers, I think in the last week  
19 but perhaps in the second last week, I asked Mr. Rush  
20 the nature of the aboriginal title he was seeking. He  
21 said -- I am sorry, I asked him the nature of the  
22 ownership he was seeking and he described it in terms  
23 of aboriginal title, that is a common law route  
24 arising from possession. Now shouldn't I take that as  
25 being the Plaintiffs' position?

26 MR. PLANT: Well, first of all, just as a matter of  
27 clarification, is your lordship referring to a  
28 statement made by Mr. Rush in Smithers in 1987?

29 THE COURT: No, no, not that long ago. Quite a while ago, but  
30 it was last month.

31 MR. PLANT: Oh, well, I am not aware of that statement. That  
32 would of course have been a statement in argument?

33 THE COURT: I asked him whether he was relying on some form of  
34 English, I don't know if I used the word archaic  
35 English law or something of that kind, and he defined  
36 what it was that he was seeking by way of ownership  
37 and he said it was an ownership by way of aboriginal  
38 title.

39 MR. PLANT: Well, I don't want to be disingenious about the  
40 argument that I am making. I understand the  
41 Plaintiffs to be saying that aboriginal title properly  
42 construed in the context of the factual matrix of the  
43 evidence that they put forward before your lordship  
44 means or can be called ownership and jurisdiction.  
45 That is a matter of argument. And it will be  
46 developed later in our submissions that the two ideas  
47 of aboriginal title on the one hand and ownership and

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1 jurisdiction on the other are as a matter of law quite  
2 different, and so what I am seeking to do here, my  
3 lord, is to begin to lay the groundwork for the later  
4 submission by concentrating for the moment on the  
5 pleadings, and your lordship at the end of the day is  
6 going to have to look at the pleadings and say in  
7 response to my friend's submission, you know, is that  
8 a claim that is founded in law, and it may be that  
9 what I am talking about now will be further developed  
10 in the course of the submission on whether or not it  
11 is part of the law, but for the time being what I am  
12 trying to identify for your lordship is the extent to  
13 which aboriginal title is not claimed in the  
14 pleadings.

15 THE COURT: Yes.

16 MR. PLANT: I don't think I will take your lordship through the  
17 paragraphs, in my submission, pages 8 and 9 until we  
18 get to page -- or paragraph 18 where I draw your  
19 lordship's attention to the reasons for judgment which  
20 were produced in February of 1988 when the issue of  
21 whether there was a Calder type claim here or not was  
22 raised and at that time your lordship said in the  
23 second of the two paragraphs which I have quoted:

24  
25 "In my view it is highly doubtful if the  
26 plaintiff has sufficiently pleaded Calder type  
27 or other alternative claims to aboriginal  
28 rights additional to the claim to ownership and  
29 jurisdiction. Such claims are pleaded, if at  
30 all, obliquely such as in paragraph 74, 74(a)  
31 and in Prayers to Relief 6 and 9."

32  
33 And it's my submission, my lord, that nothing has  
34 changed since February 18, 1988. The claim as plead  
35 is not a claim to aboriginal title in the Calder  
36 sense.

37 Now, if I could just jump ahead to paragraph 20.  
38 There is in paragraph 16 for the prayer for relief a  
39 general prayer which seeks "such further and other  
40 relief to this court may seem just". The plaintiffs  
41 have not argued that your lordship should go to that  
42 paragraph and ask for a declaration of rights akin to  
43 aboriginal title in some sense other than that in  
44 which it has been put forward by them. But what  
45 follows in the written submission is an answer to that  
46 possible argument which concentrates on the importance  
47 of confining parties to their pleadings, a point that

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1           has already been made. So that I can move ahead in my  
2           submission without derogating from the force or effect  
3           of the written word up to paragraph 27 under the  
4           heading Pleadings and the Identity of the Plaintiffs,  
5           and I say in the Statement of Claim --  
6   MR. RUSH: My lord -- excuse me, Mr. Plant. I would be assisted  
7           if my friend could explain to me in paragraph 19 where  
8           he says that Plaintiffs' counsel has suggested that  
9           aboriginal title and then in his argument he said in  
10          the Calder sense and then he completed that first, and  
11          if my friend could simply assist me in telling me what  
12          he means by aboriginal title in the Calder sense.  
13   MR. PLANT: Well, first of all let me say that the first  
14           sentence in paragraph 19 was written a long time ago  
15           and probably should be taken out of my argument but,  
16           as to what aboriginal title in the Calder sense means,  
17           without wanting to avoid the question, I think that  
18           Mr. Goldie is going to be speaking at length about  
19           what aboriginal title is or isn't or can or can't be,  
20           and that's when my friend will get the answer to his  
21           question.  
22   THE COURT: Well, I am not sure that paragraph 19 should be  
23           taken out. It seems to me that the opening sentence  
24           of paragraph 19, he reflects what Mr. Rush said some  
25           years ago, that there was hesitancy and reluctantly  
26           an alternative claim in the event that ownership  
27           wasn't made out. I can't for the moment turn up the  
28           reference to that. It was a statement that was made  
29           in Vancouver in 1988 I should think but I am not  
30           positive about that, or maybe 1989, but I think 1988,  
31           and I referred to it a moment ago.  
32   MR. PLANT: Your lordship referred to that earlier this morning  
33           and I haven't been able to get my hands on that  
34           statement by Mr. Rush, and as to what. It was by Mr.  
35           Rush?  
36   THE COURT: Yes, it was.  
37   MR. PLANT: So what its terms were and what it --  
38   THE COURT: Because I remember so well that he stressed that he  
39           did he not want to be taken to be weakening in any way  
40           his fundamental position that it was ownership he was  
41           seeking but that -- and it seemed to me that he was  
42           resiling from the firm position he took in Smithers  
43           and I think -- and on a second occasion that there was  
44           no alternative position being advanced.  
45   MR. PLANT: Well, I know the point has been visited on several  
46           occasions. I recall that in the argument that led to  
47           the reasons for judgment of the 18th of February,

## Submissions by Mr. Plant

1           1988, Mr. Grant advanced an argument, as I can recall  
2           it, that read the claim of aboriginal title into the  
3           prayer for relief that refers to Section 35 of the  
4           Constitution Act.

5       THE COURT: All right.

6       MR. PLANT: But I can't recall the statement made by Mr. Rush to  
7           the effect that your lordship recalls.

8       THE COURT: Well, I think you should know, Mr. Plant, that my  
9           present recollection is, and I won't say this in  
10          terrorem, but my present sense of all this is that at  
11          least the course of the trial suggests that there is  
12          an outstanding alternative claim but it may not be  
13          pleaded. I think this statement was made prior to  
14          what I said in February of 1988 and for that reason I  
15          think it might be useful for you to have that in mind  
16          and for your friend to consider whether he wants to  
17          find those references before I do and perhaps rely on  
18          them in the event that possibly he doesn't want me to  
19          rely on them.

20       MR. PLANT: Yes. I may look for those references myself, my  
21          lord.

22       THE COURT: All right, thank you. Should we adjourn for lunch,  
23          Mr. Plant?

24       MR. PLANT: I was going to refer to -- or start the submission  
25          in part (b) and that's going to take a few minutes, my  
26          lord.

27       THE COURT: Let's look forward to hearing from you at two  
28          o'clock. Thank you.

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

30

31                   (PROCEEDINGS ADJOURNED AT 12:30 p.m.)

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

---

Tannis DeFoe,  
Official Reporter,  
UNITED REPORTING SERVICE LTD.

## Submissions by Mr. Plant

1 (PROCEEDINGS RECOMMENCED AFTER LUNCHEON RECESS)

2

3 THE REGISTRAR: Order in court.

4 THE COURT: Mr. Plant.

5 MR. PLANT: My lord, if I might begin on page 13 of part II,  
6 section 2, paragraph 29 -- actually paragraph 28.

7 The Writ of Summons by which the action was  
8 commenced named 48 plaintiffs. By the time the trial  
9 commenced in May of '87 there were 52 named plaintiffs  
10 allegedly representing some 68 named houses.

11 I pause just to remind your lordship that the  
12 situation of a named plaintiff representing -- alleged  
13 to be representing more than one house, was a  
14 situation that occurred as a result of amendments made  
15 after the action was commenced. 29 of the houses  
16 named in the action when the trial -- when it came to  
17 trial in May of '87, or their chiefs had not been  
18 plaintiffs when the action was commenced. Some of  
19 them, and I have listed names of examples there who  
20 were not named when the action started, became  
21 plaintiffs as a result of an intervening amendment and  
22 were later dropped.

23 I say that there have been some 51 changes to the  
24 style of cause, and of course many of those I haven't  
25 added up the number, but many are the result of chiefs  
26 who passed away and their position has been assumed by  
27 others.

28 And in this context, my lord, I ask you to look at  
29 the appendix to this section, which identifies changes  
30 to the style of cause, and it's really for your  
31 reference as much as anything else.

32 The way it works is that each of the columns with  
33 the numbers in it represents an appearance or a  
34 non-appearance in the Statements of Claim identified  
35 at the top of the column. To give an example,  
36 Delgamuukw, then Albert Tait in the upper -- the very  
37 beginning of the very first page, insofar as he is  
38 alleged to have represented the House of Delgamuukw,  
39 was named in that capacity in the first Statement of  
40 Claim, and was named in paragraph 1. That's what the  
41 "1" means there, of that Statement of Claim. And you  
42 will see that the "1" appears in the columns all the  
43 way along to the right until SC9, a column headed  
44 SC9, which is the ninth Statement of Claim. There Mr.  
45 Tait, as Delgamuukw, drops out of the Statement of  
46 Claim, but if you go down three numbers, the one there  
47 refers to the fact that Mr. Tait's place was taken by

1 the late Ken Muldoe as Delgamuukw. So that there has  
2 been continuous representation of Delgamuukw by two  
3 individuals.

4 But if you turn over the page, my lord, to the  
5 next page about three quarters of the way down, Larry  
6 Wright is identified as a plaintiff holding the name  
7 Haak Asxw, H-A-A-K A-S-X-W. And you will see  
8 following this along that Haak Asxw, the House of Haak  
9 Asxw did not appear until the Statement of Claim  
10 filed -- that's September the 10th, 1986 where Larry  
11 Wright appears as Haak Asxw in paragraph 16. In the  
12 succeeding amendment, the amendment of October 27th  
13 Larry Wright is then named as a representative of the  
14 house of an additional house. The House of Mool 'Xan,  
15 M-O-O-L 'X-A-N. And you see that for the next three  
16 versions of the amendment of the Statement of Claim  
17 the house named Mool 'Xan appears in the Statement of  
18 Claim, and it's later dropped. And it does not appear  
19 in the Statement of Claim today. So Mool 'Xan is a  
20 house that has -- as far as the pleadings are  
21 concerned, come and gone. And I will be coming back  
22 to the evidence on the existence of houses and their  
23 appearance and reappearance in a later part of the  
24 argument.

25 If I could turn to paragraph 31 of my submission,  
26 my lord. It's on page 13.

27 THE COURT: Yes.

28 MR. PLANT: According to my count in the Statement of Claim of  
29 February 8th, 1990, there are 51 named plaintiffs.  
30 Each is identified as the hereditary chief of a house.  
31 Each is said to bring the action on his own behalf,  
32 and on behalf of the members of the house of which he  
33 or she is a chief. The hosts, although identified by  
34 name in the pleadings, are not themselves plaintiffs.

35 And what follows continues to be an analysis of  
36 the issue of identification within the context of the  
37 pleadings, and some of this is quite obvious. There  
38 are two groups of plaintiffs, the Gitksan and the  
39 Wet'suwet'en, and as to the Gitksan, they, by  
40 definition, do not comprise the totality of the  
41 Gitksan hereditary chiefs, because there is a  
42 sub-category of chiefs, namely, the Kitwancool chiefs,  
43 who are expressly excluded.

44 Then I want to draw your lordship's attention to  
45 an inconsistency between the pleadings and the  
46 evidence, which the point can be made in the context  
47 of paragraph 50 of the Statement of Claim. And

1 perhaps at this point I could ask your lordship to get  
2 out a copy of the Statement of Claim, because there  
3 will be one or two other points that I want to make  
4 here. And paragraph 50 is on page 10 of the most  
5 recent Statement of Claim. And there it is alleged  
6 that the plaintiffs in the paragraphs numbered therein  
7 are the hereditary chiefs of the Gitksan, and are  
8 descendants and/or successors of the hereditary  
9 chiefs, except the Kitwancool chiefs. I say the use  
10 of the definite article, the word "they" implies that  
11 the named plaintiffs comprise all of the hereditary  
12 chiefs of the Gitksan, except the Kitwancool, and the  
13 same conclusion follows for the Wet'suwet'en, with the  
14 exception that there is no category of chiefs alleged  
15 to be excluded from the category of Wet'suwet'en  
16 chiefs, and the implication is that there are no other  
17 hereditary chiefs; that the evidence is obviously to  
18 the contrary. There are many other hereditary chiefs,  
19 and both the Gitksan and Wet'suwet'en, and they are  
20 called wing chiefs, sometimes called sub-chiefs,  
21 sometimes they -- there is an uncertainty or an issue  
22 as to whether there are two head chiefs of a house who  
23 may have different responsibilities, but are equally  
24 senior. And as I recall Axtii Hiikw and Tenimgyet is  
25 an example of that.

26 The point is, my lord, that they are all  
27 hereditary chiefs, all those other individuals, and so  
28 there is a contradiction between the evidence and the  
29 pleading.

30 Now, the allegation of representation has a  
31 further problem arising out of paragraphs 52 and 54,  
32 where in those paragraphs there is an allegation first  
33 in respect of the Gitksan chiefs that they, the named  
34 plaintiffs, together represent all of the Gitksan  
35 people, and in paragraph 54 of the same allegation is  
36 made in respect of the Wet'suwet'en chiefs. And again  
37 I should be careful here, because in paragraph 52 the  
38 Kitwancool are excluded for the purpose of the claimed  
39 territory.

40 So the Statement of Claim doesn't define this term  
41 Gitksan people, and doesn't define the term  
42 Wet'suwet'en people, and there is no express  
43 allegation that the class of persons who might be  
44 described as Gitksan or Wet'suwet'en is synonymous  
45 with the membership of the named houses. The  
46 Statement of Claim also doesn't expressly tell us  
47 whether it's possible to be Gitksan or Wet'suwet'en

1 without being a member of a house.

2 Then there is the claim in paragraphs 52 and 54  
3 that -- let's deal with 52. The Gitksan chiefs  
4 together represent all of the Gitksan people, and that  
5 word "together" in my submission fails to clarify  
6 whether the representation consist of the aggregate of  
7 separate house representations, that is the jigsaw  
8 puzzle is it were, or is rather a global  
9 representation, that is to say a representation on  
10 behalf of all of the Gitksan people collectively.  
11 And the point here really, my lord, is that the  
12 pleading is ambiguous.

13 Now, the result, though, of the analysis to this  
14 point, in my submission, is that each named Gitksan  
15 plaintiff appears in the following capacities.

16 Firstly, on his or her own behalf.

17 Secondly, on behalf of the members of the house of  
18 which he or she is hereditary chief.

19 Thirdly, in some cases, on behalf of the members  
20 of named houses of which he or she is not alleged to  
21 be the hereditary chief, Delgamuukw as an example of  
22 this.

23 Fourthly, together with all other Gitksan chiefs,  
24 as representative of all of the Gitksan people except  
25 for the people in the houses of the Kitwancool chiefs.

26 And then I say that paragraph 54 has the same  
27 consequence for the Wet'suwet'en.

28 Now, the problem is to try and figure out who is  
29 claiming the rights that are at issue in the action.  
30 And I say that the Statement of Claim isn't very  
31 helpful in this regard either, and I am going to use  
32 the Gitksan path of the claim, as it were, for this  
33 purpose, although the same applies for the  
34 Wet'suwet'en.

35 Paragraph 56, the allegation is that the Gitksan  
36 chiefs, their ancestors and/or predecessors have owned  
37 and exercised jurisdiction over the lands claimed in  
38 Exhibit 646-9A.

39 And then when you get to paragraph 57, which is a  
40 paragraph that enumerates the various incidents or  
41 aspects of the ownership and jurisdiction claim, the  
42 languages used there is the plaintiffs. It's the  
43 plaintiffs who have governed the territory and  
44 expressed their ownership of the territory and so on.  
45 That language continues in paragraph 58. The  
46 plaintiffs continue to own and exercise jurisdiction  
47 over the territory to the present time.

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1           Then in paragraph 59 there is a shift. And the  
2           allegation there is that:

3  
4           "The right to own and exercise jurisdiction over  
5           the territory of the Gitksan chiefs ... was at  
6           all material times a right enjoyed by the  
7           Gitksan chiefs and the members of their  
8           houses."

9  
10          Moving ahead to paragraph 62, we return again to  
11          the language.

12  
13          "the plaintiffs ..."

14  
15          And I am here abstracting from what I say are the  
16          core allegations of ownership and jurisdiction. And  
17          in answer to the question who owns and exercise  
18          jurisdiction, the pleadings, I say, suggest three  
19          candidates. The Gitksan chiefs, the plaintiffs, and  
20          the third candidate is the Gitksan chiefs and the  
21          members of their houses. And I say that the three are  
22          not, at least not necessarily synonymous. In  
23          particular the Gitksan chiefs referred to in paragraph  
24          56, if your lordship turns back, you will see the  
25          allegation or the central parts of paragraph 56. The  
26          Gitksan chiefs referred to in paragraph 56 do not  
27          include house members. Because if they did, the  
28          addition of the words "and the members of their  
29          houses" in paragraph 59 would be unnecessary. Since  
30          the word "plaintiffs", when it appears in paragraphs  
31          57, 58 and 62, since that word in that context must  
32          mean the named plaintiffs, because otherwise, going  
33          back to paragraph 50, the allegation in paragraph 50  
34          that the plaintiffs are the hereditary chiefs of the  
35          Gitksan would mean that all house members are  
36          hereditary chiefs, which is not contended on the  
37          evidence or in argument, then it appears to be only  
38          the named plaintiffs and not the members of their  
39          houses who hold the rights, who are alleged to hold  
40          the rights claimed in paragraphs 57, 58, 62, and the  
41          remaining paragraphs where the word "plaintiffs"  
42          appears.

43       THE COURT: Doesn't the fact that the chiefs are plaintiffs  
44                   reduce the uncertainty from three to two, if one  
45                   accepts that all the named chiefs are plaintiffs?

46       MR. PLANT: Yes, it does, my lord. If Gitksan chiefs means  
47                   named plaintiffs defined as Gitksan chiefs, yes.

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1 THE COURT: The only one that is left out is the members of the  
2 houses.

3 MR. PLANT: Yes, my lord. Now, in paragraph 41 I say since the  
4 term "plaintiff" refers in its context to both Gitksan  
5 and Wet'suwet'en chiefs, it is plain that the pleader  
6 considers that some rights are held by the Gitksan  
7 chiefs collectively, and some are held by the  
8 plaintiffs collectively. And the pleadings do not  
9 identify materially different types of rights said to  
10 vest in the three different right-holders, or the two  
11 different right-holders, if that observation of your  
12 lordship is correct.

13 So what we have is a situation where it is  
14 extremely difficult to figure out who is claiming  
15 what. And it will be seen later, my lord, that the  
16 evidence is not going to assist your lordship on this  
17 point to any great extent. But for present purposes  
18 the result which I wish to draw to your lordship's  
19 attention is this. If the interpretation of the  
20 significance of the reference to house members in  
21 paragraph -- and that should be 59, my lord, because I  
22 have been doing this in terms of a Gitksan analysis,  
23 although the analysis would be the same for the  
24 Wet'suwet'en. If the interpretation in 59 is correct,  
25 then the result is that the rights held by the Gitksan  
26 chiefs are different from those held by house members.  
27 The evidence of differing classes of at least among  
28 the Gitksan, chiefs, commoners and referring to  
29 pre-contact or early days, the apparent -- the  
30 evidence of apparent slavery, reinforces this  
31 analysis. As pleaded and proven, I say the claim runs  
32 afoul of the requirement in Rule 5 (11) that the  
33 persons by whom and for whom -- or whose benefit a  
34 representative proceeding is brought must have the  
35 "same interest". That's the requirement taken from  
36 the rules.

37 My lord, just parting from the text for a moment.  
38 The issue of whether and in what respect the claims of  
39 the plaintiffs are claims advanced by a collective  
40 entity or to two collective entities or 51 collective  
41 entities was raised in argument by my learned friends  
42 on Friday and Saturday of last week. On Friday you  
43 heard Ms. Pinder argue, as I recall it, that the  
44 fishery right was a right held communally by the  
45 Gitksan, in the case of the Gitksan, and then by the  
46 Wet'suwet'en. There are two communal rights. The  
47 fishery right was not a right that was desegregated

1 into houses.

2 Then on Saturday, as I heard, and Mr. Grant argued  
3 for distinction or a difference of treatment of the  
4 ownership claim and the jurisdiction claim, so far as  
5 the declarations saw it, because we are concerned  
6 because the ownership claim was a claim -- a  
7 collection of claims. Again taking your lordship to  
8 the houses. But the jurisdiction of the plaintiffs is  
9 said to be interlocked or interwoven in such a way  
10 that the jurisdictional claim is a claim in the  
11 aggregate or the collective. And as I recall it, it  
12 would be two jurisdictional claims, one by the Gitksan  
13 and one by the Wet'suwet'en.

14 My first point in responding to those submissions  
15 is that neither of those arguments is supported by the  
16 pleadings, because the pleadings do not differentiate  
17 among types of rights. The pleadings don't say that  
18 certain rights are held by -- in the Gitksan,  
19 collectively, other rights held by the Gitksan through  
20 their houses. But if the position -- if the position  
21 taken by Ms. Pinder and by Mr. Grant are correct, then  
22 what that leads to, in my submission, is a situation  
23 where each individual Gitksan or Wet'suwet'en person  
24 has a variety of different rights and interests  
25 according to whether he or she is a chief, whether or  
26 not the house of which he or she is a member has  
27 territory, whether there is a fishing site, in what  
28 respect there is a claim to jurisdiction, and then  
29 there is a further complication of at least in respect  
30 of the ownership claim and the rights that Gitksan and  
31 Wet'suwet'en individuals have through their  
32 mother's -- through their father's side as opposed to  
33 through their mother's side.

34 So it seems that for some purposes in the action,  
35 again drawing from what was submitted on Friday and  
36 Saturday, the class is the class of persons who are  
37 bringing the action is all of the plaintiffs or is two  
38 groups of plaintiffs, or in some cases it is the  
39 various groups of houses.

40 The point I want to draw to your lordship's  
41 attention here is it was not always thus. And this  
42 brings me back to the submission made before Mr.  
43 Justice Taylor in April of 1985. And I am not going  
44 to refer at length to this, my lord, but I have a copy  
45 of it, for your lordship and for my friends.

46 THE COURT: Where do you suggest it belongs?

47 MR. PLANT: This could go tab Roman II stroke 2-18 after the

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1 Statement of Claim. Does your lordship -- I'm sorry,  
2 it's 17. It would be right there where your lordship  
3 is. After the Statement of Claim, which should be the  
4 contents of -- I'm sorry, 2-8.

5 THE COURT: 8. Yes. Right. Yes. What Statement of Claim is  
6 that? I can't read the stamp.

7 MR. PLANT: Now this was the argument advanced by the  
8 plaintiffs.

9 MR. RUSH: That was the last one, my lord, February 6th, 1990.

10 THE COURT: All right. Thank you.

11 MR. PLANT: I was going to refer to that. Your lordship didn't  
12 have a copy involving the trial record.

13 The point of interest here, my lord, is that this  
14 is the argument advanced by the plaintiffs in order to  
15 meet the province's contention that the claim to  
16 damages at least ran afoul of Rule 5(11) for the  
17 reasons considered in the General Motors and Naken  
18 case, N-A-K-E-N. And the citation of that case  
19 appears on the bottom of page 1 of this submission. I  
20 am interested in --

21 THE COURT: Is that Mr. Justice Estey's judgment?

22 MR. PLANT: Yes.

23 THE COURT: And is this the argument that was before Mr. Justice  
24 Taylor?

25 MR. PLANT: Yes, my lord.

26 THE COURT: You remember the date?

27 MR. PLANT: April, 1985.

28 THE COURT: Thank you.

29 MR. PLANT: The page 2 has the key paragraph, although there are  
30 other paragraphs in this submission. And it's the  
31 paragraph that has the sideline, near the bottom  
32 reads:

33

34 "In our case, on the other hand, there are, in  
35 effect, 47 class action and 4 claims. Each  
36 hereditary chief brings a claim on behalf of  
37 the members of his house for a declaration as  
38 to the entitlement of damages with respect to  
39 the specific territory of each house."

40

41 So what was advanced there was the proposition  
42 that there were 47 class actions which assume,  
43 correspond with a number of plaintiffs, named  
44 plaintiffs that there then were. And that in respect  
45 of each of these class actions, the members of the  
46 house had a similar interest or the same interest for  
47 the purpose of Rule 5(11). And that submission was

1           accepted. I say that now that your lordship has had  
2           the benefit of the evidence on the issue of the claims  
3           to ownership and jurisdiction, that the picture now is  
4           quite different from that advanced in this submission,  
5           although the structure of the pleadings is unchanged,  
6           and what we have now really can only be characterized  
7           as a variety of types of class actions.

8           I want to make this further point, my lord. And  
9           that is that -- just to turn to the evidence for a  
10          moment, the difficulty of finding in the evidence  
11          support for the requirement of same interests, even if  
12          you take the claim of ownership, which is said to be  
13          advanced on a house by house basis, because clearly  
14          there are individuals other than house members who  
15          within the Gitksan and Wet'suwet'en system have rights  
16          or privileges of use of territory. But let me draw  
17          this contrast between the evidence on the one hand of  
18          Dan Michell, who at -- and I am afraid I am not  
19          referring to my -- this is not in my submission, but  
20          the reference is volume 61 of the transcript, pages  
21          3772 to 3, where Mr. Michell expressly disavowed any  
22          claim to any territory of any other house other than  
23          the House of Namox, in which he is one of the chiefs.  
24          Contrast that with the situation which pertains with  
25          respect to Johnny David, and the Wet'suwet'en house of  
26          Smogelgem, and this was described in argument by my  
27          friend Mr. Grant, volume 326 of the transcript, pages  
28          24858 and 59.

29          And what Mr. Grant argued before your lordship was  
30          that there is a clear competition within the  
31          Wet'suwet'en system between the House of Smogelgem and  
32          Johnny David, who comes from a different house  
33          altogether, over who will have the right to the north  
34          Bulkley territory of Smogelgem after Johnny David  
35          passes away.

36          Mr. Grant made the submission that this contest  
37          was testimony to the vitality of the Wet'suwet'en  
38          system, that there could be this kind of dispute  
39          within the Wet'suwet'en system. Well, that may be so,  
40          but the point for present purposes is that it cannot  
41          be said that the -- there is only a house of Smogelgem  
42          that has an interest in or claims an interest in this  
43          north Bulkley territory. There is Johnny David and  
44          his sons, and those to whom he wishes to pass on the  
45          right, which would be outside the general principle of  
46          matrilineal descent, and would follow some other  
47          principle

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1           I say when your lordship has evidence of this kind  
2           of competition, the problem it raises is the problem  
3           of whether or not the claim falls within Rule 5(11) or  
4           doesn't. And in my submission if the claim is the  
5           desegregated claim of ownership on behalf of houses,  
6           then it is virtually impossible on the evidence to  
7           reconcile the action with the requirements of the  
8           rule.

9       THE COURT: What about if you looked at it the other way, a  
10       collective action?

11      MR. PLANT: If the action is at the level of the nation or the  
12       people?

13      THE COURT: Yes.

14      MR. PLANT: If the action were -- an action on behalf of the  
15       Gitksan in respect of all of the claimed rights, then  
16       that difficulty, taken at the level of allegation  
17       would not arise. Then your lordship has to deal with  
18       the problem whether that's the claim as pleaded. It's  
19       certainly not the claim as argued. But if your  
20       lordship were to say there is a Gitksan people, then I  
21       agree that the Rule 5(11) problem I am talking about  
22       doesn't arise.

23      THE COURT: But it would be a collective claim advanced by 47  
24       chiefs?

25      MR. PLANT: Yes, or 51 or whatever the number.

26      THE COURT: Have different interests --

27      MR. PLANT: I mean, you have said 47. I say 51. I don't see  
28       how you could say that there was a collective claim on  
29       the part of the Gitksan, Wet'suwet'en. I think at the  
30       highest you could take it, there would have to be  
31       considered to be two claims, because there is clearly  
32       no -- well, not clearly, but --

33      THE COURT: Some of the Gitksan members have different interests  
34       than others?

35      MR. PLANT: Yes. Dealing with my example, and it is apparent  
36       that Dan Michell, dealing with the Wet'suwet'en,  
37       claims no interest in respect of any territory other  
38       than territory of his house.

39      THE COURT: Yes. He has a different interest on the members of  
40       all of the houses except Namox?

41      MR. PLANT: Yes.

42      THE COURT: All right.

43      MR. PLANT: There is one more point I want to make about the  
44       plaintiffs' pleadings, my lord, and it's not -- again  
45       not in my submission, written submission. And it  
46       comes back again to the characterization of the claim  
47       as being either a collective one or a collection of

1 separate claims. And taking what I understand to be  
2 the plaintiffs' position that at least with respect to  
3 the jurisdiction claim, the jurisdiction claim is  
4 being advanced by the Gitksan collectively and the  
5 Wet'suwet'en collectively, then I want to draw to your  
6 lordship's attention the fact that the Gitksan  
7 plaintiffs who are in the action must therefore have  
8 jurisdictional rights in respect of the territory of  
9 the Kitwancool, or alternatively, the Kitwancool  
10 plaintiffs who are expressly excluded from the action  
11 would, on the assumption that the laws are the same as  
12 was, as I recall the evidence of Solomon Marsden, the  
13 Kitwancool chiefs would equally have jurisdictional  
14 rights in respect of the territory claimed by the  
15 Gitksan in this action.

16 The same applies with respect to the Wet'suwet'en,  
17 given Mr. Grant's statement, and I am afraid I don't  
18 have the transcript reference at the moment, but the  
19 Babine are Wet'suwet'en. And I will come back to that  
20 issue, and I will give you Mr. -- you the reference to  
21 Mr. Grant's submission on that point.

22 But having made that observation, what I really  
23 want to do right now is to take your lordship to the  
24 pleadings, because I say that that contention can't  
25 survive, or rather is inconsistent with the pleadings.

26 And here I want to direct your lordship to  
27 paragraph 61 of the Statement of Claim, and the  
28 particulars which were delivered of it. And paragraph  
29 61 is the pleading that the plaintiffs and their  
30 ancestors and/or predecessors exercised jurisdiction  
31 over the territory as against other aboriginal  
32 peoples. Now, there were particulars delivered of  
33 this, and my copy of the trial record -- I have got  
34 them at tab 4B, but that doesn't make sense.  
35 The particulars identified the aboriginal peoples  
36 against whom the plaintiffs are alleged to have  
37 exercised jurisdiction, and in paragraph KK the UU An  
38 Wea'teen, U-U space A-N space W-E-A 'T-E-E-N, are  
39 identified. Those are the Babine. And then in  
40 paragraph MM it is said:

41  
42 "Gitksan who are not members of the  
43 Kitwancool houses."  
44

45 And in my submission if your lordship reads that,  
46 that has to be Gitksan who are members of the  
47 Kitwancool houses, otherwise the particular makes no

1 sense.

2 So what you have is an allegation by the  
3 plaintiffs that they have exercised jurisdiction  
4 against the Kitwancool on the one hand and the Babine  
5 on the other. And I say that it is difficult, if not  
6 impossible, to reconcile that with the argument that  
7 jurisdiction is somehow at this -- the jurisdiction of  
8 the people is a national concept, and the case of the  
9 Gitksan must include the Kitwancool.

10 My lord, the next submission is at -- is Part II,  
11 section 2, page 20.

12 Now, this is headed "pleadings and the province's  
13 case". This is a new part of the argument. I'll just  
14 read the first paragraph.

15 In volume 7 Part IX of the plaintiffs' summary of  
16 argument, at pages 80 to 85 the plaintiffs advance an  
17 argument with respect to the pleadings of the  
18 province. That argument misreads the province's  
19 Statement of Defence. For convenience, the  
20 plaintiffs' argument is reproduced verbatim below  
21 (using a computer diskette of this section of the  
22 plaintiffs' summary), with comments inserted to  
23 respond to the plaintiffs' submissions where  
24 appropriate. The emphasis is that of the plaintiffs.

25 So what your lordship has on pages 20 to 28 is an  
26 extract from the plaintiffs' argument into which I  
27 have inserted some comments, and those comments are  
28 identified as responses. And an example appears on  
29 page 21 about two thirds of the way down the page.

30 I just wanted to say that volume 7, Part IX of the  
31 plaintiffs' summary of argument reappeared at pages 91  
32 to 97 of volume A through their final argument in the  
33 same form. I am not going to address your lordship  
34 with respect to this. I think the responses speak for  
35 themselves. I would like to turn then to the next  
36 section, section 3.

37 My lord, the principle thrust of this submission  
38 in this section is to ask your lordship to revisit and  
39 reconsider the rulings which were made in 1987 with  
40 respect to the admissibility of oral history.

41 I start at paragraph 6 by saying that the problem  
42 that arises here, arise because a claim of aboriginal  
43 rights necessarily requires that the court investigate  
44 events that occurred long before the memory of living  
45 man, and in many instances the history of such events  
46 is known orally, if at all.

47 This fact led Mr. Justice Steel, the trial judge

1 in the Bear Island case, to rule as follows:

2  
3 "Indian oral history is admissible in aboriginal  
4 land claim cases where their history was never  
5 recorded in writing."  
6

7 Now, I won't refer now to the rest of what Mr.  
8 Justice Steel said in that context, but he does speak  
9 about the importance -- even though he admits the  
10 evidence and finds that oral history is admissible, he  
11 does have observations with respect to weight, which I  
12 say are applicable here.

13 My principle concern here, though, is with the  
14 question of admissibility, and I don't accept what Mr.  
15 Justice Steel said in Bear Island.

16 Your lordship ruled to similar effect, however,  
17 albeit with recognition of the different types of  
18 evidence which might be described as oral history, and  
19 the reasons for judgment which you delivered in this  
20 regard are in the authorities binder, volume 2, and  
21 its case D2. And I don't think it will be necessary  
22 for me to take your lordship to that report, because  
23 the important parts are excerpted in my submission. I  
24 say firstly that your lordship invited reconsideration  
25 of the ruling which you made.

26 Page 334 of the report in the B.C. Law Reports you  
27 stated:

28  
29 "The questionable evidence will be received  
30 subject to a later determination of  
31 admissibility."  
32

33 And then you also said:

34  
35 "It seems to me that there are at least two  
36 reasons why I should not finally decide this  
37 question at this time."  
38

39 "First, I was particularly struck by the  
40 comments of both Mr. Jackson and Mr. Goldie  
41 about extensive anthropological and other  
42 expert testimony which counsel proposed to  
43 adduce. There may be independent corroboration  
44 or confirmation of the details which the  
45 witnesses wish to relate in their evidence  
46 which may tilt scales away from anecdote  
47 towards history. I am also heartened by Mr.

1 Jackson's assurance that there is not a large  
2 volume of this kind of evidence."  
3 "Secondly, there is a practical consideration I  
4 mentioned in my previous reasons. I refer to  
5 the fact that in most cases it will be  
6 necessary to hear the evidence in order to  
7 determine whether it is a general historical  
8 fact or a particular or anecdotal fact. As I  
9 said earlier, it may be necessary to decide  
10 these questions somewhat arbitrarily, doing the  
11 best I can, but there is no reason, having  
12 regard to the position taken by counsel for the  
13 Attorney General, to pronounce finally on this  
14 question at this time."  
15

16 My lord, you have now heard the evidence, both lay  
17 evidence and expert evidence, necessary to pronounce  
18 finally on this question, and I -- but before turning  
19 to that question, I want to identify the context in  
20 which it arises, because there is, and we will be  
21 coming back to it again and again, a fundamental  
22 distinction to which reference should be made here.  
23 And that is the distinction between the claim of  
24 ownership and jurisdiction, the claim of present  
25 ownership and present jurisdiction based on present  
26 day facts. That's the claim pleaded. And I say there  
27 is a radical difference between that claim and the  
28 traditional claim of aboriginal title which seeks  
29 recognition of an ancient tenure as burden on the  
30 Crown's title. I say there is no room for oral  
31 history in determining whether the plaintiffs exercise  
32 present day ownership and jurisdiction at the expense  
33 of the Crown and those who hold under the Crown.

34 The question of whether the plaintiffs exercise  
35 present day ownership and jurisdiction is really a  
36 question that has to be determined on present day  
37 facts.

38 My lord, you have referred, and we have all  
39 referred on a number of occasions in this trial to the  
40 two great principles of necessity and trustworthiness,  
41 which come to bear on any consideration of the  
42 admissibility of hearsay evidence. The reasons which  
43 I am going to elaborate on, my submission is that  
44 although the oral history of the plaintiffs has  
45 contained in what have been described by them as their  
46 adaawk and kungax, may meet the test of necessity, and  
47 in certain circumstances they undoubtedly do, it is so

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1           lacking in the essential element of trustworthiness as  
2           to be inadmissible.  
3           Alternatively, if the requirement of necessity  
4           alone is sufficient to allow the admissibility of the  
5           oral history, I say that such evidence ought to be  
6           accorded no weight whatsoever.  
7           Now, this submission applies, my lord, with  
8           respect to the evidence of all events said to have  
9           occurred prior to the lifetime of living witnesses,  
10          and which is sought to be admitted for the truth of  
11          its contents by virtue of its status as an adaawk or  
12          kungax.  
13          It's really only that evidence which gives rise to  
14          the necessity problem.  
15          Now -- and a further qualification on my  
16          submission, my lord.  
17   THE COURT: You wouldn't extend that submission to declarations  
18               of ownership made by deceased persons, would you?  
19   MR. PLANT: I am going to not be dealing with the question of  
20               reputation evidence in that context, my lord, as to  
21               declarations of ownership.  
22   THE COURT: Are you intending it to be included in the  
23               submissions you are now making?  
24   MR. PLANT: To the extent that the adaawk is offered as evidence  
25               of territorial ownership, yes.  
26   THE COURT: But not to my deceased grandmother told me "x". You  
27               are not including that in this submission, are you, or  
28               are you?  
29   MR. PLANT: No. I think not. Because in large measure those  
30               statements were not tendered as adaawk type  
31               statements.  
32   THE COURT: No. That's right.  
33   MR. PLANT: Mr. Mackenzie will be dealing with that in the  
34               context of the evidence about boundaries.  
35   THE COURT: All right.  
36   MR. PLANT: And another qualification on this submission, my  
37               lord, that I am making is this: To the extent that  
38               such evidence, that is the adaawk and kungax evidence  
39               is tendered not as history, but as evidence explaining  
40               the plaintiffs' understanding of their social or  
41               cultural practises today, it may be admissible. And I  
42               revise that, my lord. It is admissible. In the same  
43               way --  
44   MR. RUSH: Excuse me, my lord. Just in terms of your present  
45               query, it may be helpful if my friend would state what  
46               he means by adaawk and kungax for the purposes of this  
47               argument, and the distinction about the question that

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1                   would pertain to reputation.

2       MR. PLANT: Well, my lord, I think it's clear from the argument  
3                   that I am going to be making what I mean by adaawk or  
4                   kungax.

5                   I was in the context of saying that the -- to the  
6                   extent that adaawk or kungax evidence is tendered as  
7                   evidence explaining the plaintiffs' understanding of  
8                   their social or cultural practises today, it's  
9                   admissible, but even here it's admissible because it's  
10                  evidence of motive, intent or belief. It's not  
11                  evidence of the truth of the facts of the --  
12                  particularly it's not evidence of the truth of the  
13                  historical facts which -- in respect of which it has  
14                  been tendered.

15                 Evidence of events to which there may be living  
16                 witnesses must be proven conventionally, and in this  
17                 respect the province relies upon your lordship's  
18                 ruling on this subject in the reasons for judgment of  
19                 June 4, 1987. And that subject is dealt with at page  
20                 343 of the report in the B.C. Law Reports. It matters  
21                 not in my submission whether the witness in question  
22                 has recently deceased. The evidence of witnesses such  
23                 as Stanley Williams, Martha Brown and David Gunanoot,  
24                 who have died since the action has commenced, assumes  
25                 no different character, even though they are no longer  
26                 alive.

27                 And I make the point in paragraph 17 that  
28                 reputation as to boundaries will be a subject that we  
29                 will be returning to.

30                 So I turn now to the issue of the inadmissibility  
31                 of oral history, and I have some general statements  
32                 here, my lord. I say that if an aboriginal interest  
33                 is to be established as a matter of legal right as  
34                 opposed to a moral or a political claim, it must be  
35                 established on the basis of facts proven in accordance  
36                 with the rules of evidence according to which courts  
37                 operate. And I say this is implied by the much cited  
38                 statement of Mr. Justice Dickson as he then was in  
39                 Kruger and Manuel versus The Queen. The paragraph is  
40                 set out there, and its been read many times, but I  
41                 would draw your lordship's attention to the  
42                 distinction which Mr. Justice Dickson draws between a  
43                 justiciable issue and the political issue, and I say  
44                 that there are good policy reasons for the approach.

45                 I say questions of aboriginal interests must be  
46                 decided on the basis of evidence adduced in accordance  
47                 with established rules. There cannot be one law for

1 the proof of aboriginal rights and another for the  
2 proof of other rights. If the result is the claims of  
3 aboriginal rights are difficult to establish at law,  
4 then in my respectful submission that is no more than  
5 a reflection of the marginal justiciability of such  
6 claims.

7 Now, in your lordship's ruling of June 4th, the  
8 passage which appears at page 340 of the B.C. Law  
9 Report, the key part of your lordship's reasoning is  
10 the passage which I set out -- set out in paragraph 20  
11 of my submission, where your lordship said this:

12  
13 "There is little doubt that the oral history of  
14 a people based upon successive declaration of  
15 deceased persons may be given in evidence, as a  
16 matter of admissibility, for it could not  
17 otherwise be proven: Relying on Simon versus  
18 The Queen. When there is no written history,  
19 such evidence obviously satisfies the test of  
20 necessity. In my view admissibility does not  
21 depend upon the particular historical events  
22 being a part of an adaawk although such could  
23 lend weight to the evidence because of its  
24 enhanced trustworthiness resulting from what  
25 has been called the sifting process. But  
26 inclusion in an adaawk is not an open door to  
27 the admissibility of anything said to be  
28 historical. Historical facts sought to be  
29 adduced must be truly historical and not  
30 anecdotal."

31  
32 The first point I wish to make concerning this  
33 ruling, my lord, is that the Simon case, I say, is  
34 distinguishable.

35 Now, Simon was a case where the accused was  
36 charged with illegal possession of a shotgun and a  
37 rifle contrary to the Nova Scotia legislation, and he  
38 argued in his defence that he had a treaty right. He  
39 argued that the 1752 treaty granted him immunity from  
40 prosecution. The Crown argued that Simon had not  
41 shown that he was direct descendant of a member of the  
42 original Micmac Indian Band covered by the treaty.  
43 And this argument was rejected by the Supreme Court of  
44 Canada. Chief Justice Dickson -- pausing there for a  
45 moment, because I have a note that it may be that this  
46 passage comes from page 407 of his lordship's  
47 judgment. But the holding by his lordship for the

1 court was that the appellant has established a  
2 sufficient connection with the Indian band, who were  
3 signatories to the Treaty of 1752. His lordship then  
4 describes the circumstances of the treaty, and said  
5 that the appellants admitted at trial that he was a  
6 registered Indian under the Indian Act, and was an  
7 adult member of the particular band living in the same  
8 area as the original Micmac Indian tribe who were  
9 party to the treaty. His lordship goes on to say:

10  
11 "This evidence alone, in my view, is sufficient  
12 to prove the appellant's connection to the  
13 tribe originally covered by the treaty. True,  
14 this evidence is not conclusive proof that the  
15 appellant is a direct descendant of the Micmac  
16 Indians covered by the Treaty of 1752. It  
17 must, however, be sufficient, for otherwise no  
18 Micmac Indian would be able to establish  
19 descendancy. The Micmacs did not keep written  
20 records. Micmac traditions are largely oral in  
21 nature. To impose an impossible burden of  
22 proof would, in effect, render nugatory any  
23 right to hunt that present day Shubenacadie  
24 Micmac Indian would otherwise be entitled to  
25 invoke based on this Treaty.

26 The appellant, Simon, as members of the  
27 Shubenacadie Indian Brook Band of Micmac  
28 Indians, residing in Eastern Nova Scotia, the  
29 area covered by the Treaty of 1752, can  
30 therefore raise the Treaty in his defence."  
31

32 My lord, I respectfully submit that the  
33 considerations which apply to a case where an accused  
34 raises a treaty right in his defence do not apply to a  
35 case where ownership and jurisdiction over some 22,000  
36 square miles of British Columbia are in issue.

37 Simon is clearly authority for the proposition  
38 that entitlement to treaty rights as defence to a  
39 criminal prosecution may be established merely by  
40 proof of membership in an Indian Act band which  
41 occupies the same area as that occupied by the tribe  
42 party to the original treaty. In effect, membership  
43 of the band operates as a presumption sufficient for  
44 purposes of the criminal law, particularly where the  
45 issue is ancestry.

46 Where, however, as in this case, as in the case at  
47 bar, there is no treaty, no reliance on the Indian Act

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1 and the question whether the ancestors of the present  
2 claimants occupied the claim area is very much  
3 contested, and I say the different considerations  
4 apply. And I say it is not a question of imposing an  
5 impossible burden of proof. Rather, it is a question  
6 of ensuring that the evidence offered in support of  
7 the assertion of title satisfies both as requirements  
8 of reliability, necessity and trustworthiness.

9 My first point, then, my lord, is that the Simon  
10 case is distinguishable.

11 My second point is that necessity by itself is not  
12 sufficient. And this refers to the proposition that  
13 oral history may be given in evidence as a matter of  
14 admissibility, for it could not otherwise be proven.  
15 I say that that proposition implies that necessity  
16 alone is a sufficient ground for the admissibility of  
17 evidence. My lord, conventionally, hearsay which  
18 cannot otherwise be proven, cannot be proven at all.  
19 And I say that there is no reason in principle or  
20 policy to depart from this principle in the case at  
21 bar. Thus in my submission in order to be admitted,  
22 oral history must satisfy the requirements of proof as  
23 part of the law of evidence. And I say the oral  
24 history offered as evidence in this case fails to meet  
25 those requirements.

26 THE COURT: Well, I am having a little trouble just knowing what  
27 you're saying there, Mr. Plant. What oral history  
28 offered in evidence are you talking about now in this  
29 area?

30 MR. PLANT: The examples include the adaawk of the grizzly bear  
31 said to have destroyed the village of Temlaxam. And  
32 that adaawk is being offered as proof of the truth of  
33 the destruction of Temlaxam by a giant grizzly bear.  
34 That's the oral history I have in mind. The adaawk  
35 which were the subject matter of Ms. Marsden's expert  
36 report collected by Marius Barbeau and William Beynon  
37 and others.

38 THE COURT: Her report doesn't rely entirely. I haven't looked  
39 at it for awhile or studied it carefully. You say  
40 that her whole report is based upon that fact?

41 MR. PLANT: Well, in my submission her report is almost entirely  
42 a project of internal reconstruction of the adaawks.

43 THE COURT: Yes. But you are not limiting it to the adaawk  
44 about the grizzly bear.

45 MR. PLANT: I am saying that's an example. I mean, that's the  
46 example that I refer you, because it's -- if it's not  
47 the example your lordship heard first, it's one of the

## Submissions by Mr. Plant

1 first. An example your lordship heard first, I think,  
2 is the adaawk told by Mary MacKenzie of the Warrior.  
3 That's another example of the adaawk that I say.  
4 THE COURT: You are really saying that I should rule  
5 inadmissible the content of the adaawk.  
6 MR. PLANT: To the extent that they are offered as historical  
7 fact, yes.  
8 THE COURT: All right. Thank you.  
9 MR. PLANT: My lord, I am about to begin a new section. I  
10 wonder -- I am happy to carry on.  
11 THE COURT: I was going to split the afternoon in half.  
12 MR. PLANT: Oh, yes.  
13 THE COURT: I do have to adjourn in about five minutes time. We  
14 will go for another five minutes, if you don't mind.  
15 MR. PLANT: I am happy to.  
16 The next proposition I wish to address, then, is  
17 the issue of whether there is the sifting process  
18 which is said to satisfy the requirement of  
19 trustworthiness, and it is this sifting process that  
20 is said to be the special or distinguishing aspect of  
21 both the adaawk and the kungax, and the sifting is  
22 said to take place in the feasts where the adaawk are  
23 told. And in my respectful submission, my lord, oral  
24 history is a political act. If support for this  
25 proposition is needed, it may be found in the  
26 plaintiffs' opening where Ken Muldoe said:  
27  
28 "My power is carried in my house's histories  
29 ... it is recreated at the feast when the  
30 histories are told ..."  
31  
32 There is a direct connection between Delgamuukw's  
33 power and the histories of his house.  
34 Alfred Joseph added more when he said:  
35  
36 "The histories of my house are always being  
37 added to. My presence in this court room today  
38 ..."  
39  
40 He meant May 11th, 1987 or May 12th.  
41  
42 "Will add to my House's power, as it adds to the  
43 power of the other Gitksan and Wet'suwet'en  
44 chiefs who will appear here or who will witness  
45 the proceedings ... through the witnessing of  
46 all the history, century after century, we  
47 have exercised our jurisdiction."

## Submissions by Mr. Plant

1  
2 I say that oral history therefore is not history  
3 as the layman understands it. It is no mere record of  
4 past events. Rather, it is the taking of a position,  
5 quite literally a Statement of Claim. There is no  
6 sifting process. The chief who speaks simply dares  
7 others to disagree. Disagreement is not a process  
8 that has to do with the making of truth. It is rather  
9 a process that has to do with struggle for power. It  
10 has little to do with the events of the past, and much  
11 to do with how things -- and particularly status  
12 within the community are to be ordered for the future.

13 Now, since delivering the Reasons for Judgment of  
14 July 27th, 1987, your lordship has had the benefit of  
15 further lay evidence and expert evidence concerning  
16 the oral history of the plaintiffs. And in their  
17 final argument, my lord, delivered on April 7th, I am  
18 referring here to transcript 314, page 2353A, they say  
19 this:

20  
21 "Adaawk are the historical record of the  
22 Gitksan. They record actual historical  
23 events."  
24

25 And they go on to say that the kungax of the  
26 Wet'suwet'en similarly record significant historical  
27 events. And I say that the evidence which your  
28 lordship has heard is undermined the plaintiffs'  
29 position with respect to the reliability as historical  
30 fact of such evidence.

31 One example of evidence, which your lordship has  
32 heard since July of '87, is the evidence of Mr. Brody.  
33 Mr. Brody, one of the plaintiffs' experts, has  
34 suggested that the plaintiffs have a different  
35 conception of truth. Their conception of truth is  
36 different from the Euro-Canadian, that's Mr. Brody's  
37 term, conception. And here I am going to ask your  
38 lordship to refer to page 22 of his report. And that  
39 should be in the yellow book at 2-3-33.

40 THE COURT: Yes.

41 MR. PLANT: Your lordship have that?

42 THE COURT: Yes.

43 MR. PLANT: This is from Exhibit 991, Mr. Brody's report. And  
44 Mr. Brody says:

45  
46 "A person who says 'I know' is implying that he  
47 has firsthand experience of something. A

1                   scientist who says 'I know' is implying that  
2                   something has been tested and proved to be  
3                   true. A Gitksan and Wet'suwet'en chief who  
4                   says 'I know' means that she or he is referring  
5                   to something that has been witnessed and  
6                   validated repeatedly at the feast. One  
7                   Wet'suwet'en chief ends his statements at  
8                   feasts with the words "...",  
9

10                  And I won't pronounce them. They are words that  
11                  mean "that is how it is". He is saying that his  
12                  statements are -- been fully verified in the  
13                  Wet'suwet'en intellectual tradition. This analogy  
14                  should not be overstated. There are fundamental  
15                  differences between the two epistemologies. That is  
16                  to say the epistemology of Euro-Canadian society and  
17                  the epistemology of Gitksan Wet'suwet'en. And another  
18                  sentence down the -- into this paragraph.  
19

20                  "Both sides feel passionately that their society  
21                  understands the nature of knowledge. Both  
22                  sides rightly insist that their kind of truth  
23                  is integral to their form of ownership and  
24                  management to their system of authority."  
25

26                  I won't bother reading the rest, but I commend  
27                  that to your lordship's attention.

28                  Coming back to paragraph 33. Mr. Brody's  
29                  argument, for that is what it is, is that the idea of  
30                  truth which is integral to the Gitksan and  
31                  Wet'suwet'en form of ownership and management is not  
32                  truth as Euro-Canadians know it. He says "there are  
33                  fundamental differences between the two  
34                  epistemologies".

35                  Thus, if your lordship is to give Mr. Brody's  
36                  opinions any weight, then unless the Court is prepared  
37                  to see truth in Gitksan and Wet'suwet'en terms, then  
38                  it is bound to reject much of the plaintiffs'  
39                  evidence. I say the plaintiffs seek ownership as  
40                  defined by the Canadian legal system, but urge the  
41                  court to found its judgment on evidence which is  
42                  unacceptable to that system.

43                  I don't want to push my luck here, my lord.

44       THE COURT: I think I am going to have to adjourn now. I'll be  
45                  back as quickly as I can.

46       THE REGISTRAR: Order in court. Court stands adjourned.  
47

(PROCEEDINGS ADJOURNED AT 3:05 P.M.)

I HEREBY CERTIFY THE FOREGOING TO BE  
A TRUE AND ACCURATE TRANSCRIPT OF THE  
PROCEEDINGS HEREIN TO THE BEST OF MY  
SKILL AND ABILITY.

---

LORI OXLEY  
OFFICIAL REPORTER  
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## Submissions by Mr. Plant

1 (PROCEEDINGS RECONVENED AT 3:25 P.M.)

2

3 THE REGISTRAR: Order in court.

4 THE COURT: Mr. Plant, as long as we are going to be sitting  
5 until 4:30, we will take the afternoon adjournment at  
6 3:15 in the future. I overlooked that today when I  
7 made an appointment for three o'clock. Thank you.

8 MR. PLANT: Thank you, my lord. I was in paragraph 34.

9 THE COURT: Yes.

10 MR. PLANT: And the views of Mr. Brody -- I should say, while I  
11 was about to begin paragraph 34, I have a comment  
12 that's not in the written text. I say that the views  
13 of Mr. Brody with respect to the reliability of the  
14 adaawk and kungax can be summarized into two  
15 propositions: One, they are true because the Gitksan  
16 and Wet'suwet'en say they are; two -- which may be, in  
17 the alternative, its truth -- the adaawk and kungax  
18 are true to the Gitksan and Wet'suwet'en, but because  
19 they are radically different epistemologies, they are  
20 admittedly not true to Euro-Canadian's. And I say  
21 that neither of those statements is particularly  
22 helpful to the plaintiffs.

23 THE COURT: Is that true, Mr. Plant? Couldn't it just be not  
24 necessarily true according to Euro-Canadian thought or  
25 views? They could be -- they could both be.

26 MR. PLANT: Oh, I quite agree they could be. I'm here  
27 summarizing Mr. Brody's views.

28 THE COURT: Yes, all right.

29 MR. PLANT: And I say that neither of those views, as I've  
30 stated them, assists the plaintiffs, particularly when  
31 the burden lies on them to establish that the oral  
32 tradition is admissible not because it is Gitksan and  
33 Wet'suwet'en truth and not because it is an  
34 anthropological source of research or study, but  
35 rather as evidence.

36 Now returning to paragraph 34. The verification  
37 theory, which is said to justify the claim that the  
38 adaawk/kungax are true, is, in my submission,  
39 profoundly implausible. The verification theory is  
40 the theory that people sitting in the feast hall have  
41 the opportunity to correct errors and this is the  
42 testing or the sifting process.

43 Now, if Mr. Brody is correct and the Gitksan and  
44 Wet'suwet'en do not recognize the distinction between  
45 observed events and hearsay, and that's -- I imply  
46 that from the passage which I read to your lordship  
47 from page 22 of his report -- then clearly there is no

## Submissions by Mr. Plant

1 way of knowing whether the first account of an event  
2 said to be the subject of an adaawk, is based on  
3 actual experience or hearsay. And the most that can  
4 ever be verified is the conformity between various  
5 tellings: thus the "truth" of the second telling lies  
6 only in its resemblance to the first telling, which  
7 may itself bear no resemblance to the actual events.  
8 Since the lapse of time between the repetition of  
9 official tellings is likely to be the length of the  
10 preceding chief's, chieftainship, repetitions may  
11 occur only a few times in the life of each hearer, if  
12 at all, thus the opportunities for the verification  
13 are few and far between.

14 There are some examples here from the evidence, my  
15 lord. The first is Mary McKenzie's statement that she  
16 last told the adaawk of Gyolugyet at a feast in 1963.  
17 And I've given the transcript reference there. But I  
18 should say that in another part of her evidence, it  
19 appears to be the situation that the two previous  
20 instances on which she heard the adaawk told occurred  
21 in 1949 and 1935. And the reference there is to  
22 Volume 4 of the transcript, page 238, lines 25 to 44.

23 Now, the second observation there, my lord, is --  
24 should not be a quote, referring now to what I say of  
25 Martha Brown. Martha Brown said that Edward Sexsmith  
26 (her predecessor in title) never told the adaawk at a  
27 feast. And I've given the transcript reference there.

28 Fred Wale, when asked if he had heard the adaawk  
29 in the feast said, "We don't like to tell it outside  
30 of the house, but it is told within the house."

31 And Vernon Smith, the head chief of the Eagle clan  
32 in Kitwanga has never heard his adaawk told at a  
33 feast. In fact, he doesn't know it.

34 The community of verifiers --

35 THE COURT: Excuse me, Mr. Plant. Did you say that the second  
36 item about Martha Brown should not be a quotation?

37 MR. PLANT: Correct, my lord. Delete the quotation marks.

38 THE COURT: Thank you.

39 MR. PLANT: It's a summary of evidence.

40 THE COURT: And is this reference to Mary McKenzie at page 238  
41 include both the 1949 and the 1935 tellings?

42 MR. PLANT: Yes, my lord.

43 THE COURT: Thank you.

44 MR. PLANT: That is a construction which I place on the evidence  
45 that she gives at that page.

46 THE COURT: Yes.

47 MR. PLANT: I think I will, my lord, take you, if I might, to

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1           the reference to the Edward Sexsmith evidence, and  
2           that would be in II/3-34. And when your lordship gets  
3           there, it's the second item.  
4   THE COURT: Under 34?  
5   MR. PLANT: Thirty-four, yes, my lord.  
6   THE COURT: Yes, I have it.  
7   MR. PLANT: You have that as page 11 from Exhibit 68B?  
8   THE COURT: No, I'm afraid I don't. I've got -- which one are  
9           you referring me to?  
10   MR. PLANT: The Martha Brown extract.  
11   THE COURT: Yes, I think I have it. Yes, thank you.  
12   MR. PLANT: And just for reference, my lord, in the lower  
13           right-hand side of that page there is a number, and  
14           the "p. 2" indicates that this is the second page in  
15           the collection of extracts at this tab.  
16   THE COURT: Yes.  
17   MR. PLANT: And it's at line seven where Mr. Grant in chief  
18           asked Mrs. Brown:  
19  
20                   Q Did Edward Sexsmith ever tell the ada'ox  
21                   at a feast?  
22                   A No.  
23  
24           I just wanted to give your lordship the reference  
25           there, because it was -- what appears in our argument  
26           is really an attempt to summarize the evidence.  
27   THE COURT: Yes. Thank you.  
28   MR. PLANT: And if I could refer now back to paragraph 35 in my  
29           argument, still dealing with the issue of  
30           verification, I say that the community of "verifiers"  
31           is extremely small, because only chiefs are entitled  
32           to stand up at a feast and disagree with what has been  
33           said. And the reference to Exhibit 446D there, my  
34           lord, is a reference to the evidence of Stanley  
35           Williams. And I have an additional reference, and  
36           that is to the evidence of Dr. Daly who said in  
37           Exhibit 884-1 at page 80, "Oral histories are for the  
38           ears of the chiefs."  
39           Significantly, my lord, the listeners, those who  
40           listen to the adaawk and the kungax in the feast hall,  
41           have no responsibility for possessing the knowledge  
42           necessary to verify effectively. Because as Mr. Brody  
43           says on page 19 of his report, individuals -- that  
44           meaning individual chiefs -- are only "separately  
45           responsible for their part of the culture's history  
46           and for knowledge of their particular territories".  
47           The individuals in question would be the chiefs and

1           those in training to become chiefs.  
2           Now, I say in such circumstances, it can hardly be  
3           maintained that the adaawk or the kungax are matters  
4           of reputation within the community as a whole. There  
5           is a very select group of individuals who know the  
6           adaawk and the kungax and with -- and that knowledge  
7           is at a high level, generally. The knowledge that you  
8           have to know with any detail is really only the  
9           knowledge of your own adaawk, and that constrains the  
10          ability to verify, according to the theory of the  
11          plaintiffs'.  
12          Furthermore, the suggestion which Mr. Brody makes  
13          that the adaawk and the kungax are -- and these are  
14          his words "inductive and value free" is, I say,  
15          absurd. Because oral history is both a charter for  
16          the exercise of power and an exercise of power itself.  
17          All parts of the adaawk and the kungax, including the  
18          text itself as well as the circumstances of its  
19          telling, and those are inseparably interrelated,  
20          because as an oral text, the adaawk and the kungax  
21          only exist in their telling. And I say that all parts  
22          of the adaawk and the kungax are parts of a political  
23          act, namely the assertion of and the acquiescence in  
24          claims to power, whether this be seats in the feast  
25          hall, traplines, fishing sites, the right to claim  
26          larger payments at the next feast, or whatever. And I  
27          say that no part of political rhetoric is value free.  
28          Now, to some extent, my lord, I have focused on  
29          the adaawk. The kungax, in my submission, are  
30          markedly different from the adaawk, and this  
31          distinction is ignored by Mr. Brody. The difference,  
32          I say, with respect, is also obscured by Dr. Mills'  
33          discussion at Exhibit 906, that's to say, her expert  
34          report at pages 61 and 62. And I'm not going to refer  
35          to that, but I commend it to your lordship because of  
36          the way in which Dr. Mills attempts to connect the  
37          adaawk and the kungax without coming to grips, in my  
38          submission, with the evidence given by the lay  
39          witnesses who translated kungax as crest. That is to  
40          say, not as history. And there is evidence of other  
41          witnesses who equated the Gitksan word "nax nox" with  
42          kungax, not adaawk. And I do want to take your  
43          lordship to some of these references which would be at  
44          II/3-37, the reference to the evidence of Alfred  
45          Joseph, and that would be the transcript extract which  
46          is in page 4 of the tab. Does your lordship have  
47          that?

## Submissions by Mr. Plant

1 THE COURT: Yes.

2 MR. PLANT: And this is during the course of Mr. Joseph's  
3 examination in chief by Mr. Rush. And starting at  
4 line 33, Mr. Rush asks this question:  
5

6 Q All right. Now, you've made mention of  
7 the term Kungax, and you've heard in this  
8 court case mention of the Gitksan word  
9 adaawk. Are there differences between  
10 the Wet'suwet'en Kungax and the Gitksan  
11 adaawk?

12 A Yes, there is a difference.

13 Q Can you tell his lordship what that is?

14 A The -- the Gitksan Kungax relates to  
15 migrations within the territory.  
16

17 Skipping down a few lines:  
18

19 Q By that do you mean the Gitksan adaawk?

20 A Yes.

21 THE COURT: All right. Thank you.

22 THE WITNESS: And our Kungax is more -- more  
23 around the -- it's not migrations; it's  
24 just -- it tells about happening in  
25 the -- within the territory, how clans  
26 and crests were created, and how people  
27 defended their territory and their  
28 people.  
29

30 Now, turning ahead a few pages -- the next  
31 extract, page 6, is another extract from the evidence  
32 of Alfred Joseph. Turning ahead to page 7, and this  
33 would be an extract from the evidence of Mrs.  
34 Wilson-Kenni. Beginning at line 35:  
35

36 A In -- it was in the old hall.  
37

38 Do you have that, my lord, down near the bottom of the  
39 page?

40 THE COURT: Yes.

41 MR. PLANT:  
42

43 A It was in the old hall that was right in  
44 the middle of Hagwilget.

45 Q Okay. Now, you described that as a  
46 Kungax and that's a Wet'suwet'en word,  
47 right?

## Submissions by Mr. Plant

1 A Kungax, yes.  
2 Q Yes. Had you seen Nox Nox performed at  
3 Gitksan feasts?  
4 A Yes.  
5 Q Is the -- okay. Is there a difference or  
6 can you -- between the Kungax and the Nox  
7 Nox?  
8 A That's the Kungax. The Nox Nox is the  
9 Kungax. Kungax. You are starting to  
10 make me pronounce it like you now. It's  
11 Kungax.  
12  
13 That's -- and then the reference over the page:  
14  
15 Q Kungax?  
16 A Kungax.  
17 Q And so they are the same?  
18 A Yes.  
19  
20 So the kungax are to be equated with the nax nox  
21 which is the performance of the crest in the feast  
22 hall, not the adaawk.  
23 The -- the last reference on page 10 is from the  
24 examination for discovery of Sylvester William which  
25 was read in. Beginning at line 8:  
26  
27 Q Mr. William, does Hag Wil Negh have a  
28 Kungax; if you can, if you have got it  
29 then go ahead, Mr. Holland.  
30  
31 That's a reference to the interpreter.  
32  
33 A Yes.  
34 Q And without telling it to me, do you  
35 know, do you know it?  
36 A It is a song, I do not know.  
37 Q Is that all that he said?  
38 THE WITNESS: (NODS HEAD)  
39 MR. PLANT:  
40 Q Mr. William, are you able to describe for  
41 me what is a Kungax?  
42 THE INTERPRETER:  
43 A It is a ceremonial performance in a  
44 feast.  
45 Q Is there a story of where the name Hag  
46 Wil Negh --  
47

## Submissions by Mr. Plant

1                   That's a Wet'suwet'en chief's name, my lord.

2

3                   Q    -- came from?

4                   A    That I don't know.

5                   Q    Do you know territories of Hag Wil Negh?

6                   A    No, I have just trapped and hunted across  
7                   here; I never venture too far.

8

9                   That -- "across from here" would be across from  
10                  Smithers where the Examination for Discovery took  
11                  place.

12                  And the last reference in the tab --

13       MR. GRANT:   Just, I think my friend is mistaken. I think that  
14                   one took place in Moricetown, Mr. William's discovery.  
15                   In fact, I'm certain of that.

16       MR. PLANT:   That may be. I just have a vision in my head, the  
17                   vision of the basement of the Hudson Bay Hotel, but I  
18                   may be wrong.

19                  The last reference in that tab is to the  
20                  examination.

21       THE COURT:   Is there any reason why he would know the kungax of  
22                   Hag wil negh?

23       MR. PLANT:   He was Hag wil negh.

24       THE COURT:   Oh, I'm sorry. You have got Hag wil negh in your  
25                   chart twice: William, Sylvester once and Ron Mitchell.

26       MR. GRANT:   Mr. William passed away and Mr. Mitchell took the  
27                   name, that's why there is a change.

28       MR. PLANT:   Yes, that's right.

29       THE COURT:   I see. So he was Hag wil negh when he gave that  
30                   evidence?

31       MR. PLANT:   Yes, correct.

32       THE COURT:   All right, thank you.

33       MR. PLANT:   Yes.

34                  Paragraph 38 of my submission, my lord, there is  
35                  an illustrative example of the use of adaawk as a  
36                  political tool (as opposed to an historical record) is  
37                  found in the report of Mr. Hugh Brody which is Exhibit  
38                  991. And the chapter which I have mentioned there,  
39                  chapter 4, is really -- has to be read in full to get  
40                  the flavour of what's going on here. But this is a  
41                  chapter in Mr. Brody's report in which he describes a  
42                  series of events which took place at Bear Lake that  
43                  arose out of the attempt to resolve the overlap  
44                  between the Gitksan-Wet'suwet'en claim and the  
45                  Carrier-Sekani claim. And I should observe that there  
46                  were objections taken on numerous occasions to this  
47                  part of Mr. Brody's evidence, but subject to those

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1 objections, I don't think that they touch on the point  
2 that I want to make here, and that is this, down to  
3 paragraph 39:

4 Mr. Brody sees in the struggle to resolve  
5 overlapping claims signs of the vitality of two  
6 cultures; cultures which, in his words, are "fiercely  
7 alive". The more significant question, in my  
8 submission, is whether the native institutions work.  
9 Here is an instance of the interaction of two cultures  
10 where alleged problems of cross-cultural translation  
11 and misconceptions do not exist. That is to say,  
12 there isn't the difficulty of Euro -- of, again using  
13 Mr. Brody's terms, of an interaction between a Euro-  
14 Canadian Frontier mentality and the Gitksan-  
15 Wet'suwet'en. And as a result, the misconceptions  
16 that Mr. Brody says taint all such relations are  
17 obviously not present, and at the same time, there is  
18 what appears to be an equality of bargaining power.  
19 Yet, what you see in this account here, is that the  
20 institutions of jurisdiction and authority, in  
21 particular the institutions of dispute settlement,  
22 fail.

23 And what happens here is that the two groups of  
24 people meet at Bear Lake and they meet for several  
25 days at the old Bear Lake Village. And if I could  
26 just refer for a moment to the extract in the next tab  
27 in the yellow binder, my lord, page 42 of the chapter  
28 4. That should be in tab II/3-38.

29 THE COURT: All right.

30 MR. PLANT: Does your lordship have that?

31 THE COURT: Yes.

32 MR. PLANT: In this tabulation it's page 6. I'll just read a  
33 little bit from the first full paragraph:

34  
35 On July 15th, 1985, Gitksan met with Carrier  
36 and Sekani elders and representatives at the  
37 centre of the overlap: the old Bear Lake  
38 village. Helicopter flights to high points  
39 resulted in detailed naming of landmarks, and  
40 helped define the differences between the  
41 various elders' territorial claims.  
42 Miluulak --

43  
44 And that's the House, as I understand it, the Gitksan  
45 House that claims that territory.

46  
47 Miluulak history was told by both sides, and

1                   divergences as well as rival opinions as to  
2                   whether or not these histories pertained to the  
3                   same Miluulak were made clear.  
4

5                   I have to stop there because that's the point, my  
6                   lord. The point is that the parties cannot even agree  
7                   on the content of the adaawk, and there appears to be  
8                   no other mechanism for compromise or adjustment of  
9                   this problem at the level of jurisdiction.

10                  Now, I -- turning now to page 19 of my summary. I  
11                  think that's all I want to ask you to read in that  
12                  extract for now, although I do say that the whole  
13                  chapter bears on the point.

14                  What happens to resolve this problem is that the  
15                  Gitksan chief, Wii Gaak, who, as I recall at the time  
16                  at least, was Neil Sterritt Sr., puts a jacket on  
17                  William Charlie, one of the Carrier-Sekani chiefs, and  
18                  says -- and as I recall the jacket has the crest of  
19                  Wii Gaak on it. And he says, "I give you this jacket,  
20                  William, to keep you warm and you can hunt here in my  
21                  territory." But there is no -- well, in the Gitksan  
22                  terms, among other things, there is no eagle down  
23                  going on here. There is no settlement of the dispute.  
24                  What there really is, is a temporary truce, which I  
25                  say amounts to no more than an act of grace on the  
26                  part of the Gitksan chief, Wii Gaak.

27                  And in paragraph 40 I draw your lordship's  
28                  attention to the fact that the impetus for this  
29                  meeting at Bear Lake which took place, of course,  
30                  after the action had been commenced, was not the  
31                  desire of Gitksan chiefs to hunt, trap or fish or  
32                  exercise any rights in the disputed area -- to  
33                  exercise what might be called practical sovereignty --  
34                  but, rather, was the pending land claim litigation.  
35                  Thus, it is clear that the adaawk are intended to be  
36                  called in aid of politics and yet are singularly  
37                  ineffective in that regard.

38                  My lord, since the community of informed listeners  
39                  is small -- that is to say, no individual is required  
40                  to know more than his own history and the chiefs are  
41                  often unaware of their history. And I give there  
42                  examples from the evidence of Vernon Smith and Sarah  
43                  Layton. And I do think I should ask your lordship to  
44                  turn to Table 2216, and that will be a few tabs along  
45                  in the yellow book. That would be tab II/3-41, pages  
46                  four and five.

47                  THE COURT: Yes.

## Submissions by Mr. Plant

1 MR. PLANT: Just to draw your lordship's attention to this  
2 exhibit which purports to describe familiarity with  
3 House histories for population, firstly, 16 years of  
4 age and older. And then when you turn over the page,  
5 you find that it's a chart dealing with the degree of  
6 familiarity for those who are 15 years of age and  
7 less. And you find that on the first page, by far and  
8 away the greatest category is the -- those who claim  
9 to be not at all familiar with their House histories.  
10 That number, 426, on the right-hand column corresponds  
11 to that category.  
12 And there is also an additional reference, my  
13 lord, that I would ask your lordship to make a note of  
14 on the summary here.  
15 THE COURT: What is this table from?  
16 MR. PLANT: The Gitksan Carrier Tribal Council census which is  
17 Exhibit 901-4.  
18 THE COURT: And for what year is it?  
19 MR. PLANT: I'll give that date to you later, my lord.  
20 THE COURT: Yes.  
21 MR. GRANT: My lord, I have a concern about this. Is my friend  
22 suggesting that this document which was put to, I  
23 believe, Dr. Daly by Ms. Koenigsberg in cross, and he  
24 had not seen it, and it was marked as an exhibit for  
25 that purpose, is my friend suggesting that he is now  
26 adopting this for the truth of the contents therein?  
27 Because I think that is the only time it would be  
28 referred to and I think it was put in as a document  
29 that Dr. Daly did not have an opportunity to review  
30 and consider in his analysis. And that was the intent  
31 of that document, not for the truth of the contents  
32 therein, because I don't believe any other witness was  
33 examined on the document.  
34 MR. PLANT: Well, my lord, I haven't seen the point in the  
35 transcript where this was put into evidence for  
36 awhile. But it certainly appears to me, for the  
37 purposes of my argument, to be a document created by  
38 the plaintiffs which contains admissions against  
39 interest, and to that extent, is admissible.  
40 MR. GRANT: It was a statistical survey, my lord. I think my  
41 objection is clear for your lordship that I do take  
42 the position that it is not put in for the truth of  
43 the contents stated therein.  
44 THE COURT: But it's a plaintiffs' document. It comes from your  
45 files, it comes from the tribal council which, on your  
46 case at least, is an emanation of the chiefs or the  
47 plaintiffs.

## Submissions by Mr. Plant

1 MR. GRANT: Well, I wouldn't say it's an emanation of -- oh, you  
2 mean the tribal council?  
3 THE COURT: Yes.  
4 MR. GRANT: Yes, it came out of the tribal council files, it was  
5 a specific research project that was done, and in  
6 terms of its accuracy or veracity it was never  
7 testified to in any regard in that way.  
8 THE COURT: All right. Well, I will have to look at that, at  
9 what happened when it went in. I've got your two  
10 positions and I'll have to sort that out.  
11 MR. GRANT: Thank you, my lord.  
12 MR. PLANT: My lord, Exhibit 901-3 is the census document  
13 itself, and it appears to be described -- called  
14 "Phase 1 Results". And from the introduction it says,  
15 "The census results are intended for use by Band  
16 Councils, and my tribal council information was  
17 gathered by the land claims research team in late 1979  
18 and early 1980." So that's the closest that I can get  
19 to a date for that information.  
20 THE COURT: All right. Thank you.  
21 MR. PLANT: There is in the context of this submission, an  
22 additional reference that I give your lordship, and  
23 that is to the evidence of Dr. Daly at transcript 194,  
24 page 12660 at line 35 where he says, "Specific songs  
25 and histories are known by very few".  
26 THE COURT: What's the reference again? It's not in the text,  
27 is it?  
28 MR. PLANT: Transcript 194 -- that's Volume 194 of the  
29 transcript, page 12660.  
30 THE COURT: 12660?  
31 MR. PLANT: 660, yes, at line 35. And that's not in the  
32 material, my lord.  
33 THE COURT: Yes, all right.  
34 MR. PLANT: And I say, therefore, that the opportunity for  
35 correction within such a system is small. And I say  
36 that it is, in any event, an exaggeration to describe  
37 as a "system" of knowledge "shared out" that which is,  
38 in substance, an ad hoc collection of narratives (and  
39 which, in the case of the Wet'suwet'en, is admitted to  
40 be incomplete). And the reference there to the report  
41 of Dr. Mills is the last page in that tab in the  
42 yellow book, and it's the first full sentence on the  
43 page: "The kungax do not recount the origin of every  
44 house and crest and title."  
45 Turning over the page, my lord, I say that  
46 moreover, much of what is important appears to be kept  
47 secret. And your lordship may recall the evidence of

## Submissions by Mr. Plant

1 Art Mathews when he said that some parts of the adaawk  
2 may be told at feasts but the -- well, perhaps I  
3 better take your lordship to it. It's just the next  
4 item in the book. That would be II/3-42. And  
5 starting at line 40, Mr. Grant:  
6

7 Q I'll come back to that area in a few  
8 minutes. When the adaawk is taught in  
9 detail who is usually present?

10 A This is where we get serious. Just the  
11 family hears -- a Simoogit tells an  
12 adaawk in its -- it's like I described,  
13 all these material things, and nobody is  
14 allowed to hear this, because wisdom  
15 leaking out about our sisatxw  
16 [S-I-S-A-T-X-W], how we do it and how we  
17 realize things, hunting signs, all other  
18 things they say belongs to that house  
19 itself. But actually the actual adaawk  
20 itself publicly is told in feast halls,  
21 but not the secret parts of it. That  
22 belongs to the house itself.  
23

24 And I -- as I recall, it was Mr. Mathews' evidence  
25 that to tell the full adaawk took something like three  
26 or four months. That would be the adaawk including  
27 all of the many secret parts.

28 And the next is an extract in the evidence of  
29 Jessie Sterritt which is a couple of pages further on  
30 in the tab. It's page 4 of the material at the tab,  
31 and this is the evidence of Mrs. Sterritt who gave  
32 evidence on commission. She was examined in chief by  
33 Mr. Rush and in answer to a question said:  
34

35 A It was the responsibility of the elders  
36 of the House to pass on the knowledge of  
37 the history of the House and anything  
38 that may enhance the lives of the young  
39 people of the House, and it was usually  
40 not related to another House, it was  
41 something that was kept right in the  
42 House, the methods that they used.  
43

44 And while I say in paragraph 42 that it is  
45 uncertain whether the adaawk is history or "a guide  
46 for life", what I really mean is that there are a  
47 number of different descriptions of what the adaawk

1 is. Some have said that the adaawk is history,  
2 others -- and my recollection is that it was Mrs.  
3 McKenzie said that the adaawk is information you need  
4 to know.

5 Correction of "errors", to the extent that it  
6 occurs at all, occurs only when a subsequent feast is  
7 held for the purpose. And this was -- there was  
8 testimony concerning this by Joan Ryan and by Art  
9 Mathews, both of whom gave evidence, as did Stanley  
10 Williams, concerning a feast that Stanley Williams  
11 hosted as a result of what was said to be an error  
12 made in a feast that had been hosted by Buddy  
13 Williams, Stanley Williams' son. And that -- if it is  
14 not the only instance -- specific instance of a  
15 correction, it certainly is one of the very few in the  
16 records before your lordship. And I mean to contrast  
17 specific instance with the statements expressed in  
18 general terms, that this is how they do things.

19 Art Mathews had -- when I say by Art, he had not  
20 heard an error corrected for four years. It was, as I  
21 recall, Stanley Williams and the Buddy Williams  
22 correction that he referred to in his evidence, and  
23 Mr. Mathews was unable to recall any other examples of  
24 such correction ever having occurred.

25 And my lord, I say that the evidence is clear  
26 that critical discourse is not a feature, at least of  
27 Gitksan society. When a dispute is settled it is a  
28 violation of Gitksan "law" to raise the matter again.  
29 Thus, the idea of free historical inquiry is  
30 apparently not present within the Gitksan communities.  
31 And the reference there is to the evidence of Olive  
32 Ryan which would be in the II/3-44, and I ask your  
33 lordship to look at it. Starting at line 29, and this  
34 is in cross-examination:  
35

36 Q I suggest to you that in your lifetime,  
37 there was a disagreement about who should  
38 sit in the seat at the Feast Hall that  
39 Gwis Gyen --  
40

41 That is to say, the name held by Stanley Williams.  
42

43 Q -- now sits in?

44 A Well, I can't answer you.

45 Q Why can't you answer me?

46 A Well, that's happened before long time  
47 and we not supposed to bring it up. They

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1 already settled it.

2 Q That's a part of Gitksan law, isn't it?

3 A Yes.

4 Q When you settle a dispute, you are not  
5 supposed to talk about it anymore; right?

6 A Yes.

7  
8 And turning over the page to the next extract,  
9 this is from the evidence of Stanley Williams, and I'm  
10 in the yellow book again, my lord. This is Mr.  
11 Williams giving evidence about the fact that it's a  
12 violation of Gitksan law even to tell the adaawk of  
13 another house without permission. And at line ten,  
14 this was in examination by Mr. Grant:

15  
16 A It is not our law to tell the adaawk of  
17 any -- any -- from any house. Like I  
18 could not tell anybody's adaawk and they  
19 would not tell my adaawk, and this is our  
20 law, the Gitksan people's law. I can't  
21 use their adaawk and they can't use mine.

22  
23 And what happens, this evidence was -- may well  
24 have been given in the context of Mr. Williams giving  
25 adaawk evidence of other Houses where he took pains to  
26 say that he had the permission of the chiefs to give  
27 that kind of evidence.

28 My lord, on page 21 of my submission, where I say  
29 that there are circumstances where the trustworthiness  
30 of oral histories can be tested by comparing the oral  
31 histories to written records of the same event.

32 And the reference made in the following paragraphs  
33 is to a story related by Johnny David, which he said  
34 the chiefs themselves told to him. It concerns a  
35 Fishery officer who seized a fishing fence in the  
36 Babine area. And I think that this may be -- well,  
37 it's important that I identify that this story was not  
38 advanced by Mr. David as part of his kungax, it was  
39 really a retelling of events that occurred when Johnny  
40 David was a young man, and thus it falls outside the  
41 umbrella of the protection for oral tradition which  
42 the plaintiffs have advanced. It's a different kind  
43 of problem, my lord. I would say that generally  
44 speaking, this is pure hearsay and therefore  
45 inadmissible.

46 THE COURT: Well isn't it hearsay on both sides?

47 MR. PLANT: Yes, probably. But what you have at any rate, is

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1           you have Mr. David's recollection of events that took  
2           place a long time ago, and there are documents in  
3           evidence concerning the same events, and if Mr.  
4           David's evidence is admissible at all, then your  
5           lordship is going to have to compare Mr. David's  
6           recollection of the events to the recollection  
7           contained in the reports of the Fishery's officers and  
8           so on.

9       THE COURT: I suppose the Fishery's officer's report would only  
10           be admissible if it was in a business record, would  
11           it.

12       MR. PLANT: And my submission has already been admitted for that  
13           purpose.

14       THE COURT: All right.

15       MR. PLANT: But I want to say that this example here falls  
16           outside the umbrella, really, of the submission that I  
17           am making.

18       THE COURT: All right. Thank you.

19       MR. PLANT: Jumping ahead then to paragraphs 49 and 50, I think  
20           it continues -- I say it continues to be significant,  
21           even though it's outside the context of this  
22           particular problem, that the differences between the  
23           versions of these stories makes some sense when you  
24           see that Mr. David's recollection -- and I'm at the  
25           bottom of the page -- in 1980 -- in the 1980's, is  
26           that this was a land claims matter in which the  
27           natives asserted their claim to the land. And then  
28           your lordship will not find that proposition supported  
29           by the documentary record of the event.

30           The comparison serves as an example of the  
31           proposition restated by Drs. Bishop and Ray, which I  
32           will be coming back to, that -- particularly in the  
33           context if your lordship should decide that oral  
34           history is admissible. "The validity of oral  
35           tradition and historical 'truth' must be carefully  
36           cross-checked against other categories of data."

37           Now, paragraph 52, I set out another series of  
38           examples, and the -- these examples relate to the oral  
39           record, as it were, of the Kitsegukla fire of 1872.  
40           Once again, this example falls outside the umbrella of  
41           the adaawk, because on my reading of these accounts  
42           from the Barbeau-Beynon files, they are not tendered  
43           as part -- they weren't created as part of the adaawk  
44           of the various Houses that these individuals came  
45           from. So what you have there is an oral account by  
46           individuals recorded in the 1920s of events that took  
47           place in the 1870's. And what you have again is a

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1           problem of competing and conflicting accounts of what  
2           took place, and the difficulty of reconciling the  
3           accounts as to particular details, especially when the  
4           versions of -- that are recorded here by Dan Guxsan  
5           and Mark Wiget are compared with the existing  
6           historical record concerning the same events.

7           Now I am going to move ahead to paragraph 57.

8           Mr. Grant has just asked me a question which I am  
9           unable to answer, but there is one thing that it  
10          brings to my mind. There are some errors in the  
11          exhibit numbers in the -- on pages 23 and 24,  
12          paragraph 48, my lord.

13       THE COURT: Yes.

14       MR. PLANT: The last reference there which is -- ends dash 12  
15                should be dash 13. And similarly, the first line of  
16                paragraph 49, that should also be dash 13 not dash 12.

17               Over the page to paragraph 51, the reference to  
18               the Bishop and Ray proposition, I've transposed the  
19               numbers. That should be Exhibit 902-6, and it's at  
20               page 122. That page is included in the material in  
21               the yellow binder, but the full exhibit is 902-6.

22               Now, paragraph 57, my lord, I want to come back to  
23               the evidence of the lay witnesses who, in this  
24               courtroom, told adaawk or related their kungax, and I  
25               say there is no issue of credibility here, my lord.

26               It's unnecessary to dispute the plaintiffs' belief  
27               in their oral histories, that belief perhaps best  
28               stated by Mary McKenzie when she said, "In Gitksan law  
29               all adaawks are true". And I say, with respect, but  
30               rights to land cannot, and do not, flow from beliefs.

31               I adopt by way of argument, the following  
32               extracts from an article by M.I. Finley entitled  
33               "Myth, Memory and History" in a publication entitled  
34               History in Theory, and you'll find the complete  
35               article, my lord, in the binder of articles which I  
36               won't take you to, but in the grey books. It's the  
37               one with the yellow label.

38       THE COURT: I don't have -- oh yes, I have one over there. Yes,  
39               all right.

40       MR. PLANT: And it's at tab 4.

41               And I'm going to read from the extracts in the  
42               argument starting in the quotation about seven or  
43               eight lines down with the sentence that begins, "Now  
44               there is the tradition".

45       THE COURT: Yes.

46       MR. PLANT:

47               Now there is the tradition which shapes a large

1 part of our lives, perpetuating customs, habits  
2 of behaviour, rites, ethical norms and beliefs.  
3 There is nothing mysterious about tradition in  
4 this sense; it is transmitted from one  
5 generation to the next, partly by the ordinary  
6 process of living in society, without any  
7 conscious effort on anyone's part, partly by  
8 men whose function it is to do so: priests,  
9 school masters, parents, judges, party leaders,  
10 censors, neighbours. There is also nothing  
11 reliable about this sort of tradition; that is  
12 to say, its explanations and narrations are, as  
13 anyone can judge by a minimum of observation,  
14 rarely quite accurate, and sometimes altogether  
15 false. Reliability is, of course, irrelevant;  
16 so long as the tradition is accepted, it  
17 works, and it must work if the society is not  
18 to fall apart.

19  
20 But "tradition" detached from living practices  
21 and institutions - a tradition about a war two  
22 hundred years back, for example - is not the  
23 same thing at all; only a semantic confusion  
24 seems to place it in the same category.  
25 Wherever tradition can be studied among living  
26 people, the evidence is not only that it does  
27 not exist apart from a connection with a  
28 practice or belief, but also that other kinds  
29 of memory, irrelevant memories, so to speak,  
30 are short-lived, going back to the third  
31 generation, to the grandfather's generation,  
32 and, with the rarest of exceptions, no further.  
33 This is true even of genealogies, unless they  
34 are recorded in writing; it may be taken as a  
35 rule that orally transmitted genealogies,  
36 unless some very powerful interest intervenes  
37 (such as charismatic kingship), are usually  
38 fictitious beyond the fourth generation, and  
39 often even beyond the third...

40  
41 ...Group memory, after all, is no more than the  
42 transmittal to many people of the memory of one  
43 man or a few men --

44  
45 That should probably be one woman or man or a few  
46 people.  
47



1                   between communities and regions, changes in  
2                   power relationships, new values and beliefs -  
3                   all these historical developments shaped  
4                   tradition. They had a relatively free hand  
5                   with what was happening currently, but often  
6                   they could not afford to ignore traditions they  
7                   themselves had inherited. Where a vital  
8                   interest was affected, it was imperative that  
9                   corrections be made. Even in a world which  
10                  makes considerable use of writing, this process  
11                  is not too difficult.

12  
13                  And then he gives an example. It says that  
14                  when -- at the bottom of that paragraph:

15  
16                  When tradition is entirely oral, conflation  
17                  and falsification are childishly simple to  
18                  bring about. They cannot, indeed, be  
19                  prevented.

20  
21       THE COURT: What is conflation?

22       MR. PLANT: I beg your pardon?

23       THE COURT: What is conflation?

24       MR. PLANT: I think it's the merging of two or more possibly  
25                  reconcilable and possibly irreconcilable ideas.

26                  My lord, turning over the page, I have an  
27                  observation here that is not in the written text.  
28                  Plaintiffs argued that transcript 314, page 23533 of  
29                  the evidence -- this was their argument:

30  
31                  The evidence respecting the adaawk and the  
32                  kungax of the Wet'suwet'en and the Gitksan  
33                  chiefs were effectively unchallenged in  
34                  cross-examination. What they said is not  
35                  merely their belief, what they said was, "This  
36                  is true."

37  
38                  And that's the end of the quote.

39                  Well, my submission, my lord, is there are reasons  
40                  why hearsay evidence is generally admissible. One of  
41                  these reasons is the difficulty of testing a  
42                  proposition which, in substance, if not in form,  
43                  reads, "I was told this by someone else."

44                  When such a statement is, by definition, derived  
45                  from successive repetitions through generations, the  
46                  cross-examiner has virtually no means of testing the  
47                  truth of the proposition. His only recourse is to

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1           investigate the circumstances of the telling. And I  
2           say that if the truth of a statement is inherently not  
3           susceptible to cross-examination -- and that is  
4           manifestly the case with the adaawk and the oral  
5           history of the Wet'suwet'en -- then such a statement  
6           ought to be ruled inadmissible.

7           And I say, with respect, that the test of  
8           admissibility is not whether oral tradition counts as  
9           evidence among the community of scholars who practice  
10          history today. The test is whether it amounts to  
11          evidence at law. The oral history offered in this  
12          case, the adaawk and the kungax, do not meet the twin  
13          requirements of necessity and trustworthiness. It  
14          cannot be admissible.

15       THE COURT: Is there room for such evidence, in your submission,  
16       when it's used by others such as Ms. Albright, or is  
17       she notionally deemed to have excluded it, if I find  
18       that I should exclude it? Or put it another way, can  
19       I exclude it from your argument but still use it to  
20       the extent -- still rely upon it to the extent that  
21       she relied upon it?

22       MR. PLANT: If the oral tradition is inadmissible, then that  
23       part of the body of evidence which was before your  
24       lordship which is the oral tradition itself, is  
25       excluded. So that then takes you to the question of  
26       what do you do with the experts who relied on it? And  
27       I say that any opinion expressed on the basis of  
28       inadmissible evidence is itself inadmissible. That  
29       won't rule out the evidence of people such as Ms.  
30       Albright altogether because, of course, Ms. Albright  
31       did actual field work and is -- she is entitled to  
32       report on the results of that field work. So that the  
33       overall effect -- or it's -- the overall effect of Ms.  
34       Albright's opinion is going to be a matter of weight.

35           But I say that you can't go to Ms. Albright's  
36       report and find any independent validity for the oral  
37       tradition. I mean there is the exercise of  
38       corroboration which is what Ms. Albright was seeking  
39       to do, what the Gottesfeld and Dr. Mathewes attempted  
40       to do. And I'm going to be dealing with that in the  
41       next part of my submission, under the heading of  
42       weight -- "Considerations going to weight". But I say  
43       that if you find that the oral history is inadmissible  
44       for the reasons that I've argued, then that  
45       consequence carries on right through into the expert  
46       opinion reports.

47       THE COURT: All right. Thank you.

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1 MR. PLANT: And I might say, my lord, in this context, that  
2 while it's not referred to in the submissions, the  
3 recent Supreme Court of Canada judgment in the  
4 Lavallee case, and by recent I mean the same day as  
5 the Horseman judgment, may have a bearing on this,  
6 particularly, the judgment of Mr. Justice Sopinka.  
7 I'll get my hands on that and speak further on that.

8 THE COURT: Yes.

9 MR. PLANT: The next heading, however, is the heading  
10 "Considerations going to weight". And I state the  
11 obvious, that a basic principle is that the court  
12 should always be given the best evidence.

13 Thus, even if oral history of events alleged to  
14 have occurred prior to first contact is to be ruled  
15 inadmissible, even for the period after contact when  
16 documentary evidence does exist, the oral record must  
17 be heavily discounted in favour of the written record,  
18 where that written record exists.

19 If oral histories are admissible as prima facie  
20 proof of the truth of their contents then there are a  
21 number of points which I say must be considered when  
22 assessing the weight to be accorded to them. I submit  
23 that little or no weight can be accorded to oral  
24 histories of events allegedly taking place more than a  
25 hundred years prior to the relating of the event.  
26 Even then, the oral histories should only be prima  
27 facie proof when corroborated by other admissible  
28 evidence.

29 Now, the first proposition is that an oral history  
30 may be accorded no weight even if Your Lordship finds  
31 that the informant or the witness honestly believed in  
32 its veracity. And that much is made clear by Dr.  
33 Catherine McLellan in an article that is entitled  
34 Indian Stories About The First Whites In Northwestern  
35 America, and is Exhibit 902-7, and the relevant  
36 extract is in the yellow book, but the quote here is  
37 sufficient for my purposes:

38  
39 We are all familiar with attempts to generalize  
40 about categories of oral literature. Bascom,  
41 for example, has suggested that two major kinds  
42 of prose narrative are myths, which focus on  
43 the activities of non-human beings in an  
44 earlier or other world, and legends, which tell  
45 of recent human exploits in a world like that  
46 of today. Both kinds of narrative are thought  
47 to be true, unlike the third category:

1 folktales, which are pure fiction deliberately  
2 devised for entertainment.

3  
4 Dr. McLellan goes on to say:

5  
6 Different narrators may classify the same story  
7 in different ways...While their decisions  
8 certainly involve more than temporal  
9 considerations, the point for us is that the  
10 ethnohistorian must not expect the Indians to  
11 handle time in the same way that historians do.

12  
13 None of the Indians, however, should ever face  
14 the dilemma of the western historiographer in  
15 deciding what is fact and what is fiction in  
16 their oral literature. In theory, at least, no  
17 deliberately fictitious stories are ever told.

18  
19 Now, Dr. Daly has said in his evidence that there  
20 are myths and legends in Gitksan and Wet'suwet'en oral  
21 tradition.

22 Two points I say arise from Dr. McLellan's  
23 observations. The first, is that when reviewing an  
24 oral history "You shouldn't impose the western  
25 historiographer's perspective on the teller of the  
26 story...however the western historiographer's  
27 perspective is important for western civilization's  
28 attempts to date the history". And that's a quote  
29 from Dr. Daly's evidence.

30 Second, the fact that the events recounted in an  
31 oral history are inherently implausible or incredible  
32 does not necessarily detract from the informant's  
33 belief that the events set out in the oral history are  
34 true. To this extent, at least, the fact that an  
35 informant or a witness at trial believed the oral  
36 history to be true is irrelevant for the purpose of  
37 assessing the oral history's weight as evidence. This  
38 is because oral histories generally are not factual  
39 narratives, nor are they intended to be factual  
40 narratives. They are myths and legends as we  
41 understand myths and legends.

42 Now, in paragraph 66 I refer to the discipline  
43 known as ethnohistory, and say that whether  
44 ethnohistorians are anthropologists or historians is  
45 really irrelevant. I don't think your lordship will  
46 get any assistance from Exhibit 1051-2 on that  
47 proposition. But I say that since the test for

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1           veracity of ethnohistory in a court of law must be at  
2           least as rigorous as the test for its veracity in the  
3           academic disciplines concerned with it, whatever you  
4           call that discipline.

5       THE COURT: What is 1051-2?

6       MR. PLANT: It is the report -- or paper by Julie Cruikshank  
7           which is a critical bibliography concerning oral  
8           tradition. I think I will be making some reference to  
9           that.

10      THE COURT: Oh yes. All right.

11      MR. PLANT: So really, paragraph 66 is argument. I don't point  
12           to any authority here for it. Paragraph 67, we have  
13           Drs. Bishop and Ray, who say that:

14  
15                   Even when employed carefully, memory  
16                   ethnography can only provide totally accurate  
17                   information for relatively short time spans,  
18                   usually one hundred years at the very most.

19  
20                   That's where the 100 year time limit that I've  
21                   urged upon your lordship comes from.

22                   Now, there is a fairly extensive quote here from  
23                   Dr. Trigger, Bruce Trigger, and this is from Exhibit  
24                   888. I'll just read the first couple of sentences and  
25                   the last sentence:

26  
27                   The use of oral traditions to understand  
28                   historical events requires a detailed  
29                   understanding of their derivation and a  
30                   critical comparison of alternative versions of  
31                   the same story. While oral traditions may  
32                   provide a valuable record of former beliefs and  
33                   values, caution is needed in interpreting that  
34                   sort of information historically.

35  
36                   And carrying on down to the bottom of the page:

37  
38                   In general, some kind of independent  
39                   verification is required before such traditions  
40                   can be accepted as accurate historical  
41                   accounts.

42  
43                   My lord, I say that the extracts from the  
44                   plaintiffs' evidence cited in the two preceding  
45                   paragraphs should not be taken to represent a  
46                   universal academic acceptance that oral histories are  
47                   entitled to any weight, as history, at all. In fact,

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1 the debate in the anthropological and historical  
2 disciplines as to the value of oral history continues.  
3 And here I will not ask your lordship -- I won't take  
4 your lordship to it now, but this is where the  
5 reference to Dr. Cruikshank's bibliography comes into  
6 play.

7 And I say even those scholars who accept the  
8 value of oral histories agree that the recounting of  
9 events of more than 100 years ago is extremely  
10 problematic and independent verification is required  
11 before the contents of an oral history can be accepted  
12 as objective "truth", again, as history. This is  
13 because, as Dr. Daly admitted:

14  
15 ...where oral histories refer to the distant  
16 past, they must be handled with a good degree  
17 of reserve, for experience shows that the  
18 historical and mythical merge inextricably  
19 beyond a certain point...

20  
21 And I should pause here. This is really a  
22 question posed in cross-examination. The question was  
23 put this way:

24  
25 ...oral traditions frequently reflect  
26 contemporary social and political conditions as  
27 much as they do historical reality.

28  
29 Dr. Daly's answer was, "Some do."

30 My lord, I am in your hands as to the hour.

31 THE COURT: Oh, all right. All right, we will adjourn. I think  
32 it's the appointed time, and you would like to start  
33 at 9:30 in the morning?

34 MR. PLANT: Yes, my lord.

35 MR. GRANT: My lord, if you would make reference to that, my  
36 friend had -- it is in his material, my friend  
37 paraphrased it, but there is an explanatory answer of  
38 Dr. Daly on page 1260 of that tab and it's not -- I  
39 differ with my friend. I don't think it is as he  
40 summarized it.

41 THE COURT: Where is it again?

42 MR. GRANT: Tab --

43 THE COURT: Where he said "Some do"?

44 MR. GRANT: Yes. It's -- he says, "Some oral traditions do,"  
45 and then the answer goes on to explain it. It's one  
46 answer on his -- at my friend's tab II/3-69, and I  
47 think that my friend hasn't fairly summarized it.

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1 THE COURT: It's in this tab?

2 MR. GRANT: Yes.

3 THE COURT: All right. Thank you.

4 All right, 9:30 tomorrow, please.

5 THE REGISTRAR: Order in court. Court stands adjourned until  
6 9:30 tomorrow morning.

7

8 (PROCEEDINGS ADJOURNED AT 4:30 P.M.)

9

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