Smithers B. C,
April 23, 1990.

THE REGISTRAR: In the Supreme Court of British Columbia, this 23rd day of April, 1990. Delgamuukw versus Her Majesty the Queen, at bar

THE COURT: Mr. Adams.

MR. WILLMS: My lord, I have one point that I advised my friend of before this morning and I don't want my friend to say that he is taken by surprise when we advanced this point later, but on Friday my friend said that there were two points that they were going to deal with in reply: One is where did the Hot-sett people live, did they live at Moricetown and did they live at Hagwilget and when did they live there and he said that would be dealt with in their reply. He also said there was a great deal of evidence about territoriality in addition to beaver territoriality and that that would be dealt with in reply. And as I advised my friend before court started this morning, it is our position that that is part of their case, where the Hot-sett people lived is part of the plaintiffs' case, what territoriality they had at the time of contact is part of the plaintiffs' case, and that if my friend has further references to evidence which he says support their assertion that there was something more than beaver territory at that time, he should bring it out as part of his case and he can't save it for reply. So I just wanted my friend to know that, my lord, so that there wouldn't be a surprise when we object to any additional supplement by reply.

THE COURT: All right. Mr. Adams?

MR. ADAMS: My lord, just to address that point for a moment, first of all the two issues are things that are raised in the defendant province's argument and, therefore, in my submission, will be appropriate subjects of reply. It's not possible to know in advance everything that may turn out to be an issue as far as the defendant is concerned, and it would take far longer than we have in our main argument to deal with everything that might come up of that character. I said a little bit about them on the way by on Friday so that they were clearly identified as issues and would not be neglected in my friend's argument, and therefore subject to anything your lordship may rule, I do intend to come around to them again in my written reply.

THE COURT: Well, I don't think I can deal with this now.

You're both on notice of each other's positions. I can say that I propose to be brutal on reply, after this length of time, I am going to hold you to three days, I think it's three days, on reply. And you will have that much time to use profitably or wastefully, as you may be advised.

I don't think that I want to offer any advice at all as to what is your case and what's your friend's case at this point. I will deal with that when the time comes.

MR. ADAMS: My lord, in the written argument on the Gitksan and Wet'suwet'en societies at contact I had reached page 56, which is the beginning of section B.

THE COURT: I am sorry, you're on page 56?

MR. ADAMS: 56.

THE COURT: Is that the front or the back of this book?

MR. ADAMS: It will be the back of that volume, I believe.

THE COURT: Yes. Thank you.

MR. ADAMS: And what this section of the argument does, in general, is to contrast the evidence including evidence that I referred to at length on Friday, with the opinion evidence rendered for the defendant Province by Dr. Sheila Robinson. And in the first paragraph on page 56 I set out, in very summary form, the nature of the joined issue before you as to whatever the shape of these societies was at contact and where it came from and how long it had been there. And the suggestion there is that Dr. Robinson's argument is that Wet'suwet'en social and political institutions were borrowed from the Gitksan and that in turn the Gitksan institutions were borrowed from the coast and the coastal societies developed their distinctive cultural features as a consequence of the maritime fur trade. And what we say in the second paragraph is that this proposition is controverted by considerable historical, linguistic and anthropological evidence and it is that evidence that I propose to review briefly today.

We say that that evidence supports the plaintiffs' assertions that concepts of Gitksan and Wet'suwet'en ownership and jurisdiction pre-date both the assertion of sovereignty by the Crown and pre-date the European fur trade.

That brings me to the top of page 57, back to the documentary historical baseline and you will recall that this is what we say Professor Ray provided. And in his evidence Professor Ray addressed this question

of methodology and historical reconstruction and historical reconstruction referring to efforts to infer what may have been present and for how long a time and from what causes in the absence of direct information of the kind that we say in the Brown and Harmon and other documents. I say that Dr. Robinson undertook her opinion and so did the people upon whom she relies in the ansence of this baseline. And I have a quote set out there in the middle of page 57 from Professor Ray's evidence:

> "And it was the weight of archival evidence, the kind of evidence we have given you here, and I would point out that the ethnographies done in B.C. have never used the Brown material. So they have never established a good base line to begin their work. We have now given you one and that's where it has to start."

And we say, again, in the final paragraph on that page that there is no adequate substitute for actual recorded observations and that Professor Ray's research has made the Hudson's Bay material accessible and that any theoretical reconstruction has to take account of and make sense of the information in those records. And rather than take account of and make sense of that information, it's our position that Dr. Robinson insisted in so many words in the face of Professor Ray's evidence, the documentary record remains virtually mute. And there is a reference set out there but I want to actually read the somewhat longer passage from it and it's from volume 290, it's part of Dr. Robinson's cross-examine.

THE COURT: This isn't from the passage on page 58?

MR. ADAMS: It's not. And this is beginning at line 15 of page 21730. And it's actually line 16, Mr. Grant asked Dr. Robinson -- quoted from her documents:

> "Although a good deal has been written about 'impact of the white man' most of this material is conjectural. This is particularly the case for groups such as the Gitksan and Wet'suwet'en about whom the early written records are virtually mute.

And he asked her:

"Q Do you mine contain that view today?
A Yes, I do."

And the question was put to her:

"Q Brown, Harmon and Ogden are not mute, are they?
A Well I used used the word virtually mute, and I think their contributions are -- although they are the earliest descriptive histories for those areas, their contributions are relatively few and the kinds of data that are present in those early journals are relatively limited so I stand by the word virtually mute or the words virtually mute."

Now, my lord, in my submission that statement simply can't stand in the face, not only of the volume of material that was put in front of you through Professor Ray, but the precise nature of the material that it speaks directly to the economies and societies, to the geography of the area, to the animals that are present, to the topography of the land, all the things we say ought to have been of greatest possible interest to a cultural geographer instead were simply dismissed or ignored.

I am at the top of page 58 and speaking more generally about the nature of Dr. Robinson's opinion, and her own introduction to here opinion report, Exhibit 1189-1, says that it is a review and and interpretation of existing information largely contained in secondary sources.

And that is contrasted at the bottom of page 58 with the approach that Dr. Robinson herself in her doctoral dissertation had advocated, and there is a quotation from that at the top of page 59 where she says this:

"Coming to grips with what is and what is not contained in the ethnographic and early historical records is a necessary precondition for further general theoretical investigations."

And it's that coming to grips with what is in the early historical records that, in our submission, Professor Ray did and Dr. Robinson did not.

Now, there is a further methodological critique in Dr. Robinson's dissertation, and it's to be found at volume 289 at page 21692, and that I also wish to quote from briefly. And, again, this is in her cross-examination. And Mr. Grant put to her a quotation that she had included from an unpublished M.A. or PhD thesis, and I am now at line 14 of 21692, and this is Dr. Robinson quoting somebody else and as well see criticizing it. This person had written:

> "When the documents are silent I have chosen to rely on inference or speculation to provide an anaylsis that is systematic rather than piecemeal. Taking these liberties is, I believe, scientifically justifiable in that it provides hypotheses that can be tested by future documentary and/or field research."

And then she carried on, and this is the criticism, now at line 25:

> "It is the layers upon layers of similar attitudes which have led to the current situation: there are many contradictory theories about the nature of traditional Northwest Coast Indian cultural organizations and about the impact or early European contact on these which are still unexplained, let alone resolved."

Going down to line 44, again this is Dr. Robinson being quoted to herself:

> "Piecemeal reconstruction of particular developments is perhaps a tedious route to scholarly enlightenment, but eventually leads to more easily substantiated and probably more appropriate hypotheses."

And upon obtaining her agreement with that statement at the time of giving her evidence, Mr. Grant went on to ask her:

> "And it's in keeping with the works of scholars who stress that the anaylsis of cultural

1 processes is not always amenable to rigid
2 theoretical treatment because historical
3 records may yet yield unanticipated yet
4 illuminating data."
5
6 Again again she indicated that she agreed with
7 that statement, that it was applicable to the study of
8 the proto-historic, pre-historic and historic periods.
9 Again, my lord, we say that's precisely where Dr.
10 Robinson fell off the boat in rendering her opinion
11 for this case, because she was no longer persuaded
12 that piecemeal reconstruction of particular
13 developments was important, the grand theoretical
14 scheme overtook the facts and proceeded not only in
15 ignorance of the facts in some cases, but in direct
16 opposition to them.
17 Now, one of the critical facts that Dr. Robinson
18 apparently relied upon in coming to her judgments
19 about the impact of European influence in general and
20 the European fur trade in particular, was her note of
21 the fact that there were European goods coming inland
22 from the coast in the 1790s. That's set out in the
23 second full paragraph on page 59. And the reference
24 is given.
25 Now, in my submission, my lord, she should have
26 been very interested in the indications in Harmon, in
27 the period 1810 to 1812, in Brown in 1822, and
28 McGillivray in 1833, that European goods were
29 relatively scarce. And I simply refer back to my
30 argument from Friday, pages 45 through 49, that deals
31 with the question of the relative scarcity of European
32 goods.
33 THE COURT: What pages, please?
34 MR. ADAMS: 45 through 49, my lord.
35 Now, the thrust of Professor Ray's evidence of a
36 pre-contact, fully articulated feast system with house
37 territories and family heads, and the reference that's
38 missing there for the quotation should be pages seven
39 and eight above. Dr. Robinson simply --
40 THE COURT: Sorry, seven and eight of the argument?
41 MR. ADAMS: Of the argument, yes, that's correct.
42 Dr. Robinson dismissed that as a proto-contact
43 Europeanized social phenomenon, so if the problem from
44 her point of view with the records wasn't that they
45 didn't say anything, that is that they were virtually
46 mute, it didn't matter what they said because that
47 society had been created in a flash by the fur trade

anyway.

And then beginning on page 60, I go to another section that documents to some extent, the selectivity with which Dr. Robinson chose to use or not use data from the immediate area and from the more general north coast and interior region. And our submissions are set out there, that where it was convenient and fit with her thesis, she used data from wherever she could find it and where it didn't she distinguished it on the basis that it wasn't applicable to that area. And there is an example discussed at the bottom of page 60, going on over to page 61, where it's clear in the highlighted portions that she was being exposed to information, for instance, that quoted from Darling, that there war no evidence that patterns of land use and land ownership were altered by post-contact developments. And further in the next highlighted passage, there was a remarkable conservativism in maintaining traditional boundaries and concepts of territorial perogatives, despite considerable interference from the Europeans. There was some discussion about whether she was reporting or adopting those statements and then her own statements quoted, towards the bottom of 61, was that:

> "Highly developed patterns of territorial ownership, as well as the emphasis on riverine resources thus impeded the expansion or extension of agricultural organizations, both pre-historically and in the early historic period."

And then another passage, on to 62 that's highlighted was put to her, this was from her thesis, and this is Dr. Robinson herself writing:

> "Land and waterways containing culturally valued natural resources were owned by house groups and clan divisions. Procedures for securing rights to these resource areas, as well as for protecting them against trespass were commonly recognized and reinforced in various institutionalized ways. These concepts of property rights and ownership provided interacting groups with with the basis for dealing peacefully and competitively with the

1 uneven distribution of natural resources."
2 And then in the next highlighted passage she goes
3 on:
4
5 "Operating in conjunction with these rules or
6 resource ownership to provide social groups
7 with relatively secure access to basic
8 resources were elaborate exchange
9 institutions..."
10
11
12 Now, my lord, the evidence ground to a halt on that
13 point because Dr. Robinson wasn't satisfied that the
14 footnote to that passage referred to anyone in
15 particular, and she expressed at least one possibility
16 that it was confined to the Tlingit and in fact and
17 the references given at the bottom of 62, it was
18 Professor Duff speaking in general about B. C.
19 Indians.
20 And I might say, my lord, it sounds strikingly like
21 the evidence that you heard on Friday coming out of
22 Brown, that passage that Dr. Robinson wrote as part of
23 her dissertation could be applied, with very little
24 change, to the societies you heard about in the early
25 years of the 19th century.
26 But -- and we make this point on page 63, that in
27 this case Dr. Robinson didn't want to apply that
28 general statement to the Gitksan and Wet'suwet'en.
29 And the closest she came, in my submission, to giving
30 a reason for that was simply to assert that their
31 societies weren't that complicated.
32 Now, there is a further example given at the bottom
33 of page 63 and going on to 64, when Dr. Robinson was
34 faced with analyzing the details of the Gitksan and
35 Wet'suwet'en societies in their environment, she
36 preferred to stress general regionality and broader
37 themes. Then there is a passage set out from her
38 cross-examination. And what she was asked was:
39
40 "If you have data on the subject community that
41 you are studying, or the society in its
42 relation to the environment, that data you
43 would certainly look to in developing your
44 theory about that society."
45
46 Now that sounds too obvious for words my lord, but
47 the answer is "not necessarily."

1 That brings me in the next section beginning on
2 page 64, of the particular issue of the impact of the
3 fur trade and that's something covered out of the
4 Hudson's Bay records on Friday and something that I
5 will try to bring a variety of other evidence to bear
6 on today.
7 Now, it was clear that Dr. Robinson was not by any
8 means a specialist on the Gitksan and Wet'suwet'en,
9 not second hand through secondary sources and not by
10 ever having done any field work anywhere with anyone.
11 That put her in the position of having to rely heavily
12 upon the assumptions and conclusions of other
13 scholars. But even there we say she was highly
14 selective and the centre piece, as far as her reliance
15 upon another scholar, was Kobrinsky, and to a lesser
16 degree, Charles Bishop. And it was upon Kobrinsky she
17 relied for the proposition set out on page 65, and
18 particularly on the last few lines of the quote where
19 she says:
20
21 "Kobrinsky asserts that precise delineation of
22 territorial boundaries relating to the
23 allocation of rights to fine-fur species was a
24 by-product of the fur trade."
25
26 She went on to testify in chief, and the reference
27 there should be corrected to read page 21643 to 21644,
28 that she relied upon Kobrinsky for the proposition
29 that the territorial concepts, as well as the
30 matrilineal House and clan structure of the
31 Wet'suwet'en and other neighbours were generated by
32 the fur trade and by the peoples desire and
33 opportunity to control access to a market commodity -
34 fine furs.
35 And then there is a reference to Bishop and then
36 going on to page 66, Dr. Robinson did in this
37 instance, refers ot the Hudson's Bay journals, looking
38 there for a connection between the beaver and
39 individual ownership and suggesting, in essence, that
40 it was the value of the beaver for the fur trade that
41 was creating an interest in conserving beaver and
42 therefore creating an interest in territoriality.
43 Professor Ray had already addressed that question that
44 there was a connection evident between conservation
45 between of fur bearers and market value. Because the
46 indication that Professor Ray found in the record was
47 that the territoriality applied to, for example,

1 marten, might not have been of the same order as that
2 applied to beaver and he pointed out that marten had a
3 higher relative value. So that those things couldn't
4 sit squarely together.
5 MR. WILLMS: Sorry, my lord, if my friend could give me a
6 reference to where Dr. Ray said there was any
7 territoriality about marten I would be -- I would
8 appreciate that. I don't recall that from any of Dr.
9 Ray's evidence about marten territoriality.
10 THE COURT: I wonder if it came from someone else?
11 MR. WILLMS: Wherever it came from, I would be delighted to have
12 the reference.
13 THE COURT: I don't remember it at all, but there may have been
14 such a reference.
15 MR. ADAMS: I will pursue it and supply it if I can, to suit my
16 friend.
17 The point, my lord, would stand if there was no
18 reference whatsoever to marten territoriality it would
19 be the strongest if there was none, because the fact
20 would be that you would have territoriality with
21 respect to one animal and no territoriality with
22 respect to another, with a higher value. So it
23 couldn't very well be its value to the fur trade that
24 was creating the territoriality. That's the point
25 here.
26 And then on the bottom of page 66, Professor Ray
27 had taken up another of Dr. Robinson's contentions,
28 that is, that depletion as a consequence of the fur
29 trade is somehow instrumental in the creation of these
30 boundaries. And in the second half of the quote on
31 page 67, Professor Ray says:
32
33 "Now, if you're going to argue depletion and
34 draw parallels to the eastern fur trade,
35 depletion usually spreads out from the initial
36 area of access. So you would expect the most
37 depleted area to be the closest to the coast.
38 It isn't. So I think that's another problem
39 with the thesis."
40
41
42 Now I am go on in the middle of page 67 to say that
43 Professor Ray found in the Hudson's Bay records of the
44 1820s, two additional reasons for conservation and
45 territoriality independent of the European fur trade
46 and the first of those was the relative scarcity of
47 game in the region, generally; and the second was the

1 importance of beaver for feasting. And in the
2 highlighted passage at the bottom of page 67, he says:
3
4 "Regarding the husbanding of this resource, it
5 should be pointed out that the main concern of
6 the Babine and Wet-suwet'en 'nobles' was not in
7 securing the pelts for exchange. Beaver
8 conservation was practised to make sure that
9 adequate supplies of beaver meat would be
10 available for feasting. At least among the
11 Carrier groups the fur trade merely provided an
12 additional incentive for conserving this
13 resource, a resource that was not naturally
14 abundant when compared to the fur-producing
15 regions to the eastward. Without careful
16 management, depletion through overharvesting
17 would have taken place."
18
19 The implication, my lord, is that the feasting was
20 going on before the fur trade came and that that was a
21 reason before the fur trade got there to be operating
22 territories.
23 THE COURT: This is Dr. Ray, is it, giving this evidence at the
24 bottom of page 67?
25 MR. ADAMS: Yes, and I notice now that I get to it that the
26 volume number is omitted. It will be in his direct
27 evidence. I will find the volume number and put it in
28 this version of this.
29 THE COURT: I don't -- it was only last Friday but I don't
30 recall Dr. Ray having said that or having pointed to
31 references in the notes to conserving beaver. Is
32 there a reference to that in Brown's notes?
33 MR. ADAMS: There were references in both Brown and Harmon, yes.
34 THE COURT: If they are, that's fine. I think I remember
35 references to feasting but don't remember concerns at
36 that time. Didn't have an Earth Day then, whether
37 they were concerned about conservation for feasting.
38 I don't think they had an Earth Day then. There is no
39 evidence about it though so I shouldn't make that
40 assumption.
41 MR. ADAMS: There is a quotation from Brown on page ten of the
42 argument, where Brown says:
43
44 "Certain tracts of country which they claim an
45 exclusive right to and will not allow any other
46 person to hunt upon them. This, though an
47 excellent regulation for preserving the beaver

1 is very detrimental to the trade."
2
3 But there are further references to the feasting.
4 THE COURT: There are references to feasting but you seem to
5 have added another dimension to the equation.
6 MR. ADAMS: Well, the argument, my lord, is that the importance
7 of the beaver for feasting is another reason that
8 suggests that conservation would be important when you
9 have an animal that's important for the purpose of
10 feasting and you have it relatively scarce in the
11 area, the suggestion is that that's a substitute for
12 the suggestion that it's depletion through the fur
13 trade and the market value of the pelt that is driving
14 people towards maintaining territories. And, of
15 course, the fur trade, the market value of the pelt
16 was a recent arrival. Our submission is that the
17 relative scarcity and the importance for feasting were
18 not recent arrivals at all, and that speaks to the
19 antiquity of the territory.
20 Now, the passage that I just quoted from on the top
21 of page 68 is with respect to the Carrier in general
22 and the Wet'suwet'en in particular. In this written
23 argument above at pages 19 to 21 there is a discussion
24 that we went through on Friday about the evidence
25 bearing on the importance of beaver to the Gitksan.
26 And I simply say that that would make the same
27 conversations apply to the Gitksan.
28 Now one of the passage from Brown which Professor
29 Ray relied on in this connections is set out and
30 supplemented at at the bottom of page 68. And there
31 he says:
32
33 "The country being parcelled amongst certain
34 families to whom it descends by inheritance,
35 and the portions of many it may be supposed
36 being but poorly stocked with Beaver they can
37 therefore kill but a few - anda number who have
38 no land stake and are not permitted to hunt
39 that animal on those belonging to others..."
40
41
42 And in the next highlighted passage:
43
44 "Beaver, independent of the benefit they claim
45 from the skin, they will always endeavour to
46 kill, it being a favourite article of food and
47 in places, where large animals cannot be fourn,

1 are indespensible for the purpose of
2 celebrating their feasts in commemoration of
3 their departed friends."
4
5 Just to pick out one point of that passage, my
6 lord, the first highlighted passagae referred to
7 "certain families" holding parcels of the country, Dr.
8 Robinson had said in her examination in chief -- and
9 the reference is volume 289, 21646 at lines 37 and
10 38 -- that the territories were associated only with
11 individuals. And I would say that this passage
12 doesn't support that notion. And further in that
13 connection, Mr. Brown, in Exhibit 964-12 at page six,
14 which is quoted at page ten of the argument, refers to
15 the Wet'suwet'en heads of families and possessors of
16 lands. We say those two passages bear on the question
17 of whether you're seeing individual ownership or
18 whether you're seeing a house group as the unit of
19 ownership.
20 Now, at the bottom of page 68, Dr. Robinson adopted
21 Kobrinsky's hypothesis that territoriality was
22 engendered by the need to husband beaver for the
23 European fur trade. But according to Dyen and Aberle,
24 the concentration of abundant resources with clearly
25 defined ownership and exclusive claims, is common to
26 much of the northern Athapaskan region, and was a
27 central feature of proto-Athapaskan culture. And
28 coming in the third section of this argument to a more
29 detailed discussion of Dyen and Aberle in those
30 questions, beginning at the bottom of page 69, there
31 is a passage set out from Dr. Mills' evidence and she
32 compared a corporate, unilineal descent form of social
33 organization, with its abundant, concentrated salmon
34 resource, to the smaller, less structured bilateral
35 band form of organization.
36 And the suggestion in the defendant province's
37 argument is that this bilateral band society was
38 characteristic of the Wet'suwet'en until the fur trade
39 got there and transformed everything.
40 And Dr. Mills said in the passage set out beginning
41 the bottom of page 69:
42
43 "When you have a population that's larger, you
44 have matrilineality - either patrilineality or
45 matrilineality occurring and when you have
46 smaller populations, people organize themselves
47 as bilateral bands and you tend to have small

1 populations when people are nomadic hunter-
2 gatherers without a stable resource such as the
3 salmon. And when you have the salmon the
4 population can be larger and you tend to
5 proximate the kind of social organization that
6 usually typifies an agricultural society."
7
8 Your lordship will recall that the indications are
9 in Brown that he was dealing with sizeable populations
10 among the Gitksan and Wet'suwet'en.
11 THE COURT: What do you understand as a bilateral band?
12 MR. ADAMS: Where there is inheritance that's both matrilineal
13 and patrilineal. You inherit rights on both sides.
14 Then carrying on --
15 THE COURT: You don't suggest this is a -- that these are
16 bilateral bands then, the Wet'suwet'en or the Gitksan?
17 MR. ADAMS: No, they are distinctly not. They are matrilineal
18 societies and they are to be contrasted with the
19 bilateral bands.
20 THE COURT: That's pretty general, isn't it?
21 MR. ADAMS: It comes up and becomes important, my lord, because
22 the foundation of the Kobrinsky style hypothesis is
23 that you have these bands, these bilateral bands,
24 these relatively simple societies, that are sitting
25 there in the interior until the fur trade comes, until
26 the coastal influence comes. That's raised, as I
27 understand it, to challenge the idea that the
28 societies that have been presented to you through the
29 plaintiffs' evidence, including the evidence from
30 Brown, had been there in that form for a long time.
31 This is dealt with in somewhat more detail in the next
32 few pages.
33 On page 70 is set out the substance of Dr. Mills's
34 critique of Kobrinsky, for choosing as the model of
35 the "quintessential Athapaskan society", the bilateral
36 bands found to the east of the Rockies. And it's
37 recorded there that Dr. Mills was familiar, through
38 extensive field work, with both the Wet'suwet'en and
39 the beaver on the east side of the Rockies so was in a
40 good position to compare those two societies. And on
41 the basis of that experience, she came to a conclusion
42 that was similar to that of Dyen and Aberle about the
43 matrilineal nature of the early Babine and
44 Wet'suwet'en.
45 Dr. Mills said that her assessment was influenced
46 by the fact that the Babine-Wet'suwet'en are and were
47 organized in such a way as effectively to control and

husband an abundant and seasonally concentrated resource, namely the salmon. She referred to the archealogical records and said that a model of a loosely organized bilateral band is at odds with organizational patterns of other salmon oriented societies in the area. She noted that these pre-existing conditions were not assessed by Kobrinsky, therefore she was of the opinion he erroneously classified the Babine and Wet'suwet'en as having a bilateral band social organization prior to the fur trade. Her view of it, and the one the plaintiffs adopt, is set out in the middle of the question on page 71:

> "It seems to me that all the evidence is that these people were matrilineal long before contact. They had all the earmarks of being matrilineal; they have matrilineal clans in place; they have the salmon resource which is a concomitant of having matrilineal clans.

Then there is a passage set out from Mr. Brody's evidence, a portion of which I already referred to on Friday, where it was being suggested to him that the Wet'suwet'en had adopted a system of territories in response to the fur trade and he had said, and this is in the quotation at the top of 72:

> "There is nowhere in the anthropological world where there is something like a feast system without territoriality. So if territory is in place inside the feast system in the early 19th Century, then I imagine it's been in place for a very long time."

And continuing on 72, Mr. Brody compared that situation with the one that was being posited to him that the pursuit of fur for the European trade and the new iron tool technology created subdivision in the hunting territories, that that hypothesis was inapplicable to a wide range of societies across northern Canada with which Mr. Brody was familiar from direct experience. There is just two passages on page 73 that I draw to your lordship's attention. He said, about a fifth of the way done 73:

1 "There are many cultures in northern Canada
2 where the fur trade does not produce this
3 subdivision, this territoriality, and this
4 leads me to believe that insofar as the fur
5 trade with whites is associated with
6 territoriality, the territoriality is already
7 there and what it may done may have done is
8 intensify it. But its pre-existence seems the
9 most plausible way of seeing the historical
10 number flow of circumstances."
11
12 That reference, my lord, to intensification,
13 raises a point that I want to stress, and that is the
14 plaintiffs' argument here is not that there is no
15 influence, that nothing happens when the fur trade
16 comes and nothing happens when white people arrive.
17 That is clearly not so. The question is, what were
18 the basic features of the society in place already and
19 to what extent and in what forms did they persist?
20 And the primary I argument here is that the basic
21 territoriality, feasting, chieftianship, trading
22 activities of the Gitksan and Wet'suwet'en were, on
23 the documentary evidence and the other evidence, in
24 place for a long time before the fur trade arrived
25 and were not in any way created by it.
26 Now, carrying on with the quotation from Mr. Brody
27 towards the bottom of page 73, he says:
28
29 "If you look at the arrival at the fur trade,
30 that is the white fur trade, in societies in
31 northern Canada, you see that they can be there
32 for a long period of time, involve people in
33 trading relations, people using steel traps,
34 exchanging their furs for other goods and then
35 later in the history for money, and yet not
36 develop a preoccupation with territoriality."
37
38
39 And going on to page 74, Professor Ray in turn gave
40 evidence about the question of fur trade
41 territoriality in the eastern sub-arctic. And what he
42 was doing, and this is set out towards the bottom of
43 74, is stressing that contrary to the global
44 theoretical approach exemplified by Kobrinsky and Dr.
45 Robinson, that it was of vital importance to
46 understand the specific ecological, economic and
47 historical conditions in each region before setting

1 off to generalize between cultures between points in
2 history and between regions. And we say, again, and
3 this is set out at the bottom of page 75, that
4 Professor Ray, with his view of the importance of that
5 kind of detailed information, relied heavily on the
6 most precise information he could find, and that was
7 the Brown records. And, again, these were reports
8 from somebody who had every reason to pay attention to
9 certain features of these societies and these
10 economies and also had reason to pay attention to what
11 animals were there, what plants were there, what the
12 climate was like, what the soil was like, what the
13 topography was like, as well as what the Indian
14 economies and societies were like. And we say again
15 that a cultural geographer, as Dr. Robinson was
16 described, it's amazing that such a scholar could
17 ignore that material and say that that record is
18 virtually mute, because it only takes flipping through
19 the Brown records and seeing the headings that were
20 being addressed, for instance in the district reports,
21 to see that their whole focus is on the very stuff of
22 the field of cultural geography, it's about the people
23 and it's about the land and it's about the connection
24 between the two.
25 On page 76, we go on to refer to the fact that one
26 of the legs of Dr. Robinson's argument was the
27 ethnohistorian Charles Bishop, and she relied on an
28 article written or published by Bishop in 1983 as
29 corroborative of her position, and it was put to her
30 in her cross-examination that Bishop had, to some
31 extent, modified his views and it came out in her
32 cross-examination that that was unknown to her.
33 And the important aspects in which Bishop had
34 modified his views and accepted a challenge to his own
35 assumptions are set out in the passages quoted from
36 the cross-examination, and this in turn quoting
37 Bishop, where he says:
38
39 "It would seem that the Carrier of the Fraser
40 River possessed a rank system by 1793 and for
41 perhaps for at least a decade before this.
42 While the introduction of the European fur
43 trade augmented coast-interior trade relations,
44 it also seems clear that these relationships
45 were built on prehistoric ones.
46 Thus, it is possible that some Carrier,
47 especially the Babines and Bulkley River

groups, possessed a well developed rank system and the potlatch through their association with the coast, even before the first Europeans plied the Northwest Coast waters."

THE COURT: What do you think the reference to 1793 is?
MR. ADAMS: That's to Alexander Mackenzie's presence, as far as I understand it, my lord.
THE COURT: All right.
MR. ADAMS: And then going on to 77, there is a further passage from Bishop quoted in Dr. Robinson's cross-examination. He had previously assumed that social ranking among the Carrier was a product of the fur trade but acknowledged in 1987 the possibility that ranking was in place in pre-historic times and ranking, my lord, has implications for the presence of chieftianship. And he says in the quotation on 77:

"I have assumed that the pre-historic Carrier were egalitarian and that ranking emerged as a result of protohistoric trade dynamics between coastal and Carrier peoples. However, this is an issue that must be explored by archaeologists and possibly by ethnohsitorians utilizing some very early (and as yet unknown) records from, say Russian sources.

It must be noted, despite my earlier position on the egalitarian status of the Carrier, that evidence from the Bulkley River and Babine Lake region indicates possible prehistoric ranking."

My lord, we say that goes to call into question the supposition that is underneath every one of the people upon whom Dr. Robinson arrives that this is exclusively a matter of influence coming from the coast and especially a matter of influence as a consequence of the fur trade.
THE COURT: What evidence do you think he is referring to there on the Bulkley River and Babine Lake region?
MR. ADAMS: He is, among other things, referring to some of the Hudson's Bay materials.
THE COURT: You think he is?
MR. ADAMS: I know he is. It's cited in his article. The exhibit reference is there, 1191A-46, and I think, my lord, if you look at his footnote you will see

extensive reference to the Hudson's Bay material.
THE COURT: He hasn't treated it as conclusively as you suggest.
MR. ADAMS: Sorry?
THE COURT: He hasn't treated the Hudson's Bay material as conclusively as you have suggested.
MR. ADAMS: I think that's fair to say of his 1987 article, that's so.
THE COURT: Does he say why?
MR. ADAMS: He doesn't. He covers some of the same ground as Professor Ray.
THE COURT: All right. Thank you.
MR. ADAMS: Now I say at bottom of page 77, first of all, it is clear from Dr. Robinson's cross-examination that she was unaware of Bishop's 1987 article and all that she was able to say in her re-examination to deal with it was that she didn't think it disagreed with her basic interpretations. And the reference to that is volume 295, page 22262 at lines 32 to 36.

And the reference for her agreement that she didn't know about the changes in Bishop's views is at volume 294, page 22216, line --
THE COURT: 22216?
MR. ADAMS: That is correct, my lord, line 5 to 22218, line 1.

At the bottom of page 77 I go on to say that to a large extent Dr. Robinson's argument rests on the words of Kobrinsky and the ethnographers such as Morice, Jenness, Goldman and Steward, who shared the assumption that features of the coastal cultures diffused inland, especially during the fur trade. And there is a passage set out in Kobrinsky simply to indicate where he stands in that scheme of writers.

And in the middle of page 78, Dr. Mills gave evidence that those writers did subscribe to the theory of coastal diffusion of culture, but her point was that today we have more information with which to assess that theory.

At the bottom of page 78 there is a reference to Dr. Kari's linguistic evidence that 12 of the 13 Wet'suwet'en House names are Athapaskan in origin and 13 appear to have a Gitksan root. As for the clan names, Tsayu clan is an old Athapaskan word beaver, Gelts'eexyu is Athapaskan,Gidemt'een, laxseelyu and Laxsamshyu are blends of both Gitksan and Wet'suwet'en words construction. And the point there, my lord, is that the suggestion in Morice and his followers was that this whole complex, including the words for the clans, had been borrowed by the Wet'suwet'en from the

Gitksan. And we say Dr. Kari's evidence tends to indicate that that's not how it worked.

Then there is reference, beginning on page 79, to another of Kobrinsky's points that some of the Bulkley River Carrier, that is the Wet'suwet'en, were using titles and crests of Tsimshian derivation without knowing what he called their origin or real significance. In the passage from Dr. Mills' evidence, set out in the middle of 79, first of all she said that wasn't entirely true because:

> "...the kungax do give some origins of Wet'suwet'en clans, Houses, chiefly names etc."

But she goes on to suggest that the absence of an account for a title or a crest might just as well be evidence of its antiquity as of its recency. And that's spoken to in the second quotation on page '79.

Now, the combination, now at the bottom of 79 and going over to 80, the combination in Kobrinsky about a recent adoption of coastal ceremonial life by the Babine and Wet'suwet'en, and the house and clan structure and land ownership being a response to the fur trade, are dependent on a further assumption and that is that prior to the fur trade there was no significant interaction between the Babine and Wet'suwet'en, the Gitksan and their coastal neighbours. And we simply say that the oral and documentary, the archeological evidence, the linguistic evidence clearly indicates that that assumption is not correct.

THE COURT: I am not following you, Mr. Adams, about why Kobrinsky's theory depends in any way upon the absence of interaction with the Gitksan.

MR. ADAMS: Because the feast being territorial chiefly titles complex was supposed by him to have been borrowed from the Gitksan to the Wet'suwet'en and other Carrier.

THE COURT: Why couldn't it have been borrowed at an earlier time?

MR. ADAMS: It could have been borrowed at an earlier time, there could have been borrowing in both directions. The fact is, if it was borrowed at an earlier time, it wasn't the fur trade that was driving the borrowing. There is evidence that I will come to that suggests, and that is linguistic evidence, that suggests that the borrowing was much more mixed and in many different directions than that unilinear hypothesis

that the fur trade stretches inland and then gradually tapers off as you go east.

Now, Dr. Mills also gave evidence about Kobrinsky's confusion as to the connection between the Babine and Wet'suwet'en concepts of locality and their concepts of territorial and ceremonial rights expressed in terms of houses and clans.

And in the passage set out at the bottom of page 80, she was asked to explain what Kobrinsky is talking about when he talks about septs, S-E-P-T-S, and she says in the quotation:

> "Kobrinsky uses that terms which he got from Morice, to refer to divisions of the territory among the Wet'suwet'en, and he thought that these were referring to band level divisions - he, Kobrinsky, not Morice. Morice didn't make that mistake. But Kobrinsky felt that the septs, or these territories, were referring to band level organization."

And Mr. Rush asked what her view was on that and she said:

> "My view on that is that these territories are the property of the houses. The Wet'suwet'en make that very clear; there is no reason to presume that any other way - that it worked any other way. Kobrinsky, I think, arrives at this conclusion because a title for a people in a particular area has this Wet'suwet'en word 'wuten', people of this area. It does not mean that it is not a matriline; it doesn't mean it's not a house group."

And that's an example, in my submission, my lord, of where somebody in Dr. Mills's position, with a detailed knowledge of the society from direct personal field work, is in a position to make judgments like that of people like Kobrinsky and of people like Dr. Robinson who rely on them and have to rely on them blindly, because they haven't done that work.

Now, in conclusion to this section, I say on the bottom of page 81, that Professor Ray's opinion that the the territorial, feasting and trading societies documented by Brown, had been if place for a considerable time and were not the product of the fur

trade, was grounded on his part in a wide knowledge of fur trade in Canada and a close reading of earliest available pertaining directly to the plaintiffs' territories. And we go on to say that Dr. Robinson, by contrast, stood at the shaky apex of the pyramid of speculative assumptions about both the unidirectional cultural influence in the coastal interior and about the impact of the fur trade on Indian societies in general. Our submission is that on the grounds of Professor Ray's superior qualifications and experience and the cogency of his opinion based on the best available factual records, Professor Ray's opinion is the one which the court should adopt.

And this brings me to the final section of this argument which is attempt to deal in briefest summary with the linguistic evidence which was adduced in the form of extracts from Dyen and Aberle. And we say that out of that evidence there is a further reason to reject the assumptions which are at the heart of the province's argument on the nature of pre-contact Gitksan and Wet'suwet'en societies, that territoriality, matrilineality, feasting and the political authority of hereditary chiefs are recent borrowings from the coast, and also products from the European fur trade, you have heard about the oral histories and anything you have heard about from the Hudson's Bay documents.

Now, what Dyen and Aberle did, in very short form, was to take a large linguisticly-related group of societies, that is the Athapaskans, and to assemble a lexicon of their kinship terms. And when they had constructed the lexicon they asked themselves from what original form of this language would it take the fewest changes in order to produce all the daughter languages that we now see. And the version from which the fewest changes were required to account for all the existing forms, they called proto-Athapaskan. They said that was the original language of that whole group of people. And that group of people now exists all the way from Alaska down into the central southern United States.

The picture that Dyen and Aberle draw of the movement of these people and this language, and of the complex of institutions that we have been discussing for the last couple of days, territoriality, feasting, matriliniality,, that the origin of that society was in a homeland in Alaska. The picture Dyen and Aberle

draw is of people moving out of that homeland east and south until the occupied the areas that they occupy today. And both geographically and linguistically, the Wet'suwet'en were close to that proto-system, the parent system in Alaska. They were close geographically in the sense that the Bulkley Valley is closer to Alaska than, for instance, the people who made it down into the states. They were closer linguistically in that their language made fewer of the changes from the proto-system than many other variants.

And so there was some reason to believe, in the opinion of Dyen and Aberle, that the shape of the Wet'suwet'en society was nearer the original than, for instance, some of the Carrier people east of the Rockies. And the further consequence of that would be that rather than those features of the society such as matriliniality, territoriality, feasting, chieftianship, being coastal borrowings, they may well have been features of that original Athapaskan culture.

MR. WILLMS: Could my friend give a page reference for that conclusion of Dyen and Aberle? I have looked for it, I have searched but I haven't found it in Dyen and Aberle.

MR. ADAMS: My lord, I will have to look for a page reference. I am doing my best to summarize these very complicated concepts, but I think faithfully.

I think the place to look for is it in page 86 of my argument. I will just go there, if I can deal with this now. The middle of page 86 Dyen and Aberle are quoted as summarizing and then criticizing Morice's reasoning, and they say that his reasoning was that -- this is number 2 on page 86:

> "The 'main body' of the Athapaskans, i.e., the more easterly Athapaskans of the north, lacks a series of institutions, which include matrilineality, matrilineal descent groups with totems, rank, ownership of hunting territories by individuals of high rank or by others, potlatching, etc."

And then over the page, well, actually the very bottom of page 86, Dyen and Aberle, in critiquing that concept say:

1 "The institutions in question are either
2 innovations among the westerly Athapaskans, who
3 borrowed them from the coast, or retentions.
4 And if they are retentions, then the lack of
5 these institutions among the easterly tribes
6 can be regarded as instances of
7 simplification."
8
9
10 That's th passage I rely on for that conception.
11 Now, included in the passage discussing Morice that
12 I just quoted from, my lord, and I am now back on the
13 bottom of page 83, that that proto-typical
14 reconstruction, the use of the kinship terms to try to
15 figure out in what direction the society had moved and
16 what features of the society were original as opposed
17 to acquired or lost, they contrasted with the approach
18 that those, beginning with Morice, had used which they
19 called archetypical reconstruction. And they
20 criticized it as insupportable. And the specification
21 of what's meant by archetypical reconstruction is set
22 out at the top of page 84 as being the instance of
23 kinship, drawing inferences about the earlier kinship
24 terms, as manifesting the retention of features lost
25 in other units, that somebody who is taking that
26 approach, drawing the inferences by simply arbitrarily
27 selecting one version of the society, that they are
28 carrying on reconstruction based on an archetype and
29 their criticism of that reconstruction is not the
30 choice of the unit, the lack of a sound basis for
31 deciding which of the traits of the archetype are
32 retentions and which are modifications.
33 And there is a further difficulty, my lord, that's
34 not referred to there in the argument and that is that
35 Dyen and Aberle are also, in effect, criticizing the
36 assumption that you only go in one direction in the
37 development of the society from simple to complex.
38 Their suggestion is that the societal features of the
39 proto-Athapaskan form, that some of those features
40 might have been lost as those people moved into areas
41 where the resources couldn't sustain the kind of
42 society that had been present in their Alaskan
43 homeland. And so, for instance, there was -- the
44 suggestion that although the Sekani had attempted to
45 adopt feasting, that the area they were based in and
46 the nature of the resources they were using simply
47 couldn't sustain that, they weren't a salmon-based

economy, they were much closer to the band society that was the basis for Kobrinsky's hypothesis.

And, of course, the Wet'suwet'en based on the rivers, based on the salmon, were that sort of society that was capable of retaining those features of the parent society.

Now, beginning on the middle of page 84, there is set out an account of Dyen and Aberle's critique of Morice, Jenness, Goldman and Steward, all essential underpinnings for Kobrinsky's hypothesis and Dr. Robinson's opinion. And there we say none of these writers has stopped to decide the basis upon which he will distinguish which traits of his archetype are ancient and which are modifications.

And then beginning at the top of page 85, we say the archetypical reconstruction of old Athapaskan society is for Robinson, Kobrinsky, Morice and Jenness, Goldman and Steward, one based upon bilateral band social organization possessing no clearly defined territoriality, no husbanding of resources, no potlatching or feasts and sparse population density. In a word, a model closely resembling some of the Athapaskan hunting bands east of the Rocky Mountains.

Then there is reference to the Alkatcho-Carrier as being the archetype, with the suggestion that that's what these societies looked like originally and it's only as they borrowed from their coastal neighbours and only as they were influenced by the European fur trade this they took on the features of territoriality, feasting, chieftianship, rank and so on.

And we have set out in detail on pages 86 and following, the substance of the Dyen and Aberle critique, first of Morice then of Goldman, and in particular Goldman, which is on page 89.

And at the bottom of page 87 in the last portion of the quotation, this is from Dyen and Aberle, they acknowledge the fact that the westerly Athapaskans shared these institutions and again they are talking about matrilineality, matrilineal descent groups with totems, rank, ownership of hunting territories by individuals of high rank or by others and potlatching.

Then they say:

> "The hypothesis that at least some of these institutions form part of a common cultural substratum shared by the several speech

1 communities ancestral to the Athapaskans and
2 coastal tribes would account for some of the
3 similarities between Athapaskan and coastal
4 tribes, at least as satisfactorily as the
5 hypothesis of borrowing by each Athapaskan
6 tribe adjacent to the coast."
7
8 And it's in that hyposthesis, my lord, that Dyen
9 and Aberle are challenged as to the string of
10 assumptions beginning with Morice that the borrowing
11 was all from the coast to the interior from the
12 Tsimshian to the Carrier.
13 And at top of page 88, there is a further
14 explanation of what it is that Dyen and Aberle
15 envisioned happening. It says they postulate a
16 Proto-Athapaskan homeland in Alaska, and suggest that
17 it is logical that the proto-Athapaskans would first
18 occupy the richer areas, with renewable, controllable
19 salmon resources occur before moving further afield to
20 more sparse environments.
21 And it goes on in the quotation:
22
23 "Our discussion of the Alaskan homeland of the
24 PA, proto-Athapaskan, speech community,
25 indicates that there is no reason to regard the
26 easterly Athapaskans of Canada as archetypical,
27 since they live in an environment distinctly
28 inferior to that found in Alaska. Hence, in
29 spite of the evidence for a specific Carrier
30 borrowings from the Tsimshian, Morice's
31 argument does not make diffusion of
32 matrilineality to the Athapaskans in severalty
33 more likely than retention of matrilineality by
34 the westerly Athapaskans and loss of
35 matrilineality by the easterly tribes."
36
37 And it's that that I am referring to, my lord,
38 when I say that one of the problems with Morice, and
39 those who followed him, was the assumption that you
40 only go in one direction, you only start simple and
41 get complex and that you never go in the other
42 direction.
43 On page 89, the substance of Dyen and Aberle's
44 critique of Goldman is set out, where they say that:
45
46 "Goldman saw Carrier matrilineality as a foreign
47 coastal importation, overlying a bilateral band

organization without cousin marriage, the lack of cross-cousin marriage being a retention (from an archetype band structure). The potlatch, crest system, and phratric system adopted by the Upper Carrier from the Tsimshian impinged on the bilaterally organized Alkatcho Carrier, who developed non-unilineal descent groups rather than matrilineal phratries as a result of Upper Carrier influence."

That's their characterization of Goldman, and they go on to say, towards the bottom of 89:

"There could be no doubt about Tsimshian influence on Upper Carrier and Bella Coola influence on Alkatcho Carrier. Other points are more controversial than that."

And they go on to critique the details of Goldman's, the factual basis for Goldman's opinion. And those are set out in -- on page 90, in points one, two and three, where they first say:

"There is no reason to believe that the westerly Canadian Athapaskans moved to their present location from the east and for the Alaska Athapaskans, there is every reason to believe that they did not."

And point two:

"The Athapaskan homeland was not like the territory of the tribes listed by Goldman, and there is hence no reason to infer that these groups represent the archetype for Athapaskan."

And then carrying on they say:

"Thus there is reason to reject Goldman's 'bilateral band' as the early organizational form for the Carrier as a whole. There is no evidence for a westerly movement of the Carrier; the easterly tribes live under conditions that make them a poor model for Proto-Athapaskan organization; and Goldman's

1 'bilateral band' itself does not fit the
2 organizational forms of a number of easterly
3 groups."
4
5
6 My lord, I think the bolding there is a gremlin in
7 the argumentment, I don't believe that emphasis is in
8 the original.
9 Going on to page 91 and continuing the Dyen and
10 Aberle critique of Goldman it is, however, more likely
11 that the Alkatcho --
12 THE COURT: Where are you now?
13 MR. ADAMS: I am not bolden portion of page 91, my lord:
14
15
16 "It is, however, more likely that the Alkatcho
17 represent a southward and eastward spread from
18 Upper Carrier than a south-eastward relic of an
19 early Carrier migration from the east. Moving
20 into unfavourable territory, or into new
21 relationships, or both, they may have lost an
22 earlier matrilineality. This seems more likely
23 than that they entered the area with the
24 cultural apparatus and social organization of
25 groups like the Slave."
26
27 And there is a reference to a further critique of
28 Steward on the same basis.
29 THE COURT: So at the end they are agreeing with Goldman in that
30 part?
31 MR. ADAMS: They are agreeing with Goldman that there is coastal
32 influence on the Alkatcho, yes. They are disagreeing
33 with the suggestion that what it is that's being
34 influenced is some old archetypal form rather than a
35 simplification of a group that has come down from the
36 north. And the point of all this, for our purposes,
37 my lord, is that we say that simplification, if that's
38 what happened, had not occurred for the Wet'suwet'en,
39 that instead of regarding the Wet'suwet'en as parallel
40 to the Alkatcho, subject to a parallel coastal
41 influence, there is room to believe that there was
42 mutual influence over a very long time.
43 THE COURT: That is, mutual influence both from the eastern
44 and --
45 MR. ADAMS: Between coast and interior and interior and coast.
46 THE COURT: Yes.
47 MR. ADAMS: Now, Dr. Robinson acknowledged in her cross-

1 examination that Dyen and Aberle had performed an
2 exhaustive and extensive treatment of their linguistic
3 information, and that reference is at volume 291, page
4 21852.
5 THE COURT: Where are you now?
6 MR. ADAMS: I am just at Dr. Mills at the bottom of page 91 of
7 my written argument. And the argument as written says
8 that Kobrinsky and Robinson have not challenged the
9 reasoning of Dyen and Aberle, and this is
10 amplification of that point. That is, Dr. Robinson
11 describes their work as exhaustive and extensive
12 treatment of the linguistic information. And the
13 reference was volume 291, page 21852 at lines 38 to
14 43.
15 THE COURT: 21852.
16 MR. ADAMS: And Dr. Robinson also in the course of her cross-
17 examination, acknowledged Aberle's reputation as and
18 Athapaskan ethnologist, and that reference is at
19 volume 290, page 32176 at lines 5 to 15.
20 Then carrying on at the bottom of page 91, Dr.
21 Mills in her evidence in chief was asked if she agreed
22 with the Dyen and Aberle assessment of Steward and she
23 added to her agreement that Steward had looked at the
24 marriage system among the eastern Carrier and reports
25 that there was a lack of cross-cousin marriage which
26 she had expected to find, and it's interesting to note
27 that subsequent work with these same group of people
28 seems to have gathered more complete genealogies and
29 done a more systematic assessment, reports that cross
30 cousin marriage does exist, and that was the work of
31 Douglas Hudson. That was simply a factual attack and
32 the factual underpinnings of Steward's work on page 92
33 in the centre, there is a passage set out from Dr.
34 Daly's re-examination, and he was there addressing the
35 question about this pyramid of people beginning with
36 Morice. And he was asked this, this is the last pair
37 of questions and answers at the bottom of page 92:
38
39 "What I'm asking you is when you look at all of
40 these and when then we have Goldman referring
41 to Morice and all of them interconnected, this
42 list of anthropologists who have this, I think
43 you described this morning as the school of
44 thought, are they all relying on each other,
45 and ultimately on Morice Rees, is that how that
46 flows?"
47

1 And Dr. Daly says:
2
3 "That's the way if looks to me."
4
5
6 Now, the bottom of page 92, again I say that Drs.
7 Robinson, Kobrinsky, Margaret Toby, who was relied on
8 by Dr. Robinson, acknowledged the thoroughness of the
9 study undertaken by Dyen and Aberle. There is a
10 quotation from Toby indicating that deLaguna had come
11 to similar conclusions, that matrilineality may be
12 very ancient among Athapaskans. and yet in the
13 subsequent writings of Kobrinsky, Toby and Dr.
14 Robinson's opinion report, that material was not so
15 much dealt with as just ignored.
16 And the terms in which Toby in particular chose to
17 ignore it are set out in the middle of page 93.
18 I say at the bottom of page 93 that Kobrinsky and
19 Toby, and on their authority, Dr. Robinson, have never
20 sought to challenge the work of Dyen and Aberle and I
21 should say, my lord, that it's apparent from reading
22 Dyen and Aberle they performed a 14 year study of this
23 kinship terminology in order to come to their
24 conclusions, that Kobrinsky, Toby and Dr. Robinson
25 simply ignored because it contravened with facts and
26 with rigorous methodology theory, the very deeply
27 entrenched assumptions of a pre-contact Carrier
28 archetype based on an eastern Athapaskan bilateral
29 band model. They had built into their work the
30 assumption, and it is an assumption, that this
31 bilateral band was subsequently acculturated by the
32 coastal cultures and fur trade influences.
33 THE COURT: Tell me again, what was the conclusion that Dyen and
34 Aberle reached then?
35 MR. ADAMS: Their picture was of a proto-Athapaskan homeland in
36 Alaska, as early as immediately at the end of the last
37 Ice Age and then at the as the ice melted of those
38 people spreading east and south and of being in
39 possession from their origins in that homeland, of a
40 complex of institutions, including matrilineality.
41 MR. WILLMS: My lord, I would like -- the matriliniality my
42 friend does not need to give me the reference for but
43 the complex of institutions, I have asked for the
44 references and I trust my friends will give me that
45 reference from Dyen and Aberle, because I can't find
46 the complex of institutions records.
47 MR. ADAMS: I thought I had already done that. I read to my

1 friend, out of order in my argument, a passage.
2 MR. WILLMS: If that's it, I can deal with that. If that's all,
3 I will deal with that.
4 THE COURT: Do you think it's safe for me to assume that the
5 proto-Athapaskan homeland described by Dyen and Aberle
6 and Alaska is the same concept as Dr. Kari's refugia,
7 which she put in the Southern Yukon, are they talking
8 about the same thing or is this a different theory?
9 MR. ADAMS: It's my understanding that they are talking about
10 the same thing. The refugia was supposed to be an
11 area that was not affected by glaciation and therefore
12 it was possible for people to continue living through
13 the Ice Age.
14 THE COURT: Yes. I am just troubled with the geographic
15 difference between Dyen and Aberle on one hand and
16 Kari on the other. You think they are talking --
17 MR. ADAMS: I don't know what happens if you put them side by
18 side. Probably we could work that out.
19 THE COURT: I don't know either. It may be termilogical or
20 semantical and indeed geographical.
21 All right.
22 MR. ADAMS: Now, on page 94, my lord, and going over to page 95.
23 THE COURT: And the opposite view is said here to spring from
24 Morice?
25 MR. ADAMS: Yes, and there are extensive passages from Father
26 Morice in evidence. And it's evident on reading them
27 that they are simply an assertion that the Carrier, in
28 his conception, are such great innovators and have so
29 few ideas of their own, that they must be the ones
30 that did the copying. That's really the foundation in
31 Morice for this whole pyramid of assumptions.
32 THE COURT: Did Morice talk about bilateral organization?
33 MR. ADAMS: I don't think so. I don't think that at the time
34 Morice was writing that there was any question that
35 the the Wet'suwet'en were, by that time, obviously
36 matrilineal.
37 THE COURT: I am sorry? May I have that again, please?
38 MR. ADAMS: By the time Morice was writing there would have been
39 no question that the Wet'suwet'en, for instance, were
40 matrilineally organized, whether if arose in his
41 consideration and what might have been there earlier,
42 I can't say.
43 THE COURT: But his view was that the spread was westward
44 instead of southeasterly.
45 MR. ADAMS: That's correct.
46 THE COURT: I don't suppose he goes so far as to suggest the
47 origin of this spread?

MR. ADAMS: Well, I think it's clear that he thought it was coming from the coast.
THE COURT: The spread of the culture was from the coast?
MR. ADAMS: Yes.
THE COURT: Where did he think the people came from? Did he postulate the same concept in Alaska or southern Yukon? Seems to me that he suggested or someone suggested that the spread was from the other side of the Rockies.
MR. ADAMS: Yes. And that, my lord, is what Dyen and Aberle were responding to. But I don't recall specifically out of Morice whether he expressed an opinion about where the people were coming from.
THE COURT: But his view was that they became infected with coastal culture?
MR. ADAMS: Yes. One gets the impression from reading him of perhaps 25 years ago there was a notion current that the Japanese were only imitators, that's all they could do, and he appears to have had that kind of picture of the Carrier in general.

On page 94, my lord, we say at the top, most of the adherents to the Kobrinsky hypothesis accept unquestioningly the archetypical model,that is the one begins with a bilateral band that does its borrowing from the coast, without measuring it against the most detailed historical, ethnographic, archaeological and linguistic evidence that is available, and without questioning its methodological assumptions. And we say, my lord, that you have had the benefit of the evidence in those categories, and the benefit of hearing scholars who were in a position to do so, question the methodological assumptions of the hypothesis.

At the bottom of page 94 there is a passage from Dr. Daly's evidence, with reference to deLaguna's assessment of ancient matrilineality in the general gegion and he says that:

> "...she says it's not an either or situation, that all the people came from the -- all the occur culture came from the interior, or the culture came from the coast. There was a movement from the interior toward the coast; there were more than one movement from the coast to the interior, and these can be inferred from the oral traditions."

1 And then your lordship asked him a question, "I
2 suppose you add also the time depth to that when you
3 say what -- the movements didn't all happen at the
4 same time yet there was some cross-culturalization
5 going on at all times?' And Dr. Daly said, "Yes, it's
6 an unusual situation and looking at it globally in the
7 sense that it's part of theworld which hasn't suffered
8 from empire-building and wars and armies for a long
9 period of time, so the time depth could be staggering,
10 and we need a lot more data to have a definitive
11 answer on this question."
12 Now, in conclusion to this section of the argument,
13 my lord, the plaintiffs split that the court should
14 adopt the fruit of Dyen and Aberle's prototypical
15 method of reconstruction, in preference to the
16 logically indefensible archetypical method. And we
17 submit that what Dyen and Aberle tell us is that
18 matrilineality, territoriality, feasting and
19 chieftianship have likely been present among the
20 Athapaskan, including the Wet'suwet'en, for a very
21 long time.
22 Now combining those streams of evidence, that is
23 the documentary evidence from the Hudson's Bay records
24 and the linguistic evidence and the anthropological
25 evidence that I have briefly outlined, the plaintiffs
26 submit that the picture of the Gitksan and
27 Wet'suwet'en organized society at contact as having
28 long established systems of territorial ownership and
29 political authority, that is, ownerwhip and
30 jurisdiction, best accords with the available
31 documentary, linguistic and anthropological evidence,
32 and with the most methodologically sound approaches to
33 assembling and understanding that evidence.
34 Those are my submissions, my lord.
35 THE COURT: Thank you, Mr. Adams. We will take the morning
36 adjournment now. Thank you.
37 (PROCEEDINGS ADJOURNED FOR SHORT RECESS)
38
39 I hereby certify the foregoing to be a true
40 and accurate transcript of the proceedings
41 herein to the best of my skill and ability.
42
43
44
45 Wilf Roy
46 Official Reporter
47

THE REGISTRAR: Order in court.
THE COURT: Could I mention a matter of scheduling, which will put us in a position of knowing what to expect. I think counsel have seen the generous invitation of the Bulkley Valley Bar. I don't know if counsel have a view on that matter, but it seems to me that it should probably be accepted graciously. As it's for Wednesday night, I wonder if it would be convenient if we were to suggest that we have an evening sitting tomorrow night instead of tonight, and on Thursday night. Is that satisfactory to counsel?
MS. MANDELL: Yes, it's convenient.
THE COURT: All right. We will sit, then, if convenient, 'til 5:00 to 5:30 or so the other nights. All right. Thank you. Ms. Mandell.
MS. MANDELL: Thank you. I am just going to introduce the next section. We are going to address you on the issue of ownership, and you have before you volume 5, which is the material which will be referred to. The plaintiffs propose three speakers. Mr. Jackson will begin by introducing the legal framework for the plaintiff ownership. I'll be dealing next with the house, the unit, the land holding unit. Mr. Grant will deal with the boundaries and the significance and importance of clearly defined boundaries to the issue of ownership, and then following I'll resume with the further incidents of ownership which we will be urging upon Your Lordship the rules regarding the succession of territory, the rules regarding the transfer of territories and peace settlements, and the granting of access rights, and finally the validation of the title in the feast. And that's the order that the materials progress through. So with Your Lordship's concurrence I'll introduce Mr. Jackson to begin the first piece.
THE COURT: Yes, thank you.
MR. JACKSON: My lord, you will see on page 1, the first section is given a rather provocative heading. "The 'radical' nature of the claims of the Gitksan and Wet'suwet'en to ownership and jurisdiction". And you will see, my lord, that in using the term "radical", we are not using it in its popular meaning of extreme, but rather in terms of its dictionary definition. And I take this from the Concise Oxford Dictionary, my lord, a much battered Concise Oxford Dictionary, which defines the word as:

"Naturally inherent, essential, fundamental, affecting the foundation of, going to the root."

And in my discussion of the St. Catherine's Milling case I sought to point out how the Privy Council in describing the Crown's underlying title as a radical title did so in this context. That it is a root of title to which grantees, such as, for example a person who holds an estate in fee simple, it is the root to which they must trace the source of their title, presumed Crown ground.

As we have endeavored to point out through the review of the case law, the plaintiffs' aboriginal rights are not granted rights. They are pre-existing as the Supreme Court of Canada has clearly affirmed in Guerin, and therefore characterizing the plaintiffs' claim as a radical reflects the inherent pre-existing nature of their rights.

We say, my lord, that the characterization of the plaintiffs' rights as rights to ownership and jurisdiction is radical in the furtherance that it reflects fundamental principles governing the relationship between aboriginal peoples and the Crown. And it is our submission that these fundamental principles embodying the recognition of the inherent pre-existing ownership and jurisdiction of Indian Nations took root, not simply as a matter of diplomatic and political protocol, but as part of the common law, and with their codification in the Royal Proclamation, as principals of constitutional significance governing relationships between aboriginal peoples and the Crown in British North American colonies.

We have carefully traced in the previous submissions we have made to your lordship how over the course of some four centuries the history of treaty making evolved, and we have demonstrated that the rights of ownership and jurisdiction have been the subject of consensual negotiation from 1629 in the form of deeds signed on the Eastern Seaboard up until 1989, my lord, and with the recent signing of the Yukon comprehensive land claims agreement, that should be 1990, in the form of modern land claims agreements.

THE COURT: Mr. Jackson, before you get into your argument any further, I don't know if you were here the other night, and no doubt you have heard the question I

raised with Mr. Grant, I think it was --
MR. JACKSON: Yes, my lord.
THE COURT: -- that some time I would like to have some clear understanding of just what it is that it is alleged or what different kinds or species of ownership, if there are different ones you are alleging, and I take it that some time in the course of discussion in this volume that will be made --
MR. JACKSON: Very shortly, my lord. I have in the next couple of pages specifically addressed the questions you raise with Mr. Grant.
THE COURT: Yes. Thank you.
MR. JACKSON: We say, my lord, that the integral relationship between the rights of ownership and jurisdiction received its clearest judicial affirmation in the case of Worcester v. Georgia, a case which we say is the centerpiece of the common law of aboriginal rights. Last week, the week before, I described how American courts since the Marshall era have typically dealt with the concepts of ownership and jurisdiction as discreet elements of aboriginal rights, and I also discussed how the Canadian courts have almost exclusively focused only on the proprietary aspects of aboriginal title rather than exploring its jurisdictional component. The plaintiffs in their Statement of Claim assert their aboriginal rights in their inherent, fundamental and integrated character.

And, my lord, at page three and four I have under the heading of "The Integrated Nature of Ownership and Jurisdiction", a matter upon which Ms. Mandell will address you at some length of course in her submissions over the next several days. I have set out some of the paragraphs of the Statement of Claim to highlight the way in which ownership and jurisdiction are co-joined in the claims asserted by the plaintiffs, and at page four, again by way of an initial exploration of the way in which ownership and jurisdiction is integrated in the plaintiffs' systems, I have referred your lordship to three pieces of evidence. The first piece of evidence was that of Mr. James Morrison in his examination in chief by Mr. Rush, and Mr. Rush asked him:

> "Q Now, is there a Gitksan word for own, the English word own?"

And Mr. Morrison's answer was:

"A Xalgyax Lax Yip.
Q What does that mean? Isn't that how you would translate that?
A That means the jurisdiction of a land and the authority of that land.
Q And how would you use that phrase from a conversation if you were referring to, let's say, Waiget's territory, how would you use the word?
A Lax yips Waiget.
Q Lax yips Waiget, what do you mean?
A The Waiget territory that belongs to Waiget's jurisdiction."

And on page 5, my lord, during the cross-examination of Mr. Art Mathews, Tenimgyet by Mr. Plant, there was an elaboration on the relationship between ownership and chiefly authority.

Q And you used a phrase Ama gyaa'hi...Did you recognize the phrase from my pronunciation?
A Yes.
Q And I believe you told us that the phrase means 'taking care'?
A Looking after, showing ownership, and a -- what I was trying to say there is, yes, look after in the ownership way. Don't let anybody get on it or destroy it you might say.
Q Is it the same thing as owning in Gitksan?
A Yes."

And the last piece of evidence, my lord, in this, as it were, introduction into the concepts, the interrelationship between ownership and jurisdiction, Alfred Joseph, Gisdaywa, during his cross-examination by Mr. Goldie explained his responsibility and authority as the head chief in relation to his house territories.

"Q And in that sense, then, ownership is the same as being a caretaker, or a caretaker is ownership?
A When I say caretaker, I'm there as Gisdaywa in my lifetime, and that means I will take care of it while I'm Gisdaywa.
Q Yes.

A So another Gisdaywa comes along, we'll do the same thing.
Q And as Gisdaywa --
A Yes.
Q -- you own the territory?
A Yes."

And we say, my lord, from the above statements, Your Lordship has that introduction, as it were, to the way in which the concepts of ownership and jurisdiction are brought together and integrated in the context of the plaintiffs' system.

While we say that these are integrated concepts, in order to assist Your Lordship and to introduce some conceptual clarity into the analysis of the asserted rights of the plaintiffs, we will in fact deal with ownership separately from jurisdiction. All along, however, make the point, my lord, that they come together in ways which sometimes defy unravel.

As to the plaintiffs' right then to ownership, as distinct from their claim to jurisdiction, we have in our previous analysis of the jurisprudence, both the British, the American, Canadian and the Commonwealth jurisprudence seen how the courts have struggled to provide a language with which to describe Crown title and aboriginal title and their relationship one to the other.

And at page seven, my lord, I have set out a catelogue, as it were, a lexicon of some of the ways in which the courts have sought to describe the nature of the Crown's title. And I am not going to go over them again, My Lord. They are all ones I have referred to in the particular context of the cases in which they arise, and I have -- the one thing I would just alert Your Lordship to, and I can do this by reference to the very first one, the reference from Chief Justice Marshall's judgment in Johnson and McIntosh, where he referred to the Crown's title as the sole right of acquiring the soil from the natives. And Your Lordship will see that reference to volume three, plaintiffs' argument, all these references will be volume three of the plaintiffs' argument, and I have not given you the tabs again. You will find --

THE COURT: I can find them. Looking at Mr. Justice Strong's compendium in St. Catherine's, "a substantial paramount estate, underlying the Indian title ... A present proprietary estate in the land." What do you

1 say that "present proprietary estate" states or
2 modifies? The paramount estate which underlies the
3 Indian title or the Indian --
4 MR. JACKSON: I understand that, my lord, to the Crown's title.
5 THE COURT: This is Crown's --
6 MR. JACKSON: That's right. And that is Lord Watson, my lord,
7 from the Privy Council judgment.
8 THE COURT: So he is saying the Crown has a present proprietary
9 estate in the land?
10 MR. JACKSON: Yes.
11 THE COURT: He describes Indian title in a different way?
12 MR. JACKSON: Yes, he does.
13 THE COURT: Yes, all right. I'll find it.
14 MR. JACKSON: And on page eight I have set out, as it were, the
15 counterpart.
16 THE COURT: All right. Yes.
17 MR. JACKSON: To the descriptions of the Crown's title and the
18 way in which the courts in the cases have described
19 the aboriginal title. And, my lord, in addressing Mr.
20 Grant in raising those questions you did the other
21 night, you referred to, I think, the fuzziness of some
22 of the ways in which the courts have described it.
23 What I have done here is to give Your Lordship exactly
24 the problem which the courts have identified, in
25 trying to come up with a language which somehow
26 captures the relationship, and whether it's properly
27 described as fuzziness. And I think some of them
28 probably deserve that kind of appellation. What
29 really lies at the heart of this inquiry is some of
30 the difficulties the courts have encountered in
31 providing a language which derives from common law
32 concepts.
33 And at page nine, my lord, having given Your
34 Lordship those lists, and I am not suggesting they are
35 an exhaustive list, they are meant to highlight just
36 some of the ways in which the courts have struggled
37 with this endeavour. I also refer Your Lordship to
38 the passages which we have previously set out in our
39 argument from the Privy Council judgments in Amodu
40 Tijani and Re Southern Rhodesia and the passage from
41 Chief Justice Dickson's judgment in Guerin, where the
42 courts have acknowledged that the problems of defining
43 aboriginal title as a proprietary interest arises from
44 trying to fit aboriginal title into English property
45 law terminology. The courts, I am referring here to
46 Amodu Tijani, have cautioned against the tendency,
47 operating at times unconsciously, to render that title

1 conceptually in terms which are appropriate only to
2 systems which have grown up under English law.
3 And I refer Your Lordship also on page nine to the
4 passage from the Privy Council judgment in Re
5 Southern Rhodesia where the Privy Council said:
6
7 "There are indigenous peoples when whose legal
8 conceptions, though differently developed, are
9 hardly less precise than our own. When once
10 they have been studied and understood they are
11 no less enforcable than rights arising under
12 English law."
13
14 THE COURT: But at least you could say this much, that all the
15 definitions have treated the Crown's interest as a
16 title and the Indians' interest as a right.
17 MR. JACKSON: Well, my lord, if you look at some of the
18 references, you will see that some of the cases refer
19 to the Indians' right as a title as well. And --
20 THE COURT: Show me one.
21 MR. JACKSON: I am trying to see.
22 THE COURT: I'm sure you can.
23 MR. JACKSON: In Johnson and McIntosh, my lord, and in Symonds
24 there are references to Indian title. I can give you
25 those references. I wasn't trying to highlight the
26 exact comparisons between title and title. It is a
27 point I don't make, my lord, and I can give you some
28 further references.
29 Mr. Justice Strong talks about an usufructary
30 title in St. Catherine's Milling. But I can -- if
31 that would help your lordship, my lord, because it is
32 our submission that that is not a point of difference
33 that the characterization by the courts is of the
34 Crown's interest as a title and of the Indian interest
35 as a right. We say that that is not an appropriate
36 juxtaposition, and I can provide your lordship with
37 some further references which I think will make that
38 point clearer.
39 THE COURT: All right.
40 MR. JACKSON: Also, my lord, in Amodu Tijani in relation to this
41 question of understanding the rights of indigenous
42 peoples, the Court said that what is necessary in such
43 an endeavour to understand the rights of indigenous
44 peoples is the study of the history of the particular
45 community and its usages in each case. And this is a
46 point I made before abstract principles fashioned a
47 priori -- top of page ten -- are of but little

1 assistance, and are often as often as not misleading.
2 My lord, I would address the points you raised
3 with Mr. Grant. Your Lordship enquired whether the
4 plaintiffs' claim to ownership is something different
5 from aboriginal rights, or whether it is another way
6 of describing aboriginal rights. And as part of the
7 same interrogatory, Your Lordship enquired whether the
8 plaintiffs are saying that they have proprietary
9 interests equivalent to fee simple. And, my lord, I
10 have tried to address those questions on page 10 and
11 11 and set out a number of propositions which can be
12 summarized in this way. And each of these
13 propositions contains a larger statement, but I have
14 tried to simplify to reduce to its bare bones what our
15 position is. We say, my lord, first of all, that the
16 ownership of the territories is split. The Crown in
17 Right of the Province has the underlying title. We
18 say the plaintiffs have an aboriginal title. And we
19 say that both the Crown and the aboriginal titles are
20 co-existing forms of ownership.
21 The second proposition we make is that the
22 plaintiffs' aboriginal title is a sui generis common
23 law proprietary interest distinct from an estate in
24 fee simple. The plaintiffs do not claim an estate in
25 fee simple.
26 My lord, if I may just pause there for a moment.
27 The principle reason why the plaintiffs do not claim
28 an estate in fee simple is that an estate in fee
29 simple is a right which derives from a Crown grant or
30 as a legal fix is presumed to arise from a Crown
31 grant. And the plaintiffs' rights are not, derivative
32 from a Crown grant, they are pre-existing.
33 And there is a further reason, my lord, which will
34 become clear when we get to the last proposition why
35 the plaintiffs do not claim a fee simple estate. But
36 that's the principle one, and it relates to the very
37 different roots, as it were, of Crown title and
38 aboriginal title.
39 The third proposition, my lord, is that the
40 plaintiffs' interest is based on their possession
41 pre-existing the assertion of Crown sovereignty. And,
42 my lord, I just may, as I said, this is meant to be a
43 fairly reduced proposition. Your Lordship will
44 remember when I was dealing with the Baker Lake
45 propositions, I introduced a caveat to that
46 proposition that where -- if Your Lordship at the end
47 of the day is of the opinion that some territories are

1 not proven to your lordship's satisfaction, to have
2 been based upon pre-existing possession prior to the
3 assertion of sovereignty, we say that if those
4 territories have been held by the plaintiffs for a
5 long time, and were acquired from other aboriginal
6 people, the Tahltan or the Nishga or whatever, that
7 may ground a right based upon aboriginal title. But
8 broadly speaking, the plaintiffs assert rights which
9 are based upon pre-existing possession. I just wanted
10 to, rather than clutter up the proposition with that
11 caveat --
12 MR. WILLMS: Except to this extent, my lord. The proposition
13 was advanced when my friends amended with respect to
14 two specific instances. I take it that's what my
15 friend's referred to, and not any broad brush analysis
16 that is being introduced.
17 MR. JACKSON: This is limited to particular territories.
18 THE COURT: Yes, thank you.
19 MR. JACKSON: The fourth proposition is that the plaintiffs'
20 interest extends to the full exclusive enjoyment of
21 the territory and all its resources.
22 And the fifth proposition, my lord, which is very
23 much the proposition of Amodu Tijani in Re Southern
24 Rhodesia, is that the precise legal character of the
25 plaintiffs' interest is determined by an analysis of
26 the laws and usages of the plaintiffs in the context
27 of their organized society. And, my lord, it is
28 principally to that fifth proposition that much of the
29 submissions of my friend Ms. Mandell and Mr. Grant
30 will be addressed.
31 And we say as a sixth proposition that the
32 plaintiffs' interest, so analyzed, has the essential
33 hallmarks of ownership and not merely use and
34 occupancy.
35 THE COURT: But subject to --
36 MR. JACKSON: The underlying title of the Crown.
37 THE COURT: And the right of the Crown exclusively to acquire
38 title?
39 MR. JACKSON: Yes, my lord. And that is a proposition which is
40 number eight, which I will come to.
41 THE COURT: Yes, all right.
42 MR. JACKSON: The seventh proposition, my lord, is that because
43 the plaintiffs' interest has the essential hallmarks
44 of ownership and not use and occupancy, the
45 plaintiffs' interest in their territory, their
46 aboriginal title is legally characterized as
47 ownership. And that is why, my lord, in the Statement

of Claim it is a claim to ownership and not a claim to use and occupancy.

And the final proposition, my lord, which is the one which you've just identified, is that the plaintiffs' aboriginal title characterized, we say, as their ownership, is inalienable except to the Crown. Another way of saying that is the way your lordship stated it, is that the Crown has the exclusive right to acquire the rights of the plaintiffs.

THE COURT: And would that extend to a prohibition against any form of alienation by way of lease or mortgage or any other English law device for the permanent or temporary transfer of legal estates?

MR. JACKSON: Yes, my lord, it would, save and except to this caveat. As your lordship will hear, and as your lordship has heard much evidence of, within the internal system of the Gitksan and Wet'suwet'en there are transfers, alienations, grants of access rights. Those, we say, are part of the internal system. When I say that the interest of the plaintiffs is inalienable except to the Crown, what we are referring to there is the granting of rights external to the system. And those would be grants which would encompass outright alienation, but they would also encompass leases and other grants of like kind.

THE COURT: Would preclude out external leasing and mortgaging?

MR. JACKSON: Yes, my lord.

THE COURT: Yes.

MR. JACKSON: The relationship, my lord, between what the plaintiffs then have, by virtue of this cluster of rights, what the province has by virtue of its underlying title, and what the federal government has by virtue of having as a result of Section 91(24), the exclusive right to extinguish or acquire the Indian interest, how those three relate together is a matter we will be coming back to, my lord, before we sit down. A prospect I would say we are always looking forward to with much pleasure.

THE COURT: I am very optomistic it will happen someday.

MR. JACKSON: My lord, in the six of the propositions I have set out, your lordship will see that we have said that the plaintiffs' interest so analyzed has the essential hallmarks of ownership, and not merely use and occupancy. And what I have endeavoured to do in Section D is to explore what we mean by ownership. And as your lordship will have discovered in looking at the cases, this is where a lot of the fuzziness has

1 come in, the ambiguity, the lack of conceptual and
2 analytic clarity which one might hope for in dealing
3 with such a fundamental concept as ownership. What we
4 have tried to do is to provide for your lordship some
5 handles, some conceptual handles for the concept of
6 ownership.
7 And proceeding upon the lines of inquiry, which
8 the Privy Council has set out, which is that in trying
9 to provide a proper legal characterization of
10 aboriginal title, indigenous rights, however you want
11 to refer to them, it's important that we don't simply
12 start with our concepts and try, as it were, to fit
13 them or shoe them into those, that we should try and
14 look at this in a rather broader fashion.
15 And what we have tried to do in this section, my
16 lord, is to combine some common law concepts of
17 ownership, and also to provide a broader definition.
18 And Dr. Daly in his report in section 3, which
19 explores the whole issue of ownership, sought to come
20 up with a cross-cultural definition, a definition of
21 ownership which would link, as it were, the common
22 law, civil law, other systems other than those that
23 have grown up within the common law tradition.
24 MR. WILLMS: My lord, I objected to that, and the explanation
25 that allowed that evidence to go in was not what Mr.
26 Jackson now advances. I don't have the volume right
27 now, but I said he can't give that evidence. And Mr.
28 Grant, I think, characterized the evidence in a
29 different way, and then it was allowed to be given.
30 But it was not on the basis that it was a
31 cross-cultural legal comparison.
32 MR. JACKSON: It's a cross-cultural comparison, not a
33 cross-cultural -- Dr. Daly is not in a position to do
34 a cross-cultural legal comparison. This was a
35 cross-cultural comparison. I am suggesting, my lord,
36 that it may guide your lordship in trying to identify
37 what are the hallmarks of ownership. This is not
38 profit, nor was the evidence given at the time as a
39 legal opinion that quite obviously being beyond Dr.
40 Daly's competence as an anthropologist. It was meant
41 to bring together some shared features of systems of
42 ownership within state society and non-state society,
43 within kinship society, and for that limited purpose,
44 my lord, I submit it's perfectly proper for your
45 lordship to look at it.
46 THE COURT: I am not going to stop you, Mr. Jackson. I have some
47 misgivings that on one view he's purporting to tell me

how I inquire into a legal question, but on your assurance that it isn't intended for that purpose, that is not expressly stated to be for that purpose, I will allow you to proceed with it on a limited basis, and that need not at this moment be precisely defined.

MR. JACKSON: Yes, my lord. The bottom of page 11, my lord, Dr. Daly expressed this opinion:

> "The diversity of relationships expressed by means of property ownership makes it extremely difficult to find a satisfactory, cross-cultural definition of ownership - within the realm of state societies, let alone in societies where there are no state institutions."

And Dr. Daly went to that knowledge, the Encyclopedia Britannica where it explains property as --

THE COURT: You don't need to read that. I surely have to go beyond Encyclopedia Britannica. I wish I could settle it on that basis, but I can't. I don't want to be troubled by things I can't make use of.

MR. JACKSON: Dr. Daly suggested the following common elements of a system of ownership:

> "A broad explanation of ownership in any culture would include the following aspects. First, ownership implies the concept of exclusive possession. Implicit in this aspect is the delineation of boundaries; that is, social recognition of the physical limits of the property over which ownership is claimed. While exclusive possession is a dominant feature of ownership it does not preclude the existence of defined areas over which there are common or joint use rights. Second, ownership entails rules to govern the conveyance of rights from person to person, and generation to generation. In some societies the conveyance of land is limited to inheritance; in others, it can be bought, sold, traded or auctioned. Third, ownership entails property management; and fourth, it involves the owner in obligations to whichever society recognizes and validates his or her proprietorship. These obligations may involve the giving of gifts and

hospitality, or the payment of taxes.
Ownership implies the rights to manage and direct activities concerning of the property in question, be they production activities, marketing or property maintenance. Depending upon the actual society, this may involve the maintenance of the best possible annual harvests from the land over the generations, and/or the security and defence of the property. In some societies this defence means direct action, where policing is carried out by the owning person or persons, and where trespassers and other transgressors are dealt with according to customary law.

And over on page 13.

"Other societies administer an indirect defence of property rights in which the defence of property is usually conducted by institutions of a hierarchical nature, including a police force and an army. In both types of society in different ways, property-holders must make payments to the society for the right to have their ownership claims validated and recognized. In Canadian society these payments take the form of taxes. In non-state societies, such as those of the Gitksan and Wet'suwet'en, they are paid through the owning groups obligations to the feast systems."

And then the very last sentence of that quote, my lord.

"The public and ceremonial announcement changes and reaffirmations of matters pertaining to properties is common in societies without a written culture."

So that's, my lord, Dr. Daly's contribution, as it were, to a cross-cultural understanding. At the bottom of page 13, my lord, I have set out again the indicia of ownership identified by Mr. Justice Gould in the Calder case, where your lordship will recall in an exchange with Professor Wilson Duff as to whether the Nishga's land tenure system was appropriate referred to as ownership. Mr. Justice Gould

1 identified what he regarded as being in the common law
2 system, the hallmarks of ownership. And I've -- I
3 have given your lordship the prior reference to that,
4 but I have set out the five criteria, specifically
5 delineation of the lands, exclusive possession, the
6 right of alienation, the right to destroy at your
7 whim, and five, the exclusive possession should be of
8 indeterminable time; that is, that it can be passed
9 onto ones heirs.
10 THE COURT: You don't allege those as being an accurate
11 restatement of an aboriginal interest, do you?
12 MR. JACKSON: My lord, we say that all but number four is an
13 acceptable definition of ownership in the common law.
14 THE COURT: Well, item 2, exclusive possession, would exclude
15 what we have been -- Calder type aboriginal rights --
16 MR. JACKSON: No, my lord, because in Baker Lake, one of the
17 tests of aboriginal title identified by Mr. Justice
18 Mahoney is exclusive possession. That is one of the
19 hallmarks of common law aboriginal title.
20 THE COURT: But you think that can stand alongside Calder type
21 aboriginal rights, which is one of your alternative
22 claims, or may be one of your --
23 MR. JACKSON: My understanding is the Calder type relief is
24 based upon exclusive possession.
25 THE COURT: Well, it's based upon it, but again we are down to
26 some very precise concepts here. Are these being
27 identified as the basis for title, or are they being
28 identified as the characteristics of this interest? I
29 thought these were the characteristics of the
30 interest.
31 MR. JACKSON: These -- are you talking about the characteristics
32 on page 13?
33 THE COURT: Yes. Mr. Justice Gould, the gang of five.
34 MR. JACKSON: What I understood what Mr. Justice Gould was
35 trying to do in response to Wilson Duff's evidence,
36 which was that the Nishga had defined -- well defined
37 concepts of ownership. I believe that was how Wilson
38 Duff gave evidence. That triggered a response by Mr.
39 Justice Gould -- when you say they have well defined
40 concepts of ownership, what do you mean, and what Mr.
41 Justice Gould said was what he understood by a well
42 defined concept of ownership. And so it was part of
43 that kind of inquiry that Mr. Justice Gould sought to
44 identify, and to be fair to His Lordship, he did so,
45 as it were, from the bench. But subject, again, to
46 number four, we say that that is a useful working
47 definition of ownership, and what we are saying, my

1 lord --
2 THE COURT: I'm sorry, a useful working definition of what kind
3 of ownership?
4 MR. JACKSON: Common law ownership. Ownership as it exists at
5 common law.
6 THE COURT: And could you contend that these are the
7 characteristics of the type of interest the plaintiffs
8 seek in this action?
9 MR. JACKSON: My lord, we say that the plaintiffs' interest
10 properly analyzed fits into that -- has those
11 qualities. And thus explains, my lord, why in
12 asserting their aboriginal title the plaintiffs do not
13 assert a right to the use and occupation of the land.
14 They say that once you analyze the nature of the
15 regime of the Gitksan and Wet'suwet'en, one comes
16 inexorably to the conclusion that what this is not is
17 a system of use and occupancy. It is a system which
18 has all the hallmarks of what we regard in the common
19 law as ownership.
20 THE COURT: I have no trouble with your proposition, Mr.
21 Jackson, except for the fact that at some stage of
22 this trial Mr. Rush did advance an alternative claim,
23 and I'm -- I've never been certain to the extent to
24 which that's being advanced, and I'm looking forward
25 to a clear statement at some time, and this -- maybe
26 this isn't the time, but I would find -- I would find
27 item two of that working definition to be a difficult
28 one to reconcile with the Calder type interest that I
29 understood Mr. Justice Hall had found in his judgment.
30 I did not understand Mr. Justice Hall to include
31 exclusivity. Now, I haven't read it from that
32 particular perspective for some time. I'll certainly
33 have to read it again. I want you to understand that
34 this is another loose end that is causing me some
35 difficulty.
36 MR. JACKSON: My lord, the exclusivity of possession concept, I
37 don't think Mr. Justice Hall did use that phrase in
38 that sense. He did cite from the Sante Fe case, and
39 your lordship will recall that Mr. Justice Mahoney, in
40 identifying what he thought were the elements of
41 proof, also identified the concept of exclusive
42 possession as being one of the elements. The problem
43 may be, my lord, in terms of the definition of
44 exclusive possession. Your lordship will recall --
45 THE COURT: It's more than that, because exclusive possession
46 seems to me to be the requirement of the interest you
47 seek, but the interest that results from that

1 exclusive possession may not itself give rise under
2 Calder to exclusive possessions as an aboriginal
3 right.
4 MR. JACKSON: I don't think that issue was addressed in court,
5 my lord, because the Court was not called upon, and it
6 carefully refrained from articulating exactly what the
7 precise nature of the right was.
8 THE COURT: Yes, but you are not being as kind to me -- you are
9 asking me to make that determination. Therefore I
10 have to make sure that these concepts are unfuzzified.
11 MR. JACKSON: My lord, it is our position that the right in
12 order to be established as a common law right, has to
13 meet the test of exclusive possession, defined as the
14 way the cases have defined it, and that it gives rise
15 to an interest in the land which we say is defined as
16 ownership, which carries with it the exclusive
17 possession of that territory. So essentially you come
18 in with exclusivity and out with exclusivity.
19 THE COURT: Until somebody says something different, I have to
20 take that as you have just described it, to be an
21 abandonment of the claim for Calder type remedies. I
22 don't want to hold you to that, but that's the way I
23 would categorize your submission, and I am not -- this
24 isn't checkers, where you have made your move and you
25 are irrevocably committed to it, but it seems to me
26 that there is a conceptual problem there that troubles
27 me greatly, and I want to make sure that I understand
28 precisely what it is you're saying. If I have
29 misstated, or if you have an answer to what I have
30 just said now or at some time, I must have your
31 assistance.
32 MR. JACKSON: Well, I would welcome the opportunity to return to
33 that question, because obviously is an extremely
34 important one --
35 THE COURT: Yes, it is indeed.
36 MR. JACKSON: -- for the plaintiffs and for your lordship.
37 THE COURT: Yes, thank you.
38 MR. JACKSON: My lord, in terms of giving another definitional
39 content to the ownership which the plaintiffs assert
40 in the Statement of Claim, I have referred your
41 lordship at page 14 to the Pueblo of San Ildefonso
42 case, a case which I talked to your lordship about
43 last week. And again the hallmark of ownership
44 addressed in this case is precisely the one your
45 lordship has just identified, where the Court said:
46
47 "Implicit in the concept of ownership is the

1 right to exclude others."
2
3 That's what it meant by exclusive possession.
4
5 "Generally speaking, a true owner of land
6 exercises full dominion and control over it; a
7 true owner possesses the right to expel
8 intruders."
9
10 And, my lord, that is an element which we say
11 characterizes the nature of the plaintiffs' system,
12 and it's a matter upon which Ms. Mandell will address
13 you immediately. And what we say is that subject to
14 the qualification we have previously made in relation
15 to the fourth element of Mr. Justice Gould's
16 definition about the right to destroy property at your
17 whim, we say that the relationship of the plaintiffs
18 to their territories contains all of the elements of
19 the cross-cultural definition put forward by Dr. Daly,
20 the definition put forward by Mr. Justice Gould and
21 the definition of the U.S. Court of Claims.
22 My lord, at pages 14 to 20 we have set out what is
23 referred to as an overview of the Gitksan and
24 Wet'suwet'en systems of property ownership, and we say
25 that in so doing, for the first time in any Canadian
26 case this court will have the basis upon which to draw
27 conclusions as to the sui generis nature of
28 plaintiffs' aboriginal rights anchored in hard factual
29 bedrock and not abstract principles. And I have set
30 out, my lord, the six propositions.
31 The first one being the ownership of the territory
32 is in the house. That's at page 15. The house
33 territories have defined boundaries. Thirdly, the
34 house ownership is underpinned bylaws of trespass.
35 Fourth, that house property is the subject of
36 succession and alienation. Fifth, that ownership
37 includes the right to grant access to the territories.
38 And sixth and finally the recording, registering and
39 legitimizing the transfer of and succession to rights
40 of ownership is maintained through the feasts, oral
41 histories, crests and poles.
42 And, my lord, at that point Ms. Mandell will go
43 through the details of the essential elements of the
44 plaintiffs' system of ownership.
45 THE COURT: Thank you.
46 MS. MANDELL: My lord, I think before lunch we can cover the
47 first essential feature of the plaintiffs' system of

1 ownership, and that's a description of the owning
2 group, the land owning group which we say is the
3 house. And I want to first draw to Your Lordship's
4 attention something which I think is going to purvey
5 the entire concepts of ownership and the definition of
6 it, and that's the fact that the people are -- the
7 plaintiffs, when they talk about their territories in
8 owning, they always begin with the concept of
9 belonging to the land. And this was expressed by Dan
10 Michell where he explained that the land belongs to
11 the people, and also the people belong to the land,
12 and he said it in this quote:
13
14 "they live on those lands. Like I explained
15 before, they are part of that land...they
16 belong to it and they return back there."
17
18 And this concept of belonging to the land is
19 something which your lordship will appreciate is
20 the -- as the argument moves along -- is the
21 foundation from the people's point of view of the
22 intensity by which they claim ownership to the
23 territories which are before your lordship.
24 Now, there is a fairly complicated owning
25 arrangement, and I have set it out in summary form on
26 page 21, that the house territory and fishing sites
27 are owned by the house. The hereditary chief
28 represents the house's right of ownership as steward
29 of the land, on behalf of the house members. The
30 chief has the responsibilities to direct and safeguard
31 the house's production components: The fruits of
32 land, labour, knowledge and skills necessary to
33 produce an appropriate standard of living. In each
34 generation the task of renewing house authority over
35 property goes with the chiefly name.
36 And Joan Ryan, I think, properly and in a fairly
37 good way explained this concept of steward over the
38 lands. I wonder if I could ask your lordship first
39 before I move into the quote to have a look at Exhibit
40 34. I have asked that it be placed before you. It's
41 a picture.
42 THE COURT: Now which picture?
43 MS. MANDELL: I believe that it's self marked as Exhibit 34.
44 It's a picture of Mrs. Ryan about to take her chiefly
45 name.
46 THE COURT: Yes. Yes, I have it thank you.
47 MS. MANDELL: You will recall the evidence of Mary Johnson

1 referred to by Mr. Grant when he was referring to dax
2 gyet about the phrase being, "if I could spend one
3 night with the power of my grandmother." And the
4 reason I wanted to draw to Your Lordship's attention
5 the picture, is that it reflects the expectant and
6 also the odious task which Mrs. -- which Hanamuxw is
7 about to assume in taking the name. And I thought
8 that the look on her face and the way that she was
9 walking in the hall really brought to bear that moment
10 for her as she's about to assume the role of steward
11 as she describes it.
12 THE COURT: Did you have that as Exhibit 34? My copy is not so
13 marked. Let's look at the original. The whole volume
14 is Exhibit 34. And this is item 2 of Exhibit 34.
15 MS. MANDELL: Thank you. We'll bring ourselves into line with
16 you.
17 THE COURT: That's Exhibit 34. Thank you.
18 MS. MANDELL: Mrs. Ryan was asked in her examination to explain
19 what she was taking on when she took on the name, and
20 there is a Gitksan sentence which was repeated, when
21 she was passed the name Hanamuxw, and she was asked to
22 translate what that sentence meant. And I am reading
23 from the last part of the quote beginning roughly --
24 she goes -- at the bottom of page 21:
25
26 "Roughly the translation would be that you are
27 the one that has been selected to take the land
28 that was your inheritance, to hold it, and to
29 take care of it ..."
30
31 And I wanted to pause here and emphasize that when
32 Mr. Jackson said that Mr. Justice Gould's definition
33 of ownership didn't include the right to destroy the
34 lands, that's what she is explaining here, that her
35 role as steward is to take care of the land. And then
36 she says --
37 THE COURT: Of course I have trouble with that concept too,
38 because I don't know what that means either.
39 MS. MANDELL: I hope that by the time we finish you will.
40 THE COURT: I don't know, for example, does it mean can you log,
41 can you mine, can you do those things?
42 MS. MANDELL: Well, I think that the --
43 THE COURT: You come to it when it's convenient.
44 MS. MANDELL: All right. At the top of page 22 she goes on to
45 say.
46
47 "That means the lands that your forefathers had,

1 that includes the regalia, that includes the
2 adaawk, that includes the pole, that includes
3 the resources on the land, that includes the
4 name Hanamuxw, and the right to use that name
5 within the Gitksan territory. That means the
6 right to use the authority of the chief. That
7 includes providing leadership for the people,
8 the Gisk'aast as well as the other clans in
9 Gitsegukla. It means preserving the history of
10 the house. It means taking care of the
11 present, and always with the idea that you link
12 it with the future ..."
13
14 And I wanted to emphasize that here what she is
15 talking about is that as a steward she is being passed
16 the ownership of the house in the sense that she is
17 the holder of and the person responsible to hold the
18 dax gyet of the house as its been passed to her in the
19 form of the adaawk and the poles and the name, and
20 that she's parts of a chain of history. She doesn't
21 just get property which she can take to herself and
22 use for herself, but that she's part of a chain of
23 history which she walks into, being the next in line
24 to carry the history, which includes the history of
25 the house on the land and protecting the territory as
26 she says always with the idea that you link it with
27 the future. She is not an individual in this. She is
28 one in a chain. And then she says lastly:
29
30 "I was directly translating our words into
31 English which at best of times is difficult to
32 do. To me it means that the property is not
33 given to you directly. In other words, it's
34 not your personal property, but rather you are
35 designated as the person to manage that
36 property not just for yourself but for all of
37 the members of your house."
38
39 And I might here remind your lordship that in the
40 Pasco case the Court of Appeal there said that the
41 aboriginal right which they were contending with was a
42 right which was not individual but communal in nature.
43 And I think that what here Hanamuxw is describing is
44 the very way in which that communal quality of the
45 right functions with her as steward and with the house
46 as owners. And the quotes which I then introduced you
47 to from Martha Brown and Art Mathews senior and Mrs.

Ryan and Alfred Joseph following all explain that it's really the fact that all members of the house are co-owners. And I think that's the best legal analogy that I can draw. Martha Brown says, when asked who was the owner, she says:

> "All the members of the house."

Art Mathews Senior says:

> "The whole house and all of its members."

Joan Ryan says:

> "All of our members of the house."

And I am going to return to that concept in a minute. Alfred Joseph says:

> "Me and my house members. It's all of our family, all of the members of the house."

And I think this concept of co-owner is the best way to describe the interest of the house members collectively in the house territory.

THE COURT: Who used the term "co-owners"?

MS. MANDELL: I do.

THE COURT: You do?

MS. MANDELL: Yes. If I could return you to page 23. There is a concept here which I would like to introduce you to at this stage. That's reflected in the evidence of Joan Ryan.

THE COURT: Yes.

MS. MANDELL: She says the authority of the -- I'll read the quote:

> "All of our members -- all the members of the house have the right to use the territory whenever they need resources from the territory. And if they need to go to the territory they probably would pay a courtesy call to Hanamuxw to ask for permission to go to the territory. And usually that's just a routine matter. The answer to that question is always yes."

And what we are seeing here spelled out is

1 something which is going to be quite important for
2 your lordship's understanding on the question of
3 jurisdiction. And that is that there is a balance
4 which is continuously maintained between the chief on
5 one hand and the house, and this we'll argue later
6 extends as well to the balance between houses in the
7 harvesting and in the management of the territory,
8 where the chief needs the support of the house members
9 in order to fulfill the chief's obligation at the
10 feast, and at the same time the chief has a
11 responsibility to provide for the members of the house
12 and to receive their support in return. And so the
13 authority of the chief to grant finally the ultimate
14 say is as to who uses and on what terms the territory
15 is accessed, is -- and the ownership of the house is
16 counterbalanced by the fact, as Hanamuxw says, the
17 answer to the question is always yes, they both meet
18 each other, and that's the general framework within
19 the -- within which the steward of the land, the chief
20 and the house members as owners function within this
21 unit.
22 And if I could turn you to page 24. The last
23 concept which I think is important in understanding
24 the house was articulated again by Dan Michell, and I
25 was describing the Namox territory, and he said:
26
27 "When I was born as a Tsayu a member of the
28 Tsayu clan...I had that right when I got born
29 into that clan...this includes the right to the
30 fishing grounds of the House of Namox. This
31 right belongs to the other members of the House
32 of Namox."
33
34 And he's expressing what I began the discussion
35 with, and that is the feeling of belonging, and also
36 the fact that the ownership to the land is seen as a
37 birthright.
38 THE COURT: Was he a member of the House of Namox?
39 MS. MANDELL: Yes.
40 THE COURT: Yes.
41 MS. MANDELL: And I wanted to stress the fact that people -- the
42 house members have a right to the territory from their
43 point of view and according to the system as a
44 birthright.
45 THE COURT: But there is a potential conflict there between what
46 he says there and what Joan Ryan says. She says the
47 answer to the question is always yes, but you need my

1 permission.
2 MS. MANDELL: Yes.
3 THE COURT: There is a dichotomy there, is there not?
4 MS. MANDELL: Well, I think that the -- if you call it a
5 dichotomy, I think that the answer to it is explained
6 in the definitions of ownership, which Mr. Jackson
7 referred to you earlier, and that is that there is a
8 concept -- the ownership and jurisdiction are quite
9 connected, and there is a responsibility in the house
10 chief to manage the territory. There is the right in
11 the house members to the territory, and the balances
12 maintain because of the rights and responsibilities
13 each to each other. It's not as we have it, my lord,
14 and maybe the explanation is with reference to our own
15 system, where when -- I don't own communally, I own
16 individually the territory which I hold, and I as
17 owner am not having to ask anybody else, or I don't
18 have to behave communally in the rights that I
19 exercise to my land. But the house unit is a unit
20 that does function communally, and the arrangement
21 that has been described in the evidence and which we
22 say is the essential land holding arrangement, is that
23 the chief is steward and has finally the authority
24 with respect to the caretaking of the territories, the
25 house members have the rights, the rights to the
26 territory and to use it, and it's in the relationship
27 between the house member and the chief that those
28 rights will be articulated on the ground.
29 THE COURT: Is there a problem in the pleadings on this?
30 MS. MANDELL: I don't think so.
31 THE COURT: In the style of cause? I have got my hand on it --
32 MS. MANDELL: We say that the ownership is in the house. We
33 plead that the plaintiffs as representative chiefs of
34 the house represent themselves and the other members
35 of the house.
36 THE COURT: You say that the plaintiff -- I am looking at
37 paragraph 1:
38
39 "Delgamuukw is the hereditary chief of the House
40 of Delgamuukw and is bringing this action on
41 behalf of himself and the members of the houses
42 of Delgamuukw and not ..."
43
44 That seems to me to be technically and
45 legalistically different from the assertions of the
46 chiefs that they own the land.
47 MS. MANDELL: As I state on page 21, and I ask your lordship to

return to it, that the chiefs represent the houses rights of ownership as steward of the land, and the chiefs themselves don't possess title to the land in an individual capacity. And I think that the marriage of the hereditary chief in the pleadings as representing the house and the factual marriage in how the people own the land, that is the hereditary chief, represents the house's rights of ownership as steward is very close --

THE COURT: Well, as I have said many times, this case isn't going to be decided on joinder of parties. I am struggling with these concepts -- it seems to me that what you're saying now is that there is a form of a convention imposed upon the ownership in the chiefs, or at trusteeship.

MS. MANDELL: The analogies are there, but it's not a pure trusteeship as we know it. I mean, if you're going to walk into that line, I probably caution you to say it's something akin to a trusteeship. It's sui generis, and that nature of it will be described as we progress.

THE COURT: Yes. All right.

MS. MANDELL: Perhaps this is an appropriate time to break.

THE COURT: Yes, all right. Thank you.

THE REGISTRAR: Order in court. Court stands adjourned until 2:00 o'clock.

(PROCEEDINGS ADJOURNED FOR LUNCHEON RECESS)

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
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RECONVENED AT 2:00 P.M.)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Grant.
5 MR. GRANT: Yes, my lord. I am going to do this next part of
6 the argument and then Ms. Mandell will do the balance
7 of it.
8 THE COURT: You are on page 24.
9 MR. GRANT: Yes, my lord. This is the concept that the House
10 territories have defined boundaries.
11 I wish to emphasize here, my lord, that this
12 aspect of ownership is part of the proof of possession
13 of the territories. Firstly -- the first proposition
14 I wish to explain is the significance of the place
15 names, that the plaintiffs' ownership of these
16 territories is embedded in the histories on the land
17 and is reflected and confirmed by the place names,
18 adaawk, kungax, crests and songs. As Mrs. McKenzie
19 said:
20
21 Gitksan houses have territories; the territory
22 is an important part of the Chief's House in
23 that it holds the adaawk, it holds the songs,
24 and the names and the territories.
25
26 My lord, I submit that the number and meaning of
27 place names -- and there is well over 2,000 place
28 names in Gitksan and Wet'suwet'en that have been
29 tendered through evidence through the territorial
30 affidavits -- is convincing evidence of the
31 territorial significance of the specific names.
32 Thomas Wright was asked when he was cross-examined by
33 O'Byrne for the province if there was any way that
34 non-Gitksan people could tell that it was Gitksan
35 land, and I believe that Guuhadak, the late Guuhadak,
36 Thomas Wright, really answered this issue. He said:
37
38 Yes, they did. They, [referring to his
39 forefathers] used the names of the waters, the
40 creeks and the mountains. They used those to
41 mark their land they named them.
42
43 In other words, my lord, the naming of the
44 territory is the evidence of the possession.
45 With respect to the Wet'suwet'en, Gisdaywa, Alfred
46 Joseph, described geographic place names of long
47 antiquity. When he was asked about the boundaries he

said:

A You look for a ridge or a small hill and those features is [a] small hill or mountain is Kess.
Q What other things do you look for?
A Creek, river, sometimes a trail.
Q Are there other features on the territory in addition to those that you might identify?
A Range of mountains...

Of course here he is talking about the boundaries of the territory.

Q And the features that you've described as existing geographic points on a territory to help you determine where boundaries are, are those features that Wet'suwet'en people look to in order to identify a boundary?
A Yes.

And later on, just near the bottom of that quote, he was asked about words of antiquity, and he -- to give an example of such a word, and he said:

A All the features like mountains are old words, lakes, rivers and any camps and villages where people live.
Q And do these words appear to your knowledge in any particular place? Do they appear in at moments where you would recognize them to be old?
A They appear in songs; they appear in any stories that people tell; and they appear in place, kungax.

And my lord, it's my submission -- it's the plaintiffs' submission that the possession of the territories established through the naming and the place names of the territory, what Mr. Joseph is there referring to was clearly reflected by the Wet'suwet'en chief Kweese when she gave the kungax of the Kweese raid and described her trip through the Burnie Lake territories and the places that they travelled through on their way to that raid.

Now, my lord, as Mr. Adams referred to on Friday,

when the first white man arrived in the territory there were no signs pointing out the creeks, rivers and mountains with names on them in Gitksan and Wet'suwet'en. However, my lord, as as example by Exhibit 964-14, the 1826 Brown report and others of the historical documents, these people, these white men were guided down the water routes and trails known and used by Gitksan and Wet'suwet'en people. They used the bridges and the trails of the Gitksan and Wet'suwet'en people. And that's demonstrated by Mr. Chismore, for example, who crossed the bridge and described the bridge that I referred you to last week.

Now my lord, the provincial defendant, the government, has been well informed of the existence of Gitksan and Wet'suwet'en place names. In fact, my lord, the government maps themselves are replete with reference to original Indian place names in the territory, names you've heard of and you see on the government maps: Netalzul Mountain, Nadina Mountain, Nanika Mountain, Kitsuns Creek, Kitseguecla River, Skawill Creek, Susqua River, Damdochax Lake, all of those names I've listed there. My lord, these place names on government maps are all derived from Gitksan and Wet'suwet'en names from geographic points on the territory. There is little doubt, my lord, and I would submit that it would be preposterous to suggest that the early non-Gitksan and non-Wet'suwet'en were introduced to these locations in any other way than through their Indian names.

The Gitksan and Wet'suwet'en chiefs demonstrate their ownership through naming places on their territories. And I submit that the wealth of this knowledge is demonstrated in the territorial affidavits and the oral evidence.

Now, my lord, I put -- I believe it's Exhibit 670, on the back of the other exhibit, and that is the map of the viewing, much of which you heard evidence about. And I submit, my lord, that you had the opportunity in that viewing of evaluating firsthand the knowledge of the Gitksan and Wet'suwet'en of the territories. For example, David Blackwater not only showed your lordship where his brothers were buried at Damdochax Lake, but he pointed out the names of creeks, lakes, mountain peaks and boundaries between different chiefs' territories. All of which was also proved in evidence through territorial affidavits and cross-examinations.

Neil Sterritt, while on the view, described the David Gunanoot -- where David Gunanoot showed him Treaty Creek, the boundary between the Gitksan and the Tahltan on the Skikimlaxha territory up in the far northwest. This, of course, was also described in evidence by Jessie Sterritt and David Gunanoot. But you saw the outline of the house to which David Gunanoot and Jessie Sterritt referred, in which the treaty was made, visible on the ground. In this, your lordship was witness to a graphic demonstration of the strenth of the oral history: the connection of the external boundary between the Gitksan and the Tahltan, the long house where the treaty was made and the name of the creek which actually is on the government maps as Treaty Creek.

MR. WILLMS: My lord, I just want to remind my friend that the view wasn't evidence. I'm sure he knows that but that was agreed beforehand.

THE COURT: You want me to disabuse my mind?

MR. WILLMS: Not of what you saw, my lord, of course not. But of course there were some statements and they are quoted in here of witnesses that weren't cross-examined, never bothered to come to court, and it's not evidence. My friend knows that he shouldn't be referring to this.

MR. GRANT: Well, my lord, in the Baker Lake case, Justice Mahoney took judicial notice of what he observed within the community, that he spent some considerable time in Baker Lake. The evidence of what people said to you on the viewing is not evidence. What I've referred you to is what -- that this has been proved independently of that. These points have been proved by other people independently of that. But certainly as your lordship alluded, the viewing was not suggested that you --

THE COURT: I don't remember if there was evidence about the long house where the treaty was signed. I know I was shown Treaty Creek and told that's what its name was and I accept that and I don't think your friend would object to that.

MR. GRANT: Well, in Jessie Sterritt and David -- I believe one or both of them refer to the -- and I will put the reference in or --

THE COURT: I think you can move on. I think there is a point in Mr. Willms' objection and I'm sure we both have it in mind.

MR. GRANT: Okay.

1 You travelled through the Wet'suwet'en territory
2 and viewed the footprints at Goosly Lake. And of
3 course the significance of those footprints was passed
4 on through the oral history and has been explained in
5 the court by Gisdaywa, Alfred Joseph, and Alfred
6 Mitchell. How Namox's ancestors stood in the
7 footprints in springtime and by the rays of the sun
8 shining through a ridge of the mountain the people
9 knew the time to come to Moricetown to fish.
10 And of course, the footprints have been described
11 as "being there for thousands of years" by Emma
12 Michell. And you may recall, and there is photographs
13 of them, Exhibit 206 and 207, they were not in rock
14 but in soft ground. There was grass growing all
15 around but no grass in the footprints themselves, and
16 that's obvious in the photographs as well.
17 I submit, my lord, that the evidence of the
18 footprints are understood as a unique geographical
19 feature having arisen out of the practice of the
20 people that lived on that territory to identify the
21 seasonal movement by the angle of the sun. And this
22 is a symbol -- this particular feature has become a
23 symbol of the territory of Namox.
24 You were also exposed to knowledge among the
25 southern -- among the Wet'suwet'en chiefs of the
26 southern boundaries of the Wet'suwet'en territory, and
27 we stopped at Skins Lake Spillway and Gisdaywa
28 explained the southern boundary at the height of land
29 on the south shore of Ootsa Lake, which also was, of
30 course, given in evidence. And the boundary where the
31 Wet'suwet'en Diizenii went to develop their spiritual
32 strength was pointed out.
33 Of course you heard the evidence of Knedebeas,
34 Sarah Layton, and you also saw Pack Lake which was the
35 place where the Unoostet'en held their feast, and that
36 was described by Knedebeas in evidence.
37 And then, of course, you finally saw Morice Lake
38 where there was a crest history of the grizzly bear
39 recounted by Johnny David.
40 Now, my lord, you've already heard the evidence
41 of the adaawk and the ancient history and the time
42 depth of both the Gitksan and the Wet'suwet'en.
43 The adaawk which have been described in evidence
44 by Gitksan chiefs exemplifies how place names and
45 locations on the territory are rooted in the ancient
46 or more recent histories predating the arrival of the
47 non-Gitksan. And my lord, the detailed description

through the telling of the adaawk and the repetition of these places, as well as showing these places to prospective chiefs, is a method of teaching the territories and the boundaries of the territories to succeeding generations. And the adaawk connects the territories to the ancient ownership of a House and is a foundation for the declaration of ownership. And my lord, I don't want to overstate this. You were not exposed to the adaawk of each and every House relating to the history. In fact, it was made clear by the plaintiffs and, to a degree by your lordship, and even in cross-examination by the defendants, that it was not necessary or was not essential that each Gitksan or Wet'suwet'en plaintiff refer to the adaawk or the kungax referring to their territory.

As I indicated at the beginning of Mr. Matthews' evidence, I've quoted on page 31 that this witness' evidence at the last part of that quote:

> ...in some ways will be a paradigm of how the Gitksan houses, and in particular the western Gitksan houses relate to their territory and the historical ties to the territory.

Mr. Matthews' evidence was introduced to demonstrate a model of how the adaawk connected to the territory. And of course, as you may recall, Mr. Matthews related at considerable length, four adaawk relating to his House and to his territory. I've listed the four adaawk on the next page.

Before commencing the adaawk, Art Matthews Jr. explained the understanding that came from the retelling of it. He says:

> Okay, I'll say. Yuuhlxamtxw is wisdom, to give me wisdom, the understanding, the various spirituality of our land. Gan didils is the way of life, how to react, how not to react. In other words, it's a doctrine of one's adaawk, it's a realism, it's philosophy, and it's epics, both life and death.

And he explained about the connection between the adaawk and the territory. And he said in answer to the second question:

> Q Is that right? Is that part of the

adaawk talked about in the feast hall?

That's the part about the territory. He said:

A Yes. Like, for instance, in our starvation adaawk, it describes in great detail our territory, camp sites, bear dens, where food is available.

Now, my lord, I may pause there because you may recall that Mr. Matthews described how he was trained in the adaawk from a young age, but this is where the key to possession comes in. Mr. Matthews was taken by his grandfathers to the Cedar River territory, and they showed him where those places were, and it was at that juncture where his teaching of the oral history, combined with his presence on the land, came together; that his possession, as the future Tenimgyet of that territory, was established.

Now, the Biis Hoon adaawk was described in detail to show connection between training, spirituality and the special relationships of his House with the grizzly bear, and he described that to you, how you can learn special methods of hunting and feast practise. But the adaawk of 'Wii Hloots also specifically dealt with the two territories of Tenimgyet.

Now, I've asked Madam Registrar to pull Exhibit 349 before your lordship. And I make this point --

THE COURT: What is 349, please?

MR. GRANT: It is the sketch map and it is a tab -- I believe it may be a tab in the binder of the Art Matthews binder.

THE COURT: Yes, 349, I have it. Thank you.

MR. GRANT: A small red sketch map, my lord.

THE COURT: Yes. Thank you.

MR. GRANT: I'm not going to -- I put in the evidence, I'm not going to read it all, but of course I will just refer you to how it flows with Exhibit 349.

He says at page 33 of my argument, he talks about the travels of 'Wii Hloots and how it demonstrates the important locations of the Cedar River territory and, in particular, the locations on the western boundary. Now, he said half-way down:

'Wii hloots' and his brother originated, like I said before, from Tsihl Gwellii --

And of course that's that western territory which is

at the western-most notch there, half-way on the southern part of the Gitksan territory, if I may say.

THE COURT: Yes.

MR. GRANT: And he said:

> 'Wii hloots' and his brother originated, like I said before, from Tsihl Gwellii, from Git lax an dek', and from time to time, like, they had remembered the vast amount of many caribou that came through Tsihl Gwellii are. At the time there was hardly any meat available, only fish available. He had a great big fish trap. We call T'in.

Now, what he is talking about here and it is shown on the trails is this feature of going from the Cedar River territory up here, and how they travel up through and into this territory. And of course the T'in is on this Tenimgyet territory. That's there, my lord.

And the caribou, the caribou was on the territory of Cedar River, and of course Mr. Matthews described how they trapped and snared caribou on that territory. and it's part of the adaawk.

So he says at the bottom:

> So they set off from An gol hon past Xsi gwin ixstaat.

And if you look at Exhibit 349, you can see the trail going from An gol hon to Xsu Gwihikstaat. And then he says:

> They took the trail from Tsim ts'itixs.

And you can go -- you go beyond to Tsim ts'itixs and you follow along there and that's across from -- you can see it's up behind Cedarvale and they cut up Insect Creek.

And there seems to be some confusion that they went up Insect Creek to go into their territory. Insect Creek, it's at the headwaters.

And then he talks about the:

> ...specified place where they get [the] caribou here where they used to snare them and trap them, and the place in the Tsihl Gweelii

1 territory where they go for this caribou is
2 called Ts'imaakhl gan k'ok'.
3
4 And that's farther up and into that range past -- I
5 believe it was past Gisak Loot there.
6 Now that, my lord, also demonstrates that at the
7 time of the adaawk that he is talking about, is an
8 earlier time, probably pre-contact. Certainly an
9 earlier time when the caribou were much more prevalent
10 in that part of the territory.
11 Now, I would like to -- I've described and
12 transcribed most of the adaawk in both volumes,
13 because he continues from one day to the next on page
14 35. On page 35 there is a reference that 'Wii Hloots
15 was killed by his brother, Gaalaa'uu, and he tried to
16 hide him. The top of page 36, he describes -- they
17 went up there to get caribou, then 'Wii Hloots was
18 killed by his brother Gaalaa'uu.
19 He says on the top of page 36:
20
21 And like I said yesterday, cremated his brother
22 at that swamp just above Sand Lake.
23
24 Now, Sand Lake is labelled on the map as Dam Git
25 Axsol. It's that black lake right inside. And then
26 he went home.
27 And then he goes to the -- on page 36 of my
28 argument, the transcription describes how he goes back
29 to An gol hon and he can't get any fish because there
30 was a famine, so he went to Xsu Gwihikstaat -- I'm
31 three-quarters of the way down page 36, and you can
32 follow that on the map 349, my lord -- where his
33 brother's house was -- and that's Tenimgyet. Because
34 'Wii Hloots at that time lived at An gol hon and
35 Tenimgyet lived at Xsu Gwihikstaat, both in the Wilson
36 Creek territory.
37 Now then, Mr. Matthews described something that
38 my colleague, Ms. Mandell, shall refer to, about the
39 use of Wilson Creek as a defence, and he gives that
40 evidence, the prime location of the fishing site.
41 Now, going up you see then on page 37 he
42 describes Gaalaa'uu's -- Gaalaa'uu's trip back to
43 Tsihl Gwellii to try to get food. And he says:
44
45 He took this route, went up around the height
46 of land, and the first -- there is two or
47 three, came to the height of the land here, the

first lump of the height of land, and came to a creek we call Xsi gwin biyoosxw.

That, my lord, the evidence is, is Insect Creek. And that's the route that you see the trail going up again along Insect Creek.

Now then he said:

Because he knew, and this is traditional and these bear dens still exist on the territory today. The first on our territory he knew there was a bear den at a place we call Xsi gan ts'elhlxwit.

Now, An Sagan Tsaltwit is marked on the map just inside -- I believe it's around -- it's in the area of the "L" on Exhibit 349, because it's the one before the one at Gisak Loot. And Art Matthews describes -- that's the first camp. Art Matthews Jr. himself has followed the footsteps of Gaalaa'uu on this trip. He has gone through these trail as has his father. And that, my lord, is exemplary of the possession that we were talking of.

And then he -- of course there was no bear, so on page 38, Gaalaa'uu continues on to the bear den at Gisak Loot, which Art Matthews describes:

...there is a marker today indicated they mix their own paint in red mes we call it. Mes.

And that's marked. I believe your lordship can follow it along the trail.

THE COURT: Yes, it's there, yes. I think I walked this trail before. Several times.

MR. GRANT: Okay. Well, one of the things I want to say, because there is some confusion, is that it's clear from Art Matthews Jr. that his territory begins when you go over the height of land. And if you flip up the -- if you flip up the overlay, you can see that Insect Creek does come up over to around where the "L" is --I have the "L" on the underlay, and that's where the change is in the height of land and that's where the Tsihl Gwellii territory starts. There was some confusion or suggestion that Tenimgyet's territory went further down Insect Creek. It's a trail that's shared with a number of Houses.

Then, of course, they go to wilp dagan, and that's

shown on the map. I've reiterated Art Matthews' evidence on page 38, and they go to Luu Lax Saaxsit. Now what you see here, my lord, of course, is the description in this adaawk going throughout -- not just to one part of the territory, but throughout the territory.

And then, of course, they come to a place called Yagaxa Loobit which is also marked, and those camps are all marked on the sketch map.

And finally, of course, his grandmother (sic) died and he went up to Sand Lake, Lax Lilbax -- I'm sorry, he went to the island, la Lilbax, and then he went up to Haahl Daakhl which is the northern -- the northwesternmost portion of that territory -- and he found the bear in the den, he caught the bear and hurried back to Yagaxa Loobit which is where he left his mother and she had already died.

Now, that -- what that adaawk describes is a route throughout the territory and it describes the boundaries of the territory. When you see that, my lord, and understanding the training I talked to you about last week, the description, the reference to this adaawk and the place names of this adaawk in the feast, is the establishment of the territory as belonging to Tenimgyet.

Now then, I refer you in my argument, commencing on page 40, to the latter part of the Biis Hoon adaawk. And I just -- I won't go through that, my lord, because it's all there. I won't go through it in the same way. But if you remember what happened was, there was -- up in this area here, just down there on the westernmost boundary where Biis Hoon had her village, and her brothers, her relations, came down there, and the adaawk describes this boundary going along that western boundary as they travelled down. And Mr. Matthews described that in his evidence in the same way as I just described the 'Wii Hloots adaawk. And of course he described that Gaalaa'uu is a name in the House but it is not used because of the shame of this particular adaawk, and that's why it's referred to as 'Wii Hloots' adaawk, because 'Wii Hloots was the House chief who has been wronged.

I would like to refer you to page 42. This is where he is talking about the village of Biis Hoon and this is when these totem images moved and the people left the area.

And he confirmed that that is:

...right on the boundary where Tsihl Gwellii comes into the boundary -- comes into the places at the boundary.

In other words, that's right on that western boundary.

Now, the photos -- and I refer you to Exhibit 351 -- the photos on Exhibit 351 show the territory and a number of the fishing sites. 351 is the black binder in which the map is in. It's two tabs further along, my lord.

THE COURT: Thank you.

MR. GRANT: And photos eight -- some of these photos are good and some of them aren't so good. But photos eight, nine and ten actually are numbered. Number eight has the fishing site, that's on the second page in. And you can see the -- drawn on photo nine and photo ten -- this is across the river from the highway side -- you can see the drawing going up the mountain, and on ten there is an arrow of the route.

THE COURT: Yes.

MR. GRANT: An arrow which shows the route goes up through Tsim Tsiix up to the Tsihl Gwellii territory which is -- you can see the tops of the mountains, and you go over there, through that pass, and you are into the Tsihl Gwellii, the Cedar River territory.

And just keeping that for a moment, my lord, the photographs at 17 and 19 show -- and they marked again the tip of Lo'oba Sagan Tseltxwit which is the first of the bear dens, that's where they would go through there, and you can just see the mountain in the background which is the beginning of the Cedar River territory of Tenimgyet. They were marked with an arrow.

THE COURT: Yes. Just in that saddle between those two ridges.

MR. GRANT: That's right. There is two ridges and then there is a small mountain that comes in between them. Well, it's not small, but you can see it behind them.

THE COURT: Yes. That's where an unidentified counsel asked the witness if he could see that peak peeking behind two other peaks.

MR. GRANT: That's right. On key points your memory is much better than mine, my lord. I appreciate it.

Now, after the telling of the detailed adaawk, as referred to by Art Matthews, I submit, my lord -- and I am on page 43 of my argument -- that it is clear why the chiefs can refer to territories by reference to one or two key place names. As Mr. Matthews described

it, this means of referencing the territories in the feast hall is a code known to the knowledgeable chiefs. And there is no doubt that if another chief had claim to Tenimgyet territory, he would certainly know when that mountain was being referred to, Lo'oba Sagan Tseltxwit, he would certainly know that he better stand up and say something or else his purported right would be ignored. And that's -- we've heard evidence of that which we will refer to later in the situation of some fishing sites.

Now, Gyolugyet, Mary McKenzie in referring to the Tsuuwigus adaawk and the migration of her house from Gitangasx to Old Kuldo explained that Kuldo means "out in the wilderness". She also explained how the description of the House adaawk connects to the ancient migration of the ancestors of Gyolugyet. In that case, Mrs. McKenzie, as you recall, had not been on her territory but she knew who was on her territory, and those who were from other Houses who were her neighbours kept in close contact, including the late Albert Tait, the late Delgamuukw.

A more clear -- a more concise example is Mrs. Johnson's example of Miinhl Antselda, the name given to a small mountain on her territory. There is a lookout on the top of the mountain. This is the mountain that is visible from Hazelton. There is a trail that goes around it and the stones were very thin on that side of the mountain. She referred to them as saadlda'm loo'op. They were smooth stones. In this case, the mountain is named after those stones that are found on the side of the mountain.

There was another site she referred to as An Guux Di Git wank which means "whistle on the top of the hill", and she explained in cross-examination that from -- by Mr. Goldie, that the people from Kisgagas would stop on the top of the hill and whistle to let the folks know they were coming by. The people at the Antgulilbix smokehouse would call them down and feed them.

Similarily, on the territory much farther away in the north of Antgulilbix -- the northern territory of Antgulilbix, there is a ridge called Xsagangaxda. The ridge itself is known as Xsagangaxda, but it's where the murder of a former Yal took place. This is, of course, the Yal in her House as opposed to the Yal from Kitwanga. As she stated in her evidence, the place below the ridge is called Xsaxwhl Xsagangaxda

because that is where the murder actually took place.

Now, Mrs. Ryan -- and many of these are described in her evidence -- described many, many fishing sites and their names. For example, I'll just refer you to some because they point out the different ways in which the naming occurs.

Wilsa K'awts, number three, "when they pick the wild roots there".

Ant kii 'min, "a place where a jealous wife kept watch on her husband". And that's in the exhibit of listing.

Number eight, Win golhl hon, means "a place where [the] fish stop to rest". And I believe that Stanley Williams or Art Matthews Jr. described why that was called that and referred to that adaawk.

Gwin hat', "a place of martens". I focus on that. In the Gitksan language, marten is referred to by a name that is not at all connected to French or English or Russian, and marten is a significant resource of theirs on their own.

Eleven, Git an yuusxw, "a place of the fish trap".

And twelve, Gwin gas k'ots jaxt, means "a swift part of the river where canoeists would have to row very hard [or] they would become exhausted". "So that they would become exhausted".

Number 18 from Mr. Sterritt's evidence, Gaakhl galli dak is "the wings of the blue jay".

And number 19, Miinhl lax mihl, is "the foot of the burn". And of course here they are referring to the burning, the controlled burning for berries.

Among the Wet'suwet'en we have seen examples such as the boundary between Namox and Kannots' territory, Neen Lii. And you've seen a photograph of that particular site.

Le'na Diil, (boundary crossing with the Chilcotin) which is -- this is "the people cross on the way to get the rock".

I am on page 48, number 22, my lord. And Alfred Mitchell gave evidence of the site Beg'ut wedziih celts'ay, "just below the peak there is a meadow. This is where the caribou would have their young and that is how the place got its [name]". That's a typographical error, my lord.

And C'ass'an, "the highest point in the middle of the sky line" was another Wet'suwet'en term.

Now, my lord, these 23 names I've listed here,

over and above what I've referred to on Tenimgyet's territory, are just a few examples of the site and place names throughout the territories. Now, many of these names are depicted and labelled in the photo-albums. These are Mr. Sterritt's albums, Exhibits 377, 654, 655, 656 and 487.

Exhibit 703 is Mr. Sterritt's cross reference and he relates many of the place names in the photo-album to territorial affidavits. For example, he refers to a blaze that Robert Jackson Sr. referred to on the Miluulak territory called Djil djila, Drift Lake, and that's shown in volume 3, page 9 of Exhibit 655.

Now, my lord, a review of Exhibit 703, the index of Mr. Sterritt cross referencing and the photo-album, indicates the hundreds of other geographical features with place names referred to in territorial affidavits which are pictured as they are on the ground. And of course he reviewed one of these albums as a sample during the course of his evidence. And this is -- you, yourself, observed how the chiefs were knowledgeable about place names on the territory during your viewing and the constant referencing to places.

These names, my lord, mark and describe activities, events, or physical features on the ground. They often describe a physical feature through an analogy to a humorous device. For example, An kii iss: the water shooting from the ground like a man urinating, because there was a spring there that looked like that. In some cases they describe a geographical feature in the context of part of the Wiigyet stories. Now I say "Wiigyet stories". That's the andi mahl'asxw not the adaawk -- not to be confused with the Wiigyet adaawk. They may describe a place which has prominence for the fishery because of the conduct of the fish at that place; the Win golhl hon, where the fish rest. And of course a number of places refer to the experience of people when the river was used for travel by the Gitksan or the Wet'suwet'en.

Now, an interesting example of connection between names and territories is demonstrated by the name in Antgulilbix' House, Gyadim lax Ts'inaast. This is, of course, the name of the clearing on the mountain on her territory where this man lived. And his mask in the feast hall was considered quite funny as she described.

The place where he lived was Na laxtsinaasit and he was named after the place where he lived. And I put in the reference from Mary Johnson how vicious this fellow was, and he would come into the feast hall with a:

> ...blanket with human bones, [and] he [would] sharpen them and...they [would] stick out on both sides. So two chiefs, parted a space for him to sit and these bones poked those chiefs, but they didn't move [because] they were scared of him.

Now this -- that certainly is -- appears to be a nax nox name in part of a performance. But in any event, the name of the man, that name is directly tied to the geographic place of where he lived, and that name has been been carried on through the mask, the crest and that adaawk. So when the name of this person is mentioned, it not only gives reference to the adaawk and crest, but also literally to the territory and the location where he lived.

Among the Wet'suwet'en, my lord, with respect to the kungax, I already referred you to Mrs. Alfred's description of the history of the girl who became the frog, in my earlier part of the argument. In this context, my lord, what is significant is that Mrs. Alfred described precisely the place where that happened as Tse K'al K'e yex. A place -- which is translated -- which is near the "house on the flat rock", the name, Hagwilnegh's House -- Wah Tah K'eght's House, sorry, and it's near where Hagwilnegh's House was in Moricetown.

Now, Madeline Alfred, Mrs. Alfred, went on to explain that this was a true history, a G'idee Dee'.

Elsewhere in her evidence, Mrs. Alfred referred to the song with respect to a place known as Tah Lus. She described that Nuu 'tseni stole the rare snare spot and she describes where Nuu 'tseni was killed.

What's dramatic about Mrs. Alfred's description is after connecting the history of what happened to the song, she describes where it occurred as Tac'es'kwe on the territory of Wah Tah K'eght. The geographic place name on the territory is therefore connected directly to a conflict with the Nu'tseni. A defence of the territory, I may add, to which Ms. Mandell will refer you to further, and it's

1 demonstrated and exemplified through the song. And I
2 submit, my lord, that this is a further example of the
3 relationship of the territory to a history in relation
4 to the time depth on the territory.
5 You've heard extensive evidence from the Gitksan
6 and Wet'suwet'en chiefs about the importance of adaawk
7 and the kungax to affirm ownership and authority of
8 chiefs over the territory. When you examine the
9 territorial affidavits, my lord, or consider them and
10 the cross-examination on those affidavits and then the
11 evidence of "specialists" on the territory -- and I
12 say there are specialists, just as in our society, on
13 the territories, such people as Stanley Williams,
14 James Morrison, Pete Muldoe, Alfred Mitchell, Alfred
15 Joseph and Dan Michell. Their intimate knowledge with
16 the place names, the meaning of those place names and
17 the chief who has authority over the specific
18 territories demonstrates the necessary linkage between
19 knowledge of the territory by name and ownership of
20 the territory. In this way, my lord, ownership of the
21 territory by the House is proven in the Gitksan and
22 Wet'suwet'en systems, and I say it's the proof
23 necessary -- it's the satisfactory proof in the -- in
24 this court.
25 THE COURT: Well, at some point I have to have straightened out
26 for me the question of what can be proven by
27 declarations of deceased persons. Many of these
28 references that you've given me have been statements
29 by living persons and many are not statements of
30 reputation. And I am not sure how you see me dealing
31 with that issue, but I need your help on that at some
32 point.
33 MR. GRANT: Well, I would submit, my lord, that the statements
34 of the descriptions of the territories by -- through
35 the adaawk and the kungax and the announcement of the
36 territories in the feast is -- does go to reputation.
37 And I just would leave it --
38 THE COURT: Well, my problem is to know which ones do and which
39 ones don't. That's the difficulty I'm having.
40 MR. GRANT: Yes.
41 THE COURT: And I've dread this particular part of the case
42 because it seems to me to be a -- if I can put it
43 ineloquently -- it's a dog's banquet. There is so
44 much of it and I am not sure what counsel say I should
45 do about that.
46 MR. GRANT: We are going to deal with it more in detail later, I
47 just wish to --

THE COURT: Right. Thank you.
MR. GRANT: I just wish to set out our position.
The boundaries of the territories, my lord, are defined by reference to named geographical, physical and historical features.
You have heard on many occasions in evidence "they know the boundary and they never go over it". The chiefs state this because they know the clearly defined boundaries as these have been passed on from generation to generation.
The geographic features and place names are the markers which the Gitksan and Wet'suwet'en people look to in order to identify the boundaries. And Mr. Joseph described this in his evidence regarding the Wet'suwet'en, saying that many -- most of the geographic features of Wet'suwet'en names are of great antiquity.
And then Madeline Alfred reiterated that where she stated:

> A long time ago our ancestors had place names, mountains, creeks, which they used for boundary lines. There was no such thing as lines. They used these place names for boundary lines.

And this is the boundary around, not a boundary -- a line like a single trapline, I believe, is what she was referring to.
The Wet'suwet'en language offers evidence of the existence of boundaries for each territory identified by physical features on the territory. The boundaries "in the Indian way" is called N'Tsexw Nu Yin'aniila, which is the Wet'suwet'en word for boundary as Mr. Mitchell explained.
There was evidence of the words for river or major river. Wedzen Kwe, of course, the specific river. Other boundary words are "Ben" which means lake and "Ta'taas Tie" which means a range of mountains. And I think Mr. Joseph gave Neelgii as an example of a mountain range.
One of the important examples is the use of the term for the foot of the mountain as "Dzel C'een", which is a boundary point marker in certain circumstances. And I've already referred you to Neen Lii.
Corner carvings and blazes are sometimes used as identity points. And the Wet'suwet'en have a word for

that: "Hagel Ts'el".

My lord, you have heard evidence of the Wet'suwet'en words for directions. These indicate, we submit, the necessity of knowing the location with some accuracy. The Wet'suwet'en refer to the people towards Burns Lake as "Nuu'", the Nuu'tseni. If they are talking about people towards Terrace -- and that should be "or Prince Rupert" not "Prince George", of course -- the west, they say "Nde'" which means "down river". They refer to the southerly direction as "Naa Sts'ai" and the Wesuwet'en words for headwaters is "Niss". The word for heading south and straight ahead is "Lk'onya'".

> If you're on the territory to look for the boundaries you look for a ridge, a small hill, mountains, creeks, rivers, trails, a range of mountains.

And this, of course, is what Mr. Joseph said with respect to the Wet'suwet'en.

Fred Johnson testified that the boundaries are known by the chiefs.

> Other people know where they have to come to. Where they meet. Every year they do. Other places of the west and farther west, they know.

And he was referring to the down river territories of the Gitksan, of course.

When asked whether or not the people from Sarah Layton's territory would have a right to come up to Peter Alec Creek in Gisdaywa's territory, Alfred Joseph answered:

> No. They would stay on the other side of the ridge above the creek.

He also testified that:

> Where a river is a boundary between two Wet'suwet'en House territories it's the Chief that owns the territory next to the River. The Chief is entitled to go into the river to catch fish or pursue animals to the middle and he can't cross over to the other side. He can pursue beaver, muskrat, otter, mink and the

House claims the riverbed, water and fish.

With respect to the Gitksan, my lord, the word for boundary is "An Lay Tix" which means "marker". Mrs. Ryan described that:

> Every Chief, they know the boundary and they never go over it. They follow the An Lay Tixz. That's the line

Stanley Williams testified to other Gitksan words used to describe a mountain such as Gidii Gwaihl --

THE COURT: "Boundary", sorry.

MR. GRANT: "Boundary", I'm sorry. Such as Gidii Gwaihl Yip. And Gidii Gwaihl Yip means "as far as the territory goes". And he talks about the other terms meaning "blazing a trail, or [marker]" -- that should be marker, my lord -- "that's what it means." Hli Daaxhl Lax Yip means "the edges of the territory". And I refer you to James Morrison's evidence, how he referred to lax yip:

> The Gitksan word "lax yips" means you don't trespass onto the boundary. And there is a word for boundary in Gitksan which is "An Lii Diks". This means "that land mark where the post on the corner of the boundary" also known as "a creek" or "a mountain that's never moved", or the "creek that they use that's not dry, it's always runs, a creek all the time." So that's the reason why they use this boundary. They call it "An Lii Diks". It does not move. They don't use anything that moves because the boundaries start to be divided in those days. It's still the same today. They never change. No one can change that.

Now as I refer to and Ms. Ryan referred to, if a boundary is a creek, the Gitksan have laws defining the exact placement of the boundary. The chief owns to the middle of the creek on one side and the other chiefs owns to the middle of the creek on the other side.

Art Matthews gave evidence that a chief owns a fishing site, owns it to the middle of the river. And this will be significant later when I deal with ownership and jurisdiction of the fishery, my lord, in

the Gitksan and Wet'suwet'en context. He says -- he was asked:

Q Who under Gitksan --

"Law" that should be, my lord.

-- owns the middle of the river between the fishing sites on the right bank and the left bank?
A We say that we own the whole where it goes across it covers the middle, there is no opening there, it goes across just to the bank at the other side and back on the other side.

He explained this further in answer to questions from the court:

Q Well, then you are saying this applies to the Skeena, but not to other rivers?
A Yeah, where any kind of river, ... if you have fishing sites on both sides, naturally you own right across. But when you just claim one side just that bank side.
Q Well, in that case where you only claim one side, and another side, and another House claims the other side, ... what Gitksan chief or chiefs claim the middle?
A Well, I would claim the middle of it on my bank and this guy would claim the bank on the half of the river on that side.
Q So the river would be divided?
A Yes.
THE COURT: So there's a difference between river as a boundary and a river as a fishing site?
A Yes.
THE COURT: All right ... in other words, if a river is a boundary between two Houses then the real boundary is in the middle of the river?
A If they were opposite banks from each, yes.

Now, Art Matthews described that where fishing

sites along one portion of the river are owned by Tenimgyet, but the territory behind them is owned by Gwis gyen, the Gwis gyen territory starts from the river bank and not from the middle of the river.

James Morrison dealt with another boundary question with respect to a trail between Wii Minoosik's and Waiget's -- that's the Waiget and Wiigyet, of course, together -- territory. The boundary is a good goat hunting area. This is up in the Kisgagas territory. The Houses on either side of the trail manage the harvest. And they said:

> (The boundary) it's in between these two mountains here ...
>
> A That's how it became in two areas there, they hunt and on each side of the mountain. You travel up to the creek where the trail is and you look on both sides of the mountain and either side of the mountain where you saw goat so you have two people there which is the authority in each territory, so...
>
> Q The Gwin Dak Mountain seems to be located about in the middle of Wii Minoosik's territory?
>
> A Yes.

But he is referring to the trail going up to the mountain as being on the border.

Martha Brown finally testified that the law is that the boundary must be respected and she said the hunter must restrict his harvesting to his side of the line.

> It's the Indian law. For instance, it's the Indian or Gitksan or Indian law that we do have a line or boundary that whoever owns on one side can take from that side but they cannot cross the line and take from the other side otherwise they take it away and in turn the other side cannot enter into our boundary.

Now, my lord, I have a few points in conclusion on what this leads to.

Firstly, my lord, I ask you to find that the Gitksan and Wet'suwet'en have a concept of boundaries.

Secondly, that they have used this concept of

boundaries since before contact. And I rely not only on what I have said to you but on what Mr. Adams has said as well.

Thirdly, they have place names of their territory which are founded in their adaawk and their kungax.

THE COURT: Found in or founded in?

MR. GRANT: Founded, based in. Based in may be better, my lord.

THE COURT: All right.

MR. GRANT: Fourthly, they have knowledge of the territory and they confirm the territory through those place names. And I emphasize the example of how Art Matthews Jr. described his training in two steps of the adaawk and then being taken on the territory.

And finally, they have possession over the territory through the knowledge of the place names, and their going on the territory with respect to those place names, and through the confirmation of the territory in the feast.

MR. GRANT: My lord, Ms. Mandell is going to go to the next area. We should take --

THE COURT: All right. Do you want to take the adjournment first?

MR. GRANT: Yes.

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED AT 2:55 P.M.)

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

Toni Kerekes, O.R.
United Reporting Service Ltd.

1
2 THE REGISTRAR: Order in court.
3 THE COURT: Ms. Mandell.
4 MS. MANDELL: Thank you. You are on page 60?
5 MS. MANDELL: Yes.
6 THE COURT: Thank you.
7 MS. MANDELL: My lord, you will recall this morning when Mr.
8 Jackson was providing definitions or criteria of
9 ownership, that both Dr. Daly and His Honour Judge
10 Gould spoke about a criteria of ownership which
11 implies the concept of exclusive possession, and
12 implicit in this is the delineation of boundaries.
13 The San Ildefonso case also stated that implicit in
14 the concept of ownership is the right to exclude
15 others. And its the plaintiffs' submission that in
16 looking at the way in which the laws of trespass are
17 both present and also enforced within the system, the
18 trespass laws demonstrate how important the people
19 consider their boundaries, and also there is a very
20 sophisticated concept of trespass which we say is
21 reflective of the importance of the boundaries, which
22 is well-developed in the system of trespass. And I'll
23 be addressing that system.
24 And before I do that, though, I wanted to recall
25 for your lordship the paraphrase of Solomon Marsden's
26 quote, which was referred to by Mr. Grant last week on
27 crests, where he was saying that the importance of
28 crests to the house is, among other things, that it
29 was a real struggle to acquire them. And we say that
30 it's also a struggle to protect the territories which
31 the crests are reflective of the ownership for, and
32 it's within that context that the laws of trespass are
33 understood.
34 I begin the discussion with a portion of the
35 testimony of Alfred Joseph, where he through the
36 language demonstrates the very many concepts for
37 trespass within the system. And if I could ask your
38 lordship to turn to page 61, I am just going to run
39 through some of the various Wet'suwet'en words for
40 trespass. I am reading from the middle of the page.
41 One concept of trespass is one used another chief's
42 territory without his knowledge, and there is a word
43 meaning crossing on somebody's boundary, and there is
44 another word, stepping on someone else's land, and
45 profiting from someone else's land, trapping out of
46 your jurisdiction. Stealing off the land, using it,
47 the territory, without anyone's knowledge. Hunting or

trapping on someone's territory without their knowledge and telling anyone. Sneaking on the territory and using the land without permission. And it's within those very many words that in some ways the various degrees of mens rea, if you will, with respect to trespass have been spelled out.

The significance of the boundaries and the trespass laws was visible at the time of contact, and was the subject of comment by the first white traders in the region. And I've cited below the passage of Daniel Harmon in 1812.

> "The people of every village have a certain extent of country, which they consider their own, and in which they may hunt and fish; but they may not transcend these bounds, without purchasing the privilege of those who claim the land. Mountains and rivers serve them as boundaries, and they are not often broken over."

Now, the people speak about trespass as a law, and when we deal with jurisdiction in greater depth, the concept of the laws is more fully explained, but at least in this context may we say that when there is a law referred to, we say that it's a general understanding and system which permeates through the houses, through the houses acting together and at the feast, and when there is that global permeation of this tenant or belief system and structure, then it's referred to as a law. And Mrs. MacKenzie testified:

> "It's Gitksan law that no one goes on anyone's territory without getting permission from the head chief of the house of the territory, even if it's your husband, your wife or your children."

And I am going to refer you to the way that Emma Michell spoke about it. She says:

> "The boundaries are just like a fence around it (the territory) they watched it and looked after it all the time. Made sure nobody came within the boundaries."

And Dr. Mills was of the view with respect to the

Wet'suwet'en:

> "One of the firmest laws in the Wet'suwet'en system is that you do not go on someone's territory where you do not belong without asking permission."

And I've cited the Right of Innocent passage section, which goes to page 67, as an example of the nuance in the law, and this was pretty much the same for both the Gitksan and the Wet'suwet'en, and was stated for the Wet'suwet'en by Alfred Joseph. And I'll take you to the quote at the bottom of page 64. The general exception to trespass was that:

> "People who came up from the south would travel through Gisdayway's territory. And as long as it's a road and they are not trapping, taking beaver, they are quite free to move. Hunting is allowed if you take what you need as you were travelling through the area."

And then he said:

> "But you are not entitled to trap."

THE COURT: Doesn't that suggest that perhaps this is a -- this part of the law is of recent vintage? If you could cross the territory and hunt on it while crossing it, does the suggestion that you are not entitled to trap on it not suggest that this is something that would arise when there was a fur trade?

MS. MANDELL: Well, if I could address it in two parts. First of all the evidence that Mr. Grant referred you to on organized society demonstrates that there were trails that were very long-standing which existed before contact, and the reference to being able to travel through somebody's territory and hunt through the trails doesn't suggest contact or fur trade in that sense. And I also say that the evidence which I will refer you to later also suggests that there was trapping pre-contact.

Alfred Mitchell, for example, makes reference to the deadfalls which he encountered on the territory of Namox, which were still there, and which didn't necessarily relate to -- in fact the evidence within

which it was stated suggests that the trapping took place too before contact. So I wouldn't leap to the conclusion that we are talking about a contact phenomena. In fact we would argue to the contrary.

THE COURT: Well, I can see the possibility that pre-contact trapping could well be different from sustenance hunting while crossing through a territory. I suppose that's really what you're saying?

MS. MANDELL: Yes, that's right.

THE COURT: When you say, though, that where he had his traps, I suppose this is just a -- the risk that one runs of the well-known legal sport of jumping to conclusions, but that sounds to me like a commercial operation. You say it doesn't have to mean that, just mean ordinary pre-contact trapping?

MS. MANDELL: That's right. I think that we are all going by what was said and told. But I think that the evidence of Alfred Mitchell was fairly clear about the fact that in his father and his grandfather's time, and certainly before the concept of trapping in the commercial sense, the people would go to the territory and they would camp there, make lean-tos for the place which they would see as their locality, still do, and trap within a region, and the rotating of the trap lines and the trapping through deadfall traps and so forth doesn't create an inference that there was some magic about contact to this activity.

THE COURT: All right. Thank you.

MS. MANDELL: The same laws so for the Gitksan. And Solomon Marsden added a nuance which is worthy of note. He says at the bottom of page 65 -- he was asked about the Gitksan law with respect to crossing over the territory of another chief.

> "This is what happens when ... one of the family that owns one of the Wil'nat'ahl, that owns the territory up further than this territory here, then what happens, they they walk on the territory with that other chiefs to get to their territory. And what happens is they don't -- they just go on that trail. They don't go out of the trail and start hunting on that territory. They just keep walking until they get to their own territory."

And he explained that if there is an animal on the trail, a person is allowed to shoot that animal but

1 cannot go into and hunt on the territory. And I think
2 that -- I think it's generally the same principle,
3 that they can certainly pass through, and in the
4 Gitksan example there was the accompaniment of the
5 chief.
6 Now, Alfred Joseph makes the point that often the
7 whereabouts of each other would be fairly well-known,
8 and it would explain how Solomon Marsden makes
9 reference to a chief who would actually accompany with
10 him.
11 Now, the next section that I would like to deal
12 with is the question of -- what I am going to call
13 roughly speaking sanctions. It's really the
14 implementation of the law and how the society contends
15 with breaches. And if I could depart here and refer
16 to what I understand the argument of the provincial
17 defendant.
18 In this respect they say that there is little
19 evidence of practises which regulate two groups, and
20 within the community the practices are regularly
21 followed. And they say that the laws are vague and
22 broken with impunity. And that's how I understand
23 their position.
24 It's our position, and I think it can be
25 illustrated with respect to trespass, that both the
26 implementation and the breaches of law follow a set of
27 principles, and the implementation will vary, but the
28 principles remain constant.
29 And if I could now state that with respect to the
30 law of trespass, there is four principles which appear
31 to be active throughout all of the evidence. One is
32 that the -- there will be notice of the law, and when
33 I say notice, I'm now referring to the fact that the
34 law must be well promulgated, and we are dealing here
35 in a kinship society, and so the law has to permeate
36 into the house level, because it's at the house level
37 that the law is enforced and taught. So the first
38 principle is that there be notice of the law.
39 The second, with respect to trespasses, that there
40 be some warning, if there is going to be some
41 accusation that the law is being broken. And at this
42 stage I say that there is often time a debate over the
43 rights. And this happens at the warning stage, where
44 if somebody feels that they have rights to the land,
45 and the owner feels that there is a trespass, that
46 it's during a warning stage that that debate would be
47 capable of being aired.

1 And the third principle is that where the trespass
2 continues there will be some redress. And there is a
3 variety of places and ways in which the law can be
4 redressed. And I'll deal with some of them that
5 appear in the evidence.
6 And finally there is a balancing of the peace, and
7 this balancing and counterbalancing of the peace is a
8 feature of kinship societies, especially where it's
9 necessary for there to be a mechanism for the peace to
10 be restored. And I'll illustrate that again with
11 respect to the trespass laws.
12 THE COURT: Well, surely you have left out the dramatic one that
13 the witness has said you could kill the trespasser.
14 Where do you fit that into your four principles?
15 MS. MANDELL: Well, first of all I will be dealing with that in
16 turn. It's a fairly dramatic example of both the
17 third and the fourth -- the second, third and fourth
18 point.
19 THE COURT: It is to the trespasser anyway.
20 MS. MANDELL: I'll get to it.
21 First on the question of notice. We had some
22 evidence which I think is helpful to understand the
23 question of notice, on the question of which -- which
24 came in through Art Mathews, where he was describing
25 the privileged access to his territory. And he gave
26 three examples by which his house enforced trespass on
27 the house territory itself.
28 THE COURT: These are not in your outline?
29 MS. MANDELL: Yes, they are. It's page 67. The principles are
30 not in the outline.
31 THE COURT: All right. Thank you.
32 MS. MANDELL: Art Mathews talked about Tenimgyet's territory,
33 and in that territory there were a number of special
34 features on the land which gave rise to special ways
35 for the trespassers to be identified by house members.
36 He spoke about the berry patch on the territory, and
37 this was in house mother's time something which was
38 still used, where the ladies would make woven
39 trumplines of specific colours for their berry boxes,
40 and for those people who were going up to use the
41 berry patch they were given these identifying marks,
42 and those people in the house would know that the
43 ladies there from outside the house had permission to
44 be there.
45 And the men, when they were hunting on the
46 territory, were given a special cane, and on page 68
47 Art Mathews refers to a lake in the Tenimgyet

territory where there was blue -- a blue dye which was able to be used from the lake where they made -- they made a cane using the dye. And these staffs were coloured this light blue and again given to those that were hunting on the territory, and it was an identifying mark.

Now, as I understand it from the evidence, these symbols of permission are not used today, but they were used in the lifetime of Art Mathews' mother. But one of the identifiable permission signs which is continued to be used today is in respect of the fishery, and the evidence of Mr. Mathews, and I think Mr. Grant referred to it as well earlier, is that the -- there was a lookout site, and there still is, on the Skeena River where the fishery is, and Art Mathews stated:

> "The people going through our territories have to report at this anjok to the chief that they are going to use your territory to go through it for access of their territory maybe or trading or whatever. The rule specifies the law you have to stop and check in like and tell the owners of that territory your intentions. And then in turn they give you a pilot to go through your territory in friendly manner. If you do not stop at this particular site, or just using our site for an example but all sites are the same, if you don't report into this anjok, then -- they know you had other intentions. You might not attack this village, but they will stop you and ask -- whatever intentions you have of governing -- further up the river. This rule applies -- to all the Gitksan. Even today people that are riding up and down the river stop off and just chat for a minute and take off."

And we say that it's a kind of natural border control that exists on the Skeena that is used by the house to patrol the fishing site.

I make reference at page 69 to the historical record which is marked with examples of Gitksan and Wet'suwet'en chiefs requiring non-Indian people to pay for the right to cross over the territory. And this will be referred to further in the submissions of Mr. Adams, when he's dealing with the historical record on

this period.

Now, by far the most important institution for the promulgation of notice of the boundaries and of the laws relating to trespasses is the feast. At page 69 I recite some of the procedures and ceremonies which form part of the headstone or pole raising fees. And Your Honour will recall that the territory isn't described in all of the feasts, but certainly at the headstone or pole raising feast in which a chiefly name and territory are passed to a new chief. These procedures and ceremonies require that the history of ownership of a territory, its boundaries and place names be described and witnessed by all the clans. The reiteration of the history of ownership, the history of the house crests, the migration, the telling of ancient histories, the singing of songs which deal with the trespass issues, the telling of boundary features, all combine to provide an opportunity for people from all clans to learn or relearn about the ownership of house territories.

And I would like to remind your lordship here of the testimony of Mr. Morrison. And he testified that mentioning the boundary at the feast helps to protect the territory. And this is how he put it:

> "People sitting in the feast hall (hear) what you saying that identified boundary and they know where the boundary is. You name the place where the post is, like An Lii Diks, and they know where the boundary is. It's in the feast and anyone that is sitting in the feast listen to you what you said the feast, An Lii Diks. That's where the law has been passed onto another chief.
>
> The crest which are displayed at the feast operates to protect the territory in this way:
>
> Well, they know where they found that in those days in the early, I don't know how many years, years when they found this on that territory and only history that's been told in that territory is one of those crests, and that's why they have different crests in each clan. They know where they come from. If you see someone walk into the feast hall and they have blanket on, you know where they come from and so they protect the territory. One way to protect the territory, in order to know the

1 boundaries of that territory."
2
3 And basically what he is talking about is the
4 wearing of the crests, and the reiteration of the
5 boundaries at the feast helps to, in a general
6 reputation way, explain to those people that are
7 listening, not only where the territory is and its
8 place names, but that the owner cares about their
9 territory, wears the crest, comes to the feast and
10 exemplifies his ownership or her ownership during the
11 course of the feast's procedure.
12 In addition to the inherent procedure which I have
13 just described, there is also a procedure which is
14 utilized in the feast where regular users of a
15 territory are announced publicly, and this informs
16 people as to who has legal rights to the land.
17 And your lordship may recall that Mary MacKenzie's
18 mother spoke at the feast when Mary MacKenzie took the
19 name Gwamoon. Her mother announced at the feast that
20 Mary's husband had permission to trap on the
21 territory. And Mary explained:
22
23 "because there are witnesses there, the head
24 chief is there to witness it and another thing
25 too, where our territory is, there are other
26 territories that we see -- that he has to go
27 through to get to our territory. So this has
28 to be explained in the feasting that the people
29 up there, my neighbours, our neighbours around
30 our territory, if they see him, they know where
31 his destination is, where he is going to go and
32 trap."
33
34 THE COURT: Why would Mrs. MacKenzie have a right to allow her
35 husband to trap there, considering the fact that she
36 holds it on behalf of the members of her house?
37 MS. MANDELL: This is something which we'll go into more detail,
38 but the ownership of the territory permits the chief
39 to grant access rights to others besides those in the
40 house, and there is a number of both kinship and
41 non-kinship relationships which could expect to be
42 granted access rights to the territory. The two major
43 ones are the relations on the father's side and those
44 on the spouse's side. And your lordship might recall
45 that when Mr. Grant was talking about the organized
46 society, there is obligations which are fufilled by
47 the father's side to the house territory at the feast,

1 and this is part of the interlocking of the house
2 units, where the feast obligations fufilled and the
3 rights to use the territory are granted as part of
4 that relationship, and so too are the relationships to
5 the spouse's side. And we'll be dealing with those
6 interests and those rights to grant in more detail
7 later in the argument, but we say that it's a very
8 fundamental aspect of the system that the way that the
9 houses are related and those rights which people have
10 to each others territories are very much tied to the
11 rights and obligations of the spouse's side and the
12 father's side and the mother's side. And it's in all
13 those relationships that your lordship will see how
14 the houses are interlocked in the most basic way, both
15 on the land and at the feast.
16 THE COURT: Well, is there any room for naivety in any of this?
17 For example, it's being presented to me as if these
18 laws are universal within the community. Everyone
19 knows them, everyone obeys them. Is there no risk
20 that some people would say that's what you say, but I
21 don't accept that? They say it to themself and carry
22 on as if it's never been said. Am I to -- the picture
23 I am getting from the plaintiffs' case is that this is
24 a compliant society that follows these rules, and
25 there is rarely any failure to live according to this
26 structure that's being described. Is there any room
27 for doubt about the likelihood of such a system
28 working on a regular basis in an universal way? It
29 doesn't work in any other society. Why should it work
30 in this one?
31 MS. MANDELL: Well, this case isn't about a perfect society.
32 This case is about real life people.
33 THE COURT: Well, that's what I find disturbing, that I am
34 getting a picture that looks to me to be only one side
35 of the coin.
36 MS. MANDELL: Well --
37 THE COURT: As if everybody agrees with everybody on everything.
38 Maybe that's a cultural problem I have, but that's not
39 the way human nature works as I have come to
40 experience human nature.
41 MS. MANDELL: It's a challenging point you raise. I wanted to
42 try and deal with it by reference to, for example, our
43 law about not permitting people to steal. And we
44 have --
45 THE COURT: Every society has those laws, and they hardly ever
46 obey them. Well, I shouldn't say that. They are
47 widely obeyed, but wildly disobeyed.

1 MS. MANDELL: I think that's the same here. We are not talking
2 about a pristine and perfect world, but what we are
3 talking about is, for example, if I could back into
4 the not stealing law, if the church stands up and
5 through its pulpits and teachings says one of the
6 commandments is you shouldn't steal, and if parliament
7 passes a law that says you shouldn't steal, and if the
8 courts enforce the law against those that have been
9 brought before it, who have been alleged to be in
10 breach of it, everybody gets the point, that in our
11 society we don't accept stealing, and there is a way
12 that that's all dealt with. And we say that the
13 analogy is with what's going on at the feast, where if
14 people -- the feast isn't the church and parliament
15 and the courts. We don't in kinship societies have
16 those forms of institutions, but it does operate to
17 service those various spiritual and legal and
18 political functions. And where at the feast it's --
19 people stand up at the most important feasts of their
20 lifetime, the headstone feast and the pole raising
21 feast, and people reiterate their boundaries and those
22 are corrected.
23 And you will see later that the law of trespass
24 can be enforced through the feast, and people at
25 feasts announce whose going to be able to have rights
26 to the territory, and it's done in a fairly global
27 way, and everybody knows that. Everyone knows that
28 this system cares about trespass. It's a law which
29 permeates in the same sense as if it were stated in
30 our society to have come through the institutions
31 which we know create law and define conduct.
32 I have practised criminal law too. I mean, a lot
33 of people steal, but it doesn't negate the fact that
34 we all understand that that's a basic rule of our
35 society. And I say that the same thing -- for those
36 areas that we are calling laws, that those same
37 principles apply in the Gitksan and the Wet'suwet'en
38 society.
39 THE COURT: In the Kerkoff labour dispute I made a consent
40 injunction order by consent. That was promptly
41 disobeyed and escalated into a riot in twenty-four
42 hours. It went on for two weeks. It was a consent
43 injunction. Everybody knew that it was an order that
44 should have been obeyed. Nobody played the slightest
45 attention to it until finally we decided we better do
46 something about it.
47 MS. MANDELL: Of course you would never go home and say, "Well,

there wasn't a law." You would say, "They have broke it."
THE COURT: There has been a disobedience, yes. And you are telling me that I should assume that there is some disobedience then?
MS. MANDELL: I don't see how a society can exist without it.
THE COURT: Moslem brothers cut off the hand of the offender, and it doesn't seem to stop it there either, does it?
MS. MANDELL: I think the real question is whether or not, as you put it, the disobedience is contained within a system to contend with it, or whether or not it's random anarchy, and we got people bumping their heads against anybody and without any way of enforcing it. And I think if the provincial defendant's case would be accepted at its highest, what we have is no laws and random enforcement and irregular behaviour, and there is no pattern which can be seen to explain the conduct of people. And the plaintiffs' case is to explain to you that there is a pattern here, and while there will be breaches to it, it doesn't negate the fact that there is a pattern which has both the law and a method of enforcing it.

You know, I might say here, and it's a point that I was about to get into, that my sense of one of the essential differences between what's at heart going to force people in the Gitksan and the Wet'suwet'en society to obey the law versus the law that we have in our non-Indian law has to do with the fact that society is organized around close kinship ties, and so the -- for example, the provincial defendant makes the point that the law, for example, of trespass only applies to those that show up at the feast. But what that kind of statement defies is the fact that people are born into their house, and they are born into the feast, and they are born into the community that their parents live and their grandparents live and their uncles and aunts live and their children live, and it's not in the same way impersonal that you can simply get away with it, because it's going to reflect back on how your whole family is in the community within which they live. And I say that there is stronger reasons why the law and systems for enforcing the law within a community based on kinship, than there is for one where you just simply hope that the police don't show up at your door --
THE COURT: Well, the impression I am getting, with some exceptions, in all of the plaintiffs' case, has been

that everyone agrees within the community, that these are the laws, and everybody obeys them with very minor exceptions. That's all I have heard about. That's the impression I have received in the plaintiffs' case. I'll do no more than tell you that that's the impression that I have been -- I think I have been exposed to it from, and I think accurately from the evidence. You do whatever you want with that. I don't know what it means. And you don't have to deal with it now.

MS. MANDELL: Well, I have taken it as far as I can go now.

THE COURT: That's fine. All right.

MS. MANDELL: All right. Well, let me talk about those people that have broken the laws, and some of the ways in which --

THE COURT: If you wish. Whatever you want to do.

MS. MANDELL: Its right where I am. Some ways in which the system contends with that.

One method of dealing with those people who have trespassed was spoken about by Solomon Marsden, and I am reading -- I am dealing with his example at the bottom of page 71.

THE COURT: Yes.

MS. MANDELL: If a person trespassed by mistake, he may make a public apology in the feast hall and compensate the chief. In answer to why this must be done in the feast, he testified:

> "It is not for the Gitksan people to do this by themselves, because no one would know about it. And in order for people to recognize what has been done and what's going on, they announce it in the feast and ... this is a correction that's made before the people."

And he says that such apologies continue to this day.

Now, another method of dealing with the -- those that break the law, and also, I might add, tie into the warning aspect of the way that the system works was discussed by Alfred Joseph and Johnny David. And this is the method used by the chief of the offender's house and clan where they discussed the matter with the offender, and in serious cases they raised the issue at the feast. And the way that Alfred Joseph put it, which is -- which is typical of this expression, is that the persons violating the trespass

law are always reminded by the owners. And this is the point of the house chief on behalf of his house whose territory is being trespassed upon pressing the case of the trespass and doing it in the manner which creates a warning. He says:

> "It's the members of that house that know this man or a person that is using another territory without their permission and that person is reminded of it very often ... if it's continued, that person will have to be invited to a feast and it is taken up in that place ... the person would be there but then the chief would say why the feast is held and he would be told that he or she is not supposed to be at a certain place, not supposed to be taking any food or any animals off the territory in front of the witnesses."

And this is a very -- in our submission a tremendous internal and moral pressure on a person to obey the system. And this is just one of the ways in which the pressure is exerted.

Johnny David testified that one who is untrustworthy and uses land without permission is referred to in the community as a sneak, and there is a Wet'suwet'en name for that. Social pressure is applied to such a person in the hope that he will mend his ways. He may be ostracized by being denied the use of any territory and denied entry into the feast hall. Then this transgressor may be called to a feast where the head chiefs reprimand him and demand that he mend his ways. And there is a special name for that kind of feast where a transgressor is brought forward. And Alfred Joseph explained further that the person is invited to a feast and it's taken up in that place, the person would be there, but then the chief would say why the feast is held, and he would be told that in a certain place he is not supposed to be taking food or animals off the territory. And this would happen in front of the witnesses. And this is where we say that both -- there is the aspect of warning that goes on.

There is also the aspect of community pressure, and it's also within this context that notice of the law and notice of the violation of it is pressed in a contest way. And it's done publicly and there is

witnesses. And that implies that if there is witnesses and people who don't agree, that others can come in and press the case as to why it's not trespass. But it's done in a public witnessing forum.

Dr. Mills stated what Johnny David had earlier said, in which I referred you to, which is that ostracism is another sanction, and she explains the power of ostracism, that:

> "When a person has been ostracized from his own people and goes onto the territory of other people ..."

I'm sorry.

> "The ostracized person is without kin to mourn his death or name or territory to pass on. He will not even have people who wish to have him reincarnate among them. The removal of a title, which happens today, albeit rarely, is a form of ostracism from the feast."

And we heard Mr. Grant refer to a chief, although not in the context of trespass, who recently had a title removed, although he wasn't also banished from the feast.

Now, Alfred Mitchell and Solomon Marsden and Pete Muldoe also referred to another form of both warning and also redress with respect to the law of trespass. Alfred Mitchell testified -- this is an old example about a blaze which he saw in Namox's territory which related to a trespass several generations back. And it was a place along the southeast boundary of Namox's territory, and he named the creek. And he stated:

> "apparently that next door neighbour trapper set six traps into Namox's territory, and Namox found these and they took it all out and set the traps right on the boundary of that creek, and they placed one jackpine, blazed it well enough so you could write on it. He carved the words in it telling that other guy this is the boundary. That's in Indian, way not in English."

And Alfred was told the story by his father, and according to the evidence of Alfred Mitchell Chief

Namox had no further trespass problems with his neighbour.

Solomon Marsden spoke about the method of notifying somebody on the ground, and also taking a sanction into their own hands when he spoke about -- into the hands of the house when he spoke about seizing. In this case it was traps. And he said:

> "... at one time when we went out, that's some of the people from Kitwancool, when we went out to my territory we found there was somebody trapping there. So what we did was we took all the traps."

And then he said the reason why he did this was because somebody was trespassing.

And I might here refer you as well to volume 103, page 6520. And this is a reference to Pete Muldoe's testimony where he also testified to picking up the traps of a non-Indian person at Deep Canoe.

THE COURT: Volume?

MS. MANDELL: Volume 103, page 6520.

THE COURT: Somehow that doesn't seem like the right page for that volume number.

MS. MANDELL: I'll check it for you.

THE COURT: Well, one of them is probably right. I can probably find it. It just seems to me if you got 25,000 pages and 225 volumes, you would have more than 6,500 pages in 103 volumes.

MS. MANDELL: Art Mathews described a contemporary incident where he told Ralph Pierre to stop logging at Wilson Creek.

I am told by my friends I have got the right page.

THE COURT: All right. Thank you.

MS. MANDELL: Now, another method of both warning, and also which carries with it the principle of deterrence, was spoken of by Alfred Joseph primarily for the Wet'suwet'en, which is the evoking of the spirit power as a sanction against trespass and a means of deterrent. And this is -- this was a -- it's a method of dealing with trespassers which Dr. Mills explained:

> "If a chief noticed that someone had been poaching in his winter territory but he did not know the person's identity, upon coming back to the summer village he would make a little figure of a person out of sinew and go through

1 the village displaying it. The person who was
2 guilty of poaching would see that the chief of
3 the territory was displeased and would start to
4 sicken. If the head chief chose to he could
5 heal the poacher and make him well. If he
6 chose to, he could let him die. These powers
7 were respected and considered appropriate to
8 use in protecting and managing one's territory.
9 Today practise of these powers is done less
10 openly, but the younger generation as well as
11 older Wet'suwet'en dream and explain events in
12 terms of the kun and ha bo tsat causes of
13 accidents and misfortunes that befall them."
14
15 And in Alfred's Joseph's testimony he also
16 testified to the use of spirit power to punish
17 trespassers and those who were stealing. And in the
18 middle of the quote he says:
19
20 "... it's intended for him to return the
21 property and if he doesn't that person -- will
22 be very sick and suffer a lot."
23
24 And he explains that this is used for people who
25 have stolen food. And he mentions that food is
26 especially important when you rely upon it being there
27 when you come back. And he says in the middle of the
28 quote:
29
30 "It's to sort of deter whoever is going to take
31 something for nothing."
32
33 Now, your lordship earlier referred to capital
34 punishment, and -- well, capital punishment for
35 trespass is not followed today. The understanding of
36 how it works is important, because we say that the
37 example of the use of capital punishment for trespass
38 both underscores how important the issue of trespass
39 was and is within the community, and also it
40 demonstrates a regulated set of principles as to how
41 the breach is sorted out.
42 Now, Dr. -- the chiefs identified and Alfred
43 Joseph spoke to it, that the consequences of the law
44 against trespass according to the Wet'suwet'en law
45 could be death. And Dr. Mills stated:
46
47 "To go onto territory where permission has not

> been sought or granted constitutes the serious offence of trespassing. A person caught trespassing might get a warning the first time. (often in the form of a service of the service of a feather); however, a persistent offender could face the severest sanctions, includes death."

And she based her opinion on oral history, one of which was referred to earlier by Mr. Grant when he pointed out the location on Wah Tah Keg'ht's territory, which explained an event involving the Nuutsenii man who had ignored the warning against trespass and was strangled. And there was a song which was composed of this event, and it's part of the chiefly property of Wah Tah Keg'ht's house to this day, and it's performed in the feasts along with the kungax.

Emma Michell also spoke about the event giving rise to the trespass, and I might mention that Josephine Michell in her commission also did, and she sang the song.

Now, Emma Michell testified that it is her belief that her eldest brother Jimmy Michell was killed by a party of Wet'suwet'en for trespassing near the Suskwa River in 1935, and although this event hasn't been publicly admitted or hasn't been any compensation paid at a feast, this is her belief. And Dr. Mills relied upon this incident to conclude that the last time a Wet'suwet'en was killed for trespassing was in 1935.

Olive Ryan testified, as did Dr. Mills, that there is a warning given, and if they still didn't listen they can kill you, and it has a name. And Thomas Wright described an incident where somebody trespassing on Waiget's territory was killed in 1918.

Now, Dr. Mills makes the point where I would like to here illustrate that even though the recognized sanction for trespass was to kill the trespasser, if you refuse to respond to the warnings, the house that engaged in such a killing would have to arrange for a settlement feast with the house and clan to which the trespasser belonged. The settlement feast was intended to resolve any dispute or problem arising of the killing. And Dr. Mills described what is a sophisticated process of feasting as repayment when a human life was taken for trespass:

1 "The taking of the life of a trespasser entailed
2 legal consequences. Although treated as a
3 justified homicide, the person who had taken
4 life was required to wear a sign of having
5 committed the act, as he was himself in a
6 vulnerable and dangerous situation until the
7 relatives of the victim had been appeased
8 through a feast. Proper compensation was made
9 for having taken the life of a valued clan
10 member, even if he had been in the wrong in
11 trespassing. Until that time the people who
12 had taken the life were in danger of being
13 killed themselves.
14
15 Now, we say that feasting to compensate for a
16 death resulting from trespass is a potent example of
17 the exercise of jurisdiction among the Wet'suwet'en.
18 The house had the authority to kill a trespasser, a
19 right arising from ownership and governed according to
20 law under the discretion of the chief. However,
21 subsequently, the house had to recognize the
22 Wet'suwet'en collective jurisdiction by feasting,
23 explaining the trespass and paying compensation in
24 order for the homicide to be sanctioned by the whole
25 community.
26 And I would like to here pause for a minute and
27 explain that part of the very delicate way in which
28 the laws are enforced in kinship communties, and we
29 are here talking about the plaintiffs' communties to
30 be included in it, is that everyone has to eventually
31 live together, and because of that there is through
32 the feasting a settling or a balancing of the peace
33 which occurs as part and parcel of the enforcement of
34 the law. And so in the case of even the capital
35 punishment, there is a regulated set of principles.
36 There is a law. There is warning. There is a breach.
37 There is and was at that time the ability of the house
38 to kill for trespass. However, the house can't
39 enforce the law alone, and once the killing occurred,
40 the house and the clan had to defend their action and
41 contribute to the peace, and this occurred at the
42 feast where the giving of gifts at the feast is the
43 medium through which the balancing occurs and peace is
44 restored.
45 I say that this is quite important for your
46 lordship in understanding the concepts of
47 jurisdiction, where it isn't, as in our case, a

1 situation where a centralized institution has the
2 authority to enforce laws and to meet out punishments.
3 In the end there isn't a final resolution of breaches
4 of the law, especially serious ones, and ones, for
5 example, as serious as killing of somebody without
6 there being evoked the process to restore peace
7 generally within the kinship communties. And that's,
8 in this case, what's being described through the
9 feasting, which was referred to the witnesses.
10 If I could conclude by reference to the quote of
11 Dr. Daly. It was his opinion that trespass is a
12 question of great concern to the Gitksan and
13 Wet'suwet'en. He identified the strong public opinion
14 which is mobilized against trespassers, including
15 mournings, social ostracism and the formal public
16 debate and announcements at the feast hall. These
17 work as a forceful sanction against those who violate
18 the laws of ownership. And he explained:
19
20 "Every house group knows of instances in which
21 its lands or fishing sites have been used by
22 outsiders without permission. People point
23 that they apply their own local,
24 non-government/non-police sanctions against
25 trespassers within their community. The
26 actions they take involve the warning,
27 isolation, and ostracism of trespassers, and
28 formal public debate on the the subject, with
29 the outcome witnessed in the feast hall by the
30 high chiefs."
31
32 And we say that he, Dr. Daly there, is reiterating
33 the principles which govern the implementation and
34 breaches of the law of trespass as we have earlier
35 described them.
36 THE COURT: Want to take a break now?
37 MS. MANDELL: Sure.
38 THE COURT: All right.
39 THE REGISTRAR: Order in court. Court stands adjourned.
40
41
42
43
44
45
46
47

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
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RESUMED FOLLOWING SHORT RECESS)
2 MS. MANDELL: My lord, I will try and move at least through the
3 next section before we finish for the day.
4 THE COURT: Yes. All right.
5 MS. MANDELL: One of the incidents of ownership which was spoken
6 about by both Dr. Daly's cross-cultural definition and
7 also His Honour Judge Gould, is that ownership entails
8 rules to govern the conveyance of rights from person
9 to person and generation to generation. And Mr.
10 Justice Gould stated that possession should be of
11 indeterminate time, that it can be passed to one's
12 heirs. And if the evidence of the chiefs is accepted,
13 in our submission, the evidence is that there is a
14 succession of rights from generation to generation,
15 and that house property is the subject of such
16 succession. And I think that in this case,
17 matrilineality is at the heart of the system and it's
18 our submission that there is just overwhelming
19 evidence that the feasting and payments made at the
20 feast, support the people's long-standing adherence to
21 the law of matrilineal descent.
22 And I might, before I get into the evidence,
23 remind your lordship that Bob Atkinson, who was a
24 witness called with respect to estate files, the only,
25 in our submission, place where there was any attempt
26 on the part of the defendants to take a crack at
27 whether or not the territory passed matrilineally,
28 through succession, his evidence was that the people
29 passed what he called the crest property or the house
30 territory at the feast, and this occurred
31 notwithstanding whatever rules the Department of
32 Indian Affairs may have had with respect to the
33 passage of property patrilineally through the will
34 system of the Indian Act.
35 THE COURT: Is that in your outline?
36 MS. MANDELL: I will get you Bob Atkinson's reference. I have
37 summarized the beginning of the section and it's not
38 in the outline.
39 THE COURT: Thank you.
40 MS. MANDELL: Now, we say that the chiefs created a litany of
41 testimony to the basic law that house property is
42 passed from generation to generation with the passage
43 of the head chief's name at the feast. And they all
44 said it the same way, no matter whichever territory
45 they were talking about. Pete Muldoe, in describing
46 the Cullen Creek territory said whenever -- he said
47 that:

"...it was owned by the former Gwiiyeehl for a good many years and they are still using the same name today. That could be the Gwiiyeehl, the same name a couple of thousand years ago. But whenever one passed on to the next family or take over the name and it keeps on going like that right up to today."

Pete Muldoe described, with respect to the McCully Creek territory:

"...the former Kliiyem lax haa passed on, well they passed on to the next one. Then from there they describe as the next Kliiyem lax haa is going to be responsible for all this territory and that's how it goes."

Alfred Joseph:

"When I was given the name I took the name Gisdaywa. I was told that was where my territory was so it just came with the name. It was our laws that when you take a name, the House Chief name, that the territory goes with it.

When they...spoke on it, they said the territory goes with the name."

Johnny David when he got his name "along with the name went the territory."

And Dr. Mills summarized this evidence in her opinion:

"If the deceased person has a name, it is passed on like the flag bearer. Whenever one dies another has to come and carry the flag on, the Wet'suwet'en say. The highest chief's name in the Wet'suwet'en houses are associated with the territory. Ownership of the territory and authority over the territory is passed on with are the title."

We say that the Gitksan and Wet'suwet'en

matrilineal system of inheritance and succession provides the intergenerational continuity to the land ownership. Ownership in the house territories is a birthright to those born in the house. The succession to chiefly names through a matrilineal line of inheritance transmits the rights of ownership and resource management from one incumbent to the next ensuring thereby perpetual succession. In this way property rights over territory are extensions of Gitksan and Wet'suwet'en genealogical life cycles. The law that I have explained is to the passage of territory matrilineally, was explained by the many witnesses, it was described as a law, and Alfred Joseph said this this way:

> "The Chief's names, territories of the House and the regalia are inherited through the passing at a feast. This has been labelled the matrilineal system and that is the system the Wet'suwet'en go by."

And Dr. Mills said:

> "A law of the Wet'suwet'en is that inheritance takes place through the house and clan. Wet'suwet'en names and territories are inherited through the mother's side."

And Heather Harris stated the same law for the Gitksan.

> "Gitksan inheritance is through the matriline. The primary rule of inheritance is that titles are inherited within the house. The only exception to this is adoption."

Now on the next few pages, and I must say randomly, we chose some of the genealogies which were tendered in evidence, and in the genealogies we traced the succession of chiefly names. And an example, for example, was Exhibit 61-1 Sub (1), which was the genealogy of Gisdaywa. And the passage of chiefly names was illustrated through the genealogy that Alfred Joseph succeeded in 1972 to the name; before him Thomas George was Gisdaywa; he was Alfred's mother's brother. Before him Joseph Paul Nahloochs

1 held the name until 1946 when he died at the age of
2 100. And he was related to Alfred on his mother's
3 side. His mother was married to Zalma Paul and held
4 the name of Gisdaywa before Joseph, before Alfred
5 Joseph. All these chiefs were from the mother's line
6 in the same house. Alfred Joseph reviewed the
7 genealogy of Gisdawa and confirmed that the passing of
8 the name from previous name holders to him as
9 indicated on the genealogy, was done according to
10 Wet'suwet'en law.
11 And I am not going to orally take you through the
12 genealogies for Knedebeas, for Smogelgem and the other
13 genealogies, the Gitksan genealogies that we analyzed
14 in the same way. But I will ask your lordship to note
15 the fact that, and it was stated at page 87, that all
16 the genealogies show the succession of chiefly names,
17 and by extension the succession of territories through
18 the matriline, except one territory, and Mr. Grant has
19 referred to it. In that case, there was a caretaker
20 and that was announced at the feast.
21 Now, I would like to say this before I begin the
22 next section, that the evidence of succession through
23 matriline, in our submission, was overwhelming. And I
24 think that in this case the court is compelled to
25 conclude that there is succession and it was -- and it
26 is matrilineal.
27 I would like to speak for a minute about
28 matrilineality and what the -- what it means for the
29 Gitksan and Wet'suwet'en concept of land ownership to
30 be part of the matrilineal system of descent. It's as
31 I was explaining earlier when I began the discussion
32 of house and the ownership of house, the succession of
33 ownership through the matriline connects the present
34 generation with their ancestors on the land and at the
35 feast. And I say that there is something very
36 important about the fact that territory passes
37 matrilineally and I think in some ways it explains the
38 tenacity of the plaintiffs in fighting for their land
39 as they have done and as the record shows for as long
40 as they have. The passing of the territory upon the
41 death of one chief to another is spoken by Gitksan
42 words which translate, "Walk slowly on the breath of
43 your ancestors." And we say that the connection to
44 the ancestors of the house on the territories,
45 reinforces their belonging to the land. And I am not
46 here only talking about --
47 THE COURT: "Walk slowly on the breath of..."

MS. MANDELL: Your ancestors. It's page 88, my lord.
THE COURT: You're on page 88? I am sorry, I thought you were --
MS. MANDELL: I am digressing but I want to explain something to you.

The connection to the ancestors of the house on the territory, as I was explaining, reinforces the peoples belonging to the land. And many witnesses talked to you about the feeling of connection with their ancestors, as they travelled and lived on the land of their house territory. And this connectedness is expressed in many ways. And it's not only that people belong to a community whose ancestors used the territory before them, it's also that people of their own blood used the territory before them and their feelings about the people who did use the territory are evidenced and reflected on the land.

Alfred Mitchell and Emma Michell and Dan Michell all testified to standing at the footprints of Sam Goosly, and I understand you were there too, as I understand in your viewing.

THE COURT: Yes, I stood in the footprints.
MS. MANDELL: And it's one thing to buy a piece of land and stumble upon these footprints and stand in them and say to yourself that there is something unusual about it, but it's another thing to stand there and know that your ancestors, who had gone before you, all of whom were related to you, also stood in those footprints and they were there marking whether or not it was time to move to Moricetown to go fishing. And it's a way of continuing in the way in which the ancestors have been on the land, that happens as each new incumbent eventually becomes a chief to the territory or somebody is born into the territory. And you had a lot of examples of people who went on the land and spoke about the connectedness that they felt to the land based on their ancestors' prior presence.

There was an interesting trail which Henry Alfred and Alfred Mitchell spoke about where they travelled from Moricetown on the trail leading to the Babine. And Henry spoke about re-cutting a portion of the trail which hadn't been cut for a long time and he said, "You can see there was old cuttings from a long time before. You can see the old cuttings where I went through, I just re-cut the area." So in his labour to open up the trail he ends up seeing the people from his genealogy, his mother line, who had

been there before to cut the trail. And he spoke about various places along the trail which were known to be places where the ancestors had formerly marked off. And on page 90 he referred to a campsite, he says:

> "It's not too far from this echo, about ten minutes walk. Thee big meadowthere. That's the main campsite for -- for hunters, and that's where they drive in the peg in the middle and tie up the horses.
> Q And are the pegs of the ancestors still in the ground?

And he says:

> "Still there. And alfred saw one peg the last time he was on the trail.""

THE COURT: Of course that would be post-contact, wouldn't it?
MS. MANDELL: With the horses?
THE COURT: Yes.
MS. MANDELL: It may very well be. But it's his family who was there and he is encountering the evidence of them.

He spoke about a third place with the nighthawk, and you will recall that there was this stone that was turned by those that were moving into Wos's territory to indicate they were on their way to Wos's territory and were there and similarly turned around when the people from Wos's territory and beyond were coming back into Moricetown.

And Fred Alfred Mitchell how his father-in-law, Dick Naziel, who was Wos, turned the bird around, as his ancestors before him had done.

> "Yes...the time we were going up there with my father-in-law, Dick Naziel, he broke the spruce bough, a bunch of spruce bouch. And there's another rock, big rock, below that. Put it on that big rock and then sat that bird on there facing where we were going."

The teaching of the very special places on the territory was spoken about by James Morrison, and he spoke about a lake which is beside it a camping place on the southern territory of Wiigyet. And it's a lake

which your lordship will recall he testified changes colour with the weather. And he says, and I am reading from the bottom of this page as he talked to the court:

> "When it is good weather you start to see the milky thing coming out of that and it starts to change colour onto that. But they told me before that now is the time to approve it and that's the time when I see it happen. And I said there is a camp there. It is always the ones that they use all the time because it's safe place and there is wind blowing to protect the round the camp. This is where they chose and only one place to camp. Not all over the place. That's why they were chosen this place for that time for many thousands of years."

So you have people going to the campsites, in this case a very special spot on Wiigyet's territory, as his ancestors had done, and appreciating this phenomena, which is unique to this territory, of a lake whose colours change with the weather.

Alfred Mitchell was speaking about time on the Namox territory when he heard a grizzly bear growl and he returned home and told his father about it and his father told him the history of his ancestors at a place called C'ass'an, which is close to the location where Alfred heard the grizzly. And I won't go into the whole history of C'ass'an but only here to emphasize that one generation hears the bear and he goes to speak to his father and his father knows the history and the place and why that place had that name related to a former ancestor who at another time encountered a bear at that place.

This is in response to your question earlier about the dead falls. Alfred Mitchell was trapping on Namox's territory. He said he regularly saw dead falls. The dead falls signalled to him the movements of his ancestors whose lives on the territory paralleled his own. As Alfred was trapping the same lines for the same animals at the same time of the year. And Alfred mentioned the way in which the dead falls were made and he identified the remnants of the remains of the traps as he goes into the same trapping areas as his ancestors had gone.

Several witnesses talked about their ancestors being buried on the territory. Pete Muldoe testified to seeing the charcoal remains of the person who had been cremated on the Wiiget territory and Sarah Layton both spoke of and testified the death of her grandfather at a cabin by Tax'ets'ol'een Ben at Pack Lake and also a photograph of the gravesite in the Knedebeas territory at Pack Lake, which is the place where her brothers, Bobby and Andrew and her sister Maggie has been buried, who-- all of whom who died in infancy or small children.

And although, you know, the evidence is such that your lordship will have to accept that this is what the people believe; you're not being asked yourself to believe it. The witnesses talked about a feeling of connectedness to those who have passed on and who they believe still -- their spirits are still present on the territory.

Madeline Alfred testified that communication continues between those living today and the spirit of the ancestors who had gone before them. She said:

> "Our ancestors who have passed on before us when we are out on the territory they try to communicate with us. When you hear a whistling noise from a fire, then we immediately take a piece of smoked salmon or something and throw it on the fire. The whistling noise is our ancestors trying to get our attention."

And I just want to remind your lordship that the whistling noise that Alfred Joseph testified about hearing at C'ass'an and it being a signal or a message which the people listen for to signal the interaction with their deceased relatives.

Dr. Mills said that the people believe that people will be reincarnated back into the same house. And Basil Michell testified that he was recognized at birth as the former Kawachan reborn and that he then succeeded to that name later in his life. And he testified that he was given the name Kawachan when he was a baby when he was starting to crawl "because I was told I was Kawachan before that." And he was told this by his mother and his father. And Maxim Tom held that name before and he was related through his mother's side and his uncle Johnny Austin decided he would get his name. And Madeline Alfred testified

that it's on the territory that the elders watch for recognition in their children of places which may suggest a previous reincarnation. She said, "... because when children recognize things that they have never seen before, or recognize places where they haven't been before, and that's where the understanding is that their ancestors have been there before, and that they are the reincarnation of their ancestors."

And Dr. Mills refers to certain other examples in the Wet'suwet'en of people who understood their reincarnation to be within their house. And we say that the Gitksan and Wet'suwet'en respect the liklihood of a soul belonging eternally to a particular territory connected to the people of the house through time.

Mr. Morrison described his belonging to the territory in these words:

> "You have to go out there, and sometimes when you feel like you have to be out there, to be out on the rivers or lakes, wherever you are going to sit yourself and feel, you can hear the creeks and rivers to remind you what happened in the past. That's one of those things that people -- to go out there and sit in some of that those areas and listen to the creeks, what these people in the past used to speak about these territory. That's one reason why they went out there, to listen to this, and you can feel the presence of the creators when you have that -- the reflection of this of your territory and yourself."

And he also talked about the territory being related to basic survival and he talked about it as being -- he talked about it as being the table, "all the animals was on the territory and that seems to be right on the table. And that's where we have on your table."

And what we are really talking about with matrilineality and what the witnesses were trying to say, is that the same territory that nurtured their ancestors, their bloodline in the past, nurtures them and will nurture the generations yet to come. And matrilineality is deeply rooted in the fact that

1 people have survived in one land for a long, long time
2 and when they talk about their ownership to the land,
3 they are talking about it also in terms of their
4 ancestors who have been there and they who are there,
5 as part of the continuity between themselves and their
6 children who aren't yet born. And that, in our
7 submission, is what matrilineality is about and what
8 succession through the inheritance of matrilineality
9 is about, when the chiefs talk about their ownership
10 in that way.
11 THE COURT: What would you like to do, Ms. Mandell?
12 MS. MANDELL: I would like to go on.
13 THE COURT: All right. Thank you.
14 MS. MANDELL: Now, another incident of ownership which springs
15 from the succession, matrilineally, is the fact that
16 territories can be transferred too within the system
17 and Mr. Justice Gould talked about the incident of
18 ownership as being the right to alienate the
19 territory. And as Mr. Jackson points out, well, the
20 right to alienate is constrained by the common law
21 principle that the territory is inalienable but to the
22 Crown this does not preclude the fact that territory
23 can be alienated internally. And the evidence
24 demonstrates that the territory is and was alienated
25 in past and recent times as compensation for peace
26 settlements.
27 THE COURT: You would add internal at the start of your heading
28 at the top of page 89, would you?
29 MS. MANDELL: I would say internal to the Gitksan and
30 Wet'suwet'en and also to their neighbours, to other
31 Indian nations that are a part of the -- and recognize
32 the system of ownership within which they function.
33 MR. WILLMS: Well, there is no evidence of other societies here
34 that recognized this system of ownership, so I don't
35 know where my friend -- what my friend means by that.
36 MS. MANDELL: We will be referring in greater detail to the
37 Nisga'a and the Sekani, for example, who have
38 participated in the feast system and are part and
39 parcel and understand and recognize the right of
40 alienation as compensation in peace settlements.
41 It's a topic that will be dealt with in full under
42 jurisdiction.
43 One form of alienation, and we say is the most
44 common one is the alienation of territory and
45 compensation for a death. And Dr. Daly identifies, in
46 his opinion, that,
47

"Compensation for homicide or the accidental death of a person while on the land of another house, or reparations from war and feuds have to be paid to the offended group so as to avoid, or end hostilities. These peace settlements frequently involve the transfer of property and/or House members, as well as a peace ceremony that include the spreading of eagle or swan's down which signifies the binding law of peace. Xsiisxw agreements are legally validated when they have been witnessed in the feast house."

Now Mr. Grant spoke about some of the transfers of territory arising out of homicide, and I am not going to repeat all the evidence which he stated, but I wanted to draw to your lordship's attention some of the examples which illustrate that this is a feature of the ownership system of the both Gitksan and Wet'suwet'en.

Alfred Joseph testified that under Wet'suwet'en law interest in house territories may be passed as compensation for harm, and the way he put it: "When they say an area leaves the house for a while, it's either for compensation for a favour or when someone was harmed."

And I will deal with the compensation for favour later in the submission.

Some peace settlements which resulted in the conveyance of property from one house to another are very old, and Mr. Grant has already referred to Mary Johnson's testimony involving the hunting mountain on her northern territory. And I won't take you into that evidence.

He also, on page 101, referred you to a more recent peace settlement, where Olive Ryan testified that there was such a settlement in 1957 or '58 when a dispute was settled between Guxsan and the Eagle Clan, and this involved the death of a member of Guxsan's House and Guxsan received compensation by way of a hunting territory below Kitwanga on the right bank of the Skeena.

Martha Brown also recounted in her evidence the warfare and subsequent peace settlement which resulted in the Tahltan Wolf chief, Malii, giving his name and his territory to the Gitksan Wolf Clan chief. This

was one of Martha Brown's predecessors and this was at the headwaters of the Nass and the Skeena.

Olive Ryan told the history of a fishing site which was the subject of a peace settlement and Mr. Grant took you through the events which gave rise to that settlement, where there had been a murder and the death -- a murder in the House of Hanamuxw and I wanted to point out a feature of the transfer which it wasn't stressed by Mr. Grant, and that is that according to the law of the Gitksan and Wet'suwet'en, the site or the territory may not necessarily be transferred permanently, while permanent transfer is a possibility. And Olive Ryan pointed out that with respect to their site, that Hanamuxw's house received, that the site would be returned to Luutkudziiwus's house at a pole raising to be held at the House of Hanmuxw. The way she put it:

> "while that's settled. All the family will settle down and they not angry any more."

And this was consistent with Dr. Daly's opinion that the transfer of territory in a peace settlement will be or can be returned to the original house only when the hostility has ended. And you will see that in the case of Mary Johnson's evidence, that territory appeared to be in her house for a very long time and it may not ever come back whereas in case of Olive Ryan, her evidence is that the territory will be coming back.

I might here advise my friends and your lordship that the cite from Dr. Daly's Exhibit 884-1, where he is citing an interview with Jessie Sterritt, won't be relied upon us as it is clearly hearsay.

THE COURT: All right. That's on page --?

MS. MANDELL: 102.

We say that it's part of his opinion and we continue to see it as evidence on that point but I am not here going to urge it upon your lordship.

The very many ways in which a territory may be forfeited or transferred a court according to Gitksan and Wet'suwet'en law reflects the vitality of the system. And this was spoken about by Neil Sterritt Junior when he was asked whether or not the internal boundaries of the territory are static and he said, and I am paraphrasing what he said, that the internal boundaries, that is the territories within the

internal boundaries, may very well change in the future. There is -- the system continues and there may be peace settlements and there may be territories which will be moved back and forth as a result of the application of law within the Gitksan system. But that, he says, argues for the dynamic nature of the system and not for its static nature. But I must say, and I would like to emphasize in this section that while there are internal transfers of the territory, for varying periods every time, it doesn't affect the boundaries of the territory. People know the boundary, they know that the territory -- what the boundary is of the territory which is transferred, and they know what the boundary is of the territory which is being transferred back.

My lord, I am about to start a new area. There is two areas to go and this is a fairly long one. Perhaps it's an appropriate time to stop and we can do the whole area in the morning.

THE COURT: All right. 9:30 tomorrow morning is convenient?

MS. MANDELL: Yes.

THE COURT: All right. Thank you.

(Proceedings adjourned to 9:30 a.m., Tuesday, April 24, 1990)

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

Wilf Roy
Official Reporter