JUNE 9, 1990
VANCOUVER, B.C.

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this 9th day of June, 1990. Delgamuukw versus Her Majesty The Queen at bar, my lord.
THE COURT: Mr. Willms.
MR. GRANT: Before my friend starts, my lord, I may have misled my friend when I said at the very end of yesterday that regarding the Robinson report the whole -- it says the whole thing could not go in. What I meant was that it had been agreed at the time that certain chapters of that dissertation we were not opposed to going in or certain sections. Our difference is that my friend wants everything in, and we say only those sections referred to should go in. So I just didn't want to mislead my friend.
THE COURT: All right.
MR. WILLMS: My lord, the next tab in the blue book is tab 2. If your lordship could have volume 4 of the plaintiffs' argument. As with the last instance, you will see the only difference here, my lord, is that there is a second tab in volume 4. There is a tab 2 in the plaintiffs' argument, not in the blue book, my lord, but in the plaintiffs' argument in volume 4 there is a tab 2.
THE COURT: Yes.
MR. GRANT: And this should -- after that tab 2 in the plaintiffs' argument the heading should be "Nature of the Gitksan and Wet'suwet'en Organized Societies at Contact".
THE COURT: Plaintiffs' volume 4?
MR. WILLMS: Plaintiffs' volume 4, tab 2.
THE COURT: Yes. All right.
MR. WILLMS: Now, what I would like to do is once again I am not going to go through all of them. I will just go through a number of them.

What I have done on the first page is on the very first page of tab 2 at the bottom in volume 4 of the plaintiffs' argument they start quoting extracts from Harmon, and they quote over the next couple of pages a number of extracts from Harmon. And I have added other extracts from Harmon which I say relate to the argument that the plaintiffs make which follows.

And so, for example, my lord, on page 1 of the blue book, the very first paragraph I point out that on June 16th, 1811 Harmon reports something that the

Babine people have told him.

> "But they (Babine) say there are numerous Tribe who are scattered over a large tract of country almost west of this, and that it is not more than eight or ten days march to their first village."

Not canoe, my lord, but march.

> "They also inform us of a large river that passes through their country, and no great distance from there disembogues (discharges) into the Pacific Ocean. They likewise say that every Autumn a number of white people come up that river in barges to traffic with the Indians who live along its banks but I could not learn from them of what nation those white people belong."

So this is in 1811 that Harmon notes that. And on the next page Harmon actually goes, and I mean on the next page of this annotation at the top you will see in the very first paragraph Harmon on January 20th, 1812 was at Babine Lake and said:

> "The day following we proceeded further on and during our jaunt saw four others of their villages and at all of which we were well received for at the second we found the two Indians who last summer came to our Fort therefore they were not much surprised to see us among them, for I had promised the two that I would in the course of this winter pay them a visit to see their country, et cetera and they now gave us some account of the white people who came up the large river as they had done before when at the fort last summer and to convince us of what they had said was true they showed us many articles, which they barter from their neighbours the Atenas who purchase them directly from the white people which were guns, cloth, blankets, axes and cast iron pots, et cetera."

And the point there, my lord, is this is ten years before Brown gets to Babine Lake, and this is what

Harmon notes at Babine Lake.

Now, at the bottom of this page, my lord, Harmon says about the Carriers:

> "Their language is very similar to that of the Chipewyans, and has a great affinity to the tongues, spoken by the Beaver Indians and the Sicaunies. Between all the different villages of the Carriers, there prevails a difference of dialect, to such an extent, that they often give different names to the most common utensils. Every village has its particular name, and its inhabitants are called after the name of the village, in the same manner as people in the civilized world receive a name, from the city or country which they inhabit ..."

The point there, my lord, is back to Kobrinsky and Morice and Septs (?) and the villages that we mentioned. And the top of the next page, my lord, just refers to what they prefer to wear.

Now, the next extract I would like to draw your lordship's attention to is at page 4 of the blue book. And it's another reference to Harmon. And this is Harmon talking about the Carriers in general.

> "The Carriers have little that can be denominated civil government, in the regulation of their concerns. There are some persons among them, who are called Mi-u-ties or Chiefs, and for whom they appear to have a little more respect than for the others; but these chiefs have not much authority or influence over the rest of the community. Anyone is dubbed a Mi-u-ties who is able and willing occasionally, to provide a feast, for the people of this village. An Indian, however, who has killed another, or been guilty of some other bad action, finds the house or tent of the chief as safe retreat, so long as he is allowed to remain. But as soon as he leaves it, the Chief can afford the criminal no more protection, than any other person of the village can, unless he lets him have one of his garments. This garment of the chief, will protect a malefactor from harm, while he wears it; for no

1 person will attack him, while clothed with his
2 safeguard, sooner than he would attack the
3 chief himself; and if he should, the chief
4 would revenge the insults in the same manner as
5 if it were offered directly to himself. The
6 revenge which the chief, in this case, would
7 take, would be to destroy the life of the
8 offending person or that of some of his near
9 relation, or the life of one of the same tribe,
10 if he should happen to be a stranger."
11
12 And that note, my lord, at a very early occasion,
13 you might recall comes up again in Brown and other
14 people in the area.
15 But the next reference is at page -- if your
16 lordship could turn to page 18 of the blue book. And
17 at the same time turn to page 13 of the plaintiffs'
18 argument.
19 MR. GRANT: Just so I am clear. I understood yesterday that the
20 blue book wouldn't include, and in this case it's Mr.
21 Adams' submissions, it wouldn't be the entire
22 submission but extracts from the transcript, is that
23 right, but not sequentially, not the whole thing.
24 MR. WILLMS: No, I haven't put in Mr. Adams' whole submission.
25 I tried to put in the submissions --
26 THE COURT: To which you wish to reply.
27 MR. WILLMS: To which I wish to reply here, and to draw your
28 lordship's attention to where Mr. Adams is making the
29 submission as he is going through the book.
30 MR. GRANT: Okay.
31 MR. WILLMS: And so it does two things at the same time. You
32 see whether Mr. Adams resiles from any of the
33 propositions or supplements them.
34 But here I point out that at the bottom of the
35 page, my lord, of page 13, the plaintiffs start a
36 quote from Exhibit 964-12. After the word
37 "followers", the document carries on to say, and this
38 is what I note on page 18 of the blue book, goes on to
39 say:
40
41 "With a number of others belonging to the clans.
42 The whole amounts to 24 families. Casepin is
43 now in his prime and would be a tolerable good
44 hunter if he was not of such an indolent and
45 lazy disposition."
46
47 And then picking up again, the plaintiffs then

quote the beginning of another sentence in their argument. They start off with "his followers are few", and then there is three dots after tribe. But after tribe the exhibit continues:

> "And over these he has but little control which is as well for if he had more influence he would be both more troublesome and expense."

And then I note another part, my lord. The quote carries on over to the next page of the plaintiffs' argument, over to page 14 of the plaintiffs' argument, my lord, at the very top, and they refer to a chief called Houchete tah kie as a chief who was an inferior chief with no independent band of his own.

Well, the other reference in Brown that is important is that this chiefs:

> "... lands are very extensive, and are the best stocked with beaver of any in the vicinity of the lake. Of which he is particularly careful in neither killing too many ...",

And that should be T-O-O many, not T-W-O.

> "... himself, nor allowing any other to do so. He generally gives into the fort from 20 to 30 skins in the course of the season."

So that my submission, my lord, when you add what is left out of the quote, you can see that an inferior chief with no tribe has the best lands (Houchete tah kie), another chief has little control over his "followers", that's Casepin, and another chief appears to have influence over his village and others (Ack Koo Shaw).

And what I say from that is that none of those facts fit within the plaintiffs' claim of house territories. You have got someone whose got large territories, but apparently no house. He's got no tribe, but he's got extensive territories. You have got another one who is acknowledged to be a chief who has no control over his followers, and a third chief who not only has influence in his own village, but influence outside, which is reminescent of people like Legaix from the coast, the super chiefs, the people who had influence outside their own village.

The next extract I would ask your lordship to turn to is at page 28 of the blue book. And the reference is to page 20 of the plaintiffs' argument. And on page 20, my lord, in the first sentence of the very first paragraph the plaintiffs say on at least two occasions Brown speaks of trading beaver coating with the Gitksan. So with respect to that comment I point out on page 28 beside paragraph 3 that it's misleading to say 'on at least two occasions' Brown speaks of trading beaver coating with the Gitksan. Exhibit 964-12, which was his trip down the Babine River -- sorry, 964-12 is his 1826 report. It includes a summary of his voyage, which is set out at 964-14. So what has happened here is Brown has summarized in his report what happened on his voyage. It shows up in two documents authored by Brown, but it was only one occasion, not two occasions.

My friend is quite right. And if all my friend meant to say that on at least two occasions Brown spoke of trading beavers, but he only traded it on one occasion. Now, that doesn't leap out from the argument, my lord. The argument seems to suggest that there were two instances of trading with the Gitksan. Then the plaintiffs carry on there and say this on page 20:

> "While on another occasion he has spoken of as having procured a small quantity of beaver from the Gitksan, all of which suggests ...",

And then they carry on. Well, the reference there, my lord, is a reference to the new -- and I point this out in paragraph 4 on page 28. I say it's even more misleading to say that on another occasion he had spoken of having a small quantity of beaver from the Gitksan. This is taken from the New Caledonia district report of 1826, Exhibit 964-4, page 143, which is again a reference to Brown's trip initially described at 964-14.

So what's happened here is the plaintiffs have turned one instance of two pounds of beaver coating into three separate, in my submission, three separate instances of trading. There was only one, not three.

The next reference is at page 29 of the blue book, and it's another reference again to page 20. The plaintiffs say on page 20 of their argument that there was also evidence put to Professor Ray on

re-examination of the Gitksan feasting on beaver, as if -- and this was to go to the point of whether the Gitksan at the time of Brown ate beaver. And so my friends in their argument, they suggest, well, it's in the re-examination of Professor Ray. When you look to the re-examination of Professor Ray, the reference is to Downie, 1859. And that's the point at the bottom of page 299. It's not a reference to anything that's happening at the time of Brown, it's over 30 years after Brown that is put to Professor Ray in re-examination.

THE COURT: Where is Kittcoonra?

MR. WILLMS: Kittcoorna, I think is --

THE COURT: K-I-T-T-C-O-O-N-R-A.

MR. WILLMS: I think that is Kitwangar. I think it's Kitwangar. Now, the next reference is to page 39.

THE COURT: Of the summary?

MR. WILLMS: Of the summary. And page 32 of the argument. Page 39 of the summary, page 32 of the argument.

Here the plaintiffs are making a submission about regional trade in feasting. They quote from Professor Ray at the bottom of the page, and then they stop the quote at the word "peripheries". Really there should be three dots after the word "peripheries". Because what Professor Ray then said after that was he said:

> "Of even greater importance, it was an economy in which the Gitksan held the whip hand because of their superior strategic position."

He was referring to the Atna practise of barring the river to prevent fish from ascending to Babine Lake.

When you read the plaintiffs' argument on this point, it looks like there is sort of an equal exchange relationship going on. That's not the tenor of what Professor Ray was trying to suggest in his evidence, and that is pretty clear from this deletion.

The next point is at page 51 of the blue book, and page 44 of the argument. What I point out here, my lord, is that the quote on page 44 from Exhibit 964-12 ends with the word "provisions". When you read on, you see that Brown then says:

> "To manage the business of this place to advantage it would require from three to four hundred skins yearly and at least three-fourths

of these of the best quality."

That's leather, my lord.

"With such a supply little else would be necessary: except guns, traps, ice chisels - beaver nets and ammunition - while good returns might be relied upon."

And I say this is important because it was the European fur trade that brought the leather to the Atnah's and the Carriers. It was not prehistoric native trade. When the plaintiffs say at lines 23-24, and I'll turn to that in a minute, that's a reference to the oral argument, that "it's not the European fur trade which is driving these economies and these societies", they ignore the fact that leather brought in by or from Europeans, was not used primarily for subsistence but was used primarily in the potlatches.

So if you read down below, my lord, you will see starting at line 21 at the bottom of page 51, this is from Mr. Adams, he is making this submission:

"And again, my lord, say on this evidence, that there is every indication from this material that it's not the European fur trade which is driving these economies in these societies."

What my friends were pointing to there was the fact that they said it was really leather that the people wanted, and not European goods. But I say it doesn't matter, because it was the fur trade that brought leather to the people. It wasn't any native trading network. It was the Hudson's Bay Company from the interior, the coastal traders from the coast who brought the leather. So when I say European fur trade, my lord, I don't limit fur trade to trade in European items. I include the leather apparently the people of the claim area were desperate to have.

THE COURT: So you say this three to four hundred skins refers to skins to leather, not fur skins?

MR. WILLMS: That's the leather -- they were bringing in the leather to trade for the furs, and there is evidence that some of the leather came from as far way as down the coast from Oregon and up the coast and then some came over land.

The next point, my lord, is at page 59. The

reference in the plaintiffs' argument is to page 50. In the plaintiffs' argument they say on page 50 that the plaintiff argues in its summary quoting Dr. Robinson that the fur trade seems to have spurred to Gitksan occupation of the middle Nass and especially the Upper Nass and Upper Skeena. Then they carry on with a second quote. What I point out on page 59 towards the bottom, my lord, is that although the second part of the quote, that is the part that says where the resources is close at hand, that is Dr. Robinson, the first part of the quote is not Dr. Robinson, it's Dr. Rigsby that's being quoted. So my friends suggest here that this is what Dr. Robinson said. In fact it's what Dr. Rigsby said.

My lord, then you will see that this ends with section -- page 65, and then you start after page 65 with April 23rd, again another reference to the transcript that I am taking extracts from.

THE COURT: All those submissions up from the start of your tab 2 are from April 20th?

MR. WILLMS: Are all from April 20th, yes, and then it switches to April 23rd. My lord, the first number of extracts that I was going to draw to your lordship's attention to here tie-in with my submission on Dr. Robinson, and I don't want to make it if my friend isn't ready to deal with it today, and I don't -- maybe my friend could -- whether he's had a thought about it overnight and whether he wants to deal with it. If he wants to deal with it today, I will do these next series, if he doesn't, I'll save them.

MR. GRANT: I advised my friends yesterday it wasn't possible.

MR. WILLMS: All right.

MR. GRANT: So I'm not ready to proceed to make my argument on Dr. Robinson today.

MR. WILLMS: Now, the first number of extracts that I wanted to direct your lordship's attention to relate to my friends submissions about Dr. Robinson, and I am going to save those until my friend is ready to proceed. But I would ask your lordship to turn to page 15 on the second part of the blue book. At the bottom of the page I refer to page 66 of the plaintiffs' argument. And on page 66 of the plaintiffs' argument the plaintiffs suggest that the -- they make an argument about the value of marten versus the value of beaver, and refer to Dr. Ray's point that if the value is the important thing or one of the important things, why wasn't exactly the same thing applied to marten,

river otter, muscrat and lynx. Those furs actually had a higher relative value than beaver. That's the quote that my friends put in. What they don't refer to at this point is that Dr. Ray gave evidence, and I don't have the cite on page 66, but I did refer to it in my argument, my lord, but Dr. Ray gave evidence that marten had a three pelts equals one made beaver value. So with respect to marten, at least you have got a bit of an inconsistency in what Dr. Ray said. But Dr. Ray said earlier on in his evidence that you have three marten pelts to one made beaver. Dr. Ray, I point out, did not refer to any territoriality associated with marten. He said there was none.

And then here we -- I would like to read the exchange between myself and Mr. Adams. I said -- I asked my friend if he could give me a reference to where Dr. Ray said there was any territoriality about marten. I said I didn't recall that from any of Dr. Ray's evidence. Mr. Adams says at the bottom of the page:

> "I will pursue it and supply it if I can, to suit my friends."

I note over at the top of the next page that no such reference was ever provided by Mr. Adams. I say that because the only territoriality noted in the early records was with respect to beaver.

The last extract from this tab that I would like to draw to your lordship's attention is at page 41. The reference to 86 and on, my lord, is a reference that from page 86 and on, and you don't need to turn to it, but from that page to the end of this part of the plaintiffs' argument they dealt with a lengthy discussion of Drs. Dyen and Aberle. I point out here that the published writers that have considered Dyen and Aberle's work have not come to the conclusions that the plaintiffs' witnesses have come to.

Dr. Bishop considered Dyen and Aberle twice, and it didn't effect his opinions. Dr. Kobrinsky considered and rejected Dyen and Aberle even with respect to matrilineality. Dr. Toby commented on Dyen and Aberle's matrilineality, but said it didn't effect the discussion of borrowing of the potlatch rank complex. Dr. Robinson said that the borrowing of the potlatch rank complex is acknowledged by Drs. Dyen and Aberle, and that they only speak to matrilineality.

1 Dr. Ives considered the work of Drs. Dyen and Aberle,
2 and did not consider it relevant, other than to
3 matrilineality. I say when it is independently
4 tested, Dr. Robinson's theory stands up better than
5 the plaintiffs on what Dyen and Aberle mean.
6 Now, the next section, my lord, is --
7 MR. GRANT: My friend indicated that there was a part he didn't
8 want to refer to now. I think as long as my friend is
9 clear that the issue I understand that I was not
10 prepared to deal with is what is in Part 4, that is
11 the admissibility of the dissertation of Dr. Robinson.
12 I understand -- my friend may have other comments
13 about how Dr. Robinson -- but he may need that for
14 that point. I just want him to be clear as to what I
15 cannot deal with --
16 MR. WILLMS: Well, yes, the point on Dr. Robinson is that my
17 friends attack on Dr. Robinson's credibility, and his
18 attack on Dr. Robinson's research only has merit if
19 her dissertation is excluded. In other words, if the
20 dissertation is not in evidence, then my friend can
21 make the arguments that he makes. If the dissertation
22 is in, the dissertation refutes each and every one of
23 the plaintiffs' arguments on the credibility of Dr.
24 Robinson and on the extent of her research.
25 Now, that's why I skipped over the points here
26 that I dealt with, my lord, where my friend -- it is
27 in this part of my friends' argument that they attack
28 Dr. Robinson, and my friend did that in
29 cross-examination as well, and it's the dissertation
30 that deals with that. And that's what I am saving.
31 The credibility aspect of Dr. Robinson, the allegation
32 that she didn't do detailed research.
33 Now, I would then ask your lordship to turn to tab
34 3 and have volume 8 of the plaintiffs' argument. In
35 volume 8 at tab 2, my lord, volume 8 of the
36 plaintiffs' argument in the black book at tab 2, you
37 should see an argument entitled "establishment
38 acceptance or use of reserves as surrender, cession of
39 purchase". That is what this replies to at tab 3.
40 So if you turn the page. I have done this one
41 somewhat differently, my lord. You will see at the
42 top of the first page I have page references in the
43 left-hand column. 111 to 148. Those are at tab 2.
44 And what I say is that the plaintiffs in their
45 argument, pages 111 to 148, discuss the laying out of
46 reserves in the claim area in the period 1871 to 1898.
47 Rather than deal with the plaintiffs' submissions page

by page, this annotation at this part will deal with the section. Most of the documents which are referred to in the following pages are also referred to in the plaintiffs' argument. Here they are dealt with in chronological order, and the extracts are not taken out of context or selectively quoted as they are in the plaintiffs' argument. When the documents are considered in their totality, it is our submission they support the allegations in paragraph 34 of the Statement of Defence.

What I have done then, my lord, from here on, is given you the exhibit number of the exhibit that I am going to quote from, and I have tried to avoid three dots in all of this as much as possible.

So for the first document, for example, is the letter from Dewdney to Pearse talking about what Dewdney did at Hazelton.

And over to the second page of the blue book you will see a reference to the notice. And when it's indented and quoted, my lord, it's from the document. When it goes out to the margin those are my comments. So when you go out to the margin you will see "there is a notice attached to the letter which reads as follows:" That's my comment. Then it quotes from the notice. And then I say my comment again, I say there is a map attached to the letter which is entitled "sketch showing Indian reserve at the Aguilgate and proposed townsite". On the last page of the document, which is dated September 1871, Pearse says, and then I quote from what the documents say again.

And the point, for example, of this document in respect of the plaintiffs' argument is at page 3. And what I try to do, my lord, is at the end of each document make some comment that would relate it to the plaintiffs' argument. This is an important document to review in full. But when the document in full is reviewed, I say it at page 3 of the blue book, that the plaintiffs' counsel asked during the course of argument where he could find the evidence which shows that Dewdney laid out an Indian Reserve at Hazelton in 1871. This is the document that shows it. There is a map, there is a note, and there is a discussion of it, and there is also a discussion of Lieutenant-Governor Musgrave's comments on the authority that Dewdney had to do what he did.

THE COURT: I think the plaintiffs' point was that it wasn't formalized and completed, gazetted --

MR. WILLMS: Well, it wasn't surveyed. That is clear. The townsite was surveyed, but the reserve wasn't surveyed. But, my lord, the whole process of the reserves was that, for example, when O'Reilly came through, O'Reilly laid out the reserves and then a surveyor came through later to survey it. And it's a two-stage process for the reserves. You have the laying out and then a subsequent survey.

MR. GRANT: And O'Reilly laid out this -- the reserve in 1991 in this area --.

MR. WILLMS: Well, that's next year --

MR. GRANT: I said 1891.

MR. WILLMS: Perhaps to go to another example, if you could turn to page 8 of the blue book. I point out here -- this is Exhibit 1035-54, report of Charles W. Clifford of the Hudson's Bay Company in 1890. This is before O'Reilly comes up. And he has a sketch plan of the Hazelton post in his report, which shows an Indian village to the north of the property claimed by the CMS, the missionaries. But he also says in his report, he says:

> "In 1870 or 1871 the flat was laid off by the Government as a townsite but no lots were sold. A few occupants paid ground rents for a short time but when the Omineca mining excitement passed away the place was almost deserted and all landmarks lost and forgotten."

I just pause there -- well, I'll read the next extract, because I have summarized it at the bottom. If you skip the next paragraph, Clifford then says:

> "It has been proposed that the flat should be made part of the Indian Reserve."

Are you with me, my lord?

THE COURT: Yes.

MR. WILLMS: So the point that I make at the bottom of this document, is that if there were no Indian reserve, as the plaintiffs allege, Clifford would have said an Indian reserve, not the Indian reserve. He clearly knew there was an Indian reserve there. And the notice posted by Dewdney in 1971, he referred to ground rent that would have to be paid by pre-emptors. And as Clifford notes here, ground rent was paid for awhile, but then people stopped paying the ground rent

under the pre-emption. So the point I make, my lord, here is that 20 years later his acknowledgement that land was pre-empted, because the ground rent was paid, but the pre-emptions were never carried through.

That was another point, I think, that my friends made about -- they said that the land was never pre-empted. Well, there is a difference between carrying a pre-emption through to getting a Crown grant and starting out on the pre-emption. And as Dewdney pointed out in his notice, in order to start the pre-emption process, you pay the ground rent for a period of time before you are entitled to the grant. That happened, but people never entitled themselves to the grant.

The next document, my lord, which is not a document that my friends refer to in their argument, is O'Reilly's letter of instructions. And it says -- gives the exhibit number, my lord. And the part of the instructions that are important for these purposes are at the bottom of page 9 where O'Reilly was instructed that:

> "... in allotting reserve lands to each band you should be guided generally by the spirit of the Terms of Union between the Dominion and local governments which contemplated a 'liberal policy' being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the band, to the amount of territory in the country frequented by it, as well as to the claims of the white settlers (if any)."

And I will come back to that in a moment. But I say at the bottom, and once again this is my comment, because it's not indented at the bottom. I say that it is clear from the provincial Order in Council and from the instructions to O'Reilly that he was to carry out the policy commenced by Douglas before Union. That policy, in contradistinction to the the U.S. policy, was to leave the Indians in possession of their villages rather than to remove them and to allow the Indians to hunt, fish and carry on their activities over unoccupied Crown land, rather than to confine them to the reserves. As was made evident in the meetings with the Indians described in the documents which follow, the reserve process clearly

1 contemplated settlement and alienation after reserves
2 had been laid out. However, to the extent that lands
3 were not settled or alienated, there was to be as
4 little interference with the aboriginal lifestyle as
5 possible.
6 I say at the top of page 11, my lord, this
7 prospect was well-known by each of the bands whom
8 O'Reilly visited. In light of O'Reilly's instructions
9 and the statements in the meetings, no band could have
10 been under the misapprehension that all the land was
11 theirs, after the reserve had been laid out.
12 The arguments advanced by the plaintiffs to this
13 effect can only be based on ethnocentric
14 characterizations of the ability of the bands visited
15 by O'Reilly to understand exactly what was taking
16 place in the reserve process. Throughout the
17 plaintiffs' argument respecting the laying out of
18 reserves, this ethnocentric approach to the
19 understanding of the Indians during O'Reilly's
20 meetings underlies, and I say is necessary to their
21 submissions especially when you read the back and
22 forth that takes place.
23 And so what you can see following, and I am not
24 going to go through them, my lord, but following this
25 I have tried, whenever there was a meeting, to put the
26 whole extract in of what happened between the
27 commissioner and the band that he was meeting with.
28 THE COURT: I don't understand that second paragraph.
29 MR. WILLMS: The second paragraph, my lord, is an argument that
30 my friends make from time to time that on the one hand
31 the -- there is some sort of thinking going on in
32 looking at the historical record that the native
33 population couldn't speak for themselves, they didn't
34 understand what was going on. My friends refer time
35 and time again to what they have called the racist
36 theory of viewing the dealings between the aboriginees
37 and the white people. What I say is that when they
38 ask your lordship to interpret every single one of
39 these documents as if the Indians didn't understand
40 what was happening, they are falling into exactly the
41 same trap that they have warned this court about and
42 us about time and time again throughout their
43 argument. They are making the suggestion that when an
44 aboriginal person is quoted, that you have to take
45 from that that he probably didn't know what he was
46 saying, he probably didn't understand the process, he
47 was confused. You have got to give him every break,

construe every ambiguity, even in conversations in his favour. What I say, my lord, is that argument is ethnocentric. It's also completely contrary to the evidence that the plaintiffs led which I say shows that the plaintiffs' ancestors clearly understood what was going on at all times in the claim area. There were no misapprehensions.

THE COURT: So you're saying, really, just give the Indians' pronouncements the literal meaning.

MR. WILLIAMS: Literal meaning, my lord.

Now, as I said, my lord, what I have tried to do, and I won't go through it, but in the next several pages set out the back and forth when O'Reilly had minutes. But I would ask your lordship to turn to page 28. And this is one occasion when I would ask your lordship also to turn to page 118 of the plaintiffs' argument. This lends, my lord, support to my suggestion that you have got to read all of the documents, and that you can't take selective quotes as the plaintiffs have done.

What the plaintiffs say on page 118 in the second full paragraph:

> "Finally writing on July 18, 1892 O'Reilly observed with respect to the establishment of a reserve at Hazelton in 1891 there was a very considerable complication in regard to the townsite of Hazelton portions of which the Indians had fenced and cultivated."

They put that in a section in a submission to try to show that there were a lot of problems that O'Reilly had in the reserve process.

Now, when you look at the document, and I start the document at page 28, this is the document that my friends refer to, the whole paragraph is on the next page. And it's the second full paragraph beginning:

> "my reception ..."

> "My reception by the Chief, 'Tet mol doc', and the members of his band was most cordial; I had several meetings with them; they expressed the utmost satisfaction at the prospects of having their lands defined; they were reasonable in their demands, and though there was a very serious complication in regard to the townsite

of Hazelton, portions of which they had fenced and cultivated, I was fortunately able to satisfy them both as to cultivable land and timber."

Then when you read the whole document, you can see that it was but a very, very minor difficulty, yet that is the part that the plaintiffs pull out and put in their argument, leaving the balance of the document which describes the -- what O'Reilly did, and the reception that he had as being most favourable. And when you review the minutes of the meeting, my lord, it's quite clear that O'Reilly had no difficulties at all at Hazelton.

The next point, my lord, goes to something that my friend, I think it was Mr. Grant asked me, where is the evidence of pre-emptions; that O'Reilly knew about pre-emptions in the reserve process. And if you go to page 31 of the blue book, there is a reference to Exhibit 997-12, a letter from O'Reilly to the Superintendent of Indian Affairs. And Here O'Reilly is writing about what happened at Kitwanga when he was at Kitwanga the year before. On the next page, on page 32 he says this in respect of the claim of the people at Kitwanga:

"This stretch of country, thirty-five miles, included the pre-emption claims of two settlers, and I told them I had no power to give it to them."

Now, that I just draw to your lordship's attention and my friend's attention because he asked where is the evidence of pre-emptions at the time of O'Reilly. So not only do we have the pre-emptions at Hazelton, but in the land claimed by the Kitwanga people for a reserve, O'Reilly knew of two pre-emptions which prevented him to the knowledge of the Indians from laying that reserve out.

THE COURT: What do you take that to mean, "I told them", the pre-emptor's or the Indians?

MR. WILLMS: The Indians. You see, he had no power to gift the land to the Indians because of the two pre-emptions.

The next -- if you turn to page 40 of the blue book, my lord, I refer to -- at the bottom of the page a letter from Loring to Vowell of August 3, 1896. And on the next page -- I quote the whole letter, or I

quote a considerable part of the letter, and then say at the bottom of page 41: The plaintiffs, in their argument, incorrectly date this document as 1898 instead of 1896. And it's page 145 where they incorrectly date it. And then they make a submission about -- they say O'Reilly didn't care about the wishes of the Indians, he just wanted to know what Loring thought. And I say that the only reason why Loring was asked to investigate the reserve issue at Kispiox was because O'Reilly, in his letter of April 9, requested a report from Mr. Loring before undertaking the great expense of returning to Kispiox. That return was necessitated by two letters in February of the same year, which I have set out in this extract, my lord, from the Indians at Kispiox, asking Mr. O'Reilly to return.

So I point out that all that Loring was being asked to do in 1896 was not to find -- not to give his opinion on how big the reserves should be. He was asked to confirm that he understood what the wishes of the Kispiox Indians were, because O'Reilly didn't want to go to the expense of coming back up to Kispiox unless there was going to be something done at Kispiox.

The next extract that -- if I can ask your lordship to turn to page 48 of the blue book, and at the same time to page 129 of the plaintiffs' argument. On page 129 of the plaintiffs' argument they say in the second paragraph:

> "As for O'Reilly's statement about never making a promise without seeing the land I was reserving, Loring wrote in 1918"

And then they quote from Loring's letter, and this is the letter, my lord, that I have set out in greater detail at page 48.

Now, when you read the letter, and especially the part quoted, you can see that what Loring is writing about was Lot 1196, range 4 partly occupied by an Indian named William Leo or Canyon Creek William. All right. Then he refers to William Leo or Canyon Creek William, and he gives his description, and then it's on the next page where you find the paragraph from which the plaintiffs have taken the quote that they have reproduced on page 129. The suggestion that the plaintiffs make is that O'Reilly didn't go to all of

the places where people were, he just stayed in a couple of locations.

The point that I make after this, my lord, is that Loring's letter was written in 1918. In another document, and I have the document later on in this argument, it was noted that Canyon Creek William, far from being on lot 1196 since time-immemorial, had only been there for six years before 1915.

William Leo or Canyon Creek William, who this letter is really about, had only been on the land since 1909. It's no wonder O'Reilly missed it.

Now, that -- the first 49 pages, my lord, deal with that reserve process, and then I carry on with the other method of just putting the page number in the left-hand margin.

THE COURT: In tab?

MR. WILLMS: In tab 3. So the pages 1 to 49.

THE COURT: Yes.

MR. WILLMS: Are my detailed response, including comments -- including the documents on the reserve process from 1871 to 1898 dealt with by the plaintiffs at page 111 to 148, and that ends on page 49. And then what I do from page 49 on is I set out again the page reference in the plaintiffs' argument in the left-hand column and then my comments in the body. 1 to 49, including comments. But I have tried to put in as much of the document, leaving as little out as possible, and basically they are the same documents that the plaintiffs have referred to, only I just set them out in chronological order so you can see the story.

THE COURT: Then 50 to 54, then.

MR. WILLMS: You will see --

THE COURT: Are other format.

MR. WILLMS: The rest of the comments up to the end of this section of the plaintiffs' --

THE COURT: Yes. All right.

MR. WILLMS: -- argument. So the last extract is at page 51 that I would like to refer your lordship to. And what I do here, my lord, is I make a reference in the left-hand column to pages 163 to 176 of the plaintiffs' argument, and I say that on these pages the plaintiffs quotes extensively from 1035-380, the 1915 Royal Commission on Indian Affairs for the Province of B.C., Babine Agency. I point out throughout the statements of the Indians made to the Royal Commission, their requests for the land back. As stated earlier, this is not consistent with the

1 continued and existing ownership. It is consistent
2 with a change of mind after cession, surrender or
3 abandonment. You don't ask for your own land back, if
4 you're still asserting that it's your land. You are
5 not asking for the government to give it back to you.
6 It's your land. And if you read through these
7 sections you will see almost invariably there is at
8 least one comment in each location "We want the land
9 back."
10 Now, I also set out some other extracts which I
11 say are relevant, and I do --
12 THE COURT: Isn't that semantical, Mr. Willms? How am I to know
13 at what point what they meant or put it differently?
14 Why should I assume that the request to have land back
15 does not include the unspoken? 'It's always been
16 mine. You took it. I want it back.'
17 MR. WILLMS: My lord, when you read the whole sections, and you
18 just have to read the whole section in which they say
19 we want the land back. Because they say that in the
20 context of its our forefather's land, the white people
21 are here, we want the land back. And I just say that,
22 my lord, you take it as they say it. What they mean
23 what they say, and they are not saying, as was said at
24 Metlakatla, that "It's all ours, and it's not yours.
25 You don't have it." That's not what they are saying
26 in this series of meetings. It's not Metlakatla, it's
27 "We want it back". And the important aspect of that,
28 my lord, is this all takes place after O'Reilly and
29 Vowell have been through laying out the reserves. And
30 I say it adds support to the submission that is made
31 that there was no misunderstanding at the time of the
32 effect of the reserve process, none at all, that each
33 of the bands visited knew, that after the reserves
34 were laid out the rest of the land was going to be
35 opened up to pre-emption, and that was that, and to
36 the extent that lands weren't pre-empted or otherwise
37 alienated, there was the continuing right to hunt,
38 which is held in common by every one over unoccupied
39 Crown land, but that was it.
40 So I just draw on that, my lord, as further
41 support for that earlier proposition. But you do have
42 to read the whole thing, my lord. I don't want to
43 take the word back out of context. I say when you
44 read it in context, that's what it means.
45 The other point, and I didn't draw your lordship
46 to the document, but you might recall the Kitwanga
47 people complaining about the Kitsegukla people on

1 their reserve and that correspondence. They weren't
2 complaining about the Kitsegukla people being on their
3 traditional tribal lands. They didn't complain about
4 the Kitsegukla people being on their house
5 territories. They complained about the Kitsegukla
6 people being on their reserve. And I say that that's
7 even further support for the understanding that after
8 the reserves were laid out that the rest of the land,
9 whatever interest they may have had or may have
10 thought they had was gone as part of that process, to
11 their knowledge and with their agreement.
12 Now, the last extract, my lord, is at page 53 that
13 I would like to direct your lordship to. And here I
14 am quoting at the bottom of the page from the Babine
15 Agency meetings, and it's from page 101 from the
16 exhibit that I start quoting from some two pages
17 before.
18 THE COURT: What is this exhibit?
19 MR. WILLMS: The exhibit is Exhibit 1035-380.
20 THE COURT: What is that?
21 MR. WILLMS: That is the evidence -- the 1915 Royal Commission
22 on Indian Affairs, Babine Agency.
23 THE COURT: Yes. All right.
24 MR. WILLMS: And there was a joint meeting at Hazelton with the
25 Babine, Kuldoe and Kisgegas bands of Indians, and at
26 the conclusion of the meeting, and I quote this at the
27 bottom of the page, Jimmy Michell of Hagwilget, and
28 that should be in square brackets, my lord, one of the
29 ancestors of the plaintiffs, because that is not part
30 of the quote, that's me saying -- because there is
31 evidence that Jimmy Michell of Hagwilget is one of the
32 ancestors of the plaintiffs.
33 THE COURT: Yes.
34 MR. WILLMS: Met commissioners McKenna and McDowell and made the
35 following statement.
36
37 "We object to the Gitenmax tribe getting part of
38 our reserve at Hagwilget, and if the government
39 wishes to give this part away, we, the
40 Hagwilgets, must be paid for it in money.
41 There are 203 acres in the piece and we value
42 it at $20 per acre. Or if they don't want to
43 do that, the government must give us a piece of
44 land equally as good as the piece they're going
45 to take away from us. We also wish to have our
46 fishing rights preserved from the Gitenmax and
47 we want the river to be the dividing line."

Two things there, of course, my lord. The difference of opinion between the Wet'suwet'en and the Gitksan as to the reserve at Hagwilget, and I think your lordship has heard some evidence that there is some rule of Gitksan and Wet'suwet'en law that allows that reserve to be there, but not according to Jimmy Michell. He was unhappy about the prospect of giving part of it to the Gitksan in 1915.

The second point, my lord, is the reference to the "government must give us a piece of land". All right. That's inconsistent with it being their land. It's completely consistent with them wanting land back. And I have already made submissions on that.

Now, that takes care of that, my lord. So there are two things still that I would like to deal with, and my friends have -- I want to deal with Dr. Robinson, and I would like to deal with Dr. Robinson as soon as possible outside of normal sitting hours, so that we don't take up the small time that we have left to deal with Dr. Robinson.

The second point, my lord, you might recall that I handed up the draft -- the document that Downie wrote in hand that was reproduced in the colonial -- in a colonial paper. And I only did that to show your lordship that Downie had written two documents, and one said that there was a village at the forks, and the other one didn't mention the village at the folks. And my friend said that Mr. Rush would have to speak to that. I don't know what there is to speak to, but those are the two things that I still would like to deal with, and I would like to deal with them as soon as possible. But I am in my friend's hands, I think.

THE COURT: When will you be ready, Mr. Grant?

MR. GRANT: I had suggested out of court to my friends that Tuesday -- we would be ready Monday or Tuesday. But if my friend is now proposing to -- if he is going to take the entire day on other parts of his submission today and not moving things up and needs the time, it's really, as far as I am concerned, in the early part of next week. If he wants it on other hours, it would be subject to your lordship's view as to what would be a convenient evening. I discussed it with Mr. Rush, and he has analyzed the Downie document, and that's why --

THE COURT: Well, I hesitate to say that my social side is starting to intrude on this trial for the next three

weeks. June is always a dreadful month. All the various organizations of the bar wanting to have their various functions before they depart for wherever lawyers depart for in July and August, and I have very few evenings in June that aren't already committed.

MR. GRANT: Well, I understood -- I mean, as I said, I have talked to Mr. Rush. We are prepared to deal with it Tuesday.

THE COURT: What about 9:00 o'clock Tuesday morning?

MR. GRANT: That's fine. That's fine with me.

MR. WILLMS: That's fine with me, my lord.

THE COURT: All right. Look forward to hearing it then.

MR. GRANT: Thank you. My lord, that concludes my dealing with 1 through 3. And Ms. Sigurdson will now deal with some further points.

MS. SIGURDSON: My lord, I am dealing with the next tab in the blue book, and that's tab 5.

THE COURT: 5.

MS. SIGURDSON: Yes. And it's an addendum to Part 4, Section 2, paragraph 41.

Mr. Plant in his submission noted that:

> "Although the house is given pride of place in the Plaintiffs' model of Wet'suwet'en social organization ... it is clear that the line between the house and clan is ..."

THE COURT: I'm sorry, I'm not sure what -- your Part 4 of the plaintiffs' argument.

MS. SIGURDSON: Our argument, my lord, the province's summary of argument.

THE COURT: So this is an addendum to plaintiffs' argument. Would it be better to leave it here, or should it be put into that volume?

MS. SIGURDSON: At your convenience. You will find when we have our final index that we stay in the blue supplement binder. May be convenient to make it there.

THE COURT: I should make a note that there is this addendum. Is volume 4 handy?

MS. SIGURDSON: It will be the blue volume 2.

THE COURT: I'm sorry. What I need, though, is the province's volume 2, I guess.

MS. SIGURDSON: Volume 1.

THE COURT: Plaintiffs' volume 1.

MS. SIGURDSON: Province's volume 1.

THE COURT: And it's Part 4, Section 2.

MS. SIGURDSON: And it should be entitled "identity geneaology

and descent", and it's paragraph 41 in that section.
THE COURT: Yes. All right. Thank you.
MS. SIGURDSON: And in that part Mr. Plant submitted that:

> "Although the house is given pride of place in the plaintiffs' model of Wet'suwet'en social organization ... it is clear that the line between house and clan is in many cases so sketchily drawn as to be virtually invisible ..."

And Mr. Plant referred to your lordship a few examples that indicated the Wet'suwet'en witness considered the clan to be the determining factor for ownership and for rights of access to territory.

And in paragraph 41b I set out the exchanges that occurred in the transcript at that time where your lordship said:

> "THE COURT: Well, I did not understand the plaintiffs' evidence to be that the clan members as such have rights on each other's territory."

And Mr. Plant asserted that there was evidence to that effect.

On page 2 your lordship said:

> "THE COURT: Because that's not what I understood the burden of the plaintiffs' evidence is, that house territory belongs to members of a house. This is introduced in a different regard, that is to say, that clan territory is for clan members. And I would have taken this statement of Mrs. Daum's to be out of step with the burden of the evidence and indeed the burden of the plaintiffs' submissions ... a contradiction, as it were, in the plaintiffs' basic submission."

And Mr. Plant agreed that it was a contradiction, but had a different view of the burden of the plaintiffs' evidence.

In this addendum, my lord, he set out further examples from the evidence of the Wet'suwet'en witnesses where they assert that ownership or rights of access turn on clan, the clan designation of the

member, not the house. And I will not take your lordship through all of them, but I will highlight a couple. And on page 3 in the evidence of Bazil and Josephine Michell, and the second question:

> "Q When you say that you want to keep your territory for your grandchildren, does that Wet'suwet'en word mean for the younger generation of people in your clan?
> A When I refer to the future generation I am referring to the people from my clan."

And at page 4 Emma Michell of the Laksilyu or Beaver clan was asked:

> "Q Emma, if the Wet'suwet'en chiefs win this court case against the province, can you tell us what you would like to see changed in how your territory is managed and controlled?
> A I would like to see my grandchildren who have the rights to the territory look after the territories, Laksilyu and Gilseyhu and all the other clans."

And I refer you, but will not read the evidence of Mr. David at page 7. There is another extract from the evidence of Madeline Alfred and from Henry Alfred of the House of Wah Tah Keght, and I draw your attention to the underlined portion of Madeline Alfred's evidence:

> "Q So do the people of the different houses of the Laksilyu have the right to go on each others territories?
> A Yes."

And at page 8 I have an extract from the evidence of Mr. Joseph. And I said the association between territories and clans was also noted by the Plaintiff's expert on the Wet'suwet'en, Dr. Mills. Dr. Mills was of the opinion that:

> "Under Wet'suwet'en law, feast names are legally related to distinct territory ... The feast names are passed on from clan member to clan member, and not to someone outside of the clan ...

1 ... The assumption of a name in the clan is a
2 manifestation of the holder's right to use clan
3 territory."
4
5 And she cites a personal communication with Mr.
6 Joseph.
7
8 "All the name holders belong on all the clan
9 territory."
10
11 THE COURT: Well, is Dr. Mills perhaps using clan and house
12 interchangeably?
13 MS. SIGURDSON: She in her opinion has a section on clans and on
14 houses. She does not use the words interchangeably.
15 THE COURT: All right.
16 MS. SIGURDSON: And I conclude by saying these examples, and I
17 digress to say these are but examples of the
18 Wet'suwet'en witnesses but several other examples that
19 could be given. These examples provide further
20 illustration of the contradiction in the basic
21 position of the Wet'suwet'en plaintiffs. While it is
22 contended on their behalf that territory belongs to
23 houses, it is clear that many of the Wet'suwet'en
24 chiefs see matters quite differently. For those whose
25 evidence has been quoted above, including Dr. Mills,
26 ownership and rights of access to territory are
27 matters for the clan, not the house.
28 And those are my submissions on that point, my
29 lord.
30 Turning down to the next tab in the blue
31 supplement binder, tab 6. Before I get into the text,
32 I will just explain what we are doing here. We are
33 returning to the issue of territories. Submissions
34 were made by Mr. Mackenzie in Part 4, Section 5 on the
35 inconsistent and conflicting evidence as to the
36 ownership and boundaries of a selection of
37 territories. Mr. Willms addressed your lordship on
38 the extent and the effect of overlapping claims of the
39 enabling nations.
40 THE COURT: Yes.
41 MS. SIGURDSON: It was and is our position that those examples
42 that were described by Mr. Mackenzie are included in
43 his submissions and other material, and that part of
44 the argument show that there is no reputation of the
45 type asserted by the plaintiffs in the community as to
46 the ownership or the boundaries of the claimed areas.
47 However, to respond more directly to the plaintiffs'

territory by territory argument, we will cast the net a little wider and show that the evidence is inconsistent and contradictory throughout claim area. Mr. Mackenzie will follow me, and he will make submissions on several territories and several bodies of evidence. In my submissions I focus on one type of evidence, and that's the sworn statements of hereditary chiefs describing their territories, and the statements I refer to are their affidavits in response to interrogatories delivered by the province, and the maps that were attached to those interrogatories. And in these submissions they are compared to the claimed areas as shown on Exhibit 646-9A and 9B. That's the plaintiffs' so-called final map.

And turning to my addendum, I note that throughout the course of the trial and in final argument, the plaintiffs have emphasized that knowledge of house territory, boundaries and features is essential to their claim of ownership. Boundaries and features within the territories are commonly known in each of the Gitksan and Wet'suwet'en communties, and hereditary chiefs have a duty to know the boundaries of their and their neighbours' territories. And I set out a few references from the plaintiffs' argument. And I will just draw your attention to the underscored portion on page 2 where Mr. Rush as I recall said:

> "It is one of the principle responsibilities of the Gitksan and Wet'suwet'en hereditary chiefs when they are invited to the feast of other houses and clans to perform the essential role of witnesses and validators to the claims to chiefly names and titles to territories made by other chiefs and houses. In order for chiefs to perform their roles in this distinctive form of public acknowledgement of land title, they are trained by their predecessors in the boundaries of their own house, territories and the boundaries of the territories of the neighbours."

And the other reference refer to the plaintiffs' assertion that boundaries, ownership are common knowledge in each of the Gitksan and Wet'suwet'en communties.

Turning to page 3, we submit that it is part of

the plaintiffs' case that knowledge of territories, boundaries, et cetera, is widely dispersed, and that the chiefs have a particular obligation to know their territories, and their neighbours' territory.

Exhibit 646-9A and 9B allegedly depict the boundaries of the house territories. These maps were based on territorial affidavits, many of which were sworn by persons other than the hereditary chiefs of the houses claiming ownership of and jurisdiction over the territories.

Prior to the commencement of trial, this defendant delivered interrogatories to each of the named plaintiffs, and that would be the hereditary chiefs of the houses as described in the Statement of Claim. Answers were received by way of affidavits. Each named plaintiff was asked, 'Does your house claim ownership of or jurisdiction over any particular territory, and if so, what are the boundaries of your house territories?'

Now, in several cases a map was attached to the affidavit, and usually it was labelled a draft map, and it is accepted that the hereditary chiefs' affidavits were true as they swore them to be to the best of their information and belief. It follows that it must be accepted that the interrogatory maps reflect the information and beliefs of the hereditary chiefs at the time the affidavits were sworn. The draft designation must be understood to refer to a draft in terms of the mapping process. In that context it is reasonable to expect that a boundary line may be modified to more accurately reflect a height of land or the extent of a drainage system.

Subject to that minor qualification, the hereditary chiefs' descriptions in their responses to the interrogatories must be taken as true statements of the chiefs' knowledge of the ownership and location of the territories, the key geographic features on the territories, their boundaries, and the ownership of neighbouring territories.

In this addendum we go through several examples, comparing the interrogatory responses to map 9A and 9B, and it will be shown that the boundaries and ownership of territories claimed by the hereditary chiefs in their interrogatory responses are often strikingly different from the boundaries and ownership described in the territorial affidavits and depicted on maps 9A and 9B. And those differences in most

cases, many cases go far beyond any cartographic inaccuracy that could be encompassed within the designation draft.

And we say the differences show that ownership and boundaries of territories are not a matter of common knowledge in the Gitksan and Wet'suwet'en communties. Further, the sworn statements of the hereditary chiefs in their responses to interrogatories cannot be reconciled with the differing depictions of their territories on Exhibits 646-9A and 9B. If the latter depictions are correct, then where there is a discrepancy the affidavits are false. The interrogatory affidavits are false. Assuming that the chiefs had no intention to mislead, only one conclusion follows, that the hereditary chiefs do not know their territories, and on the plaintiffs' theory of the case, that cannot be.

What I propose to do, my lord, is go through two examples, and leave the rest for your lordship. But for the first example I would like -- I would ask that Exhibit 1020-2 be put before you.

Before turning to that, if I can just locate your lordship on the map. The territory I am referring to is shown on Exhibit 646-9A as being claimed by Gaxsgabaxs, Wiis Dis and Hanamuxw. Now, that is just at Kitsegukla Village.

THE COURT: Yes. No, I haven't found it.

MS. SIGURDSON: If your lordship has Skeena Crossing and the Kitsegukla Reserve and Andimaul, that's in that --

THE COURT: Well, this map has so many overlays on it that it's hard to figure it out.

MS. SIGURDSON: Perhaps if I can point it out on my map and --

THE COURT: I know the area. I just can't quite pick it out because the names of the houses are supposed to be on here, and I don't recall them with three names on it.

MS. SIGURDSON: Three separate territories on it. One Gaxsgabaxs, one Hanamuxw, one Wiis Dis.

THE COURT: All right.

MS. SIGURDSON: This may be a way of doing it.

THE COURT: Let me come down there. There is Gaxsgabaxs, I have that one.

MS. SIGURDSON: And Hanamuxw territory and Gaxsgabaxs territory.

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

MS. SIGURDSON: That will be what I am referring to.

THE COURT: All right.

MS. SIGURDSON: Now, in his interrogatories response Larry Wright who owns the name Haakaxs, he is the head chief of

that house, swore his affidavit, and I have the affidavit, and he says in paragraph 1:

> "I am one of the plaintiffs in this action and have received interrogatories served on me by the defendant. I have attached hereto and marked Exhibit A to this my affidavit, my answers to those interrogatories. Those answers are provided in the same numerical order as the interrogatories."

Paragraph 3.

> "The answers that are attached to Exhibit A to this my affidavit are true to the best of my knowledge including information which I have received from others."

And I point out in paragraph 4 that these are further responses to the interrogatories as were ordered by Mr. Justice Locke. But turning to the map attached to Mr. Wright's affidavit.

THE COURT: Yes.

MS. SIGURDSON: In the centre southern of the territory your lordship may be able to see the Kitsegukla Village.

THE COURT: Yes.

MS. SIGURDSON: Skeena Crossing the Kitsegukla Reserve.

THE COURT: Yes.

MS. SIGURDSON: Up in towards the northern part you may be able to see Carnaby, which is in the territory claimed by Hanamuxw. It's right on the border of the Haakasxw territory. And it's my submission that these can be compared, and this whole territory claimed by Haakasxw in his interrogatories is virtually the same as the three territories now said to be claimed by the houses of Gaxsgabaxs, Wiis Dis and Hanamuxw on Exhibit 646-9A.

That 1020-2 is the affidavit and map of Larry Wright.

THE COURT: What you're saying is that the map attached to Mr. Wright's affidavit or affidavit response to interrogatories, Exhibit 1020-2, is approximately equivalent to three territories shown in 646-9A?

MS. SIGURDSON: Yes.

THE COURT: Yes.

MS. SIGURDSON: And we say those are completely inconsistent assertions, and in light of that type of evidence it

cannot be said that there is a reputation in the community as to the ownership of that territory.

THE COURT: Is it convenient to take the morning adjournment now?

MS. SIGURDSON: Yes, my lord.

THE COURT: You are going to another set of documents now?

MS. SIGURDSON: Yes.

THE COURT: I think we will take the adjournment now. Thank you.

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED FOR A BRIEF 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.

(PROCEEDINGS RESUMED AT 11:15)

THE REGISTRAR: Order in court.
MS. SIGURDSON: My lord, I've placed before you another overlay. This is an overlay that fits on the judge's series, or Mr. Macaulay's map. For the purposes of these submissions, I won't ask your lordship to put it on the map. I have taped it to a paper print of map 9A and 9B. What this map is was a cartographer's attempt to map the interrogatories maps as available at that time. And on the green overlay -- or I should say the paper print is -- the black and white is a paper print of map 9A and 9B on the 1 to 500,000 scale. The legend to the overlay is in the upper right-hand corner, and what the cartographer did was try to plot the interrogatories maps. You'll notice that wherever there is a solid circle, or a solid line around -- circle around a number, that is where there was an interrogatories map provided. In other areas there's a broken line around a circle, and that is where the interrogatories and just a general written description was provided. And I tender this not as an exhibit, of course, this is the exhibit -- is the interrogatories map itself, and it's on the interrogatories map that you see the geographic features that were claimed by that hereditary chief and the neighbours that were claimed by that hereditary chief, but this may be of some assistance in placing your lordship in seeing the differences in discrepancies.

By way of example, on the interrogatories map legend number 1 is Xhliimlaxha, here spelled X-H-L-I-I-M-L-A-X-H-A, and on the northern boundary of the land claim area and about the centre, your lordship may see a number 1?
THE COURT: Yes.
MS. SIGURDSON: And this is a long thin territory of Kliiyemlaxhaa. Now, in her interrogatories response, the chief of the House of Kliiyemlaxhaa attached this map, or a map approximately showing that area as describing the area over which she claimed ownership and jurisdiction. And you'll note it extends far past the northern boundary as presently claimed.
THE COURT: Yes.
MS. SIGURDSON: And you'll notice that it does not go as far west as it previously did. The difference there, my lord, is the boundary line on her interrogatories map follow the river, the Nass River. More recently the

claim has been altered, and her claim is asserted to territory west of the Nass as well. And the other one that I will point out is the Ma'uus territory that I set out in paragraphs 15 to 18 of my submissions.

Now, on the west boundary of the land claim area, and it's just at and north of Kispiox on the map -- in fact, if you can recall where the Gaxsbgabaxs territory we were talking about earlier --

THE COURT: Yes.

MS. SIGURDSON: North of that is the Luutkudziiwas territory, north of that Angulilbix and Ma'uus, and the Ma'uus territory is the area addressed in the following paragraphs of my submission. And I note in my submissions that on Exhibit 646-9A Ma'uus claims two territories on the west side of the Kispiox River, at and north of the Kispiox Reserve, and a small Wii Elaast/Amagyet territory on 9A divides those two territories. In 1986 Jeffrey Harris Jr., Chief Ma'uus, swore an affidavit in response to interrogatories, and his answer to question 59(c) was:

> "I will accept the map attached to Schedule 'B' because it is a 'draft' and it is subject to change in the future to more accurately reflect the exact boundaries of my territory."

And harken back to my submission on "Draft". That is what we say the chiefs had in mind by the designation "draft". It was accurate to their best of their belief and knowledge, but they contemplated there could be a modification to more accurately reflect the precise location of a boundary point. Chief Ma'uus' description of the territory of Ma'uus is inconsistent with the description given by his father, Jeffrey Harris Sr., who holds the name Luus, in his territorial affidavit. And some of the inconsistencies are on the interrogatories map. Ma'uus does not claim ownership of the southern territory at Kispiox village shown at 646-9A. And if you can see on the overlay, my lord, that area is with the interrogatories map of Antgulilbix, that's 6B.

THE COURT: Yes.

MS. SIGURDSON: So at that time, according to Jeffrey Harris Jr., the chief of the house, he didn't claim that area. On the interrogatories map Ma'uus claims the mountains north of Date Creek. Now, on 9A Antgulilbix claims those areas, although those weren't claimed in

her interrogatories. On Exhibit 1020-8, that is the interrogatories map, Ma'uus' neighbour to the north is Amagyet, whereas on 646-9A the neighbour is now Kliiyem lax haa. On the interrogatories map there is no reference to a small Wii Elaast/Amagyet territory at Date Creek, whereas on Exhibit 646-9A there is. On the interrogatories map, Ma'uus' neighbour on the east of the Kispiox River is Kliiyem lax haa. And that, I'm afraid, you would have to see from the interrogatories map itself. But on 646-9A the neighbour is said to be Delgamuukw.

Now, we say, my lord, that it must be noted that the lands in question are not remote or inaccessible mountain peaks; they are the hills readily available from the village, and they can be seen by people in the village who are people who pass through the area. And we say the question deserves to be asked on what basis can a claim based on exclusivity of possession be advanced where the owner cannot identify that which is said to be possessed? And I take that from paragraph 18 of my submissions, my lord, at page 8.

And, my lord, because of time constraints, I will not go through the rest of my submissions orally. I would just draw your attention to a conclusion at page 20, and where we say that the examples set out show that the hereditary chiefs' perception of their territories is quite different from the claims described in Exhibit 646-9A and 9B. Exhibit 646-9A and 9B do not reflect a consensus, or reputation, within the community as to the ownership of territory within the claim area, and we say that must be clear in light of the conflicting contradictory evidence of the hereditary chiefs themselves and their sworn statements and sworn responses to interrogatories.

And, my lord, that concludes my submissions.

THE COURT: Thank you.

MS. SIGURDSON: And Mr. Mackenzie will now address you.

MR. GRANT: I just wondered if my friend could -- our map ratio is, of course, different from Mr. Macaulay's, and if my friend would have the courtesy of providing me with at least the underlay so that I could follow this as well.

MS. SIGURDSON: Yes. It is for the judge's series, and he has that, but I can provide an underlay as well.

MR. GRANT: Yes, my lord.

MR. MACKENZIE: My lord, I will be speaking about Part VII, which can be inserted in your lordship's binder, which

is volume IV of the plaintiff -- of the Province's summary.
THE COURT: Volume IV?
MR. MACKENZIE: The blue book.
THE COURT: Oh, in this?
MR. MACKENZIE: Which your lordship has.
THE COURT: Oh, this is volume IV. Yes, all right.
MR. MACKENZIE: And this, as your lordship can see, is tab VII. Your lordship may not wish to insert that right now, it's --
THE COURT: First tell me where I should install it in this blue book now, what tab number?
MR. MACKENZIE: Tab VII, my lord, Roman numeral VII.
THE COURT: It's going to be difficult, again I don't think I have a tab VII.
MR. MACKENZIE: I just handed it to your lordship.
THE COURT: All this? Oh, I see. That won't conveniently go in the book, I don't think.
MR. MACKENZIE: It will eventually, my lord, because it has three-hole punches that -- it's punched for three holes and it's just kept together for easy reference together with a press.
THE COURT: Shall I put it in?
MR. MACKENZIE: No, my lord. If your lordship will remember to put it in at that tab.
THE COURT: Okay. I'll just put a little reminder.
MR. MACKENZIE: Just take a little time to get all the separate pages in, right now it might take a little longer.
THE COURT: All right, thank you.
MR. MACKENZIE: So --
THE COURT: So this is Plaintiffs' --
MR. MACKENZIE: The Province's --
THE COURT: All right, the Province's -- the Province's volume IV, tab VII.
MR. MACKENZIE: Yes, my lord.
THE COURT: And when I get a diskette of this book it will include this tab VII, will it?
MR. MACKENZIE: Yes, my lord, the written portions of it.
THE COURT: Yes, all right.
MR. MACKENZIE: That tab VII, as I say, can be put conveniently into your lordship's blue binder so that madam registrar has it.
THE COURT: All right, thank you.
MR. MACKENZIE: I refer to the Table of Contents which follows the tab, my lord, to orient your lordship to the position of this material in the Plaintiffs' -- in the Province's argument. This is an addendum to Part IV,

1 5(g) of the written summary.
2 THE COURT: All right. Now I've got to go to -- I've got to go
3 to that now. Is part (g) in volume II perhaps?
4 MR. MACKENZIE: Yes, my lord.
5 THE COURT: Yes, all right.
6 MR. MACKENZIE: It carries over in part.
7 THE COURT: May I have volume II of the Province, please.
8 MR. MACKENZIE: The title of this addendum -- oh, sorry.
9 THE COURT: That's all right. Thank you.
10 MR. MACKENZIE: My lord, the section to which this is an
11 addendum, that is 5(g), was a detailed analysis of
12 territorial boundary evidence, as it appears from the
13 top information on the Table of Contents here. And
14 the title of this material, this addendum, which I'll
15 be -- to which I'm directing your lordship's
16 attention, is "Inconsistent Evidence As To Plaintiffs'
17 'Core' Claim Area Ownership and Boundaries", that is
18 claim areas not covered by non-plaintiff overlaps.
19 So, my lord, this is -- these are territories that
20 are in the heartland of the Plaintiffs' claim area
21 unaffected, or only partially affected by the overlaps
22 from neighbouring nations. And referring to the Table
23 of Contents, section A contains written submissions,
24 at which I'll be going through, dealing with the
25 evidence. Section B contains a table -- just
26 referring that to your lordship, section B, which is
27 tab B, contains a table. And if your lordship will
28 just look at that to see that there is a table there
29 with several pages, 27 pages, and I'll be discussing
30 that in more detail, my lord. That is a summary of
31 inconsistent territorial ownership and boundaries
32 evidence. And then section C consists of four
33 detailed analyses: C1, C2, C3, C4, dealing with
34 analysis of some of these territories in the core
35 area. And then finally, section D is a map. Perhaps
36 your lordship can pull that out, because it will be of
37 relevance to the discussion, and your lordship will
38 see this is a paper copy of map 9A and 9B, and
39 highlighted on this map are the territories which are
40 dealt with in the table and in the submissions I'm
41 making today. If your lordship would keep that handy,
42 there are 70 territories highlighted on that map.
43 THE COURT: There's 70 pink lines on this map?
44 MR. MACKENZIE: Yes, my lord, 70.
45 THE COURT: All right, thank you.
46 MR. MACKENZIE: Now, my lord, I'll move to section A of these
47 submissions. And commencing with paragraph 1 of

"Introduction", my lord, I have referred your lordship to the section 5(g) of the Province's summary, where there was a detailed analysis of evidence for certain claim areas. And that was designed to show inconsistencies and conflicts in the evidence with maps 9A and 9B. At the time those submissions were made, counsel submitted that "the same exercise could be done for every House territory".

Following the Defendant Province's submissions, my lord, your lordship commented, as I've outlined in paragraph 2, that every territory had not been dealt with in detail. I won't read that quote from your lordship's comments, I'll pass on to paragraph 3.

This submission deals with boundary and ownership evidence for 70 territories located in the core area of the claim area which are not covered or are only partially covered by overlapping claims of non-plaintiff Indian groups. And I've referred your lordship to the map, which your lordship has removed for easy reference.

Paragraph 5 I refer to the table, which is at tab B. It is emphasized that that table is not a detailed analysis of the evidence, it's a general summary.

In paragraph 6 I note that there is a detailed analysis of five of the core claim areas: Hagwilnegh, Spookw, Wah Tah Keght, K-E-G-H-T, Wiigyet, and Wii Minosik. Those two latter territories are in the Shedin Creek Valley north of Kispiox. These are territories -- I'm just adding to paragraph 6 now, my lord. These are territories in the heartland of the Plaintiffs' claim area. In our submission, the unreliability of the evidence has shown that these analyses adversely affects all the neighbouring house claim areas.

The table and the map for these 70 claim areas provide further support for our earlier submission that for virtually every house claim area comprising the entire Plaintiffs' claim area there is conflicting evidence of ownership and boundaries. These inconsistencies dilute the alleged reputation evidence of ownership and boundaries contained in the territorial affidavits and on maps 9A and 9B.

Reference is made to the Defendant Province's submissions on reputation evidence earlier in our summary.

Now, my lord, the next part of my submissions review the sources of conflicting evidence, which

comprise the contents of the table. And if your lordship could have open page 1 of the table, just to follow along -- the table is at tab B -- your lordship will see the column headings. If your lordship would just have that open as we go through paragraphs 9 and 10. As your lordship reviews the table, your lordship can see that along the top of the table are the various categories of information, with column 1 indicating the house claiming area, column 2 indicating the claim area Indian name, column 3 indicating the claim area English name, column 4 identifies the territorial affidavit, column 5 discusses interrogatories, column 6 refers to Exhibit 22.

THE COURT: What's Exhibit 22?

MR. MACKENZIE: Exhibit 22 is Chris Harris' map, my lord. I will refer to that in these submissions as we go through those. Exhibit 101 was that map of the territory with certain areas indicated by codes. Exhibit 5 --

THE COURT: Just a moment, please. What is Exhibit 102?

MR. MACKENZIE: My lord, I'm just referring your lordship now to the top of the table in summary fashion, I go into this in some detail later in my submissions, but Exhibit 102 is a map prepared by Marvin George in October, 1985.

THE COURT: October, 1985?

MR. MACKENZIE: Yes, my lord.

THE COURT: Thank you. I know what Exhibit 5 is.

MR. MACKENZIE: And the last two columns summarize other data and evidence and the general remarks column, referring to the table.

Now, my lord, returning to my submissions on page 3 at tab A, your lordship will see that I review these various categories of evidence set out on the table. At paragraph 10 I summarize those various sources of evidence, at paragraph 11 I discuss Exhibit 22.

Your lordship will recall -- I'm now reading page 4, Exhibit 22. The court reviewed Exhibit 22 in detail during the Province's submissions as to the relationship between house claim areas and registered traplines.

Exhibit 22 is a map which Neil J. Sterritt obtained from Chris Harris in 1975. Mr. Sterritt made notations on the map. Mr. Sterritt did not know whether Chris Harris had drawn the map. The original information on the map is hearsay evidence which is

not admissible for the truth of the information depicted. The map information, however, can be used to dilute ownership and boundary evidence in the territorial affidavits. In addition, Mr. Sterritt's annotations are direct evidence inconsistent with evidence in territorial affidavits, particularly those relating to the Thutade and Bear Lake claim areas. I refer there to the Province's earlier submissions on that point.

Exhibit 22 is a significant source because the information was obtained relatively early in the information-gathering process prior to the beginning of the litigation.

Now, Exhibit 102, as your lordship asked, that was prepared by Marvin George. Mr. George testified that that information was based upon Mr. Sterritt's and other researchers' working maps and data sheets containing information obtained from the hereditary chiefs. This map is significant because it reflected the views of Mr. Sterritt's and the other researchers' informants at a relatively early stage in the information-gathering process prior to the intensive research project directed towards the production of a map and affidavit to be used in this court.

And I now hand up to your lordship another overlay for your lordship's series of that map, Exhibit 102. Now, my lord, I will not be requesting your lordship to review this overlay at this time or to use it on your lordship's series, but your lordship will see the use to which that overlay can be put later in these submissions. I may say, my lord, that one of the Plaintiffs' overlays purported to be a copy of that trial Exhibit 102, and this is in fact a reproduction of that Plaintiffs' overlay, Exhibit 646-4. As it turns out, there were -- it is not a true copy of trial Exhibit 102. The copy that I've handed to your lordship has a legend on it summarizing the codes which are contained in the various territories on trial Exhibit 102. I have put trial Exhibit 102 on the board beside your lordship's desk, and that is the actual trial exhibit, and I'll refer to that later in these reasons.

THE COURT: Well, this says -- this shows that it's Exhibit 646-4.

MR. MACKENZIE: Yes, my lord. As I indicated, my lord, that is the Plaintiffs' overlay, which purports to be a copy of trial Exhibit 102.

THE COURT: All right, yes, all right.
MR. MACKENZIE: And that was the understanding upon which that overlay was marked as Exhibit 646-4.
THE COURT: What's the difference between this, what you've given me now, and 646-4?
A What you have now, the difference between that is simply the legend.
THE COURT: Oh.
MR. MACKENZIE: With the codes. The plaintiffs did not include that. I submit it's a little difficult to use that map without those codes, because that explains what those territories are.
THE COURT: You put the Exhibit 102 code onto 646-4?
MR. MACKENZIE: That's correct, my lord.
MR. GRANT: But, my lord, the code -- the code on the Plaintiffs' map -- this code is -- it was put on the base so that when you had 646-4 on your Plaintiffs' map, you will see the code, it was just a question of cartography. So it wasn't on the overlay, it was actually on the base, so there is no difference when you look at them again.
THE COURT: There's no difference if I look at 102?
MR. GRANT: If you look --
THE COURT: 102, when it's -- when it's super-imposed on the base of 646-4.
MR. GRANT: Right. The copy of 102, which is 646-4. If you put it on the base of our series you will have all of the information.
THE COURT: Yes, all right.
MR. MACKENZIE: Yes, that's correct, my lord. This was made for use with the judge's series, and so the -- so that's the reason that the code was added to the overlay.
THE COURT: All right.
MR. MACKENZIE: Now, there are some other points about that that I will be making later in my comments.

And now moving over to page -- to page 6 and paragraph 14, I refer to Exhibit 101. Now, that is the Carrier-Sekani overlay map. Marvin George prepared that map for display at the All Clans Feast at Moricetown in April 1986. It depicts the boundaries of the Wet'suwet'en claim areas and the extent of the Carrier-Sekani overlap. At the All Clans Feast the Wet'suwet'en chiefs relied on this map as an accurate depiction of their territories. There's no indication on Exhibit 101 that this is a draft map. There is no evidence that anyone at the All Clans Feast said that it was a draft map. There

1 were several references in the All Clans Feast
2 transcript, Exhibit 82, to this map as depicting the
3 Wet'suwet'en territories.
4 And in my table, references to 101 are contained
5 in the second-to-last column with other data and
6 evidence.
7 Now, carrying on to Exhibit 5. Your lordship is
8 familiar with Exhibit 5, and I have placed a copy
9 beside your lordship's desk for later reference as
10 well. That was the first map produced at the trial
11 depicting the boundaries of all the house claim areas.
12 Exhibit 5 is dated May 2, 1987. It was delivered to
13 the Defendants as a "correct copy of the internal
14 boundaries with the names of the chiefs of those
15 territories marked thereon". Plaintiffs' counsel
16 submitted the map for marking as an exhibit proper.
17 It was marked, however, as an exhibit for
18 identification on May 20, 1987. Plaintiffs' counsel
19 referred to Exhibit 5 as a map of the Plaintiffs'
20 internal boundaries. There is no indication on
21 Exhibit 5 that it is a draft map. Several witnesses,
22 such as Mary McKenzie, Mary Johnson and Alfred Joseph,
23 identified the boundaries of their house claim areas
24 as depicted on Exhibit 5. They testified that Exhibit
25 5 boundaries were correct. In addition, these
26 witnesses identified in further detail the house claim
27 area boundaries on enlarged maps with boundaries
28 similar to Exhibit 5. In the summer of 1987 the
29 Plaintiffs and their counsel regarded Exhibit 5 and
30 these enlarged excerpts from Exhibit 5 as accurate
31 depictions of the boundaries and the ownership of the
32 claim area.
33 Continuing on with the summary of these categories
34 of evidentiary sources, my lord, I turn to
35 Researchers' Field Notes and Data Sheets.
36 Information from these sources appears on Exhibit
37 102 and the interrogatories maps, which Miss Sigurdson
38 dealt with. The field notes and data sheets are
39 significant because they identify sources of some of
40 the information recorded on the data sheets, the
41 working maps and Exhibit 102. The working maps were
42 the maps that Mr. Sterritt and the other researchers
43 kept to record their information and which they passed
44 on to Marvin George. For example, in the case of the
45 Spookw claim area, there are several data sheets
46 indicating that Neil J. Sterritt obtained information
47 from Steven Robinson, who is chief Spookw, and Henry

Wright of the House of Wii Gaak, which conflicts with boundary and ownership information in Mr. Robinson's later territorial affidavit and on map 9A.

Now, that evidence and those references are dealt with in detail in my analysis of the Spookw territory in these submissions at section C2.

Paragraph 17. In the case of the Tsabux, Wii Minosik and Wiigyet claim areas in the Shedin Creek watershed, Mr. Sterritt obtained from Henry Wright of the House of Wii Gaak information conflicting with James Morrison's later territorial affidavit and map 9A. Mr. Morrison deposed that he relied upon Mr. Wright as one of his informants. Detailed references to that information are contained in my analysis of that -- those territories at tab C4 of these submissions. Passing on to interrogatories, my lord, Miss Sigurdson has dealt with interrogatories in detail. I refer to Peter Muldoe's interrogatories in paragraph 18. I point out that the Plaintiffs who responded to the interrogatories each swore an affidavit attaching interrogatories responses. Subsequently, several Plaintiffs swore supplementary affidavits, so in many cases we have two affidavits. For example, Peter Muldoe swore an affidavit in September 1986 and a supplementary affidavit in February 1987. And we dealt with those in Mr. Muldoe's cross-examination.

In his September interrogatories affidavit, Mr. Muldoe deposed in paragraph 3:

> "The answers that are attached as Exhibit 'A' to this my affidavit are true to the best of my knowledge except where stated to be upon information and belief and where so stated I verily believe them to be true."

Interrogatory 59(c) was as follows:

> "What are the boundaries of your house's territory?"

Mr. Muldoe responded as follows:

> "The boundary of some of Gitludahl's territory is set out in Schedule C."

Schedule C was a map of the Gitludahl territory.

1 At tab 10 of these submissions following what I'm
2 reading now, my lord, is contained -- are contained
3 the references which I make in these paragraphs
4 dealing with Mr. Muldoe's interrogatories. I won't go
5 through those in detail. I have a copy, for example,
6 of the transcript and Mr. Muldoe's interrogatories
7 affidavit there.
8 Paragraph 21. Mr. Muldoe then swore a
9 supplementary affidavit, where he deposed again:
10
11 "The answers that are attached as Exhibit A to
12 this my affidavit are true to the best of my
13 knowledge including information which I have
14 received from others."
15
16 And in -- Mr. Muldoe, in that February affidavit,
17 referred again to his interrogatories map, and Miss
18 Sigurdson has dealt with this question of draft maps
19 in paragraph 23 of my submissions.
20 Paragraph 24 I point out, as Miss Sigurdson did,
21 in many cases there are major discrepancies between
22 the location and boundaries of the house claiming area
23 shown on the interrogatories map and those shown on
24 maps 9A and 9B. And that can be seen from an
25 examination of the interrogatories map overlay and the
26 map 9A and 9B base which Miss Sigurdson handed to your
27 lordship.
28 These responses are true to the best of the
29 Plaintiffs' knowledge, referring to paragraph 25 of my
30 submissions. The Plaintiffs' responses to
31 interrogatory 59(c) are not said to be based upon
32 information and belief. The information is alleged to
33 be true to the best of the personal knowledge of the
34 Plaintiff answering the interrogatories.
35 Where such sworn evidence in the interrogatories
36 responses and maps conflicts with territorial
37 affidavits and maps 9A and B, the alleged reputation
38 as to boundaries and ownership in the territorial
39 affidavit is diluted to the point of invisibility.
40 There is significance also if the response to
41 interrogatory 59(c) does not identify a house claim
42 area later depicted on map 9A or 9B. The inference is
43 that the Plaintiff is unaware of that claim area. In
44 addition, if the --
45 THE COURT: You mean is or was?
46 MR. MACKENZIE: Was at the time of swearing the affidavit, my
47 lord.

1 THE COURT: Yes. There aren't any areas that are left unclaimed
2 at the end of the day, are there?
3 MR. MACKENZIE: That's correct, my lord.
4 THE COURT: Yes, thank you.
5 MR. MACKENZIE: In addition, if the response to the question
6 "What are the boundaries of your house's territory?",
7 consists of a vague reference to an area without any
8 boundaries indicated, that, too, is significant. The
9 obvious inference from such vagueness or lack of
10 response is either that the boundaries are
11 unimportant, or that ignorance was the state of the
12 Plaintiffs' knowledge when he or she swore the
13 affidavit to which the responses were attached.
14 Now, my lord, that concludes my discussion of the
15 general areas of evidence contained in the table. The
16 whole point of my submissions, of course, is simply to
17 hand the table to your lordship, and what I am doing
18 now is describing the table for your lordship. And on
19 page 12 I summarize the contents of the various
20 columns, which I've already done with your lordship.
21 Page 13, paragraph 33 of my submissions I point
22 out the analysis in the Table is not exhaustive; there
23 are many more examples of inconsistencies in the
24 evidence in addition to those summarized in the Table.
25 Paragraph 34 I refer to the various overlays which
26 your lordship now has in order to compare the mapping
27 for these claim areas over the years, and the -- to
28 determine the inconsistencies. And for your
29 lordship's convenience, I have actually provided
30 excerpts from all of these overlays for one territory.
31 I plan to go through each overlay for one territory in
32 this table to show your lordship how this table works.
33 Now, paragraphs 35 and 36 I refer to the map which
34 I have --
35 THE COURT: That's this one?
36 MR. MACKENZIE: -- to which I've drawn your lordship's
37 attention. Yes. It shows the areas in the core which
38 are dealt with in these submissions.
39 Now, I turn then, my lord, to give your lordship
40 an example of the working of the table, and turn to
41 the table at page 10 -- page 10 and 11. And I now
42 deal with the Hagwilnegh information. Does your
43 lordship see Hagwilnegh on page 10 of the table?
44 THE COURT: Yes.
45 MR. MACKENZIE: If your lordship will open page 10 and page 11
46 and have those handy. Now, I will proceed through
47 those columns, and, my lord, I have provided for your

lordship the references in this -- these entries so that the table may be used for all the entries after this example has been completed. The overlays and maps to which I will refer are contained in a pocket following tab 10 in your lordship's binder. If your lordship could take those materials out, and if your lordship can keep the paper clip handy, that will be useful to pin the overlays to the base map.

The first document which appears is the base map, and that is a black and white copy of the base map for the judge's series. And directing your lordship to that, this is an excerpt from the base map showing the area covered by Hagwilnegh's claim, and I'm going to now orient your lordship to that location. Your lordship may see Smithers in the upper right-hand corner.

THE COURT: I understand the map.

MR. MACKENZIE: Yes, my lord. And McDonell Lake is an important geographic feature in these submissions. The next document is -- the next document is an overlay which is an excerpt from Exhibit 646-9B. It should be a black plastic overlay, and it should say "Hagwilnegh".

THE COURT: Yes.

MR. MACKENZIE: That, my lord, is the claim area of Hagwilnegh. That may be placed on the base map by aligning the external boundaries generally to get an idea of the current claim area presently claimed by Hagwilnegh on map 9B. Now, using the paper clip, your lordship could affix the overlay to the base map.

THE COURT: They don't coincide.

MR. MACKENZIE: No, this one doesn't coincide exactly, but your lordship could place that on by aligning the external boundary on the left.

THE COURT: As close as you can make it?

MR. MACKENZIE: Yes, my lord.

THE COURT: Yes.

MR. MACKENZIE: So now your lordship will see, having placed that overlay on the base map, that Hagwilnegh claims a large area from McDonell Lake south across the Telkwa River.

THE COURT: Yes.

MR. MACKENZIE: And down to just north of -- and including the headwaters of a river known as the Thauril River.

THE COURT: Yes.

MR. MACKENZIE: And now that's the claim area. If your lordship will just keep that handy, and referring to page 10 of the table, we are now at column 4 of the table. If

your lordship could just keep those documents handy.
THE COURT: Yes.
MR. MACKENZIE: And the reference to the territorial affidavit is contained in column 4, my lord, that's Mr. Johnny David's territorial affidavit. If your lordship could write there "tab 1", because that affidavit appears at tab 1 of your lordship's binder.
THE COURT: That is J. David, tab 1?
MR. MACKENZIE: Yes, my lord.
THE COURT: Tab 1 of what?
MR. MACKENZIE: Tab 1 of your lordship's binder.
THE COURT: Of this book?
MR. MACKENZIE: Yes. And without going into that, my lord, I will say that in that section is contained references to this territory set out on map 9B.
THE COURT: Yes.
MR. MACKENZIE: And actually at page 6 of that table, paragraph 19 and paragraph 21 of that -- sorry, tab 1 --
THE COURT: Yes.
MR. MACKENZIE: Mr. David refers to McDonell Lake, and he refers to this area which is shown that is claimed by Hagwilnegh.

Now, moving on -- does your lordship have that general reference?
THE COURT: Yes.
MR. MACKENZIE: Yes. Now, moving on with the overlays and now -- and on the table, my lord, the next column on the table deals with interrogatories, and the next overlay should be a green overlay, which is an excerpt from the interrogatories maps that Miss Sigurdson handed up to your lordship. And that can be placed on the base map and 9B aligning along the external boundary.
THE COURT: Yes.
MR. MACKENZIE: If your lordship does that, of course, my lord, this can be done with the large overlays too, these are just excerpts.
THE COURT: Oh, yes.
MR. MACKENZIE: Your lordship will see the number 15a at McDonell Lake, and that is, as will be seen from -- as could be seen from the legend on the overlay map, is John Namox's interrogatory, the interrogatory of Wah Tah Kwets. And looking at my table, page 10, in column 5 I say:

> "Major inconsistency. Wah Tah Kwets interrogatories map covers McDonell Lake claim

area."

Does your lordship see that on the table?
THE COURT: Yes.
MR. MACKENZIE: If your lordship would make a note at that point, tab 2 is Mr. Namox's interrogatories response, his affidavit, that's Exhibit 828.
THE COURT: Yes.
MR. MACKENZIE: And then Mr. Namox swears the usual affidavit, then carrying on, Mr. Namox refers to in interrogatory 58 to a geographical feature, MacDonald Lake, which may or may not be McDonell Lake. I'll just hang on. Does your lordship have tab 2, Exhibit 828?
THE COURT: Yes.
MR. MACKENZIE: And I've referred your lordship about four pages in to the interrogatories responses.
THE COURT: Yes.
MR. MACKENZIE: Carrying on, my lord, to interrogatory response number 63 at just another two pages on at tab 1 --
THE COURT: Yes.
MR. MACKENZIE: And at that response Mr. Namox says:

"A copy of the map of my territory which roughly delineates the boundaries is set out as Schedule B to these answers."

THE COURT: Yes.
MR. MACKENZIE: And carrying over to tab 3, my lord, is the interrogatories map. That is John Namox's interrogatories map, Wah Tah Kwets' interrogatories map. Now, on the right-hand side is the north designation, my lord.
THE COURT: Yes.
MR. MACKENZIE: And the point of the arrow should be pointed north up to the top, and Smithers is right there on the right-hand side about -- just up from the north designation, just to orient your lordship. Does your lordship see the "N" for "North"?
THE COURT: Yes.
MR. MACKENZIE: And does your lordship see "NR" going up to Smithers?
THE COURT: Yes.
MR. MACKENZIE: The purpose of that, my lord, is simply to orient your lordship. If your Lordship would go west to Smithers we see Hudson Bay Mountain.
THE COURT: Yes.

MR. MACKENZIE: And then you have the claim area, or Mr. Namox's interrogatories area, in the centre of this map west of Hudson Bay Mountain, and right in the north-west portion is a lake with a Wet'suwet'en name, but that is MacDonald Lake right on the boundary there.
THE COURT: Yes.
MR. MACKENZIE: So does your lordship see that?
THE COURT: No. I can't say that I found the lake yet. What's the Indian name for the lake?
MR. MACKENZIE: It starts with D-Z-O, my lord. There are some district or mining lot numbers right on the boundary, north central boundary straight across from Smithers west of -- past Hudson Bay Mountain, and lot numbers are lot 2549, lot 517.
THE COURT: Yes, I see the lake, yes.
MR. MACKENZIE: Yes, my lord.
THE COURT: Right on the boundary.
MR. GRANT: D-A-T.
THE COURT: D-A-T, yes, I have it.
MR. MACKENZIE: Perhaps your lordship could circle that for ease of reference.
THE COURT: Yes. It didn't look like that when I saw it.
MR. MACKENZIE: So, my lord, your lordship will see that the green overlay which we've placed on the base map represents the area which is depicted on John Namox's interrogatories map.
THE COURT: Yes.
MR. MACKENZIE: Thank you, my lord. I've finished with that interrogatories map, my lord.
THE COURT: So have I.
MR. MACKENZIE: Now, my lord, we're still in the table, interrogatories column on the table.
THE COURT: Yes.
MR. MACKENZIE: And your lordship could make a point that the map, Exhibit 828A is at tab 3. And if your lordship would just put tab 3 --
THE COURT: Yes, all right.
MR. MACKENZIE: Then carrying on in that table, my lord, is the comment:

> "Hagwilnegh interrogatories response to 59(c) does not mention McDonell Lake or Keel Weniits."

If your lordship could put tab 4 at that comment. Now, my lord, the point that is probably clear, but Hagwilnegh is said to claim this area we are speaking

about now, but there's no mention in his interrogatories response about this area.

Now, if your lordship would be kind enough to turn to tab 4, your lordship will see Hagwilnegh's interrogatories affidavit and response set out there. Does your lordship have that reference?

THE COURT: Yes.

MR. MACKENZIE: And that interrogatory 59(c), the question is:

> "Q What are the boundaries of your house's territory?
>
> A Boundaries are Blunt Creek to the east and the western boundary is Blunt Mountain."

In other words, Mr. Williams is there referring to the --

THE COURT: I haven't found that yet.

MR. MACKENZIE: Sorry, my lord, we're at tab 4.

THE COURT: Yes.

MR. MACKENZIE: And if your lordship can follow past the affidavit to interrogatories answer 59(c) on page 11 --

THE COURT: Oh, yes.

MR. MACKENZIE: Does your lordship have that? That's quite a ways down the page.

THE COURT: Oh, yes. The boundaries are Blunt Creek to the east and the western boundary is Blunt Mountain.

MR. MACKENZIE: Those are --

THE COURT: Blunt Mountain is on the other side of the Skeena, isn't it?

MR. MACKENZIE: Other side of the Bulkley, my lord.

THE COURT: Bulkley, sorry, yes.

MR. MACKENZIE: It's north-east of Moricetown. That's Blunt Creek and Blunt Mountain, that area which is now claimed by Goohlaht Kaspit.

THE COURT: Yes.

MR. MACKENZIE: Now, turning to the table, my lord, column 6 refers to Exhibit 22, but Exhibit 22 it deals with Gitksan territories and claim areas, so that is not applicable here.

Carrying on to column 7, a reference to Exhibit 102. Now, if your lordship now will return to your overlays, your lordship will see an overlay in red ink. That, my lord, is an excerpt from Exhibit 646-4, which purports to be Exhibit 102.

THE COURT: Yes.

MR. MACKENZIE: So aligning that with the external boundaries,

your lordship will see that -- just looking at the overlay, that the house or the designation of the house claiming the McDonell Lake area is 7-H-44. Does your lordship see that?
THE COURT: Mm-hmm.
MR. MACKENZIE: And going down to the Telkwa River, the designation of the house claiming that is 7-H-43.
THE COURT: Yes.
MR. MACKENZIE: Carrying on south, the designation is 7-H-44. Does your lordship see that?
THE COURT: Yes.
MR. MACKENZIE: Now, my lord, on the legend which is affixed to Exhibit 102, 44 refers to Wah Tah Kwets, K-W-E-T-S.
THE COURT: Yes.
MR. MACKENZIE: I have a copy of the legend to hand up to your lordship.
THE COURT: I have it here.
MR. MACKENZIE: The designation of 43 is Hagwilnegh. Now, my lord, I have to say now that the point can be made that is still inconsistent with the Hagwilnegh claim to McDonell Lake, but I have to say now that trial Exhibit 102, the trial exhibit does not have these numbers, the numbers have been changed, and I have an excerpt from trial Exhibit 102, and I've also put up trial Exhibit 102 on the sideboard beside your lordship. Now, does your lordship have a white and black paper photocopy of trial Exhibit 102 in your lordship's collection?
THE COURT: With the legend?
MR. MACKENZIE: With the overlays, small eight and a half by eleven.
THE COURT: Overlay?
MR. MACKENZIE: It should follow the overlays, my lord. Here's a copy. Yeah, it's the very last one. It should say -- I've handed one to your lordship so your lordship can add that in. I'm just making the point here, my lord, I'm moving over to the copy of trial Exhibit 102 which I've placed before your lordship's desk, and I have the excerpt from that map and trial exhibit in my hand, and I now point your lordship to the designation at McDonell Lake, which is number 45.
THE COURT: Yes.
MR. MACKENZIE: And the designation further south is number 43, so that has not changed, but the designation further south is number 45.
THE COURT: Yes.
MR. MACKENZIE: And, my lord, number 45 on the legend is Wah tah

Keght, K-E-G-H-T.
THE COURT: Yes.
MR. MACKENZIE: So, my lord, to that extent the overlay, the Plaintiffs' Exhibit 646-4, is not a true copy of trial Exhibit 102, as it is indicated as being. But that is a point that's not necessary to be made any further with respect to the table, my lord. Trial Exhibit 102, as I've indicated on the table, has the area attributed to Wah Tah Keght. Does your lordship have that?
THE COURT: Yes.
MR. MACKENZIE: Yes. And it also has the area to the south attributed to Wah Tah Keght. I made an error there.
THE COURT: Yes.
MR. MACKENZIE: So if your lordship could amend the table in column 7 to put Wah Tah Keght, K-E-G-H-T, for the McDonell Lake area, and also for the house and creek area in column 7.
THE COURT: It should be Wah Tah --
MR. MACKENZIE: K-E-G-H-T. That's the bottom, my lord, house and creek area. Does your lordship see that?
THE COURT: You're talking about the bottom?
MR. MACKENZIE: Paragraph -- entry.
THE COURT: Paragraph on the Exhibit 102 column?
MR. MACKENZIE: Yes, my lord.
THE COURT: And what is the change that should be made?
MR. MACKENZIE: It should be changed from K-W-E-T-S to K-E-G-H-T.
THE COURT: Yes.
MR. MACKENZIE: That's the reference to the actual trial exhibit.
THE COURT: Yes.
MR. MACKENZIE: But the point can be made -- sorry, my lord.
THE COURT: But both of these territories on the overlay you showed me are attributed to 44?
MR. MACKENZIE: That's correct, my lord. And that is Wah Tah Kwets, K-W-E-T-S.
MR. MACKENZIE: K-W-E-T-S.
THE COURT: Yes.
MR. MACKENZIE: So the overlay is inconsistent as well. The point that I'm making here is that it's different from Exhibit 102, which is -- was not expected.
THE COURT: What's the number of the overlay?
MR. MACKENZIE: The overlay is Exhibit 646-4.
THE COURT: Yes, all right.
MR. MACKENZIE: My lord, then I'll pass on to the rest of this -- moving on to column number 8, which is the

Exhibit 5 column, your lordship will find an overlay with blue coloured ink. These are all indicated in a tab in the upper right-hand corner by their exhibit number, my lord.

THE COURT: Yes.

MR. MACKENZIE: Now, affixing that Exhibit 5 excerpt to the external boundary, your lordship will see the information summarized in the table column 8 with respect to Exhibit 5.

THE COURT: Yes.

MR. MACKENZIE: Now, Exhibit 5, Wah Tah Kwets, K-W-E-T-S, claims McDonell Lake and the Howson Creek areas to the south. Does your lordship see that on Exhibit 5?

THE COURT: Yes.

MR. MACKENZIE: Yes. That completes the reference to Exhibit 5, my lord.

THE COURT: Hagwilnegh claims only the middle area?

MR. MACKENZIE: Yes, my lord. And that is indicated on table column 8.

THE COURT: Yes, my lord. Moving to column 9, I have not -- or I will not go through the evidence in detail, but I'm going to ask your lordship to note the tabs where this evidence is contained in your lordship's binder. Now, reading in column number 9:

> "Lucy Bazil and Pat Namox stated that McDonell Lake is in Wah Tah Kwets claim area."

And if your lordship could put down there tab 5 for Exhibit 99.

THE COURT: Yes.

MR. MACKENZIE: Tab 6 for Exhibit 672A. Does your lordship have that reference?

THE COURT: Yes.

MR. MACKENZIE: And as I've already pointed out to your lordship, this table is a summary analysis, it doesn't go into details. A lot of the details can be made, but Lucy Bazil and Pat Namox are members of the House of Wah Tah Kwets who were examined on commission. I'm just speaking now in elaborating on this point, my lord, and they gave that evidence which is set out at those tabs. I should also point out that there is a detailed analysis of this area, much more detailed, set out at tab -- in section C1 of these submissions. Now, carrying on in that column 9:

> "Johnny David agreed that Wah Tah Kwets owns an area around Beaver Creek near McDonell Lake."

1
2 That is tab 7. Johnny David, of course, was the
3 territorial affient, he was cross-examined. Carrying
4 on in column 9: "Alfred Joseph testified that the
5 Howson Creek claim area" -- that's the southern
6 most -- "was Wah Tah Kwets". And that reference is
7 tab 8. And because of the time constraints, I'm just
8 going to summarize Alfred Joseph's evidence by
9 directing your lordship to Exhibit 5.
10 Alfred Joseph is Gisdaywa, and he was asked to
11 describe the territories bordering his claim area, and
12 he spoke about the northern tip of his claim area, and
13 he said that Wah Tah Kwets owned the area to the west
14 of the northern tip of his claim area. And that is a
15 reference on Exhibit 5 to this southern area, which
16 was then claimed by Wah Tah Kwets. And carrying on in
17 that column, my lord, this is on -- we're on page 11,
18 carried on on page 11.
19 THE COURT: Yes.
20 MR. MACKENZIE: On Exhibit 101, the McDonell Lake area is
21 attributed to Wah Tah Kwets, and I have included a
22 paper copy of Exhibit 101 with your lordship's
23 overlays. It is noted as being Exhibit 101 in the
24 upper right-hand corner of the exhibit.
25 THE COURT: Yes.
26 MR. MACKENZIE: And the information your lordship can orient
27 yourself with Smithers on the right.
28 THE COURT: Yes.
29 MR. MACKENZIE: Yes. So that's that point. This is Exhibit
30 101, which is the Carrier-Sekani overlay map, my lord.
31 THE COURT: Yes.
32 MR. MACKENZIE: We discussed in detail. Now, reading from the
33 table on page 11: Johnny David and John Namox were
34 both at the All Clans Feast on April 6th, 1986, where
35 Exhibit 101 was displayed. They were prominent
36 participants. Finally in that column, another
37 reference to Pat Namox, my lord. He has a registered
38 trapline at McDonell Lake. He continues to hunt and
39 trap there, and the reference there is tab 9 of your
40 lordship's binder.
41 THE COURT: And that's 672A.
42 MR. MACKENZIE: Yes, my lord.
43 THE COURT: Is tab 9.
44 MR. MACKENZIE: Yes. And that completes my review of the
45 references, my lord.
46 And finally, the final column for this territory
47 on page 10, is a summary of the -- of what in our

submission arises from all this inconsistent evidence. Does his lordship have that column?
THE COURT: Back to page --
MR. MACKENZIE: Page 10, my lord.
THE COURT: Of your text?
MR. MACKENZIE: No, page 10 of the table, my lord.
THE COURT: Oh, yes, yes.
MR. MACKENZIE: Just continuing on under "Hagwilnegh", "Remarks": Until at least 1988, when map 9B was produced, the Plaintiffs regarded McDonell Lake and Howson Creek as Wah Tah Kwets' claim areas, and in our submission, no reputation has been established there for the ownership and boundaries of these territories. My lord, that is a summary review of one entry in this table showing how the table operates. And would your lordship wish to adjourn at this time or --
THE COURT: Oh, yes, I think so, but before we do, could you make a suggestion what I should do with these overlays?
MR. MACKENZIE: The overlays should be put together, my lord, and returned to the pocket following tab 10 in your lordship's binder.
THE COURT: Yes, all right. Is it necessary to have the paper in between each one; do they rub off?
MR. MACKENZIE: No. I think that's because it was wet at the time, my lord.
MR. MACKENZIE: Sometimes they stick to each other, my lord.
THE COURT: They were in this envelope, were they?
MR. MACKENZIE: Yes, my lord, pocket tab 10 in your lordship's binder.
THE COURT: All right. We'll adjourn then until 1:32 or thereabouts.
THE REGISTRAR: Order in court.

(LUNCHEON RECESS TAKEN AT 12:30)

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

Graham D. Parker
Official Reporter
United Reporting Service Ltd.

1 (PROCEEDINGS RESUMED AT 1:30 p.m.)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Yes, Mr. Mackenzie.
5 MR. MACKENZIE: Thank you, my lord. My lord, this morning we
6 reviewed the entry for the House of Hagwilnegh and in
7 the table at tab B of your lordship's binder, we
8 reviewed the references contained in the table for
9 that entry. Same exercise can be done for the rest of
10 the 17 entries in that table. Some of those claim
11 areas have been dealt with in more detail at tab C of
12 your lordship's binder, and I'll refer to that tab now
13 if your lordship has that.
14 THE COURT: Yes.
15 MR. MACKENZIE: The first item at tab C is the detailed analysis
16 of the Hagwilnegh area which we have just gone through
17 on the table, and your lordship is now aware that
18 that -- has been aware that that area is just west of
19 Smithers in the McDonell Lake area, and that appears
20 on this map that I have handed up to your lordship of
21 map 9A and B. Perhaps your lordship might note that
22 Hagwilnegh is dealt with at tab C1 in detail.
23 That's -- I point out as a result of the analysis in
24 these pages -- that these pages are not as detailed as
25 the analysis we did earlier in section 5G, but the
26 submission is made that the inconsistent evidence
27 supports the proposition that the reputation for
28 ownership and boundaries of that house have been
29 reduced to the point of invisibility and unreliability
30 and that affects the reputation for the surrounding
31 and adjoining house claim areas. And can your
32 lordship locate that on map 9A and B?
33 THE COURT: I was just looking at Hagwilnegh and, yes, I have
34 it, thank you.
35 MR. MACKENZIE: The next item at tab 2 in your lordship's
36 binder, section C, is the Spookw territory. I am
37 turning to that now, my lord. That is the area near
38 Hazelton and it's referring to the map again that's
39 right in the centre of the plaintiffs' claim area.
40 Does your lordship have that?
41 THE COURT: Yes.
42 MR. MACKENZIE: That is dealt with in detail at tab 2, and of
43 course is also dealt with in summary in the table at
44 page 21 of the table. The same comment can be made
45 for the Spookw territory and I refer your lordship
46 briefly to paragraph 15 on page 5 of the Spookw
47 analysis. The final point should be made that the

Spookw claim area is in the Gitksan heartland. This is not a remote wilderness claim area. The many serious inconsistencies as to Spookw claim areas and ownership illustrate the lack of any settled reputation as to the location and ownership of this and all the plaintiffs' claim areas. Your lordship will recall that is the territory right at New Hazelton.

Continuing on, my lord, to tab 3. I deal here with the Wah Tah Keght, k-e-g-h-t, area and this is Moricetown. This is Wet'suwet'en heartland area. In my submission, the points made in this analysis supports the conclusions on pages 6 and 7 of this section, C-3. Refer your lordship to paragraph 21 on page 7. This is with respect to the Wah Tah Keght, k-e-g-h-t, territory at Moricetown. The lack of reliable evidence or reputation as to the Wah Tah Keght boundaries affects the boundary evidence for all other claim areas with which this claim area has a common boundary, including Goohlaht, Woos, Woos, (Gyologyet), Hagwilnegh, Guxsan, Gwis Gyen and Djogaslee.

And continuing on now to the final section of this -- these analyses, my lord. This is section 4 and this refers to the Wiigyet and Wii Minosik claim areas just north of Kisgagast and I locate your lordship to that location.

THE COURT: I have found it.

MR. MACKENZIE: Yes, my lord, that's in the Shedin Creek Watershed. And, in summary, the evidence as analyzed in the section 4 and also referred to in the table shows that there are several inconsistencies both in the interrogatories, maps and data sheets on previous maps and in other evidence relating to these two territories which leads to the propositions on page 6 of this section at paragraph 16. Whether or not the conflicting evidence is more reliable, it casts doubt -- casts doubt on the credibility of the James Morrison's territorial affidavit. It is submitted therefore there is no reliable evidence as to boundaries and ownership of these two claim areas.

THE COURT: When you say whether or not it is more reliable, more reliable than what?

MR. MACKENZIE: More reliable than the evidence in the territorial affidavit, my lord. A point should be made again, my lord, that the map is based upon the territorial affidavits.

THE COURT: Yes.
MR. MACKENZIE: And the fact that this conflicting evidence is being compared to the territorial affidavit would appear from my reading of the previous paragraphs in the section. And so, my lord, paragraph 17, the conclusion follows that there is no reliable foundation and no reputation for the boundaries and ownership of these two claim areas.

The lack of reliable evidence or reputation as to the boundaries and ownership of these two claim areas affects the boundary evidence and the ownership evidence for all other claim areas with which they have a common boundary, including Tsabux, Shelf Ridge, Tsabux, Upper Shedin, Luus, Larkworthy Creek, and Wii Gaak - Shelagyot/Sustut.
THE COURT: Are those names somewhere conveniently available for madam reporter?
MR. MACKENZIE: The madam reporter is following along with these submissions, my lord. She has them in front of her.
THE COURT: Thank you.
MR. MACKENZIE: And so, my lord, all these territories highlighted on your lordship's map can be found in alphabetical order in the table with those five to which I have just referred -- dealt with in more detail in these analyses at tab C.

That completes my submissions on that material, my lord.
THE COURT: All right. And is it your suggestion that I should now put this material into your volume 2, was it?
MR. MACKENZIE: It is volume 4, my lord.
THE COURT: I am sorry, yes, you were going to put it in volume 4.
MR. MACKENZIE: Of the Province's supplement. And it goes in there under tab 7.
THE COURT: All right.
MR. GRANT: Could I get clarification? When the disk is available for this, will the table be included in that disk?
MR. MACKENZIE: I don't think the table will be included in the disk, my lord.
THE COURT: All right. Perhaps I won't put it in right now. We can do it later. All right, thank you.

Now, this map D of inconsistent ownership and boundary evidence, that's just an aide memoire, is it?
MR. MACKENZIE: That, my lord, goes at tab D in your lordship's binder of this section.
THE COURT: Yes, all right.

MR. MACKENZIE: That is more than an aide memoire, that is a paper copy of maps 9A and 9B, the plaintiffs' claim area and it's an aide memoire in the sense that it is highlighted in those areas which are dealt with in the table. Those are the areas which generally speaking are in the core of the claim area partially or not affected by the overlapping claims. Your lordship does have another piece of paper there and that's the code -- codes for Exhibit 102 and your lordship might put that paper right in that pocket following tab 10 as your lordship is doing.
THE COURT: Yes, all right. What about this overlay?
MR. MACKENZIE: That overlay is to go in the judge's series, my lord. Can be used with the judge's series.
THE COURT: All right. Can you look after that?
THE REGISTRAR: Yes.
THE COURT: Thank you, Mr. Mackenzie.
MR. GOLDIE: My lord, could I return your lordship to volume 2 of the Defendant's summary, and I am going to complete one item remaining under tab Roman IX.
THE COURT: Am I going to need this new book of --
MR. GOLDIE: I hope to get to that immediately after.
THE COURT: All right. What number was it?
MR. GOLDIE: It's tab Roman IX, Arabic 8, and Mr. Plant has dealt with 8(a), and following 8(a) page 7 is 8(b), my lord, Miscellaneous Matters South African War Land Grant. And your lordship will also need the yellow binder, volume 19, and I am wishing to complete some of the documents under that. In the yellow binder, if your lordship would turn first to tab IX/8b-2, the thinner of the two insertions that I have handed up is an additional Proclamation, and it with the blue separator sheet should immediately follow the Proclamation that is presently under tab 8b-2.
THE COURT: Yes.
MR. GOLDIE: And then under tab 8b-10, the additional documents which start with the page number in the lower right-hand corner, page 8.
THE COURT: I am sorry.
MR. GOLDIE: I am sorry, page 7 would immediately follow the last blue separator sheet -- I am sorry, would immediately follow with the blue separator sheet preceding page 6.
THE COURT: Thank you.
MR. GOLDIE: Now, my lord, if I could go back to the narrative in volume 2 of the Province's summary, it is headed South African War Land Grant, and I say Dr. Lane filed

evidence of her researches -- of her researches into grants of land made under the South African War Land Grant Act as amended from time to time. The preamble to the Act stated its purposes: recognition of military service and:

> "...it is also expedient that such recognition should take the form of grants of land to be made in such manner as will be conducive to the actual settlement of the public lands of British Columbia."

Neither of these purposes was new. Douglas' Proclamation of March 18, 1861, and of February 23, 1863 providing for remission of purchase price and the use of location tickets issued to retired officers of the army and navy in respect of unoccupied and unreserved country lands. And those are the two Proclamations which are under 8b-2, one of which I just added. The second purpose -- returning to my summary -- the second purpose, settlement, was of course pressed upon Douglas by Lytton as early as July 1858. And that was the exhortation that -- and it is page 7 under that tab 8b-2, my lord, where the last paragraph of the second paragraph of Lytton's despatch of July 1, 1858 to Douglas states, and I quote:

> "All claims and interests must be subordinated to that policy which is to be found in the peopling and opening up of the new country, with the intention of consolidating it as an integral and important part of the British Empire."

I say that the South African legislation expressly protected Indian settlements and villages in Section 3 where lands other than "...unoccupied, unclaimed and unreserved Crown lands..." were excluded from settlement. The applicant was required to swear that the land sought was not an Indian settlement. And that appears under the next tab, my lord, which is a photocopy of the declaration -- does your lordship have the declaration?

THE COURT: Yes.

MR. GOLDIE: The declarant was required to swear that the land that for which he has made application, and this is the third line down:

"...is unoccupied and unreserved Crown Land, within the meaning of the 'Land Act' and is not an Indian settlement or any portion thereof."

Returning to my summary. I say: Although the terms of the Act respecting exemption from taxation and freedom from execution were meant to encourage permanent settlement by the returned volunteer the favourable access to land represented by the scrip itself created a speculative interest. There is no evidence that this result was intended.

Now, I say that the purposes of the legislation were as stated in the Act itself of settlement and a reward for service in the Armed Forces and that the manner in which it was set up was unremarkable in the sense of achieving those purposes.

And paragraph 5, I say: The utilization of scrip in the Bulkley Valley resulted in disputes over land between Indians, mainly those who were utilizing off reserve lands east of Moricetown, and settlers who claimed rights to Crown lands open to pre-emption. It has been suggested that the Indians affected were dispossessed of traditional lands. It is submitted that this was not the case and that the Indian use of the lands in question was recent and occurred after the principal reverse had been set aside. In any event, it cannot be suggested that the Province in any way departed from the policy of setting aside reserves for the protection, use and occupation of Indian peoples. The evidence of the -- these disputes is largely irrelevant to the issues in the case at bar and will be reviewed only briefly.

In relation to the Indians of the Bulkley and Skeena Valleys the operation of the South African land grant legislation was no different than the legislation providing for settlement by pre-emption. The Indian interest was protected by the continuation of the Colonial policy of setting aside reserves comprising the Indian settlements as indicated by the Indians. This had been largely accomplished by O'Reilly in 1891 - 1893.

In the period between Downie and 1857 and Poudrier, who was employed on behalf of the Provincial Government, reporting on his survey of 1892 - 93, the habits of the native peoples had undergone substantial changes. With the advent of horses in 1866 it became

1 necessary to obtain winter feed and with the advent of
2 the white man the cultivation of vegetables became
3 more widespread as well as commercially rewarding. In
4 1891 the agricultural activities at Moricetown were
5 rudimentary and within the area set aside by O'Reilly.
6 There are two documents under that tab in the yellow
7 binder, my lord, the first is Poudrier's report of his
8 survey in the Bulkley Valley in January of 1893, and I
9 will come to that in a little greater detail, and the
10 second at page 8b-7 page 8 is O'Reilly's report of
11 March 26 on the reserves which he had set aside in the
12 Bulkley Valley. And, in particular, I refer to page
13 435, and I am referring to a handwritten number in the
14 upper right-hand corner, my lord.
15 THE COURT: In this tab?
16 MR. GOLDIE: Under this tab, yes.
17 THE COURT: What number?
18 MR. GOLDIE: Well, perhaps the better way to go about it is it's
19 8b-7 page 9 at the bottom of the page.
20 THE COURT: Yes, thank you. And this is from what?
21 MR. GOLDIE: This is from O'Reilly's report on his setting aside
22 the reserves in the Bulkley Valley.
23 THE COURT: Yes.
24 MR. GOLDIE: And he says at the top of the page:
25
26 "The Hagwilgets are good hunters and trappers,
27 they also engage in packing between Hazelton
28 and mines. They grow a limited quantity of
29 vegetables, but have not hitherto engaged in
30 agriculture. They possess a few horses and
31 cattle, and they expressed their intention to
32 add to their number."
33
34 I ask your lordship to bear in mind that that's 1892,
35 and the horses were introduced into the Valley in
36 1866. Now, returning to my text, I say that most
37 agricultural development took place after 1892 is
38 evident from Poudrier's report. It is clear that
39 there were no Indian settlements beyond Moricetown
40 until one reached the Endako River - outside the claim
41 area - where it was noted that an Indian had
42 cultivated some 30 acres of land. And that, my lord,
43 is -- Poudrier's report is under the next tab.
44 THE COURT: His report is in twice.
45 MR. GOLDIE: It's in twice because it's referred to in the two,
46 but -- now he is reporting in 1893, and on page 5 and
47 the page number is the one in the lower right-hand

corner, he begins a discussion under the heading Climate.
THE COURT: Yes.
MR. GOLDIE: He says about six lines down beginning with the sentence: "At Moricetown".
THE COURT: Yes.
MR. GOLDIE:

> "...where the altitude is also 1,200, potatoes, turnips, carrots, are raised without any trouble by the Indians, and their system of cultivation is of the most primitive nature."

And then he goes on to the last sentence, last paragraph, he says:

> "Beyond the head of the Bulkley River, but in the continuation of the same valley on the Endako River, there is an Indian who has a ranch of over thirty acres under cultivation. He raises barley, oats, potatoes, turnips, carrots and other vegetables in abundance, and that was a very defective method of farming."

THE COURT: What would you understand he meant "beyond the head of the Bulkley River"; the headwaters of the Bulkley, is it?
MR. GOLDIE: Yes, that's my understanding. I take that having regard to the reference to the Endako.
THE COURT: So the headwaters of the Bulkley is somewhere west of Burns Lake.
MR. GOLDIE: Yes, yes. It's -- I think that's correct.
THE COURT: Somebody told me where it was once but I don't remember now. And north of the present railway corridor.
MR. GOLDIE: Well, the railway runs along --
THE COURT: I am sorry, east, yes. All right.
MR. GOLDIE: Yes.
THE COURT: He doesn't really say there is nothing between Moricetown and --
MR. GOLDIE: This settlement.
THE COURT: -- this settlement.
MR. GOLDIE: No, he doesn't, and I am going to refer, my lord, back to -- back to O'Reilly who is there not much more than a year before where he says at -- and all my page numbers will all be to the pages in the lower right-hand corner, under the tab 8b-7, it's page 8.

Under tab 8b-7 O'Reilly says: "I have now the honour to forward" --

THE COURT: I am sorry, you are at what page?

MR. GOLDIE: Sorry, my lord?

THE COURT: What page?

MR. GOLDIE: 8b-7 page 8.

THE COURT: Yes, yes.

MR. GOLDIE: He says:

> "I have now the honour to forward herewith Minutes of decision and sketches of twelve reserves defined by me during the past season for the use of a portion of the Hagwilget tribe of Indians who reside on Babine Lake, and on the Hagwilget River which discharges into the Skeena immediately below the town of Hazelton."

That's the Bulkley, of course. He says:

> "The Hagwilget Indians occupy scattered settlements from the Hagwilget river to Fort George, on the Frazer river, a distance of about two hundred miles, the greater number of the reserves for these Indians have not therefore been dealt with."

And then I have read the next paragraph, and then he proceeds to describe the various reserves. Number 1 is I think clear, it is Moricetown. He says:

> "...about thirty-five miles from the mouth of the Hagwilget river. The principal village of the tribe, consisting of 18 houses, is at this place and has, according to the census supplied by the local Agent, a population of 76, of whom Legoul is the chief."

He says:

> "The most important fishery of the band is immediately in front of the village; here great quantities of salmon on annually taken."

And the next page he says:

> "Although there is a considerable extent of good land on this reservation, nothing has been done

for its improvement, or utilization, excepting only that a few potatoes and vegetables are grown in isolated patches."

Number 2:

...about two miles from Moricetown; and is used by the Indians as a winter run for horses.

I point out, my lord, that as I said a few minutes ago the horses were introduced in 1866. Number 3:

"...situated on the Frazer Lake trail, about five miles south of Moricetown, contains 160 acres, the layer portion of which is good hay land."

And then --

THE COURT: Would that not be "larger"? I don't know what a layer portion is.

MR. GOLDIE: The larger portion is -- yes, I guess that's what it is, a larger portion of which is good hay land.

Now, the next one, my lord, is on the right bank of the Babine River so we have left the Bulkley Valley. Number 5 is on the left bank of the Babine River. Number 6 is a reserve at the foot of Babine Lake; and number 7 is a timber reserve, 100 acres situated on the western shore of Babine Lake. Number 8 is on the eastern shore of the Babine Lake; number 9 is on the western shore of the Babine Lake; and number 10 is on the eastern shore of the Babine Lake; and 11 is the same thing. And the 12th, a timber reserve, some 330 acres, is about a mile and a half southwest on the western side of the Babine Lake.

In my submission, it is clear that when O'Reilly laid out those reserves, most of which were on the Babine Lake, he was dealing with the settlements which he found in that area.

Now, I have referred to Poudrier who went through that area a year or so later and he found, as I said, an Indian who had cultivated some 30 acres of land. Poudrier of course had before him the so-called telegraph trail, the Old Collins Telegraph Trail. And he describes its effect, and I am going to refer at page 3, my lord, of that, in the lower right-hand corner.

THE COURT: I am sorry, what are you looking at now?

MR. GOLDIE: Poudrier's report again under tab 8b-7 -- I am sorry 8b-8.
THE COURT: I am sorry, is that Poudrier's report?
MR. GOLDIE: Yes, it's repeated again.
THE COURT: I think it is either 7 or 9, isn't it?
MR. GOLDIE: It is under 7.
THE COURT: I am sorry, no -- you are right, it's under 7. Yes, thank you.
MR. GOLDIE: But at page 3 of that report or the third page of that report he talks about the -- he talks about the various townships that he is crossing and he -- at the bottom of page 2, he says:

> In Township 2, twenty-two entire sections have been surveyed. The old Telegraph Trail runs through a number of these. The general appearance of this township is rather uneven, and the greater part is covered with timber.

He says in the next page that:

> "...numerous extents of open country covered with a rich growth of hay, where from two to three tons can be cut to the acre. Several tons have been cut by the Indians, and it would be quite easy to use a mower on all open land. The meadows lie near the trail or along the numerous small streams, where some parts of them are rather wet."

And he says in the Township 3, the third line:

> "All the parts surveyed could be used either as farming or grazing land."

There is an absence of any present use in those terms. And then he talks about, in Township 4:

> "The Bulkley Valley crosses the south-west corner of the township, and the old Telegraph Trail traverses it from north to south. There are some very rich open meadows, especially along the trail and along the river. On the side-hills the grazing land is also very abundant."

And the last -- the last -- and that's near Lake

Aldermere, my lord.

> "On the north end there is a small house, built years ago as a station of the Union Telegraph Company, and now occupied by Indians."

And then the next township is again close to Aldermere Lake, and he speaks about the next township, best township for grazing. And then over the page at the end of the paragraph dealing with -- the section dealing with Township 6, he says:

> "All parts of this township will be utilized some day or other as farming or grazing land."

Now, I say that, if one reads that report in its entirety, it is clear that he is reporting on potential use, not actual use or occupation, or he notes where there is occupation but not -- but he reports nothing of any -- of any farms other than the one that's about 30 miles from -- not 30 miles, but the one that was some distance from Moricetown.

THE COURT: What is this gentleman doing, laying out townsites?

MR. GOLDIE: He is a provincial government surveyor.

THE COURT: So he is not establishing reserves.

MR. GOLDIE: No, no, he's got nothing to do with that. His sole purpose was to go through the country and determine its suitability for agricultural purposes and to lay out townsites.

THE COURT: He's building very substantial townships, some of them are 16 sections.

MR. GOLDIE: Yes, it is.

THE COURT: A section is a square mile, isn't it?

MR. GOLDIE: Yes, 640 acres, yes.

THE COURT: All right.

MR. GOLDIE: I am now back at my summary, and I have -- in paragraph 9, I say: The absence of Indian settlements or occupation is confirmed by the absence of reserves. O'Reilly's care in laying out reserves where and to the extent requested by the Indian peoples themselves is revealed both in his diaries and in the long transcript of the meetings he held in 1888 on the Coast. It is inconceivable, in my submission, that O'Reilly would not have set aside reserves for farms of the kind described in 1907, and that's the date that some difficulties arose with respect to Wet'suwet'en people in the Bulkley Valley, continuing,

if they had existed in 1891. Now, I say that having regard to O'Reilly's instructions, having regard to the absence of settlement that is reported on by Poudrier in 1893, I say that O'Reilly would have had no restrictions in the form of existing white settlement on laying out reserves in 1891 or 1892 if they were there. I say: His report of his reserve allocation for the Hagwilget tribe whose "...scattered settlements (extend) from the Hagwilget River to Fort George on the Frazer" and I have already read that, my lord, makes no reference to settlement or Indian occupation between Reserve 3, six miles south of Moricetown on the Frazer Lake trail and the reserves on the Babine River and Lake.

Now, the dispute which was the subject matter of Dr. Lane's researches was aired before the Royal Commission by Father Godfrey, a missionary whose sincerity was doubted by Mr. Brody but whose statement to the Royal Commission of the changes in the lifestyles of Moricetown peoples is consistent with all other available evidence. And his -- an extract from his evidence on April 26, 1915 is found under tab 8b-10, and he addresses the Commission on behalf of the chief and the Indians as follows, and about half-way down the paragraph after some introductory remarks, he says:

> "The main grievance around here which may be summed up in the general way is that they desire to have a little more land allotted to them than they have at the present time. A large portion of the land in and around the Moricetown Reserve is not what you would call exactly good agricultural land."

And then down at the bottom of the page, three lines from the bottom:

> "They have looked into the ways and means of living of the white population, and for the past ten years, or ever since they came into contact with the white man and especially during the last three or four years, during the railway construction days, they have endeavoured, as far as they were able, to get work from the white man and to take out contracts from them..."

And so on. And then midway down the page, my lord, there is a sentence which begins with the words:

> "There is a greater desire on the part of the Indians..."

THE COURT: Yes.
MR. GOLDIE:

> "...towards the increasing of their stock, and, I daresay, every one of them wants to launch into cattle raising, and in order to do this, they desire to have a little more land, so that they will be better able to feed their stock than they are at the present time."

And right at the bottom he says:

> "Formerly, all these men made their living by hunting, going out in the winter time, about September till about Christmas and from the middle of January to the end of June."

THE COURT: I am sorry, I am having problems with that.
MR. GOLDIE: That's right at the bottom of that page, my lord.
THE COURT: Yes.
MR. GOLDIE: And then after talking about the difficulties that they have with their hunting, I go over to page -- the page at the lower right-hand corner 8b-10 page 4, and -- this is about a third of the way down the page beginning with the sentence:

> "Another point I am asked to draw your attention..."

THE COURT: Yes.
MR. GOLDIE:

> "...is regarding some special claims and grievances which have existed in the past. We have had cases I daresay seven, eight or nine cases where certain families have taken possession of certain pieces of land conveniently located near a beautiful lake, which land naturally offered facilities for cutting hay, especially formerly when there

1 were no mowing machines. Some of these pieces
2 of land have now been alienated by the
3 Government and have come into the possession of
4 some white settlers. I daresay that one of
5 those cases is the case of a family around Tyee
6 Lake or McClure Lake. Those living there are
7 Tyee Lake David, John Baptiste and Big Pierre.
8 Another instance of this kind is a case of two
9 families living at Canyon Creek..."
10
11 And it gives the names of those. And he is -- he says
12 on the next page in response to the question from the
13 chairman:
14
15 "THE CHAIRMAN: Is there any cultivation on
16 these lands?
17 A. There were some spots cleared around the
18 houses where they used to cut hay for their
19 horses. In each of these cases they had houses
20 on these lands which were used for hunting
21 cabins, and in a great many cases these cabins
22 have been destroyed by the incoming white men."
23
24 And then that, my lord, was in 1915.
25 THE COURT: Now, this wasn't the McKenna-McBride Royal
26 Commission?
27 MR. GOLDIE: Yes, it was.
28 THE COURT: Oh, it was. This is -- yes, thank you.
29 MR. GOLDIE: I say that the -- I am back in my summary, my lord.
30 After saying that Father Godfrey's evidence is
31 objective, I say in page 6: Evidence with respect to
32 the most notable example, Jean Baptiste, was collected
33 by Dr. Lane and Dr. Galois. From these it is clear
34 that by 1923 the Department of Indian Affairs had
35 purchased land for Baptiste. It is also reasonably
36 clear by Baptiste's own account that there was no
37 Indian occupation of this land before 1899. Now, that
38 is under tab 8b-10, and it's page 29, and this is a
39 report from Mr. Loring to Mr. Ditchburn of March 20,
40 1920. Now, my lord, Mr. Baptiste was a man who
41 couldn't be moved and he refused to move. He said
42 that he had improved the land he was on; he had had to
43 move before and he wasn't going to move his wife and
44 family again. And Mr. Loring is reporting that the
45 owner of the north half of 882 had said there was an
46 Indian by the name of Jean Baptiste occupying that
47 land and the question was had he occupied that land

before it became alienated, and "in context to the above" -- this is the second paragraph of Loring's letter:

> "I here beg to state that with the intent to elicit the information required I requested Constable Jas. Hevenor to investigate..."

And then there is set out what Hevenor's information was:

> Regarding Lot 882, Range V, the information gleaned in the Provincial Land Office at Smithers it stood:
>
> > Applied for under the S.A.W.G. in the year 1904, allowed February 5th, 1905. Crown Grants issued to Robert Whittington.

Then with respect to Baptiste, he has on that land a log house; log stable; implement shed; hay shed; root house; 35 acres of land cleared and sown in timothy; and fence; part logs, part poles, for about a mile in length; 21 head of stock, consisting of 19 horses and 9 head of cattle. He has a wife and five children and claims to have been on the land for the last 21 years. That's the basis for my statement that he had not occupied the land before 1899. And I draw your lordship's attention to the fact that he had a -- a considerable holding of stock for people whose occupation some 40 or 50 years before had been hunting and trapping and who were -- to whom domestic animals such as horse and cows were unknown prior to 1866.

My lord, some of the people in question fully realize that they were not dealing with lands that were theirs, and I refer to Mr. Thomas George, beginning at page -- under 8b-10 page 33, is the Order-in-Council approving Mr. George's application for pre-emption. My lord -- your lordship may recall that Mr. Thomas George was at one time Gisday wa and this pre-emption in fact is in the middle of the lands claimed by Gisday wa. And your lordship will see in the Order-in-Council which is 1921:

> "It is also represented that Thomas George is a young man, twenty-eight years old, and is industrious, intelligent, of good character and a thoroughly deserving Indian."

And he owns three cows, two calves, four horses, harness and wagon, and so on.

Now, returning to my summary, I note that: In law, it had been acknowledged by the Dominion that Indian rights to lands outside reserves was to be -- were to be determined by Provincial laws of general application. Now, I am referring there, my lord, to an Order-in-Council of the Dominion which was passed in 1895, and it reads as follows:

> "The Committee of the Privy Council have had under consideration a Despatch, hereto attached dated 14 October 1895, from the Lieutenant-Governor of British Columbia, transmitting a copy of his Report of the Committee of his Executive Council, relative to the unsatisfactory state of affairs in connection with Indians settling upon lands other than reservations in different parts of the Province of British Columbia, but especially in the East Kootenay District."

And then it's referred to the Superintendent-General who reports, beginning at the third line from the bottom:

> "...that the Indian Superintendent, at Victoria, states that for several years he has repeatedly instructed the Indian Agents to discourage the settling of Indians on land other than their reservations, and to advise the Indians that they should, as much as possible, confine themselves to the reserves allotted for their use, endeavouring to make them understand that they could be summarily ejected without compensation from land squatted upon unlawfully."

And then I go over to the page 8b-11 page 3, the second -- the paragraph at the bottom of the page:

> "The Minister observes, as to the statement in the Report, that it is open to the Provincial Authorities to put the law in operation against the offending Indians and to have them expelled from the land which they have squatted upon;

that he does not consider that the right of the Province in the matter, is open to question."

So from 1895 on, the Dominion's position was that the settlement of Indians on lands beyond reserves must be governed by provincial laws of general application. Now, the ejectment of Indians occupying Crown lands open to pre-emption upon the happening of such an event or upon the happening of the acquisition of the fee by a veteran or assignee of the veteran of the Land War Grant Act would cause hardship is self-evident. Most of the people referred to by Father Godfrey were encouraged to pre-empt lands in place of what they lost and a number did.

Now, that, my lord, is evident from the material under tab 10, and as I said earlier, it was apparent that by in the 1920s lands had been purchased by the Indian Department for Jean Baptiste, for instance, under tab 8b-10 page 17 is Mr. Ditchburn's letter to the Indian Agent at Hazelton on behalf of Round Lake Tommy, and obtaining pre-emptions for them, and page 18 is to the same effect, it is 1925, reporting that Jack Joseph has received his pre-emption record and then in the last paragraph he says:

"To my own personal..."

This is the Indian agent:

"To my own personal knowledge Tommy has fished on Round Lake and trapped muskrat since 1909.

Members of Tommy's family are still in evidence and were there over sixteen years ago, so one can quite understand that this Indian has a craving to reside in the vicinity."

And urging the acquisition of a small piece of land. And that is recorded as having been achieved in 1927 at page 19. Now, the -- some of -- there is correspondence between the registered owners and the Indian Department or Agencies with respect to Jean Baptiste at pages 29 and 30, I have read part of that, and Mr. Ditchburn's letter to Mr. Scott in Ottawa, page 31. And then a report on page 32 which indicates that Baptiste has been resettled on land purchased on his behalf by the Department of Indian Affairs, that's

1923.

My lord, what I have to say in relation to all of this is that this episode, painful as it was, is unrelated to any aspect of the claims made in the case at bar. The Indian occupation of the lands subject to claims created by the use of scrip under the South African War Land Act was recent, it reflected a change in lifestyle since the advent of the white man and the horse, and it confirmed in the earlier acknowledgement of the Dominion that outside the reserves the Indian peoples had no interest other than that afforded by the laws of the Province. If the events referred to by Mr. Brody and Dr. Lane are intended to support a claim to ownership and jurisdiction they are, in my submission, ineffectual and serve to demonstrate the opposite.

My lord, I wish to turn to volume 4. I am going to --

THE COURT: I think, Mr. Goldie, if you don't mind, we'll take a short adjournment. We have been going a little over an hour now.

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED AT 2:40 p.m.)

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

Tannis DeFoe,
Official Reporter,
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RECOMMENCED AFTER BRIEF RECESS)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Goldie.
5 MR. GOLDIE: My lord, I am turning to Roman numeral VIII in
6 Volume 4. It's headed "Addendum and Supplement to
7 Submission of the Province".
8 THE COURT: Yes.
9 MR. GOLDIE: Contained in Part 5 of its written summary, Royal
10 Proclamation. Part A. Comments on the plaintiffs'
11 final argument on the Royal Proclamation of 1763 runs
12 from pages 2 to 13. And, my lord, I am not going to
13 do anything other than hand that up. It's in the same
14 form as -- or roughly the same form as others like it,
15 namely, there is a comment from my friends' written
16 argument -- I'm sorry, an extract from my friends'
17 written argument followed by a comment.
18 And then item B, addenda, runs from pages 14 to
19 22. And it is a comment, firstly, on the case of
20 Mohegan Tribe v. Conneticut in the Second Circuit
21 Court of Appeal in the United States in which my
22 friends have drawn a comparison between the
23 Non-Intercourse Act of that country and the Royal
24 Proclamation. And again I do no more than hand it up.
25 And then on page 17 there is a reply to my
26 friends' argument on the proposition that even if
27 settled colonies there is a room for the application
28 of the Royal prerogative based upon a submission
29 that -- where the prerogative purports to deal with
30 constitutional matters, then there is continuing
31 application. And I do no more than hand that up.
32 And then I come at page 23, my lord, to a
33 conclusion or some submissions that can be regarded as
34 a conclusion on the role of the Royal Proclamation in
35 Canada, and in response to the court's question at
36 transcript 347, page 27479. That transcript reference
37 is under Tab VIII-1 immediately following, and at
38 lines 3 to 36. Your lordship indicates an interest in
39 the effect of the enlargement of the province of
40 Quebec, and what it had on the operation of the Royal
41 Proclamation, and that's what I am going to deal with
42 now.
43 I say the response is set out in point form below,
44 A. The great reserve or hunting reserve created in B,
45 and that is the designation in Exhibit 1160 which we
46 have been using, the copy of the Royal Proclamation
47 annotated with letters to indicate various sections.

And B is the section which creates the hunting reserve, I'll call it, west of the Appalachians and east of the Mississippi. Now, it excluded the old Quebec. When I say it excluded, its text excluded the territory of the Quebec that was defined in the Royal Proclamation.

Now, under Tab 2 I have an enlargement taken from a map that is over there, my lord, the territorial evolution of Canada.

MR. RUSH: And I take objection to that. I take objection to this enlargement and the map.

THE COURT: I haven't found it yet. You say tab 2?

MR. GOLDIE: Tab VIII-2, my lord.

THE COURT: Oh, yes.

MR. GOLDIE: It's just a photographic -- not a photographic, a photocopy enlargement of the third map which is 1763.

MR. RUSH: It's not an exhibit. It's not a treatise. It doesn't qualify under any of the heads however liberally applied. It's a map made in 1969, Government of Canada, for its purposes. We don't know the author. We don't know who made it. We know nothing about it. It happens to be a convenient pictorial depiction of my friend's argument, and nothing more. It shouldn't be used. It has no status. And it's visual value is more to my friend's purpose than its evidentiary basis or its provenience.

THE COURT: Well, if I walked into a library, I might come -- and picked up an atlas, I could come across it, I suppose, could I?

MR. RUSH: That's a very good question. I suspect that that was obtained from the Government of Canada, the Department of Mines, Minerals and Energy, and is probably housed in there. Now, if your lordship's search took you there, perhaps.

THE COURT: It's not a map in general distribution?

MR. RUSH: I would say it's in general distribution by the Government of Canada, by one of its departments for their purposes, whatever they are. But I say, my lord, that if your lordship is moving from the view that your lordship could go out and look for a map of this kind in your own judicial inquiries for the knowledge to come to your lordship, I would say that this map is not likely to be in the libraries, although I couldn't say for sure. It's likely to be in the Government of Canada, but whatever the case, if that's -- if that's the standard, my lord, then I say it's a very, very baseline standard for the

1 acquisition of information about the case, since you
2 know so little about its basis.
3 THE COURT: But we have -- but we have in the evidence, I
4 suspect, all the documents that brought about these
5 changes of boundaries, do we not?
6 MR. GOLDIE: Yes. All this is is a depiction of the description
7 which is contained in the Royal Proclamation.
8 MR. RUSH: That's not what it is, with respect.
9 MR. GOLDIE: I beg your pardon? What is under VIII-2 is a
10 description of the old colony of Quebec, and I am not
11 relying upon it. It's not evidence. It is simply a
12 means of advancing my argument.
13 Now, as far as -- so far as the authority of the
14 document is concerned, on its face, it is produced and
15 printed by the surveys and mapping branch, 1969.
16 Copies may be obtained from the map distribution
17 office, Department of Energy, Mines and Resources. It
18 is stated that these maps are to be published in the
19 National Atlas of Canada. So there is representation
20 that it is for the public use, and it is created by
21 that office of government which has the responsibility
22 for it.
23 Your lordship is now judicially encouraged by the
24 judgment in the Seaqua (?) case to undertake your own
25 researches.
26 THE COURT: I hope that's not good law.
27 MR. GOLDIE: It raised a few eyebrows, but all that I think with
28 respect to His Lordship Mr. Justice Lemare, all that
29 he was saying is that there are certain things of
30 which a judge can take judicial notice, and the
31 boundaries of the country is one of them.
32 Now, this is historical, and if my friend wishes
33 me to -- well, I don't need to do it. The description
34 of the boundary is firstly in the Royal Proclamation.
35 The description of the enlarged Quebec is in the
36 Quebec Act of 1774. The description of what happened
37 after the conclusion of the American Revolution and
38 the creation of Upper and Lower Canada in 1791 is
39 found in the Constitutional Act of that day. All of
40 these can be found in text, and it is not part of -- I
41 don't have to prove the boundaries of Quebec, but I am
42 responding to a question from the Court.
43 MR. RUSH: This proving nothing, my lord. It proves my friend's
44 argument. That's -- it supports his argument, not
45 proves it. It does nothing more than that much. My
46 friend says the boundary of Quebec is "x" for his
47 argument. I say it is not. To have a depiction --

1 THE COURT: Well, I have had the boundary of Quebec explained to
2 me with -- in terms of degrees of Latitude and
3 Longitude and by landmark.
4 MR. RUSH: And that should be sufficient.
5 THE COURT: Well, I was going to come to that. I suppose Mr.
6 Goldie could make his argument by including in his
7 argument those descriptions whenever he found it
8 necessary to do so.
9 MR. RUSH: He is asking you to accept as so the pictorial
10 representation of what he says the boundary is on this
11 map, and that is a point of contention, my lord. And
12 my argument, I don't think, would have the same force
13 if I could say I know what this was based on, I know
14 who did it, whether it was Bellin, whether it was Bone
15 or who, but I can't in any way challenge what is
16 alleged to be the pictorial representations on this
17 map. We don't know the authors, we don't know what
18 they relied on, and at the very least, my lord, if you
19 were to go to a library and look at this map and say I
20 can't tell who did the drawing or the coloring on this
21 map, I cannot tell what they relied upon, you would
22 reject it out of hand. It would be worthless to you.
23 THE COURT: Well, if I had a description in -- by degrees of
24 Longitude and Latitude and by landmark, and I had a
25 map prepared by the Government of Canada purporting to
26 describe that, I don't think I would reject it.
27 Unless somebody showed me that it was clearly wrong, I
28 think I would accept it as probably an accurate
29 pictorial description of the so-called metes and
30 bounds description that's contained in the documents.
31 MR. GOLDIE: Well --
32 MR. RUSH: Well, my lord, you have to accept 101 opinions by
33 this map-maker as you go through it.
34 THE COURT: You do that on every map.
35 MR. RUSH: Precisely. But that means you have to be satisfied
36 on each and every one of those metes and bounds
37 descriptions, that the opinion is accurate. And I say
38 it is self-evident by looking at this that it's simply
39 not so.
40 THE COURT: Well, Mr. Rush, there is another problem. Mr.
41 Goldie has been referring to this map throughout his
42 argument. He has been pointing this out. I would
43 think he has gone to that map a dozen times.
44 MR. RUSH: He has indeed, my lord, and if he attempted to do
45 anything with that map, as he is now attempting to do
46 it, and that is to place it before your lordship and
47 say you should accept this as some authority or

reference to rely upon, that's the point of this, then I object to it as a visual --

THE COURT: All right, Mr. Rush. I think the thing to do is -- I haven't got it open in front of me. Where is it again? I think I will take it out, and you will have to count on me to remember, when Mr. Goldie shows it on the map, what it is he shows me.

MR. GOLDIE: Before your lordship fully throws it away, I refer to my friend's words in transcript 308, page 23255, where an issue or a question arose as to the judge's series and the interrogatories overlay, and my friend Mr. Rush said, in raising an objection, line 26:

> "Well, I object to that, my lord, and this particular one, the problem that is now clearly arising is the distinction between aide-memoire and an exhibit is fast becoming irrelevant. And for the most part all of the overlays are being added as exhibits because the underlying facts have now been proven in one way or another. That's not true with this one, and it can't be true until somebody comes and proves what was done with this map, and I think if my friends want to make use of this in argument as an aide-memoire, then at the time of argument they should produce and make use of it in that form."

And that's all I am doing. Now, my friend invited us to use whatever we wanted as a means of clarifying and giving some point to our submissions.

MR. RUSH: Not whatever he wanted. I don't think I would be that foolish.

THE COURT: I don't think you said that. Well, let's get along, Mr. Goldie. I don't have to have it in my book. I have a general idea now that Quebec in 1763 was a great deal smaller than it was the day before yesterday. And as a matter of fact it's -- I didn't really appreciate until quite recently that the Hudson's Bay Company had more than half of what is now Quebec. And I know now that it's a relatively small area on both sides of the St. Lawrence River. And I can follow it, if I can go and look at the map, I have a picture in my mind now of what it is, and I think I can follow it without having to have a copy of a portion of it, an enlargement of a portion of it in the documents I am going to take away. And we'll all

have to take your chances on my memory, because I am not going to likely get out another map and plot my own from the Latitude and Longitude and descriptions that appear in the documents.

MR. GOLDIE: Your lordship may recall that when I was dealing with the Star Chrome case, I was at some pains to outline the boundaries of old Quebec.

THE COURT: Yes.

MR. GOLDIE: And it's taken straight from 'D' of the Royal Proclamation.

THE COURT: Yes.

MR. GOLDIE:

> "The Government of Quebec bounded on the Labrador Coast by the River St. John ..."

That's where we start on the north coast.

> "... and from thence by a line ..."

That is to say a straight line.

> "... drawn from the head of that river through the Lake St. John, to the south end of the Lake Nipissim; from whence the said line, crossing the River St. Lawrence and the Lake Champlain in 45 degrees of north latitude ..."

Another straight line.

> ".... passes along the high lands ..."

Which is natural line.

> "... which divides the rivers that empty themselves into the said River St. Lawrence from those that fall into the sea ..."

And so on.

THE COURT: Didn't you show me that in that map that was part of your submission in relation to the Star Chrome case?

MR. GOLDIE: Yes. Yes, I did. I was showing your lordship the southeastern part of the boundary where it changes from 45 degrees to the height of land.

THE COURT: Yes. All right.

MR. GOLDIE: Now, that was excluded from the hunting reserve, and that is 'S' in the Royal Proclamation -- I'm

sorry, I should say 'V', where the King said:

> "And we do further declare it to be our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for use of the said Indians, all the lands and territories not included within the limits of our said three new governments."

So we start, then, with the knowledge that the so-called hunting reserve never extended to what I will call the bounds of old Quebec.

Now, the Quebec Act of 1774 enlarged the boundaries of the old or 1763 Quebec, and took in a great part of the northern part of the reserve down to the Ohio River.

Now, my friend, I suppose, will object to Tab 3, which is a depiction of the extension of the old Colony of Quebec as a result of the Quebec Act of 1774. But if we look at the Quebec of 1774 itself, and that's under tab 4, my lord --

MR. RUSH: My friend is anticipating that I do object to it, but, my lord, for the two reasons that I have indicated, is that provenience and notes and authorship, I can't do anything with a map like that, to answer it.

MR. GOLDIE: I am referring to the Quebec Act under tab 4.

THE COURT: Yes.

MR. GOLDIE: And in the preamble it recites the Royal Proclamation, and in the second preamble it says, and I quote:

> "And whereas by the arrangements made by the said Royal Proclamation a very large extent of country ..."

THE COURT: What page are you on now?

MR. GOLDIE: I am under tab --

THE COURT: I have the Act. Whereabouts in the Act?

MR. GOLDIE: It's the first paragraph, my lord.

THE COURT: All right. Yes.

MR. GOLDIE: And it's the second preamble which is about seven or eight lines down.

THE COURT: Yes.

MR. GOLDIE: And the recital refers to the fact that:

"Very large extent of country, within which there were several colonies and settlements of the subjects of France, who claimed to remain therein under the faith of the said treaty ..."

That is to say the Treaty of Paris.

"... was left, without any provision being made for the administration of civil government therein. And certain parts of the territory of Canada, where sedentary fisheries had been established and carried on by the subjects of France, inhabitants of the said province of Canada, under grants and concessions from the government thereof, were annexed to the government of Newfoundland."

Now, that tells your lordship that to the east of the old colony of Quebec, established under the Proclamation of 1763, there were subjects of the former province of Quebec -- former province of Canada whose territories were annexed to Newfoundland. And that is, of course, the origin of the present claim of Labrador.

And then the substantive parts of the Proclamation:

"May it therefore please your most Excellent Majesty that it may be enacted; and be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same. That all the territories, islands, and countries in North America, belonging to the Crown of Great Britain, hounded on the south by a line from the Bay of Chalcurs, along the high lands which divide the rivers that empty themselves into the River Saint Lawrence from those which fall into the Sea, to a point in forty-five degrees of northern Latitude, on the eastern bank of the River Connecticut, keeping the same Latitude, directly west, through the Lake Champlain, until, in the same latitude, it meets the River Saint Lawrence."

Now, my lord, that describes a boundary of the old province, but going in the opposite direction.

THE COURT: Uh-huh.

MR. GOLDIE:

> "... from thence up the eastern bank of the said river to the Lake Ontario."

We begin to depart from the old colony.

> "Thence along the Lake Ontario, and the river commonly called Niagara; and thence along by the eastern and southeastern bank of Lake Erie ..."

And by this time we are getting into the United States.

THE COURT: We are out west now?

MR. GOLDIE: Yes.

> "... following the said bank, until the same shall be intersected by the Northern Boundary, granted by the Charter of the Province of Pennysylvania, in case the same shall be so interested; and from thence along the said Northern and Western Boundaries of the said Province, until the said Western Boundary strike the Ohio."

And then:

> "But in case ..."

There is an interjection there with respect to the case. Then following:

> "The said bank until it shall arrive at that point of the said bank which shall be nearest to the north western angle of the said province of Pennsylvania, and thence, by a right line, to the said northwestern angle of the said province; and thence along the western boundary until it strike the River Ohio."

That was the provision in case there wasn't an intersection.

THE COURT: Uh-huh.
MR. GOLDIE: And along the bank of the said river. That's the Ohio.

> "... Westward, to the banks of the Mississippi, and northward to the southern boundary of the territory granted to the merchants adventurers of England, trading to Hudson's Bay."

My lord, that comprehends a very large area of land.

And then the last provision is with respect to the and attachment to Quebec of part of the Labrador coast.

Now, I have traced that, irrelevant as it may be to my friend's consideration, on both of the maps that are on there, and I can assure your lordship that as far as a layman's following of the boundary I have just described, it is coincidental or is pictorially depicted in the enlargement under tab 3.

Now, that was the largest that Quebec ever achieved, my lord, the largest territorial extent that Quebec ever achieved. And turning back to my summary.

THE COURT: Where are you now?
MR. GOLDIE: I am at page 23 of the supplement, my lord.
THE COURT: Yes.
MR. GOLDIE: Item B I have just gone down.
THE COURT: Yes.
MR. GOLDIE: Now, item C. The Quebec Act revoked the application of the Royal Proclamation in respect of the enlarged Province of Quebec. And that -- I go back to the Quebec Act under tab 4, and I refer to the last paragraph, which is in some versions of this Act numbered 4 on page 402 beginning with the recital.

> "And whereas the provisions made by the said Proclamation ..."

THE COURT: Just a minute.
MR. GOLDIE: It's the second page under Tab 8-4, my lord.
THE COURT: Yes.
MR. GOLDIE: Does your lordship see the last paragraph?
THE COURT: "And whereas the provisions ..."
MR. GOLDIE: Yes. The side note describes it all.

> "Former provisions made for the province to be null and void after May 1st, 1775."

I'll read it, because it applies, as I say, to the enlarged Province of Quebec.

"And whereas the provisions, made by the said Proclamation, in respect to the civil government of the said province of Quebec and the powers and authorities given to the governor and other civil officers of the said province, by the grants and commissions issued in consequence thereof, have been found, upon experience, to be inapplicable to the state and circumstances of the said province, the inhabitants whereof amounted, at the conquest, to about sixty-five thousand persons professing the religion of the church of Rome, and enjoying an established form of constitution system of laws, by which their persons and property have been protected, governed and ordered for a long series of years, from the first establishment of the said province of Canada; be it therefore further enacted by the authority aforesaid, that the said Proclamation, so far as the same relates to the said province of Quebec."

That's the enlarged province.

"... And the commission under the authority whereof the Government of the said Province is at present administered, and all and every Ordinance and Ordinances made by the Governor and Council of Quebec for the Time Being, relative to the Civil Government and Administration of Justice in the said Province, and all Commissions to Judges and other officers thereof, be, and the same are hereaby revoked, annulled, and made void, from and after the First day of May, One thousand seven hundred and seventy-five."

Now, that created the state of affairs which I describe in paragraph C.

THE COURT: Revokes for the territory of the new province, the Royal Proclamation.

MR. GOLDIE: That's correct. But there is -- there is a savings clause.

THE COURT: All right.
MR. GOLDIE: And I say this did not effect rights granted to Indians in the hunting reserve by virtue of the Royal Proclamation.

Now, the provision -- the savings clause oddly enough is in the preceding section, but it's the last paragraph, and it states, and I quote:

> "Provided always, and be it enacted, that nothing in this act contained shall extend or be construed to extend to make void or to vary or alter any right, title or possession derived under any grant, conveyance or otherwise howsoever of or to any lands within the said province or the provinces thereto adjoining but that the same shall remain and be in force and have effect as if this act had never been made."

Now, I say what is the result of that?

Point 'D' I say this. In the result, pre-1774 Indian rights in the hunting reserve were left intact, and those parts of the post-1774 Quebec to which they applied, namely, the lands west, south and north of the 1763 Colony of Quebec.

Does your lordship follow me? We start with the old colony being exempt, the new colony is extended into lands which comprise the hunting reserve, the Royal Proclamation is annulled, but there is a savings clause.

THE COURT: Existing aboriginal rights are preserved?
MR. GOLDIE: Yes.
THE COURT: We have heard that before somewhere.
MR. GOLDIE: If there were any. And I say, there were by virtue of the Royal Proclamation.
THE COURT: Yes.
MR. GOLDIE: So I say by virtue of the Treaty of Paris of 1783 terminating the American Revolution Quebec's southern boundary became the 49th parallel. The territories north of that line remained British. When I say the 49th parallel, I am not talking about the 49th parallel west of the area that we are talking about, but it's -- the statement is accurate enough for the purposes of this analysis. I say the --
THE COURT: I'm sorry, that doesn't somehow sound right to me. It seems to me that the southern boundary of Canada west of the Great Lakes was well south of the 49th

parallel.
MR. GOLDIE: South of the Great Lakes.
THE COURT: Well, I'm sorry, east of the Great Lakes.
MR. GOLDIE: That's correct. No, that's correct.
THE COURT: So --
MR. GOLDIE: I should have traced through the boundary -- well --
THE COURT: This paragraph should probably say something like by virtue -- I'm sorry, the Treaty of Paris of 1783 fixed Quebec's southern boundary?
MR. GOLDIE: Yes. And I'll leave it at that.
MR. RUSH: You mean 1763 there don't you?
MR. GOLDIE: No. This is the one that finished the American Revolution, and it too is negotiated in Paris.
MR. GOLDIE: Treaty of Versaille.
THE COURT: I thought one was the Treaty of Paris and the peace of Paris, but it doesn't matter.
MR. GOLDIE: In any event, there are different people at the negotiating table.
THE COURT: Yes. Different parties.
MR. GOLDIE: The territories north of, and I'll say the southern boundary, remain British, and in my submission continued to be subject to the hunting reserve as to those who obtained rights therein prior to the revocation of the Royal Proclamation.

Now, I refer to tab 5, which is the situation that pertained after the old province of Quebec was divided into Upper and Lower Canada. The boundaries are the same.

THE COURT: Yes.
MR. GOLDIE: Now, I say this was recognized, and when I say this, I mean the proposition that I put in the preceding paragraph, I say this was recognized in St. Catherine's Milling by Lord Watson where he said, and I quote:

> "The territory in dispute has been in Indian occupation since 1763."

And I say the significance of that is that His Lordship was identifying and fixing people who had an interest prior to the Quebec Act of 1774, and to the same effect, when His Lordship said:

> "... there has been no change since the year 1763 in the character of the interest in which its Indian inhabitants had in the lands

1 surrendered by the treaty."
2
3 Again the significance of 1763 is that we are
4 outside of the old province of Quebec, inside 1774
5 Quebec, and the interest is -- stems from a period
6 before the revocation of the Royal Proclamation in
7 that area in 1774. And I have also noted his
8 lordship's statement.
9
10 "Their possession, such as it was, can only be
11 ascribed to the general provisions made by the
12 Royal Proclamation in favour of all Indian
13 tribes then living under the sovereignty and
14 protection of the British Crown."
15
16 And I emphasize the word "then".
17 Point 'G'. The effect of the saving clause in the
18 Quebec Act of 1774 was expressly noted by Mr. Justice
19 Taschereau in the Supreme Court in the St.
20 Catherine's Milling case at SCR page 648.
21 And I wish to quote a little before what I have in
22 my summary. And beginning at page 647 His Lordship
23 analyzes the Indian provisions of the Royal
24 Proclamation, and he says on that page, he says the
25 words "for the present" in this, and that's the
26 presiding clause. And the next clause which is 'V':
27
28 "Are equivalent to a reservation by a King of
29 his Right thereafter or at any time to grant
30 these lands when he think it proper to do so.
31 He reserves for the present for the use of the
32 Indians all the lands in Canada outside of the
33 limits of the Province of Quebec as then
34 constituted."
35
36 Now, His Lordship is addressing the situation that
37 pertained at that time, and when he's not considering
38 the Indian country as it was south of the border he
39 says:
40
41 "Is that, in law, granting to these Indians a
42 full title to the soil, a title to these lands?
43 Did the sovereign thereby divest himself of the
44 ownership of this territory? I cannot adopt
45 that conclusion, nor can I see anything in that
46 proclamation that gives to the Indians forever
47 the right in law to the possession of any lands

as against the Crown. Their occupancy under that document has been one by sufferance only. Their possession has been, in law, the possession of the Crown. At any time before confederation the Crown could have granted these lands, or any of them, by letters patent, and the grant would have transferred to the grantee the plenum et utile dominium, with the right to maintain trespass, without entry, against the Indians. A grant of land by the Crown is tantamount to conveyance with livery of seisin. This proclmation of 1763 has not, consequently, in my opinion, created a legal Indian title."

Then he goes on with what I have in my summary.

"From this result of my interpretation of it it is unnecessary, for my determination of this case, to consider how far the section is of the Proclamation to which I have alluded, have been affected by the Act of 1774. I may nevertheless, remark, that any right the Indians might have previously had could not, it seems, have been affected by this Act, as by its 3rd section it is specially provided and enacted that 'nothing in this Act contained shall extend, to make void, or to vary, or later, any right title, or possession derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the sad Province, or the Provinces thereto adjoining'."

So it was clear his lordship's statement or his lordship's opinion that the savings clause operated to save the rights under the hunting reserve of those whose territories were outside the 1763 colony or province of Quebec, but remain inside Canada after 1774.

I say on page 27: The result is that in those parts of Canada which were beyond the limits of 1763 Quebec, but within the limits of 1774 Quebec, such rights existed only in respect of those Indian peoples whose ancestors were within the hunting reserve when it was created in 1763. In present day Canada this is essentially that part of Ontario south of what was Rupert's Land and east of the Quebec Ontario boundary.

The Treaty of 1873 which figured in St. Catherine's Milling was a surrender by Indian peoples of rights granted to their ancestors in 1763. In the result the only area in Canada in which the hunting reserve in the Royal Proclamation had any continuing effect was in Ontario. Such effect was extinguished by treaties entered into before and after confederation.

Now, I make reference to a photograph or a photocopy of that part of the second map, my lord, which shows the treaties negotiated in -- prior to confederation and after confederation.

THE COURT: Can you excuse us just a moment, Mr. Goldie.

(REPORTER CHANGE)

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

_____
LORI OXLEY
OFFICIAL REPORTER
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(CHANGE OF REPORTERS)

MR. GOLDIE: My lord, I'm at paragraph number 2 on page 28. As the Royal Proclamation and the rights of pre-1763 Indians in the Hunting Reserve was a concern only in Ontario or Upper Canada, the extinguishment thereof took place both before and after Confederation. Evidence has been given of that, my lord. The Robinson Treaties of 1850 figured in the Bear Island case. In fact, my understanding is that virtually the whole of Ontario was covered by treaties at surrender.

Then in paragraph 3 I submit that the Royal Proclamation application to British Columbia was first suggested, and as no more than a suggestion, by Mr. Hewitt Bernard, Deputy Minister of Justice, in his report of January 19th, 1875 recommending disallowance of the 1874 Crown Lands Act of British Columbia, which is referred to under tab 7.

Now, if your lordship would look under tab 7, you will find the print of Mr. Bernard's report, which was adopted by the Department of Justice, and in this particular print it was forwarded to the Colonial Office by Lord Dufferin. And this is part of the Colonial Office confidential print, and the report of the Privy Council reads as follows:

> "The company of the Privy Council had under consideration the report from the Honourable The Minister of Justice to whom was referred with the other Acts passed by legislature of the Province of British Columbia in the 37th year of Her Majesty's reign the following Act, which was ascented to by the Lieutenant-Governor on the 2nd of March, 1874."

Et cetera. And they adopt the recommendation of the Minister of Justice. And there is the following report, one of which -- well, the report is that of Mr. Bernard as seen -- as is apparent from page 52, the last page, and Mr. Fornier simply adds the words "I concur". So the undersigned, who is reporting, is that of Bernard's report. And my lord, the -- the basic reason for recommending disallowance is that adequate measures are not taken to protect the interests of the native peoples. And Mr. -- this came at a time when there was a dispute between British Columbia and the Dominion over reserve allocation.

1 And I say that as far as I'm aware, this is the first
2 time that Mr. -- that anybody has suggested that the
3 Royal Proclamation has an application to British
4 Columbia.
5 Now, this report became, of course, public
6 knowledge, and it became public knowledge right away,
7 because there is annually a report printed of
8 Provincial Acts which have been disallowed and the
9 reasons; therefore, it became public knowledge. It
10 was widely relied upon by the Indians and their
11 advisers. And by 1913 the Nishga, in their petition,
12 relied solely upon the Royal Proclamation.
13 Now, Mr. Bernard had been the Indian Department
14 solicitor in the pre-Confederation Province of Canada.
15 And I say as such he provided the Executive Council of
16 that province with a long report on the validity of a
17 lease granted by Indian chiefs in 1778. His
18 conclusion of invalidity was based in part on the fact
19 that the lease did not conform to the surrender
20 provisions of the Royal Proclamation. Now, he was
21 also of the view that the Quebec Act 1774 repealed the
22 Royal Proclamation in only a limited sense, and, my
23 lord, I should say that there is -- there is an
24 academic dispute, if I may put it that way, some say
25 the revocation of the Royal Proclamation in Quebec
26 extended over to government and the administration of
27 justice. I say that whatever may be the case, it was
28 treated in St. Catherines' Milling as extending to the
29 Royal Proclamation. Bernard was also of the view that
30 the Quebec Act -- well, I've read that. Although the
31 lease was considered invalid, the Indian title
32 subsisted until cession. That was his conclusion.
33 Now, his report, which the Plaintiffs put in
34 evidence, is found under tab 8. I think it was one of
35 Mr. Morrison's exhibits. So Mr. Bernard was a person
36 who, if I may say so, was steeped in the Royal
37 Proclamation and its application in what, in my
38 submission, was the only area in Canada in which the
39 rights granted under the Hunting Reserve provisions
40 subsisted after 1774.
41 Now, I submit, my lord, in paragraph 5, that no
42 foundation exists in fact or law for concluding that
43 the Royal Proclamation applies to British Columbia.
44 The suggestion in 1874 -- now, I just want to check
45 that year, my lord, just if I may. I think -- yes, I
46 think Mr. Bernard's report was '75, so if your
47 lordship could change that. The suggestion in 1875

that it might apply by a Dominion official whose background was clearly in Proclamation country -- whether directly or through legislation -- does not occur until 12 years after Confederation. It comes when the Province and the Dominion were engaged in a serious dispute over reserve land allocations. How little Bernard himself regarded the proposition is indicated by the fact that virtually identical B.C. legislation was allowed to operate in the next year, 1875. The sole difference was the agreement of the governments, the two governments, to set up the Indian Reserve Commission, a body which did not deal with title. If the Royal Proclamation applied in 1875, it applied no less than in respect of the later legislation of that year.

My lord, that constitutes my answer to your lordship's question. In my submission, your lordship is free to make whatever use of the -- of the aides memoire which are attached to my submission and which are tabs 1, 2, 3, 4, and 6.

THE COURT: Mr. Goldie, what do you say about the next paragraph? Well, sorry, you didn't read it, but after quoting I think from the Proclamation on page 50 of your tab 7 --

MR. GOLDIE: Yes.

THE COURT: Mr. Bernard says:

> "It's not necessary to...(read in)...the term of that policy has been followed to the present time except in the British Columbia."

MR. GOLDIE: Well, he was wrong, my lord, just simply factually wrong. There was nothing in the old Province of Quebec, there's nothing in the Province of Nova Scotia, nothing in the Province of New Brunswick, nothing in the Province of Newfoundland.

THE COURT: Nothing?

MR. GOLDIE: Of what he's talking about.

THE COURT: Nothing -- no acquisition of Indian territorial rights?

MR. GOLDIE: That's correct.

THE COURT: Well, the treaties in Ontario were under the acquisition.

MR. GOLDIE: That's west of the Quebec boundary.

THE COURT: I see.

MR. GOLDIE: As Mr. Mackenzie said, he said there are no treaties of surrender, or more accurately, treaties of

significance, not surrender, treaties of cession, east of about the 80th parallel, which, roughly speaking, is the Quebec-Ontario boundary. That statement by Mr. Bernard, of course, has been picked up and has been repeated ever since as if British Columbia in some strange way was a unique animal. The very -- the Dominion itself west of the Rockies didn't acquire lands in the Yukon by treaties of cession. It wasn't unique to British Columbia, it was what happened west of the Rockies.

THE COURT: You say there were no treaties east of --

MR. GOLDIE: The Quebec-Ontario boundary.

THE COURT: That is Newfoundland, Laborador, Quebec, Rupert's Land, and --

MR. GOLDIE: The Maritime --

THE COURT: The Maritimes.

MR. GOLDIE: Yes. Nova Scotia, New Brunswick, Prince Edward Island.

THE COURT: Yes, all right. Thank you.

MR. GOLDIE: Your lordship may recall that I asked Dr. Lane if she could produce any treaties in what is today Canada, west of Ontario, and she was unable to.

THE COURT: And you say that need for treaties in -- west of the Quebec-Ontario border arose because of the Royal Proclamation?

MR. GOLDIE: It arose in that remnant of the post-1774 Colony of Quebec, and the boundary of that Colony was a straight line -- or I'm sorry -- a line from the junction of the Ohio and the Mississippi to the point where it intersected with Rupert's Land. And I say the rights in that area was, roughly speaking, lay west of the Ontario-Quebec boundary and east of the -- what was determined to be the boundary between Manitoba and Ontario. I say those rights arose by reason of the savings clause in the Quebec Act of 1774 in favour of people who had been there whose ancestors had been there in 1763.

THE COURT: Whose ancestors were in place.

MR. GOLDIE: In the Hunting Reserve, and who were the beneficiaries of the Hunting Reserve.

THE COURT: And they were in place in the Hunting Reserve in or before 1763?

MR. GOLDIE: Yes, that's right. As Lord Watson said of the people who made the surrender in 1873, he put it:

> "The territory in dispute has been in Indian occupation since 1763. No change since the

1 year 1763 in the character of the interest
2 which Indian inhabitants had in the land is
3 surrendered by the treaty."
4
5 THE COURT: But what about all the treaties on the Prairies?
6 MR. GOLDIE: Those were made, my lord, and I will be coming to
7 this in the counter-claim, as a result of the
8 surrender of Rupert's Land to the Imperial Government
9 and the union with Canada of Rupert's Land and the
10 northwestern territories. And I will be dealing with
11 that on -- hopefully on Monday.
12 THE COURT: All right.
13 MR. GOLDIE: My lord, under tab Roman IX of this volume is my
14 submission with respect to another question that your
15 lordship put, and the question is found under tab
16 IX-2, when your lordship said to Mr. Willms:
17
18 "I have been considering his argument last week,
19 that it was never British colonial policy to
20 recognize aboriginal rights outside village
21 sites and cultivated fields that he referred to
22 the Select Committee of the House of Commons
23 relating to the New Zealand question, he cited
24 some Privy Council authorities. And I'd like
25 to have his assistance on this specific
26 question of whether that view is consistent or
27 inconsistent with the events that Mr. Jackson
28 described relating to either British colonial
29 activity policy or at least activities in the
30 North American colonies prior to the Royal
31 Proclamation."
32
33 That is what I propose addressing at this point,
34 my lord. And I'm at page 1 of the document headed
35 "Addendum" under tab Roman IX.
36 I say the Province has submitted that the common
37 law of England recognizes no interest in lands other
38 than one derived from the Crown. And I quote Chief
39 Justice Robinson in the Ontario 1852 case, where his
40 lordship said:
41
42 "We cannot recognize any peculiar law of real
43 property applying to the Indians - the common
44 law is not part savage and part civilized."
45
46 And then I refer to the question your lordship raised,
47 and then I say on page 2 "Pre-1763". Now, what I am

1 endeavouring to do here is to define further what in
2 my submission was the law at or around the Royal
3 Proclamation of 1763, and I make reference here to
4 Chalmers' treatise published in 1780 entitled
5 "Political Annals of the Present United Colonies, From
6 Their Settlement to the Peace of 1763". And the
7 learned author suggests that the interest of James I
8 in planting colonies in North America probably
9 emulated that of the Spanish Crown "to share in the
10 gold and silver which were expected from mines".
11 Henry Wheaton's own "Elements of International Law",
12 published in 1836 when he was the resident minister
13 from the United States of America to the Court of
14 Berlin states at pages 138 to 139:
15
16 "The title of almost all the nations of Europe
17 to the territory now possessed by them in that
18 quarter of the world" --
19
20 Which was the Americas:
21
22 "-- was originally derived from conquest, which
23 has been subsequently confirmed by
24 international compacts to which all European
25 states have successively become parties.
26 The Spaniards and Portuguese took the lead
27 among the nations of Europe...
28 the heathen nations of the other quarters of
29 the globe were the lawful spoil and prey of
30 their civilized conquerors, and as between the
31 Christian powers themselves, Sovereign Pontiff
32 was the supreme arbiter of conflicting claims.
33 Hence the famous Bill issued by Pope Alexander
34 VI in 1493...Independent of this --"
35
36 Your lordship will appreciate that this is a
37 condensation, and the document itself is found under
38 tab IX-4. Mr. Wheaton says:
39
40 "Independent of this papal grant, the right of
41 prior discovery was the foundation upon which
42 the different European nations, by whom
43 conquests and settlements were successively
44 made on the American continent, rested their
45 respective claims exclusive use of each
46 nation....On the other hand, Great Britain,
47 France, and Holland disregarded the pretended

> authority of the papalcy, and pushed their discoveries...But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions....In the same manner the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to 'discover such remote heathen and barbarous lands, countries, and territories, not actually possessed of any Christian prince or people, and to hold, occupy and enjoy the same with all their commodoties, jurisdiction and royalties'. It thus became a maxim of policy and of law that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives."

Now, your lordship will see there a hint of the contrast between the alleged religious qualification of the Christian princes and the alleged disqualification of the native peoples.

I say in paragraph 4 the early basis in English law for disregarding native title, in my submission, was stated in Calvin's Case of 1608, where Sir Edward Coke, in reporting the views of the Judges of England, summarized the character in law a person may assume: Alien born or subject born? If the former: Alien friend or alien enemy? If the latter, whether temporary or perpetual? And at page 397, he said this:

> "All infidels are in law...perpetual enemies..for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility."

Now, that, I say, is what appears to be a rationalization for the proposition that the interests of the inhabitants can be disregarded. And I note the juxtaposition and date. The second or definitive Charter of the Colony of Virginia was granted by James I in 1609, and in 1624 it became a Royal Colony instead of a Charter Colony.

Now, Chalmers, referring once again to the view in 1780 of the pre-1763 period, said at page 676 of tab

3, my lord, which has the title page, and the part I'm quoting from is at page 676, and I'm starting on the second paragraph:

> "The American emigrants settled in a region which was regarded by them as a territory of the English empire, because it had been first discovered and first occupied by virtue Of commissions under the great seal of England. The validity of this title had been recognized by the approbation and practise of the European world. And it had been confirmed by the law of nations which sternly disregarded the possession of the aborigines, because they had not been admitted into the society of nations."

And at page 677:

> "It instantly became a fundamental principle of Colonial jurisprudence, that, in order to form a valid title to any portion of the general dominion it was necessary to show a grant either immediately or directly from English monarchs. And this suggests the principal cause of the general solicitude to procure patents from the sovereigns of England at every period, because in them the whole was supposed to be invested."

Now, he's speaking about the situation prior to 1763, and then noted how the common law of England was adapted to Colonial purposes. And this is at page 677:

> "The jurisprudence of England became that of the colonies, as far as was applicable to the situation at which they had newly arrived; because they were Englishmen, residing within a distant territory of the empire. And we have beheld the wisest of the emigrants, who had been born within the realm, whose affections were yet warm, enforcing, by positive acts this salutory principle of the common law. When the legislative energy of these declarations had ceased, even Colonial lawyers were often perplexed to decide what part of the laws of England extended to the colonies, what remained

> a dead letter, what judicatories they should apply to for a solution of their difficulties. But have not English lawyers often differed in opinion with regard to a precept of the common law; have they not constantly appealed to the courts of justice, because these form the great depository of the laws? In the same manner the provincial tribunals decided, in the first instance, which of the laws were suitable to their circumstances; which were, therefore, to be considered as a rule of action: And their former decisions and daily practice are authoritative evidence by which all are concluded. Hence, we may infer, in different provinces, a different rule may prevail."

And that, as I say, is taken from Chalmers' under tab 3.

And then I make reference to Blackstone under tab 6, the Laws of England. In 1765 Blackstone, in his "Commentaries On The Laws Of England", Book I at page 104 to 105, treated a settled law that plantations or colonies are either such:

> "-- where the lands are claimed by right of occupancy only, by finding them deserted and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been gained by conquest or ceded to us by treaty."

Both these, he stated, are founded upon the law of nature, or at least upon that of nations.

The difference between the two species of colonies lay in the automatic introduction of English law in the case of settled colonies, while in conquered or ceded colonies, the law there remained that of the conquered sovereign until supplanted by the King. He stated that the American plantations were principally of the latter sort:

> "...being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties."

Now, the view taken by colonial lawyers is

illustrated by "Councells Opinions Concerning Colonel Nicholls Pattent and Indian Purchases" given in 1675. The second question put to Councell was whether a grant from the Indians would be sufficient to any planter without a grant from the King or his assigns. In answer it was stated by the eight signatories to the opinion, and I'm not going to try and put in all the "ye's.

THE COURT: Yes.

MR. GOLDIE:

> "by the Law of Nations if any people make Discovery of any Country of Barbarians the Prince of the people who make the Discovery have the right of the Soyle and Government of the place and no people can plant there without the concept of the Prince."

Now, if I may say so, that is -- that echoes Calvin's Case.

> "Though it has been and still is the Usual Practice of all Proprietors to give their Indians some Recompence for their Lands and So Seems to Purchase it of them yet it is not done for want of Sufficient Title from the King... but out of Prudence and Christian Charity Least otherwise the Indians might have destroyed the first planters...or refuse all Commerce and Conversations with the planters and thereby all hopes of Converting them to the Christian faith would be Lost in this the Common Law of England and the Civil Law doth agree...and therefore tho some Planters have purchased from the Indians yett having done So without the Consent of the Proprietors for the time being the title is good against the Indians but not against the Proprietor without a Confirmation from them upon the usual terms of Other Plantations."

This opinion is found in "Documents Relating to the Colonial History of the State of New York", which is -- the extract is found under tab 7. And it is the opinion quoted by Chancellor Boyd in his judgment in Regina versus St. Catharine's Milling at page 208.

And writing in 1683, a Colonial lawyer, William Fitzhugh of Virginia stated:

1 "Now as to the comparing of us to Ireland and
2 therefore concluding because Ireland is not
3 bound by any Act of Parliament made in England,
4 unless particularly named, or generally
5 included, we are not neither. There is great
6 difference between Ireland and us, they having
7 the Kingdom of Conquered Christians, we of
8 Conquered infidels. They were to be governed
9 by their antiant municipal laws, till an
10 alteration made amongst them, ours if we had
11 any were ipso fact abrogated, because not only
12 against Christianity, but against the law of
13 God and nature."
14
15 This is found in the treatise "William Fitzhugh and
16 His Chesapeake World", et cetera.
17 Paragraph 10. In the Plaintiffs' Exhibit 1244-11
18 there's an extract of the "Remonstrance of the
19 Ambassadors of the States General to King Charles I".
20 The complete document, including the answer to the
21 Remonstrance of King Charles -- that's the answer to
22 the Remonstrance of the Dutch Ambassadors on behalf of
23 King Charles, is found in "Documents Relative to the
24 Colonial History of the State of New York Procured In
25 Holland, England and France", under tab 9. The Dutch
26 Ambassadors were protesting the seizure of a vessel
27 belonging to a Dutch trading company which had been
28 forced into Plymouth, England, by reason of weather
29 and was there seized because it had been trading in
30 territory with the Plantation of Virgina, which at
31 that time, my lord, extended a very long way north,
32 and in fact, the trading took place at Manhattan. In
33 answer to the assertion that Holland had for a long
34 time traded in the River Manathans, which I understand
35 is Manhattan..."having purchased from the native
36 inhabitants and paid for a certain island called also
37 Manathans, where they remain surrounded on all sides
38 by the natives of the country", the English response
39 was:
40
41 "It is denied that the Indians were possessores
42 bonae fidei of those countries, so as to be
43 able to dispose of them either by sale or by
44 donation, their residences being unsettled or
45 uncertain, and only being in common."
46
47 Now, my understanding of the Latin phrase is imports

one who has a title sufficient to transfer property if unaware of any defects.

In the next paragraph of the Answer to the Remonstrance the authors say:

> "The right of His Majesty's subjects have in that country, is justified by first discovery, occupation and the possession which they have taken thereof, and by the concessions and letters patent they have had from our Sovereigns, who were, for the above reasons, the true and legitimate proprietors thereof in those parts."

And the outcome is recorded in the Calendar of State Papers, which doesn't concern us.

So I say in summary, as to the period up to 1763: First, the laws of England recognized no title or interest other than that of the Sovereign or derived from the Sovereign; (b), Religious grounds were advanced in the 17th century as justification for ignoring claims of indigenous peoples; (c), payments made to indigenous peoples as "Recompence" were made for reasons of prudence -- and I characterize prudence as encompassing fear, seeking an ally, et cetera -- or Christian charity, which appears to, and I'm quoting from counsel's opinion, which appears to include encouragement of trade, et cetera, as well as -- as well as proselytizing; (d) occupation perfected by possession was good title on the part of the Sovereign in international law as well as in municipal law as against prior inhabitants. There was no English acknowledgement of a legal interest which bound the Crown unless so acknowledged by the Crown. This is consistent with the views expressed by Vattel, probably the most authoritative commentator on matters of international law in England prior to 1763. He said:

> "There is another celebrated question to which the discovery of the New World has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country in which there are none but erattic nations, whose scanty population is incapable of occupying the whole? We have already observed, in establishing the obligation to

1 cultivate the earth, that these nations cannot
2 exclusively appropriate to themselves more land
3 than they have occasion for or more than they
4 are able to settle and cultivate. Their
5 unsettled habitation in those immense regions,
6 cannot be accounted a true and legal
7 possession, and the people of Europe...
8 finding land of which the savages stood in no
9 particular need, and of which they made no
10 actual and constant use, were lawfully entitled
11 to take the possession of it and settle it with
12 colonies."
13
14 My lord, that was quoted by the Commissioners of 1844.
15 I included a part of their report, which was one of
16 the Plaintiffs' exhibits, in my introduction.
17 THE COURT: Which Commissioners are those?
18 MR. GOLDIE: These were Commissioners appointed to investigate
19 the payment of moneys in Crown lands in Upper Canada.
20 THE COURT: I think it's quoted by the Supreme Court of Canada
21 in St. Catharine's Milling.
22 MR. GOLDIE: Vatell -- Chancellor Boyd quoted it.
23 THE COURT: Yes, all right, Chancellor Boyd, all right.
24 MR. GOLDIE: Yes. Now, Vattel, who died in 1767, nevertheless
25 praised the moderation of the English Puritans who
26 purchased interests from the Indians notwithstanding
27 their Charter. And tab 10 is the extract from the
28 1844 report quoting Vattel, and that part of that is
29 quoted by Chancellor Boyd.
30 Now, subsequent to 1763 --
31 THE COURT: I wonder if we shouldn't adjourn, Mr. Goldie. How
32 are we getting along?
33 MR. GOLDIE: Well, I would like to finish this, my lord, and
34 that will really complete this part.
35 THE COURT: How long do you think it will take you to finish?
36 MR. GOLDIE: I would think about another, oh, 15 minutes.
37 THE COURT: Oh, all right. Miss Sigurdson can last, I think.
38 All right, we'll stay then.
39 MR. GOLDIE: I'm going to deal fairly quickly with the post-1763
40 part.
41 THE COURT: All right.
42 MR. GOLDIE: Wheaton, in his 1836 treatise, referred to above,
43 does not indicate any change subsequent to the
44 American Revolution of legal principles from those
45 which he described as applying to discovery and
46 occupation of European nations in North America.
47 Kent's Commentaries, my lord, are referred to in a

number of prior authorities, one of them being St. Catharine's Milling, first published in 1826. The 12th Edition in 1873 was edited by Oliver Wendell Holmes, and he states the fundamental principle in the English law that the King was the original proprietor was said to be one that had been adopted in the United States and applied to republican governments. And he said:

> "In New York it was held to be settled rule that the courts could not take notice of any title to land not derived from our own state or colonial government. This was also a fundamental principle in the Colonial jurisprudence. All titles to land passed to individuals from the Crown, through the colonial corporations, and the colonial or proprietory authorities. Even with respect to the Indian reservation lands, of which they still retain the occupancy, the validity of a patent has not hitherto been permitted to be drawn in question in a suit between citizens of the state, under the pretext that the Indian right and title as original lords of the soil had not been extinguished."

And the section beginning at page 512 headed "Right of Colonization" Kent speaks of the entire Colonial period and after stating that as far as Indian nations had formed themselves into regular organized governments within reasonable and definite limits necessary for the hunter state there would seem also to be no ground to deny the absolute nature of their territorial and political rights. He goes on to say:

> "But beyond these points are colonial ancestors were not willing to go. They seem to have deemed it to be unreasonable, and a perversion of the duties and design of the human race, to bar the Europeans."

Et cetera. Now, he cites Vattel, who did not place much value in the territorial rights of erratic races or people, et cetera. He asserts at page 515 that in point of fact the colonists were not satisfied, nor did they deem it expedient to settle the country without the consent of the aborigines, procured by

fair purchase, under the sanction of the civil authorities. There is no doubt that Kent regarded this practice as invariable, but he makes no assertion that it was a legal requirement either in the pre-revolutionary period or in the post-revolutionary period except by statute.

He quotes Chalmers for the proposition that "the practice of the European world had constituted a law of nations which sternly disregarded the possession of the aborigines, because they had not been permitted into the society of nations". He was at pains to defend the Indian practice of the American Colonies both before and after the Revolution.

THE COURT: What do you call the Indian practice?

MR. GOLDIE: Of purchase.

THE COURT: Oh.

MR. GOLDIE: It is -- it's very neatly summed up by the Counsell's opinion of 1675. The only law was the title from the King that prudence of Christian charity dictated that treaties should be entered into, and, my lord, I have submitted in my main summary that you take all of the treaties collected by my friends and they can all be -- come under that heading: Prudence, to mark the end of a war, alliances; they all mark the fact that these were things which either prudence, or I put it, at that time, commercial development or lands speculation dictated.

Then I refer to Regina and Symonds, decided by the Supreme Court of New Zealand in 1847, and Kent's Commentaries are cited in the judgments of both Chief Justice Martin and Mr. Justice Chapman. It might be said that the two judges drew opposite conclusions. The latter believed that the practice of extinguishing native titles by fair purchase was now a part of the law of the land, while Chief Justice Martin said:

> "Now the general law of England, or rather of the British Colonial Empire, in respect of the acquisition of lands, such as those which are comprised within the claimant's purchase and the defendant's grant, has from very early times said as follows: Wherever, in any country to which (as between England and the other European nations) England had acquired a prior title by discovery or otherwise, there were found land lying waste and unoccupied and appropriated by subjects of the British Crown,

> it was holden that such subjects did not and could not thereby acquire any legal title to the soils against the Crown. And this rule was understood to apply equally, whether the country is partially peopled or wholly unpeopled, and whether the settlers entered or obtained possession with or without the consent of the original inhabitants. Accordingly Colonial titles have uniformly rested upon grants from the Crown. This was the case in the oldest British colonies in America: And it is notorious that the same rule has been acted upon without deviation or exception in the more recent colonization of Australia."

This case was decided some seven years after the Treaty of Waitangi and the decision has been taken by the Colonial Secretary -- and the decision had been taken by the Colonial Secretary in 1846 that the Crown was in honour bound to accept the extreme view of its effect.

Now, when I say that, I mean that the Colonial Secretary and the Select Committee both believed that the interpretation which had been given the Treaty of Waitangi went beyond what -- went beyond what was called for, but they considered themselves to be honour bound to accept it.

In law, the views of the two judges in Symonds can be reconciled with colonial law only because of the view taken of the Treaty of Waitangi that it made no distinction between waste lands and those actually occupied by the native inhabitants. It was the failure to make this distinction that drew the criticism of Lord Grey in his dispatch to the Governor of New Zealand in 1846.

Chapman refers to judgments of Colonial courts. One which was referred to in the address of Sir George Gipps, G-i-p-p-s, quoted with approval in the report of the Select Committee, was Martin versus Johnson, a judgment of the Supreme Court of Louisiana, where Judge Derbigny stated, and I set out the quote:

> "The King of Spain, in taking possession of his dominions in America, disregarded the rights of the original lords of the soil, and declared himself the sovereign of the country. As some compensation, however, for that usurpation, he

> assigned to the former proprietors such extent of land as they wanted; and particularly took care to secure to them, by law, such tracts as he conceived were sufficient for the purposes of cultivation and which pasturage of their cattle."

From the same jurisdiction is the case of Breaux versus Jones, cited by Mr. Justice Taschereau in St. Catharine's Milling, which qualified Martin versus Johnson and recognized only a right of actual occupancy of village sites. Breaux and Jones cited Johnson and M'Intosh.

And then it has already been submitted that there is language in respect of actual occupancy which is consistent with Breaux and Jones, and I set that out, the right to grant the soil while yet in the possession of the natives.

And the top of the page:

> "So far as respect of the authority of the Crown, no distinction was taken between vacant lands occupied by Indians."

Then I refer to waste lands and to the discussion of waste lands in Milirrupum, where one judicial definition is there quoted, as I quote:

> "In law it has for a long time meant 'lands of the Crown which have not been alienated."

And I submit that the invariable practice relied upon by Mr. Justice Chapman in Regina versus Symonds and the Plaintiffs in the case at bar was not invariable in the pre-revolution colonies of Nova Scotia and Newfoundland, nor was it regarded as having the force of law in any colony prior to 1763. The theory that that practice ripened into a rule of law subsequent to 1763 was rejected by the Judicial Committee in St. Catharine's Milling. That theory, my lord, that quiet practice that ripened into the rule of law, was that adopted by Mr. Justice Strong in the Supreme Court of Canada and was that which counsel for Canada argued for in the Judicial Committee.

The treaties and agreements in the pre-revolutionary American colonies cited by the Plaintiffs arose out of a variety of circumstances,

many of which attest to the wisdom of treating with a powerful neighbour whose land is desired. But none of these derogate from the principle stated in United States and Santa Fe Railroad:

> "As stated...in Johnson v. M'Intosh...'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts."

The Plaintiffs' attempts to elevate practice into a law which is binding on the Crown is negated by Sparrow in the Supreme Court of Canada, where it is stated:

> "...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown...."

It is submitted the Select Committee on New Zealand in 1844 correctly concluded, consistently with principles of Colonial law, that only lands actually occupied by native peoples were excepted from the general description of waste lands. This was the interest that was protected by Douglas. The need to purchase this interest never arose.

That concludes my submission on that, my lord.

THE COURT: All right. And how is your schedule now, Mr. Goldie?

MR. GOLDIE: Well, I'm anticipating that with the two days which I have on Monday and Tuesday I can complete the counter-claim and make my concluding submission.

THE COURT: All right. I can't speak beyond Tuesday, but I'm presently engaged both Monday and Tuesday evening, so you weren't planning on any evening sittings?

MR. GOLDIE: No.

THE COURT: All right, thank you. Then we'll adjourn until 9:30 Monday. Thank you.

THE REGISTRAR: Order in court. Court stands adjourned until 9:30 Monday morning.

(PROCEEDINGS ADJOURNED)

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

Graham D. Parker
Official Reporter
United Reporting Service Ltd.