SMITHERS, B.C.
APRIL 25, 1990

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

THE REGISTRAR: Order in court. Supreme Court of British Columbia, this 25th day of April, 1990. Delgamuukw versus Her Majesty the Queen at bar, my lord.

THE COURT: Thank you. Mr. Grant, before you start, I would like to make one last attempt to make sure that we are understanding each other and, hopefully, that I might understand the fullness of your submissions.

I start with the proposition that your clients have exercised their rights as citizens of Canada and they have brought their claim in this court and have sought to have their rights determined according to Canadian law. It seems to me that the case, as presently being advanced, constitutes a clear clash or conflict between law and culture, and we have to try and accommodate those considerations as best we can, but that we must always remain within the law.

It seems to me that -- and please sit down if you wish, Mr. Grant. I won't be long but I'm going to soliloquize here for a moment.

It seems to me that as long as the potential exists for any Gitksan or Wet'suwet'en person to opt out of the authority or jurisdiction of the chiefs -- and by that I mean opt out in the sense that he cannot be compelled to accept their authority if he chooses not to -- then it follows from that that the authority and jurisdiction of the chiefs, however well established it may be and however well recognized it may be within the general aboriginal community, must be regarded in law as voluntary or consensual.

Now if this is so, then it seems to me that -- at least as presently advised -- that this court could not make any order which would impose a cultural authority or a jurisdiction upon such persons. Particularly, but without limiting the generality of what I've just said, but particularly in their absence in this action as defendants, and in the absence of specific pleadings and, for example, guardians appointed to represent infants and such other legal niceties that Canadian law insists upon.

And, of course, without presuming to pass on the question, any such action would have to withstand the Charter scrutiny. Could a court make an order that

imposes an authority or a jurisdiction of a chief upon an aboriginal person against his will or against the possibility of it being against his will? And in the face of that, it seems to me that evidence of the jurisdiction or authority of the chiefs as understood within the culture, can only be relevant to issues relating, as I said last night, to the identity of the plaintiffs as proper plaintiffs, or as evidence relating to the social organization of the Gitksan and Wet'suwet'en at the time of contact or at the time of the Crown's assertion of sovereignty or at whatever relevant date or time is fixed. Or, specifically, to issues which relate -- which are related directly to land.

Now, that's the way I understand the pleadings in the course of the action and the permissible extent of the claim that's being advanced. And while I am perfectly happy to have your submissions on that separately from your argument, and I would be glad to hear from you now or at some other time if you think I have unduly confined the issues. It's my present view that I should hear what you have prepared for your argument in relation to what I might call -- and I don't say this critically -- the minutiae of the chiefs' authority and jurisdiction or the social organization of the Gitksan and Wet'suwet'en. But that as presently advised and subject to being persuaded otherwise or reaching a different conclusion upon giving the matter the careful consideration I shall attempt at the end of argument, I -- I will be receiving your argument within that general framework.

And I pass that along to you for whatever benefit or assistance it may be to you in the presentation of your -- of your arguments. I don't really expect you to respond to that at this moment unless you wish to do so. And of course in -- ultimately, I hope that I might hear from the defendants, if they disagree with any of what I have just said.

MR. GRANT: If I could just have a moment?

THE COURT: Yes, certainly.

MR. GRANT: I want to say, my lord, that I appreciate your elucidation of that perception, and I think it's of assistance so that -- to try to meet the issue which I've tried to grapple with last evening. And it was our intent after questions you raised yesterday afternoon, since the commencement, actually, of the issue -- the area of argument relating to jurisdiction

and the system of authority, those series of questions you've raised which all -- which certainly are focused in this -- in what you've stated now.

And we intend to come back and -- to this. But I appreciate -- I'm sure you appreciate we would like to have some time to consider these comments.

THE COURT: Yes, certainly.

MR. GRANT: And having said that, in this respect in this area that I'm now focusing on of international relations, the authority of the chiefs that I am arguing are demonstrated is here probably covers a number of the points that you've raised in terms of the nature of a social organization. But the focus of it is that this authority relates to issues which are related to the land, and that's the intent of this evidence and this area of argument. And that the issues related to the land here, this argument -- or this evidence will demonstrate that it is not a -- that there is a context within which now, this morning, the Wet'suwet'en exercise authority with respect to the land.

I am on page 215 and I'll proceed with my argument from there, my lord.

THE COURT: Thank you.

MR. GRANT: I intend to complete this section and then Ms. Mandell will return to the section that she left off last evening to commence a new section.

THE COURT: Thank you.

MR. GRANT: Firstly, my lord, I am dealing here now with the Wet'suwet'en and their relations with other nations. And by "other nations" I mean other aboriginal peoples. And of course, of particular relevance, is their neighbours.

The All Clans Feast, and there were two of them, one of which I've referred to in the context of the Gitksan and David Gunanoot in Burns Lake, but this is the one in 1986 at Moricetown. And the -- the purpose of the feast was explained by Gisdaywa in his evidence. He said:

> It was our traditional way --

This was in cross-examination by Mr. Goldie:

> It was our traditional way of solving matters like that, by a gathering where all Wet'suwet'en were present, and there was

witnesses to everything that happened there and that we had already lost quite a few of our rights and by gathering there, we weren't there to challenge anyone, but to inform them that there was a little misunderstanding in the boundaries and that we knew that it wasn't -- it wasn't done by maybe some young people without consultation.

I think that should be, "it was done by some young people without consultation," my lord. That was the context.

THE COURT: Yes.

MR. GRANT:

Whatever we did was always done by the chiefs and the elders.

[Now] there was a dispute about the boundaries and there's had been talk about it, but not at a gathering like that so they (the Carrier Sekani) were invited down and were told...where our traditional boundaries were...by each Wet'suwet'en chief.

Now once again, if I may pause, the system of authority that's demonstrated by this -- and of course these boundaries -- and I go on to describe or refer to what some chiefs said. And that's not to prove, of course, the truth of the boundaries, because they've been proven in the evidence independently, we say. But the process -- and I say "process" cautiously because I think that word is a general word. The system, the -- the authority of the chiefs to make the decisions and Mr. Joseph, Gisdaywa, was making that clear in his evidence, that that was how it was dealt with, and that's what was consistent with the Wet'suwet'en system.

Now, one year later there was an All Clans Feast held in Burns Lake hosted by the Carrier-Sekani chiefs, and once again, Gisdaywa attended. There were about 400 people present at this feast. And the purpose of this feast was to clarify the boundaries on the eastern boundary of the Wet'suwet'en. And actually, I should focus -- as I recall, it would be to focus on the area that we've all heard of at Chapman Lake area, up in -- up in this area here and then down in this area here, towards Burns Lake, my

lord.

Now, Alfred Joseph explained that at the first feast in Moricetown it was difficult for the Wet'suwet'en chiefs because they were dealing with elected officials from the Carrier-Sekani rather than the Carrier-Sekani hereditary chiefs.

In other words, my lord, what's happened and what's demonstrated in the evidence, is that the band councillors or chief councillors attended at Moricetown rather than the hereditary chiefs of the Carrier-Sekani.

And Ms. Wilson-Kenni explained two systems in operation at the feast:

> And the Gitksan and Wet'suwet'en were using the system of the clans and the Houses and the ownership of the territories through the clans and the Houses, but the Carrier Sekani were using the DIA boundaries, you know, and how the districts were, and a lot of the speakers were chief counsellors for bands, that's why I -- that's why I came to that conclusion that there's two different systems there. And there were a few that realized what we were saying and they realized that some of them were members of Houses and Wet'suwet'en, for instance.

She stated that the apparent confusion over the boundaries -- this was her evidence. I say it's of the opinion, but she stated that the apparent confusion over the boundaries was as a result of the band system being superimposed on the hereditary chiefs system. For example, John Thomas, the Chief Councillor of Neetah Buhn, is actually a Wet'suwet'en person from the House of Goohlaht. He resides at Nee-teh Ben within the Goohlaht territory. That's -- there is a typo there, my lord. This -- there should be a period after "territory". This is entirely consistent with Wet'suwet'en law.

Now, if I may pause here, my lord. This certainly is an issue between the plaintiffs and the provincial defendants. The provincial defendants, when they talk about village and when Mr. Willms says yesterday, bands or whatever, they are focusing your lordship on the Indian Act system of band membership as the focus. Once you get into that, as Ms.

Wilson-Kenni said, you have the two different systems in clash, in conflict. It's not, of course, necessary, in this action, for you to -- and it's not even sought, for you to make any order that the Band membership under the Indian Act doesn't necessarily -- doesn't apply to the plaintiffs. That's not the issue. The issue is that the plaintiffs are not band members, the plaintiffs are not status Indians or non-status Indians. It's none of that. They are the members of the Houses and it's the only way the formulation applies.

When that's applied, then it becomes clear who John Thomas is, who Rita George is, who Sophie Ogden is. Sophie Ogden, you remember, much was made of her from the Broman Lake Band. These are people who are Gitksan or Wet'suwet'en people. In the case of Sophie Ogden, as I recall, I think she is -- well, Rita George is adopted into Gisdaywa's House and Sophie Ogden in Spookw's House. These are people who have -- are represented in this action.

Now you may recall, my lord, of course you viewed this area down south, the Cheslatta area. You will recall though that the evidence of Mr. McIntyre and Mr. Shelford, two defence witnesses, that the Cheslatta people were moved in the early 1950's from their traditional territory around Cheslatta Lake up into the territory of Goohlaht among the Wet'suwet'en. And the Cheslatta Reserve as shown on the Indian Act -- the federal map of reserves, the Cheslatta Reserve is nothing more than a whole bunch of district lots spread over a wide, wide area because of this move. In effect, a diaspora, I would say.

A certain amount of the confusion with respect to the Indian Act system as opposed to the hereditary chief system, was created by the fact that the Cheslatta were given farm lands on widely separated pieces of land within the Goohlaht territory. The creation of this diaspora for the Cheslatta within the Wet'suwet'en territory has led to confusion among Indian agents and those among the Cheslatta and Nuu'tsenii who are not familiar with the hereditary system. And I think that Mr. McIntyre, the Indian agent from Burns Lake, was quite open about that, that he saw that confusion in his working. And we are talking here, of course, of these series of reserves in this southern area, my lord. And there is a large number of them, they are all called one reserve but

they are all over the place.

And I believe Mr. McIntyre also led -- gave evidence with respect to the social problems in that area at the time that he was there. And of course the Cheslatta are not parties, they are not Wet'suwet'en.

As Dan Michell explained in his evidence during cross-examination, the confusion over the boundary was a result of the division of Indians Affairs into two administrative districts. Now I focused on one aspect of the confusion, which feeds into the province's argument. The second -- that is the Cheslatta dispersal. The second aspect of it is the -- is the two administrative districts. The Nuu'tsenii chiefs told the Wet'suwet'en that this was not "an overlap" but was as a result of the creation of the Indian Affairs district. So now you see even the Nuu'tsenii chiefs, not just the Wet'suwet'en, stated that. Now that -- all I'm saying there is that is some or all of any reputation but it is not a question of -- it's the fact of what they said, of course.

And here, of course, you have a division which cuts into this area -- it's on the other map, but it cuts into -- here is Babine and you recall it sort of chops this piece out. So this section is in that Prince George section of Indian Affairs, the rest of the Wet'suwet'en is in the Gitksan -- Gitksan-Wet'suwet'en district which now is part of the Terrace district.

Now Dr. Mills, in her opinion report, gave a description of what occurred at the feast. And there was a transcription of the 1986 All Clans Feast in Moricetown from which she took extracts, and that transcript is in evidence. Now, I'm only referring to this in the context of what happened, and as I say, the -- the evidence of what the chiefs said as to their boundaries, of course, isn't put in to prove those boundaries. We've done that independently.

She stated -- she described the seating and you can see in this seating description what she observed, and she was present: that the -- the chiefs sat as chiefs -- as clans in the feast hall. And then Mary George, the late Mary George, she was a chief who died, I believe, after the writ was issued but before evidence was led. And she said -- she explained the relation between the seating of the chiefs and I refer you to that.

And she -- then Tonia Mills goes on and she says:

> All the clans gathered together, then, make up four whole salmon, of which the head chiefs are the inner, richer meat. The Wet'suwet'en do not seat people from different communities separately. The clan members from each of the Wet'suwet'en and Babine and Gitksan and Carrier communities makes up the "whole salmon".

I'm on page 219, my lord.

THE COURT: Yes, 219.

MR. GRANT: Yes. The second paragraph.

And that's what Dr. Mills observed in her attendance at these feasts.

Now, my lord, when one keeps in mind that this feast was specifically to resolve apparent differences over the boundaries of the Wet'suwet'en territories, it's my submission that the treatment of the guests of honour is indicative of a system of diplomacy undertaken by the Wet'suwet'en. And such diplomacy, I say, parallels the diplomacy that you heard Mr. Jackson refer to between the first European settlers and the aboriginal nations on the eastern seaboard. In other words, the aboriginal system is implemented to resolve these issues.

And the description of what happens is set out: The guests were fed. After they were fed, the Wet'suwet'en chiefs hosting it were -- spoke. And in the course of their speeches, they demonstrated ownership and jurisdiction based on the principles within their laws. The speeches also demonstrated the strength of the Wet'suwet'en chiefs to settle matters with their neighbours.

Once again, you see in the recording of the speeches, the -- a practice -- and again, it's not one person, it's a number of chiefs, and the first of them being Gisdaywa, who -- who wears his robe as Dr. Mills said, and it was:

> ...a large frontal bear worked in mother of pearl buttons on a dark blue background trimmed in red.

So he is wearing his regalia which is his authority and which is reflective of his territory. And then he spoke about his territory.

After their speeches, Gisdaywa and Smogelgem talked about the boundaries of their territory. They

verbally walked the assembled nations around the periphery of their territory, naming several landmarks. Alfred Joseph testified about what he said at this feast in his evidence.

Now once again, I'm not suggesting this proves the boundary of Gisdaywa. We've done that in evidence. He was here before the court and cross-examined on it. What this shows is how Gisdaywa and the other Wet'suwet'en chiefs deal with their neighbours, what is the foundation when they are working with their neighbours on the clarification of boundaries. And of course in the face of their neighbours, some of the younger people being confused as to the foundation for the claim.

Now then, I refer you to Dr. Mills' report where Smogelgem spoke. And again, I ask you to refer to that. I'm not going to read that over, but once again, it's demonstrative of how they deal with the protection of their territory, their authority over the territory when dealing with non-Wet'suwet'en people.

On page 222 I refer you to Charles Austin speaking on behalf of the Laksilyu chiefs, and I -- he talked about the succession of the Laksilyu chiefs that held and still hold territory around Burns Lake.

Now my lord, one of the most powerful speakers of the feast was Maxlaxlex, Johnny David. And I'm glad you had the opportunity to see Johnny David who was cross-examined in this court on his affidavit, and of course gave extensive commission evidence.

Doctor -- as Dr. Mills reports, he -- Johnny David, as you may recall, is a very small -- elderly but very small man.

> He donned his robe and then spoke about the people who had spoken before, and how they had been trained by their grandparents in the way of the feasts. He spoke about how Gitdumskanees got the robe and the song that went with the name long ago, and how he had witnessed this.

And then she quotes from the transcript, which is in evidence, as to what he said.

Now, Mr. Rush is going to refer to the territories of the Wet'suwet'en in argument, but of course you may recall that the Gitdumskanees lines concerned, would

be talking about this area, my lord, the Hagwilnegh area that encompasses Burns Lake and actually is the furthest east protrusion.

THE COURT: Not quite.

MR. GRANT: Well, almost. In the Wet'suwet'en area.

THE COURT: Yes, in the Wet'suwet'en area.

MR. GRANT: And then Dan Michell, another witness you saw, spoke on behalf of the Tsayu or Beaver clan, and he had been asked by Kweese, Florence Hall, to speak on their behalf. He spoke about the Tsayu territory at Goosly Lake and the importance of recognizing the Wet'suwet'en system. Again, his speech reflects the way of dealing, training, and long-standing ability to enter into discussions, to enter into diplomacy with other aboriginal peoples.

Now, a number of the Carrier-Sekani chiefs -- I'm on page 234 -- 224, I'm sorry. A number of the Carrier-Sekani chiefs reflected that the Indian government is in the feast hall. And Ed John, the Carrier-Sekani chief stated -- and this is from the transcript although it's cited from Dr. Mills:

> Our chiefs --

That is the Nuu'tsenii.

> -- have said the proper way to settle this is the feast hall. We are committed to work with each other. The potlatch, that's the way we have to settle it. Like Charlie said last summer, he said, "If we want to settle we have to bring the game warden into the feast hall." We don't have to bring the game warden into the feast hall. What we are talking about, kayo, territory, every Chief, you too understand. When you are chief you own that land. Little chief and high chief, you all understand as well as I do. I know too. (In English) We are not talking about the white man's trapline. (In Nutseni) I know what I am talking about: Kayo wadnenee, our peoples' territory. We will call you back in our feast hall, the same way you did today. We will call you back to a feast, a potlatch, in the summer.

THE COURT: Is "potlatch" an Indian word or is it an English word?

MR. GRANT: English.
THE COURT: Is it?
MR. GRANT: A Chinook word, I understand. It was used by the traders, I believe, my lord.
THE COURT: Thank you.
MR. GRANT: And I think in the -- I think it's fair to say that the way it's come to be used, it's a popular word like -- in some senses like Mr. John speaks. But it's come to be used to talk about the coastal potlatching, and Dr. Daly talked about the distinction between that and the feasting, although there is a lot of similarities.
THE COURT: Is it an offensive word?
MR. GRANT: No, I don't think so. But it's a word not used by the Gitksan or the Wet'suwet'en generally. They use the word "feast". Of course they use the word in their own language, but it's translated as "feast".

And I think -- I may say this, my lord, because I was trying to, when I was going to talk to you about the feast and I couldn't locate it in the evidence, but the words of the Wet'suwet'en and Gitksan which we translate as "feast", I think probably has a bigger -- you know, it may not literally translate as "feast". That's the closest proximity we can come to it.

THE COURT: Potlatch?
MR. GRANT: Feast.
THE COURT: Oh, sorry. Feast. Yes, all right.
MR. GRANT: And when the anthropologists refer, of course, to the potlatching, they are referring generally to the coastal potlatching.

Now, it's significant that the feast at Moricetown did not end with the sprinkling of eagle down. The Wet'suwet'en chiefs realized that for the Nuu'tsenii from the east it was time to consider what they were told about the territories. The Nuu'tsenii did invite the Wet'suwet'en to a feast to be held in the future, and the discussions between chiefs had not ended. But what's significant, my lord, and -- at that feast, is that both sides, the Nuu'tsenii and the Wet'suwet'en, agreed that the foundation for the territory was the responsibility of the hereditary chiefs and not the responsibility of elected chief councillors to resolve that issue. That -- in other words, there is a parallel system between -- with the Nuu'tsenii and the Wet'suwet'en on that.

I say, my lord, in exercising their jurisdiction or system of authority to settle boundary disputes

with the Carrier-Sekani, both nations acknowledged the feast as the forum of resolution and they relied as well on proof of ownership based on crests and matrilineality to support their resolution. It is significant that when the Wet'suwet'en faced the problem that the Carrier-Sekani appeared to be claiming ownership to land based on principles other than crests and matrilineal descent, there was no common basis for the Wet'suwet'en chiefs to recognize the Carrier-Sekani claims.

In other words, you -- and I think this goes to the issue you've raised even this morning, and this is the difficulty we face, similarly with the Nuu'tsenii and the Wet'suwet'en. If one says, "Well, we've got bands and reserve lands here," and then that's -- that's it, of course all post-contact creations, the Indian reserves. And the other said, "No, it's based on our matrilineality and crests," you are missing -- there is no commonality because you are talking different languages, you may say. And that's why it's important to realize that both sides recognize the foundations of the territoriality in the crest and the matrilineal descent.

I am now going to take you back in time in terms of the Wet'suwet'en relations to an incident with the Nishga that happened over a hundred years ago. And this was described by Johnny David in his evidence, in his commission evidence, and it was the killing of a Wet'suwet'en person who had taken down the stone marker of one of the Nishga chiefs on the boundary. As a result of this killing there was a settlement in Kitsegukla in which the name Samaxsam was given to the Wet'suwet'en as compensation. No Nishga territory was given in compensation in the case. Johnny David described the incident in his evidence.

THE COURT: You say this is a hundred years ago from now?

MR. GRANT: This is over -- his evidence was -- yeah, his evidence was in '86, and he said that this was over a hundred years ago, yes.

THE COURT: Thank you.

MR. GRANT:

> Half way between Kitwancool and the Nass River there was a grave marker of old Samaxsam who was the size of this table --

That was -- in the commission video you would see it would be a standard kitchen table that we were at,

my lord.

-- and on this big log was a big stone and that was knocked over. When the two people had come to this grave marker they were playing around on it and it tipped over and Samaxsam avenged this by killing one of the Wet'suwet'en and it was not old Tiljoe's brother that knocked this rock over but some one else. There was Samaxsam's uncle whose grave was marked with this big tree and this rock...

Now, this is this same rock and the same boundary that -- and the spelling is different, but it's -- that's the Wet'suwet'en way to spell the word -- it's the same one as you heard me talk about last night, that Stanley Williams referred to in the -- in the Nishga feast.

A It was during the time when old Tiljoe was alive. Old Tiljoe and Jimmy Michell went to Kitsegukla.
Q Who gave the name Samaxsam to them?
A There is a chief from Nass River who is in Kitsegukla when Old Tiljoe and Jimmy Michell went to Kitsegukla and that was when the name was given to them.

If I may just pause there, my lord. You may recall last week when I talked about trade, that I focused on the trails. And the trails -- there is a recognized trail from the Nass to Kitsegukla and then there is that route going through from Moricetown up through the MacDonald Lake area to Kitsegukla. And those are recognized trade routes that Dr. George MacDonald referred to.

So you have this meeting at Kitsegukla:

Q Had there been a dispute or killing of a Wet'suwet'en by someone from the Nass?
A Old Tiljoe's brother was killed in the Nass and Old Tiljoe went to avenge the death of his brother. This was when he was given the name. Jimmy Michell ran through the village [this is Kitsegukla] on a pair of snow shoes and Samaxsam was notified that Jimmy Michell was in town to avenge the -- his death -- to avenge

Old Tiljoe's brother's death.

The reference to the running through the village was the knowledge of -- he was making it clear that he was going to avenge the death.

When Samaxsam found out that Old Tiljoe and Jimmy Michell were in town he [that's Samaxsam] called a feast, and Old Tiljoe and Jimmy Michell were also invited, where a song and a head-dress was given to Old Tiljoe. The head-dress was painted red, red cedar bark. The song he sung is Samaxsam that was given to Old Tiljoe along with the name.

Mr. David in his commission, Maxlaxlex, then sang the song. And he said:

A That song that I just sung, it is sung in the language of the Nass River people.

And then he was asked:

Q I would like to move back. You said that the name was given because Old Tiljoe's brother was killed; who killed him and why?

And he said:

Q You said there were two Wet'suwet'en, was one of these Wet'suwet'en that was around the marked Old Tiljoe's brother?

And he was pointing in the direction, and he said:

A ...the people from there they have gone back and Old Tiljoe's brother was coming through that area and he was the last person going through and he was killed.

And on the commissions he was pointing up towards the Nass area from Moricetown. And he was then asked:

Q Can you describe this marker? Was it a rock on top of a log or was it a rock

with some wooden markers on it?
A It was a big rock similar to what you see in the graveyards today.
Q Did it have wooden markers in it?

He didn't know, but he said it was over 100 years ago.

Q You said that some people from "over there" knocked this rock over, were they from the Babine?
A These people from this area and my father has seen the rock and that was how he described it to me.

THE INTERPRETER: His father had seen the rock when he was a young man. He had told Johnny, that is what he is telling us now.

So this was passed on by his father to Johnny David that his father had actually seen the rock. So Johnny's father who died in 1908 -- and as I recall, he was -- and Johnny David's evidence is that he was about 45 years of age, that would give you a time frame for this happening, my lord.

THE COURT: What do you say this proves?

MR. GRANT: Well, what this particular -- what this goes to, my lord, is the Wet'suwet'en relations with the Nishga and the utilization of feasts to settle disputes in that time period. And it's a time period when there certainly was contact. If we look to the 1820's -- it appears that it was certainly would have been after the 1820's, but that the feasting occurred with respect to dispute resolution independent, independent of contact. And it is the utilization of the passage of names, the tsiisxw and the settlements occurring between the Wet'suwet'en and the Nishga just as between the Gitksan and the Tahltan.

THE COURT: All right.

MR. GRANT: What is also interesting and distinctive about this, though, as opposed to the Kliiyem lax haa dispute, is that, as I say on page 227, that there was a direct interaction and engagement in settlement feast. Now, one of these names among the Wet'suwet'en, Samaxsam, was transferred from the Nishga to the Wet'suwet'en. And as Dr. Kari said about the Wet'suwet'en and Gitksan language, what you find here is the song that

was given as well is a Nishga song. It's a song that Johnny David could not translate because it was in the Nishga language, but he knew it, the song, and the passage of that song is a demonstration of this settlement.

Now, Stanley Williams -- I put in the reference from Stanley Williams in which he describes the same item. Now I just want to correct something there, my lord. That parenthetical remark at the bottom of 227, the "chief in Luutkudziwus House".

THE COURT: Yes.

MR. GRANT: That shouldn't be there, my lord. The reference there to Txim Xsaan is to the Nishga chief and it's not to a chief in the House of Luutkudziwus. And that wasn't in the transcript, that was put in as an insert inadvertently.

Now, as explained by Stanley Williams and also by Solomon Marsden who also referred to it -- and I've given you the reference -- the same issue and the same dispute was referred to by them between the Wet'suwet'en and the Nishga -- that this incident did not, of course, change the boundary, and no territory was given to the Wet'suwet'en as a result of this settlement.

This also is indicative of how the -- it isn't a trespass in the same way, but what Ms. Mandell referred you to yesterday, that there had to be this -- there always has to be a balancing, and I think she was talking about that in the context of the divorce feast.

Basically, what happens is the Wet'suwet'en person -- and by the way, when Mr. Williams refers to Hagwilget, he is referring to the Wet'suwet'en generally, that's -- he often would refer to the Wet'suwet'en as the people from Hagwilget. But the Wet'suwet'en person knocks the pole down -- knocks the rock off the marker, insults the Nishga chief. The Nishga chief kills a Wet'suwet'en, but that can't end it. There must be a settlement, otherwise, as in any kinship society, you -- matters escalate. The threat by Jimmy Michell and Old Tiljoe to avenge that death is resolved through the feast and the passage of the name and the crest which has been carried on to this day. It also demonstrates the close -- the interconnections between the Wet'suwet'en and the Nishga.

Now, the final section on the international

relations, and I submit, is an important section, and that is the relation between the Gitksan and the Wet'suwet'en. I'm on the bottom of page 228, my lord.

THE COURT: Yes. So am I.

MR. GRANT: The relationship between the Gitksan and Wet'suwet'en themselves speaks much of the authority and power between them. Although there are deep similarities and affinities between these two peoples, they remain two peoples with differences.

The relationship between the Gitksan and the Wet'suwet'en was described in the following way by Dr. Daly:

> The frontier between Gitksan and Wet'suwet'en has been remarkably peaceful over a very long period.

You don't have the situation like you had with the Nishga and the Wet'suwet'en.

> In many ways this testifies to the balanced nature of trade within the region. Both peoples utilize similar ecological niches; both occupy choice positions vis-a-vis coast and inland trade, and while both peoples share the salmon resources of the upper Skeena system, their respective hunting territories fan out from the mainstem rivers in opposite directions. Thus, when the people complete their salmon harvest and processing, and turn to their hunting grounds, the possibility of conflicts developing over access to land are minimized. Both peoples have followed similar annual harvest schedules which required the appropriate seasonal access to river sites, valley and mountain tops for the taking of similar plants, animals, fish and fowl. Both peoples are blessed with many of the same resources, and those items which happen to be scarce among one or other people have long been the objects of trade and gift-giving between the Gitksan and the Wet'suwet'en.

And I just wanted to pause here if I could, my lord.

My lord, I take you back to Exhibit 358-2, and the wall-size map of 1052-2, and refer you back again

to what Dr. Daly is referring to with the Hazelton variant. This yellowed area on this -- and I think it's a light green on the Exhibit 358. And then you seen this distinctive territory of the Wet'suwet'en with its different resource base. And I say a different resource base, based on the different environmental matters -- environmental and ecological zones.

But remember that the Wet'suwet'en incorporates in this line here, incorporates some of that Hazelton variant. So you do have with the Wet'suwet'en, you do have some of this unique ecological zone that Ms. Haussler and Dr. Daly have referred to. So -- but you also have this type of environment which encourages that interrelationship. So there is a -- very much of a mutual -- and this -- and this among the Gitksan is a much, much more widespread utilization of the Hazelton variant.

So you have very much a mutual advantage in this exchange and a good, positive relationship between the two peoples. And of course you have the riverine valley utilization of the salmon fishery which is also important by both peoples, and that's what Dr. Daly is referring to.

It's my submission, my lord, that the boundary between Canada and the United States espoused as one of the longest peaceful boundaries, both geographically and timewise, between nation states, is a very short time span of peaceful relations when compared to the Gitksan and Wet'suwet'en boundary. It's a hundred -- I gather a hundred and eighty years old, that peaceful relationship between Canada and the U.S. The longevity of peaceful relations between the Gitksan and different nations has been referred to furthre in the arguments on the origins of the two peoples where I discussed that before.

Dr. Mills tabled a diagram between the clans, the Wet'suwet'en clans and the Gitksan equivalent, and it's something that's referred to by Dr. Kari. And you see there, the Wet'suwet'en Gilserhyu, Gitksan Ganada. Wet'suwet'en Laksilyu, Gitksan Laxsel. Now remember, my lord, that from the Wet'suwet'en perspective, Gilserhyu and Laksilyu are separate from the Gitksan respect of Ganada and Laxsel are the same clan. And you have really four clans among the Gitksan and not five. But the term -- the word is what she is looking at here. And then Wolf:

Gitdumden and Laxgibu. And Laksamshu and Gisk'ast -- and that should -- that's a misspelling there. It should be G-I-S-K-A-'-A-S-T. And then Tsayu and Laxski'k.

Now, Dr. Kari pointed out --

THE COURT: Sorry, what was that spelling again for Giska'ast?

MR. GRANT: G-I-S-K-A-'-A-S-T.

THE COURT: Instead of the "R". Yes, thank you.

MR. GRANT: Yes. That's the Fireweed.

It was Dr. Kari's opinion that the similarity of names of clans and Houses between the Gitksan and Wet'suwet'en indicated a contact on a millennial scale; where ideas and peoples travelled back and forth. He explained the similar clan names by identifying how two different peoples may have one or many words for geographic place names.

He said:

> There's a multilingual culture. Multilingualism must be dealt with in a sophisticated way...We find that -- words like Lexts'amishyu [Laksamshu] --

Now that's the second from the bottom of the Wet'suwet'en for Fireweed. And of course he is using his lexicon, my lord, that linguists seem to spell things differently than what I've seen them otherwise, and certainly in this case:

> I explained those are blends...It's not that one slavishly borrowed from the other. They have been communicating in a multilingual zone in the area. The boundary is not as rigid as people want to say and people can see things. Do you know what intervisible means, like intervisible geographic features? It's possible to stand at different points in the country and see mountains in different areas... it's possible to see the mountains up at Bear Lake from Takla Lake, for example, and the same mountain might have three or four different place names and it might be in somebody's territory and outside of somebody's territory.

And of course we say it is.

> Are there dual name land, triple names and

quadruple names for the same intervisible features?

And so what you see here is Dr. Kari, in his evidence, is referring to the fact that you have a place, and if you go to any place on the territory such as we went to Cutsene (ph) Mountain, for example, in the viewing, and you look around and you can see places. But from -- and they have a Gitksan name. From a different perspective, that is, from the Wet'suwet'en territory, the same place is visible and it would have a Wet'suwet'en name.

The interconnection between the Wet'suwet'en and Gitksan was addressed by Dr. Mills with reference to Barbeau's description of Axtii Hiikw. And she discussed this in her report:

> Barbeau relates that the Gitksan of Kitwanga trace ancestry to the Wet'suwet'en chief Woos. His account gives testimony to the immense time depth of Chief Woos and the interconnections of the Gitksan and Tsimshiam. He says:

And this is a quote from Barbeau. I believe this is -- yes, this would be Totem-Poles of the Gitksan, my lord, the red book I think as you've seen.

THE COURT: Yes.

MR. GRANT: "The clan of which" -- and I'm going to pronounce these as they are. This is Barbeau's spelling which, again, is a little confusing.

> "The clan of which Arhteeh [Axtii Hiikw] is a member may be termed Gitrhandakhl [Gitlaxandek], from the name of the village at the headwaters of Kalem River, where his ancestors lived long ago.

And of course this is what Mr. Matthews described in his evidence.

> "The Nass, to the north seems to have been the birthplace of this clan. The family of Ness-yawqt, at Gitlarhdamks [Gitlaxdamx], may belong to the ancestral stock: its crests and other privileges being considered analogous. The headwaters of the Kalem, besides, are situated close to the Nass, and the names of

their geographic features are said to be in the Nisrae [Nishga] dialect.

"The two Wolf Households under Wudiwiyae --

That's a Nishga chief as I recall -- sorry, a Kitsumkalum chief.

"-- of the Gitsemraelem [Kitsumkalum] tribe, along the Skeena River Tsimsyan [Tsimshian], on their ancient territories.

So what Barbeau is here referring to is the source at Gitlaxandek. He also theorizes -- and I say -- emphasize theorizes, and we are not relying on this to accept that, because you've heard the evidence of Tenimgyet and he was cross-examined on this. But that the Nass may have been the birthplace of this clan. But Laxandek and the -- was certainly a place where those who became the Kitsumkalum, those who ended up in the Nass, the Nishga and the Gitksan such as Tenimgyet.

THE COURT: What are you saying is the equivalent for this word "Gitsemraelem"?

MR. GRANT: That's Kitsumkalum, K-I-T-S-U-M-K-A-L-U-M. That's in the second last paragraph, my lord?

THE COURT: Yes.

MR. GRANT: So he is there showing the connections between the Nishga, the Gitksan and the Kitsumkalum all rooted at Laxandek, being the place on Kitsumkalum Lake.

Now then he goes on to say:

"The three Wolf families immediately under Arhteeh [Axtii Hiikx] at Kitwanga are those of Hrrpeeharhae [Bii Lax ha], Tenemgyet, and Hlawts [H'loots]; the name of Arhteeh [Axtii Hiikw] at the front being only of recent date.

So that is consistent with Mr. Matthews' evidence that Axtii Hiikw, if this is -- this is being written in 1929, and the -- based on interviews from 19 -- well, the very earliest, 1915, Beynon's first interviews, probably more like the early 20's when they did these series of interviews. But this is -- that Axtii Hiikw was -- took the name, the head chief name being at the front only recently as a result of the reduction in the members of the House. He says:

Although their three Households belong to the same clan, their separation seems to have taken place long ago, according to traditional accounts.

Again, this is consistent with Tenimgyet's evidence that they originally were three houses, and of course he talks about the H'loots account and the starvation adaawk I referred you to the other day.

In the course of an ancient migration, Hrpeeharae [Bii Lax ha] is said to have met Tenemgyet at a place known as Roundbluff Island.

Now that was a strange spelling but that is Bii Lax ha and it's the name, of course, that Charlie Smith took and that's the name that Charlie Matthews, Art Matthews' brother presently holds, and that's in the evidence.

But at a point known as Roundbluff Island, Gwihikstaat, on the Skeena. Now that is -- Gwihikstaat, you will see that on Exhibit 349, my lord, that's in the region of Wilson Creek.

Their families amalgamated, and from that moment passed out of the Tsimsyan nation into that of the Gitksan.

That is -- he is here referring to Bii Lax ha.

Kalagwaw, of their family, went out to his former home on the Kalem River [and], at a later date, killed a relative named Weehlawts [Wii 'Hloots], and conquered the hunting grounds and other possessions. The name of Weehlawts [Wii 'Hloots] also passed to his family, thereafter to become that of a Household chief among the Gitksan.

So you see that's referring to the Galaa'uu who killed Wii 'Hloots, and I referred you to that in another context about the defined boundaries.

"The close relationship" -- this is what's relevant for the Gitksan-Wet'suwet'en relationship:

The close relationship between Arhteeh [Axtii

Hiikw] on the one hand, and the other 'Waws [Woos] and Kurhwawq [Goohwawq], two chiefs of the Carriers at Hagwelget --

Now of course, again, as Mr. Williams refers to the Wet'suwet'en as the Hagwilget, so in this context does Barbeau. And I don't think you should take that literally to mean that they were only living at Hagwilget, but that's what they referred to the Carriers of Hagwilget -- Moricetown Hagwilget Carriers were referred to that way by Barbeau.

-- throws further light on the history of this clan. Arhteeh [Axtii Hiikw's] family, taken as a whole, is believed, at Kitwanga, to be a branch of that of 'Waws [Woos], and to have come from the neighbouring Carriers...It seems, from the traditional accounts that a part of the Gitrhandakhl [Gitlaxandek] Wolves migrated in the first place from upper Kalem River to what is now the country of the Carriers on [the] Bulkley River, there to establish in permanence two Households under the chieftainship of 'Waws [Woos] and Gurhwawq, and at a subsequent date, another --

I'm sorry, that Gurhwawq should be Goohlaht.

-- and at a subsequent date --

Not Goohlaht, I'm sorry. I'll leave it, my lord, because I am -- it would be Gurhwawq, it's a chief in the House.

THE COURT: It's a quotation from a published text, I can find it.

MR. GRANT: Yes.

-- and at a subsequent date another among the Gitksan of Kunekstaet [Gwihikstaat] (the name of a tribe that later became Kitwanga).

Now, Gwihikstaat there he is referring to is, of course, where that downstream village, the Anjok, A-N-J-O-K, which was referred to by Mr. Matthews.

These Households of Tenemgyet and Hlawts [H'loots] in particular are believed to have issued from that of 'Waws [Woos].

In other words, he is describing there the connection between Woos and Tenimgyet and Axtii Hiikw. Then he concludes:

> "Thus we find that the Gitlaxandek clan of the Wolf phratry at the present day consists of seven families: two in the Gitsemraelem [Kitsumkalum] Tribe, of the Tsimsyan; two, among the Carriers of Hagwelget or Moricetown; and three, in the Kitwanga tribe of the Gitksan."

Now, my lord, what Barbeau -- and Dr. Mills is referring to Barbeau there -- is to show the connection between the two. And of course that was demonstrated as well in the evidence of Tenimgyet.

Now, in the modern context, you actually saw the living personification of what I say is a tremendously long interconnection between the Gitksan and the Wet'suwet'en. And that living presentation was in the person -- was personified by Ms. Wilson-Kenni. She is a chief in the House of Spookw, holding the name Yaga'lahl. Spookw's territory borders on the Wet'suwet'en territory. Wet'suwet'en people live at Hagwilget in Spookw's territory. And Alfred Joseph explained the move of the Wet'suwet'en into Spookw's territory.

> It happens that one spring in Moricetown there was no fish, no fish came, people went fishing every day and they couldn't catch anything. So they sent out young people, patrol, to find out what was wrong down the river. So they were gone for awhile, then came back and said that there was a -- they told the people in Moricetown that there was a slide at Hagwilget. And that's why the fish weren't let through. So the people all, all the people in Moricetown, all the Wet'suwet'en people went down there and started clearing away rocks so that the fish could get by again. So it must have taken them a little while to clear, make a passageway for the fish to get through. That's why they moved to Hagwilget.
> ....

Q Now, the place where that is located, is that a Gitksan or Wet'suwet'en territory?
A It's in Gitksan.
Q And were the Wet'suwet'en people who moved to Hagwilget permitted to stay there by the Gitksan?
A Yes.
Q And was there or were you told by your uncle Joseph Nahloochs and your grandmother, Mrs. Felix George, who it was that gave permission to the Hagwilget, the people who moved to Hagwilget, to stay there?
A Yes, it was in Spookw's hunting territory and they always had dealings with Spookw, and they knew him very well and he was an uncle to most of the people, related to most of the people that moved there. So there wasn't too much -- they just moved in there and he told them it was fine for them to be there. Not all stayed, not all stayed, when the clearing --

That should be "the", my lord.

-- when the clearing was finished, fish could get up the river again, some moved back to Moricetown.

And of course that's demonstrative of the whole issue of Hotset and Moricetown, and it wasn't the people abandoned it -- sorry, I was going to make a reference on the map.

I believe that you recall, of course, that Spookw's territory on the map encompasses where Hagwilget is.

THE COURT: And it's agreed, pretty well, this is 1820, isn't it?

MR. GRANT: Yes. That is the move up.

THE COURT: Yes.

MR. GRANT: If I could just have a moment.

Now, Ms. Wilson-Kenni explained that Spookw had close connections to the Wet'suwet'en Houses. She explained there is a close connection between Gisdaywa's House, that's a Wet'suwet'en Wolf House, and Spookw, a Gitksan Wolf House. For example, Dora's mother is -- Mrs. Margaret Austin is a member of the

House of Spookw, but she also has been given a Wet'suwet'en name.

It's been strengthened, this interconnection, between Gisdaywa and Spookw through adoptions. For example, Dora's own son, Abraham, was given a name in Gisdaywa's House. Spookw adopted Ida Austin back into the House of Spookw from Gisdaywa's House.

Dora Wilson-Kenni herself had been adopted into the House of Gisdaywa at a time when that was -- that House was low in numbers. In 1975 she was taken back into the House of Spookw and given her present chief's name, which is a subchief in the House.

Cecilia George, Alfred Joseph's grandmother held a seat in the Gitksan feast. She contributed to the feasts of Spookw and he gave her a seat and allowed her to hunt and trap on his territory in exchange.

This crossover of assistance has gone on in this connection, as Ms. Wilson-Kenni explained, for hundreds of years.

The two Houses help each other at feasts and have held combined feasts. I refer you, my lord, to Exhibit 317, which is a feast book regarding a combined feast of Spookw and Gisdaywa. It's remarkable, my lord, that it's not like an All Clans Feast at all. That is a feast that was held of both Houses -- of both Houses of both the Gitksan and the Wet'suwet'en. And it reflects the distinctions between the two peoples, but the fact that they still can join to that extent and how closely they are.

The citations I give for the next part under "Crests" are to Sheila Robinson, and those citations are not necessary because the references are from the Exhibit 119-39, which were put to her.

And this is -- of course, Ms. Robinson didn't know who these people were but -- I'm sorry, Dr. Robinson didn't know who these people were. But Barbeau, in his Totem Poles of the Gitksan referred to a crest obtained by Hanamuxw from Goohlaht. Hanamuxw, you may remember, is that Gitksan chief, of course, from Kitsegukla, Joan Ryan. And Goohlaht is Lucy Namox, the chief from Moricetown. And once again it's interesting how you see these connections when you look at the territory relationships.

Hanamuxw is fairly close and again you have the trail going through -- this is the Hanamuxw territory. And Goohlaht on the other hand is quite disparate but it's quite -- it's down in this area. But Goohlaht,

of course, has fishing sites at Moricetown.

And what Dr. -- or what Barbeau has said in his text:

> The Hanging-across emblem, with head down, was ceded to Hanamuk by Gurhlaet [Goohlaht], a chief of the neighbouring Carrier village of Hagwelget, as compensation for the murder of a member of Hanamuk's family. Gurhlaet [Goohlaht] himself seems to have obtained it from the neighbouring Gitksan --

And this is theoretical, but he suggests:

> -- possibly from Weemenawzek [Wii Minosik] of the Larhsail phratry at Qaldo.

And that's, of course, the Frog clan, my lord. You see these words "phratry" and "clan".

> -- And from Kisgagas, who also owns it as part of his family traditions, had it painted on his House-front and boxes, and carved on a totem pole...

Now, the second aspect of that is Barbeau's effort to try to figure out why Wii Minosik and Hanamuxw would have it. But the significance of it is that what's consistent with his account here is that Johnny David himself went to feasts at Kisgagas. There is a connection of the Wet'suwet'en to the Kisgagas. On the other hand, there is a connection of the Wet'suwet'en to Kitsegukla and that's also demonstrated by the Nishga feast.

Barbeau also referred to the fact that Guxsan -- you remember Guxsan is the chief who has the territory around Kitsegukla Lake or Guxsan Lake. He has as his kinsman Smogelgem, a chief of Hagwilget.

Dr. Robinson did not know if any of these people were Gitksan or Wet'suwet'en, but she did not disagree that the access of the crest by Hanamuxw from Goohlaht could have happened in pre-contact times.

Alfred Joseph explained his connection with the Gitksan Houses as follows:

> While my wife being from the Gitksan area and her mother is from Kispiox, and she holds a

seat at the feast hall at Wiiseeks' table so that whenever they are having a feast I have to go, I am invited to go and whenever other clans put up feasts she goes and I have to take her and at times I am sitting in. So I am very much involved with the Gitksan feast system, as well as the Wet'suwet'en system.

And this was, of course, on cross-examination.

He also explained that he was commissioned by Pete Muldoe to carve a pole for the Gitksan.

Now, his wife is the present Waiget, succeeding to Elsie Morrison who died. And of course the reason why he is commissioned by Pete Muldoe to carve a pole, you will remember that Gitludahl, Pete Muldoe, was originally from Wii seeks' House and Wii seeks and Waiget are the same wilnadaahl, the same House group. Pete Muldoe was adopted into Gitludahl's House to take that name because of the House -- the House has no surviving members, and he -- but he still is connected to Wii seeks' House.

I wonder, my lord, just for your own planning, when do we plan for the break?

THE COURT: I thought we should finish the section. We have only three pages.

MR. GRANT: I have no problem. Do you intend there be one break in the morning?

THE COURT: No. We'll take a break.

MR. GRANT: But one break in the morning?

THE COURT: No, there will be another one around 12:45 or something.

MR. GRANT: That's fine. I just wanted a sense.

The language between the Gitksan and the Wet'suwet'en.

Now, while the Gitksan and Wet'suwet'en language are of entirely different linguistic origins, there are a substantial number of loan words which shows a long-standing relationship between the Nations. And I say there, my lord -- and I use, by the way, the word "nations" and "peoples" interchangeably in my argument, although often in this section it's "nations". I don't want you to get the impression that when I use the word "nations" that these are hierarchical nation states because they are not, and that's why I sometimes use the word "peoples". Because, of course, I've already explained the kinship basis and it shouldn't be misleading to your lordship

that there are, of course, nation states of hierarchy in the separate systems as Canada, for example, or other nation states.

But the evidence -- but they are distinct peoples and in that sense they can be defined as nations with a definable territory and definable people and definable language as referred to in the Apache case and in some cases you will be referred to later. The International Court of Justice of what a peoples of a nation is.

The Gitksan and Wet'suwet'en borders, my lord, this is one of the most fascinating pieces of evidence of connection between the Gitksan and Wet'suwet'en, I would submit. It's Mrs. McKenzie's evidence relating to her husband, and his grandmother who held the name Luutkudziiwus. You recall, of course, that Ben McKenzie himself held the name. So this is his maternal grandmother that we are talking about. She -- that is, Ben McKenzie's grandmother married David McKenzie who was a Wet'suwet'en and the uncle of Johnny David. And Johnny David described David McKenzie as sometimes "Old McKenzie".

And David McKenzie, of course, took the name Smogelgem. And this is the David McKenzie who, at the death of Johnny's father, took that name and Johnny was the one who buried his father and got rights of access to the western Smogelgem territory.

But Mrs. McKenzie described the interconnection as follows:

> Now, across the river, the Suskwa River, is a territory of old McKenzie David McKenzie, and he did the trapping there while Ben's grandmother did the trapping on Luutkudziiwus' trapline, so they always met, so this is how they got married, is knowing each other from the territory. So that it made it a big area for both of them to do the trapping because they were joined together. This Suskwa River just divided the territory between them. So they have a big territory. So they either go to the Lax See'l territory --

That's the Gitksan Luutkudziwus territory.

> -- they go Gisk'aast, and this territory belongs to the Wet'suwet'en people...Smogelgem.

Now that's the territory -- the Fireweed is the territory of Smogelgem, and that's, of course, the Laksamshu.

Now, Mrs. McKenzie died, this is the grandmother:

> ...that left Ben to trap on their line. Now, he would go, his grandfather would tell him to go on his trapline when -- he was getting old and he couldn't travel, couldn't do anymore trapping, so he sent Ben out to his trapline.

And so Ben worked both sides of the river.

> And what Ben made out of that trapline, he would give it to his grandfather, and then what he got from his own trapline, he kept for himself. Now, when David McKenzie died, Ben never set foot again on that territory because it belonged to his grandfather and it is a Wet'suwet'en territory, so he kept to his own part, Luutkudziiwus' trapline territory.

Now here, my lord, you see that Ben McKenzie's grandparents made an alliance through marriage which enlarged the territory to which they each had access. This alliance connected Smogelgem on the northeast of the Wet'suwet'en territories with Luutkudziiwus on the southeast of the Gitksan territories. And I just do wish to refer you to this, because I think it's a dramatic demonstration, granted in more recent times, of this connection.

And you see here, the Luutkudziiwus, the Gitksan territory, and then the Smogelgem territory here, and that's the connection between the two. There is a small strip of Gyetm galdoo territory in there, but generally those are the two major territories that are there.

So they utilized -- here you have a Gitksan, Ben McKenzie, certainly Gitksan. If my friends' theory worked, you say, "Well, it's someone from Moricetown and someone from Gitanmaax." But he is a Gitksan from Luutkudziiwus' House. He gets rights to his father's -- his grandfather's territory with his grandfather's permission, and then he has to stop using it. He can only go back to his own territory, Luutkudziiwus. His grandfather allowed him to use the south side of the trapping ground, but Ben could no longer go there

after his grandfather died.

It's my submission, my lord, in conclusion, that the summary of international relations demonstrates a number of significant features regarding this aspect of the jurisdiction as I have defined it already, or as Mr. Jackson more properly defined it, being the system of authority exercised within a set of institutions and laws in the context of an organized society extending over a defined territory. And I'm referring to page 3 of this section of the argument.

It demonstrates the Gitksan and Wet'suwet'en chiefs have the authority to enter into international relation with non-Gitksan and non-Wet'suwet'en peoples.

It demonstrates, my lord, that the Gitksan and the Wet'suwet'en have extensive experience in exercising that authority through conflicts, through peace settlements, and through joint feasts with their aboriginal neighbours.

It also demonstrates, my lord, that notwithstanding any disputes -- and it's not a pristine society, it's natural there will be disputes -- but there is no dispute by either the Gitksan or the Wet'suwet'en or their Nishga, Tahltan, Carrier-Sekani neighbours, or Kitsumkalum neighbours, that the -- that the authority of the Gitksan and the Wet'suwet'en people rests in the hereditary chiefs, and the institution among the Gitksan and Wet'suwet'en for the resolution of disputes is the feast, and this is also the resolution mechanism of their neighbours to the extent that they agreed they should deal with them through the feast.

It also demonstrates, my lord, that the Gitksan and the Wet'suwet'en are distinct nations, they are distinct peoples. Yet their boundary has been one along which there has been long-standing peace, vis-a-vis each other. The relationships between the Gitksan and the Wet'suwet'en are based on joint feasting, assistance, reciprocating aid to members of the same clan, inter-marriage and trade.

It's remarkable I say, my lord, that when Alfred Joseph carves the pole for Pete Muldoe, Gitludahl, that -- as you recall, the carver himself will be reflected on the bottom of the pole. This interconnection will be demonstrated to future generations -- or is demonstrated by the crest of Gisdaywa on the pole of Gitludahl.

A strong example of the peaceful relationship between the Gitksan and the Wet'suwet'en was the inter-marriage between Luutkudziiwus and Smogelgem which allowed Ben McKenzie's grandparents and, for a short period of time, Ben McKenzie himself, to utilize the resources of two contiguous Gitksan and Wet'suwet'en border territories.

Now, I say that's only a recent demonstration. The Goohlaht, Hanamuxw crest exchange, Johnny David's participation in the Kisgagas feasts are other examples that that's -- that's something that has been going on for some time, and I say before contact.

The interconnections of the Gitksan and Wet'suwet'en is exemplified in the life of Ms. Wilson-Kenni, emphasized that through inter-marriage, feasting together, adoptions, trading and providing mutual assistance on the land and at the feast, the Gitksan and Wet'suwet'en have lived in harmony. And I am not suggesting pristine harmony, my lord, or a pure absolute harmony, but that they have lived in harmony. Both of them share the concepts of ownership and jurisdiction and yet they continue to respect each other's title and authority over the territory.

My submission, my lord, it demonstrates a system of authority with respect to relations with other nations, and that system of authority is a foundation or is an important aspect of the ownership of authority over the land.

THE COURT: All right. Thank you. We will take the morning adjournment.

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED AT 10:15 A.M.)

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

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

(PROCEEDINGS RESUMED AFTER BRIEF RECESS)

THE REGISTRAR: Order in court.
THE COURT: Mr. Grant.
MR. GRANT: Before we commence, I wanted to raise a scheduling matter that's come to my attention. In light of the schedule, our clients approached me, and they would like to have a dinner for the plaintiffs' counsel, and tomorrow evening is the only evening for that. So I just wondered if we could --
THE COURT: What's wrong with Friday evening?
MR. GRANT: I think people will be flying away. That's the difficulty.
THE COURT: Yes.
MR. GRANT: This is what I propose. It may not be too disruptive. If we could not have an evening session, but if we could stop a bit earlier and start a bit --
THE COURT: Why don't we start at 9:00 and go to, say, 6:00, and then have your dinner, not have --
MR. GRANT: That would work out, I believe. I will check with my client. I think that should be satisfactory in terms of their planning. They have to make some arrangements.
THE COURT: I am told that we turned out 180 pages of transcript yesterday, which deserves an inclusion in the Guinness Book of World Records.
MR. GRANT: Maybe in one sector of the world.
THE COURT: Well, I think these obligations must be recognized, and I think the 9:00 to 6:00 suggestion is almost equivalent of an evening session.
MR. GRANT: Thank you, my lord.
THE COURT: We should do that. You will let me know if there is any change from that.
MR. GRANT: Yes, I will let you know.
THE COURT: Ms. Mandell.
MS. MANDELL: Thank you. My lord, I am going to address you with respect to harvesting, managing and conserving the resources. It was the piece which was left unspoken from the material which I provided to you yesterday.
THE COURT: What page are you at?
MS. MANDELL: It begins at page 80.
THE COURT: All right. And it runs to where, Ms. Mandell?
MS. MANDELL: It runs to page 180.
THE COURT: Yes, all right. Thank you.
MS. MANDELL: I would like to introduce the section, though, by reference to some of the comments which you have been

1 making over the last few days.
2 THE COURT: Yes. Go ahead.
3 MS. MANDELL: We have shown that by virtue of the laws which
4 regulates citizenship, marriage and succession, and
5 through the exercise of jurisdiction by the houses
6 collectively, that the house as a unit whose members
7 are determined with precision, a durable unit capable
8 of holding the ownership of the house territory, and
9 of exercising the jurisdiction vested in the high
10 chief to maintain the house's survival. Also to
11 manage the house territory for the benefit of house
12 members, to grant access rights to non-house members,
13 and to protect against trespass, resolve disputes
14 regarding the territory, internally and with their
15 neighbours.
16 We will submit, and that's what I will begin to
17 touch upon today, that the house and the houses acting
18 together is also a unit of jurisdiction with authority
19 to harvest, manage and conserve the resources of the
20 house territory, both for the benefit of house members
21 and for others of the Gitksan and Wet'suwet'en nations
22 who attend at the feast.
23 While the jurisdiction to harvest, manage and
24 conserve the resources is primarily exercised within
25 the house itself, as with the other areas of
26 jurisdiction the harvest, management and conservation
27 of the territory can involve the collective
28 jurisdiction of the houses acting together at the
29 feast on issues affecting the community as a whole.
30 Now, this section, in response to your comments
31 this morning, my lord, is specifically related to the
32 land, and we are going to address you on it. But I
33 wanted to just go to one more preliminary point in
34 dealing with this. You raised yesterday in the
35 transcript and in court, as reflected in the
36 transcript, if we are making a claim for ownership,
37 why do we need jurisdiction anyways. And I understood
38 your comments to be stating that owners are capable of
39 doing what they like on the land, and -- or perhaps
40 I've unfairly paraphrased you, but in any event don't
41 we get what we want if we get declarations of
42 ownership.
43 THE COURT: Well, put it the other way. If your interest in
44 land is ordered, then within that interest surely you
45 can do what you want with it.
46 MS. MANDELL: That's how I understood you to say that.
47 THE COURT: Yes.

1 MS. MANDELL: The only point that I would like to clarify at
2 this point is that normally owners are still subject
3 to the management regimes of the province with respect
4 to harvesting and other regulations and laws affecting
5 the land, and if your lordship's framework is so,
6 then -- and we were successful in receiving
7 declarations of ownership, that may place the
8 plaintiffs as owners within a management regime which
9 conflicts with the management regime exercised since
10 time immemorial by the chiefs in respect of the
11 harvest management and conservation of the territory,
12 and it's there that we say that ownership is not
13 enough, and that your lordship will bear with us as we
14 move through the proof of the nature of the
15 conservation, harvesting and management regime of the
16 chiefs, and we will be later submitting that there is
17 an operational conflict between that regime and what
18 underpins it, and that which as owners we might
19 otherwise be subjected to, which is the management
20 regime of the province.
21 THE COURT: I don't think there is anything different in what
22 you said there, from what I said this morning, but
23 there may be on more fulsome consideration, but at the
24 moment I don't think there is. I think the confusion
25 arises, in my mind, out of the use of this troublesome
26 word "jurisdiction", because "jurisdiction" to me
27 implies use, and that is use or possession or
28 equivalent words are the basis for the aboriginal
29 right. And it seems to me that whatever rights you
30 establish, also establishes what use or possession you
31 are going to enjoy, and I presently find the concept
32 almost circular. But there may be fine distinctions
33 or subtleties that haven't yet presented themself to
34 me, or I haven't developed them sufficiently to
35 recognize the distinction between ownership and
36 jurisdiction, but that may become clear as we proceed.
37 I do have a problem -- your friends haven't mentioned
38 it -- is there any pleading that supports a claim for
39 collective preservation of the territory as opposed to
40 house or chiefs --
41 MS. MANDELL: Yes, the plaintiffs plead that each house, the
42 chiefs of the house are suing on behalf of themselves,
43 and so forth, and then they plead that they
44 collectively do. So the collective --
45 THE COURT: Collective pleading?
46 MS. MANDELL: Yes.
47 My lord, if I could just pursue with you for

1 another minute this question of ownership and
2 jurisdiction.
3 I move into the analogy of my own backyard, and I
4 as a fee simple holder will have certain rights of
5 jurisdiction, if you will, certain authority over my
6 lands which flow from my right of ownership, but I
7 butt up against the city when I attempt to do
8 something on my land which is contrary to a zoning
9 bylaw, and I think that in this case the analogy,
10 although not perfect, is that even if the plaintiffs
11 were to have declared to their members rights in
12 ownership to the territory, when they butt up against
13 the management regimes of the province, there is there
14 too the same kind of operational conflict, as when I
15 want to do something on my territory or my property
16 which is precluded by city regulation.
17 What we're saying, when we are talking about
18 jurisdiction in this context, is that to the extent
19 that the plaintiffs have since before contact and
20 continued today -- to today exercised authority
21 governed by specific laws which regulate how they are
22 to behave and their members at that point where the
23 provincial laws intrusive. We say that the
24 jurisdiction of the plaintiffs is thereby part of the
25 aboriginal rights which are being sought after and
26 included within Section 35, and beyond the authority
27 of the province to abrogate. And this is where the
28 issues of ownership and jurisdiction, if you will,
29 will begin to impress upon each other as issues which
30 aren't exactly severable. And it is different from
31 the right in the land to use it. You eventually get
32 into the question as to who decides what will go on
33 that land and under what management regime will that
34 occur. And that's the specific area that I wish to
35 address you on at this point.
36 THE COURT: Well, I have no difficulty with that. It seems to
37 me that your backyard difficulties are deficiencies
38 flowing from the nature of your title.
39 MS. MANDELL: That's right.
40 THE COURT: And to the same extent it seems to me that the
41 aboriginal interests, to whatever extent they are
42 found to be, will include some deficiencies. We know
43 of one, that they can't sell it to anyone but the
44 Crown. There may be others that will, as I presently
45 perceive the matter, other deficiencies that will
46 likewise be incidents of the nature of the interest to
47 which they may be found entitled. I see no

distinction -- I see no difference in the aboriginal interest concept and your backyard difficulties under a fee simple title. It seems to me they are both deficiencies of the particular kind of title or impediments or restraints or burdens to the kind of title or interest you have.

MS. MANDELL: We are now going to try and persuade you that the jurisdiction to harvest, manage and conserve falls within the backyard of the Indian people's title, and is not a deficiency or limitation on the title as we have earlier and just now discussed.

THE COURT: Well, I have throughout this entire dialogue reserved as a live issue cultural matters that relate to land. It was the non-land issues, non-land cultural issues that have caused me all the difficulty that I have in understanding the plaintiffs' case, but the land issues have not caused me difficulties at all.

MS. MANDELL: I am going to proceed then.

THE COURT: I think at the bottom, as the English say, this case is about land.

MS. MANDELL: It is. It is also about authority as to who governs the land, and that's where this part of the argument is directed.

THE COURT: That's a good line upon which to start a judgment, isn't it, this case is about land.

MS. MANDELL: And authority.

THE COURT: I think that -- I think one subsumes the other.

MS. MANDELL: As long as it's included.

THE COURT: Which subsumes which, yes. All right. Thank you, Ms. Mandell.

MS. MANDELL: All right. Thank you. If I could ask you to turn to page 80.

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

MS. MANDELL: I don't intend to read throughout this piece. I am going to direct your lordship to specific points which I would like to highlight.

The antiquity of the concept of jurisdiction to harvest, manage and conserve the resources of the territory for the Gitksan and Wet'suwet'en is reflected in the language.

There are words in the Wet'suwet'en language to describe managing and conserving the resources. Dan Michell testified that the two words for conserve and harvest are old words in the Wet'suwet'en language. And he put it:

"Yes, when the Creator created, he had given us those words way back."

The first area that I would like to address you on is the authority in the head chief to manage and conserve the resources.

THE COURT: Can I stop you for a moment, Ms. Mandell, and just say to Mr. Jackson that one of the random thoughts that I have come across since his submission related to this idea of frozen aboriginal interests. And he contended very strongly for -- against the concept of a frozen concept of aboriginal rights, and suggested that we shouldn't feel tied in to what happened at the time of contact or pre-contact or at the time of the claim to sovereignty, and that the rights could agree and expand this through possession and use after that time.

I would like you to some time, Mr. Jackson, to tell me whether that submission on his part would include the converse or obverse, perhaps, of that proposition, could aboriginal rights be lessened after that time, if they are not frozen. Perhaps, Mr. Jackson, you can find a few minutes of your time or someone else's time or his own time during the course of the remaining period of defendants' argument to let me have his views on that question. Thank you.

MS. MANDELL: Thank you. The first proposition which I am directing to your lordship is a general proposition that the head chief has the authority to manage and conserve the resources of the territory. This is an incident of ownership which passed to the chief with the passage of the chiefly name.

I am going to explain that through the witnesses. Solomon Marsden was asked who in the house has the power, and is responsible for all of the territories and fish sites, and he says:

"It is always the first chief, the head chief to be responsible to have power and authority over these matters."

And he says that when the head chief's name is passed:

"When the decision has been made for the successor of the former chief, then the name is put on this new chief, and the power and the

1 authority is put on this chief to make
2 decisions on the territory."
3
4 And this parallels the law of access with respect
5 to the granting of rights to non-house members, which
6 you have heard about earlier.
7 As to who in the house has authorities to make
8 decisions regarding the management of Gitludahl's
9 territory, Pete Muldoe said:
10
11 "After Gitludahl passed on and the name is
12 passed on to me, and I have the full authority
13 to look after the place or to give permission
14 to anyone that wanted to go there."
15
16 Mary MacKenzie said:
17
18 "There is a Gitksan word for the authority of
19 the chief to make decisions regarding
20 territory. The word is dax gyet which means
21 giving the authority."
22
23 And I wonder if I could here pause and remind your
24 lordship of the submissions made by Mr. Grant on dax
25 gyet, where he submitted that dax gyet springs from
26 the ownership in the land, and in using the same word
27 dax gyet to describe the authority of the chiefs to
28 make decisions regarding the territory, under the
29 Gitksan system there is a marriage between the
30 authority or jurisdiction to harvest, manage and
31 conserve the resources and the ownership of the land.
32 And we say that within the system the authority to
33 harvest and manage, according to the words used,
34 appears to spring from the ownership in the land.
35 THE COURT: Now, you have got me troubled there, Ms. Mandell,
36 because I have understood throughout that we were all
37 agreed that dax gyet meant power.
38 MS. MANDELL: Power. It is a power.
39 THE COURT: And Mrs. MacKenzie says dax gyet means giving the
40 authority.
41 MS. MANDELL: That's right. That's right.
42 THE COURT: I guess she means delegating the power, does she?
43 MS. MANDELL: It's part of the power which the chief has passed
44 to him or her upon the receipt of the high name, is
45 the power to make decisions regarding the territory.
46 And your lordship will recall that dax gyet is a power
47 which originally flows from the land, it's carried in

the crests, it's carried in the adaawk, and it's carried and made stronger or weaker with the exercise of the authority of each chief during his or her lifetime as chief. And it's that same word which is used in the language to describe the power to make decisions regarding the territory.

THE COURT: So you would say that it includes the power or authority delegated by the chief to someone else?

MS. MANDELL: If the chief uses his power in that way, then the delegate would possess the power so delegated.

THE COURT: Thank you.

MS. MANDELL: Glen Williams at page 82 also used the word dax gyet.

> "Q And is there a Gitksan term or phrase that your grandfather would use in explaining that authority over the territory?"

And he used the word "dax gyet".

My lord, we will be dealing later in this argument with the way in which the authority is exercised within the house. I am not going to here deal with that portion of the argument. I would like to continue with some general principles and speak about the nature of the authority which passed to the high chief in order to harvest and manage and conserve the resources.

We say that the authority which the chief has to do this is not absolute, in the sense that a fee simple owner might do what he pleases or she pleases with personal property, but the authority is governed by laws and practises flowing from the intimate knowledge and spiritual connection with the territory. And this governing of the dax gyet or the power in the chief was testified to by many chiefs who spoke about the power they understood they received with the passage of the name as it related to what they felt they could do with respect to the management of the territory. And if I could take you to Gisdaywa's quote, which is repeated at the bottom of 82:

> "When the name Gisdaywa was conferred, that carried with it the ownership and responsibilities of the territory and this is so with respect to other Wet'suwet'en chiefs who hold the name of the territory."

And he testified to the nature of the chief's jurisdiction, the power which he was passed at the top of page 83. He says:

> "When the house chief takes a name, they take on the responsibilities that go with the name. One of them will be to make sure that the territory you have taken to protect is to see that the people that are using it make sure that there is no pollution and no area that the animals that are using the game trails, beaver dams and fishing sites are free of any obstructions, and you have to make sure that people that are using it doesn't clear out the animals that are there."

And he goes on, and he says:

> "Head chiefs when he takes a name, like I said, the territory goes with it and you have to see that the rest of the sub-chiefs and other - see that all the clan members are using the territory, have a place to go ..."

And if I could just back out of the quote and explain what in our submission Alfred Joseph was talking about. Is that when he received the name, he was under an obligation to protect the territory, to make sure that people were using the land, to make sure that he protected the land, and this is what he is speaking about when he talks about no pollution. Make sure that he as steward makes the land comfortable for the animals within it. And this is what he is talking about, that the animals are free from obstruction, and finally he says to protect the animals for the next generation. And that's to develop a framework within which the harvesting will happen and the animals will continue.

And finally he says that he has to make sure that those in his clan or his house have a place to go. And so he's going to be directing the movement of people within his house who have rights to the land and make sure that there is room for them.

I am not going to ask you at this time to listen to my recitation of Dan Michell's testimony with respect to how he understood his jurisdiction passing to him, but I say that it's similar to that which was

already mentioned by Alfred Joseph. But he mentions one other factor, which is not mentioned by Mr. Joseph, and that's when he speaks about the fact that there is also at the same time to protect the land, he mentions that the women, the young girls when they reach puberty are constrained by the operation of the Wet'suwet'en law, and he thinks this is also part of what he must do.

If I could just here remind you of what was stated in -- by Mr. Grant again in organized society. And that is that unlike our system, the Gitksan and the Wet'suwet'en also regulate relations with the spiritual world. And this is one example which is provided in the quote by Mr. Michell.

Now, I've set out in the next section what we've called the philosophy of conservation. It's not truly speaking the law, but it is the attitude or policy or philosophy which overall is part of how the chiefs look at their management of the territory. And Dr. Daly pointed out that the harvesting of various species is carried out under the chief's direction according to what he called a sustained yield policy. And he described that policy at page 84.

It was Dr. Daly's opinion that the Gitksan philosophy of conservation is based upon active pursuit and harvest of the useful species. Without pursuing them regularly and with sustained intensity, the Gitksan and Wet'suwet'enm say that a species will either abandon an area, or its numbers will fall to such an extent that the remaining population would not remain viable if any hunting were to be carried out. And Art Mathews Junior put that philosophy into his own words, and I ask you to turn to page 85. This is a quote -- this should be a quote by Art Mathews Junior, and not attributed to Dr. Daly. I will give you the proper reference to it:

> "We look after our land by using it. If you don't hunt and fish your territories the salmon, the mountain goats, the beaver and ground-hog won't stay around. If you're not active they just go away. We've always taken just what we needed, and then we protect the life cycle of the rest. We have always limited our hunting to the fall and winter, when the young are no longer dependent on their mothers. We guarded the spawning beds, we burned the

> berry patches to keep them healthy and productive. We even used controlled burning to get rid of the insects which kill off the trees - it was more effective than insecticides - at least we did in the 1936 when they started charging us with being arsonists on our own land."

And I might here stress that this policy of sustained yield or active pursuit which was referred to by both Dr. Daly and by Art Mathews is a policy which isn't, if you will, completely compatible with the enviromental movement. It's not a case of save this area and protect it, preserve it and don't do anything in it. The policy is to competitively and actively pursue the animals which are in the area, while at the same time not being dominant over the animals, and at the same time protecting the life cycle of those that are there and those that will remain.

It was Dr. Daly's opinion that sustained yield harvesting was in existence at the time of contact. And he relied on a letter by William Brown by the -- who is a Hudson's Bay factor, which was put into evidence, who described the chiefs' control of resources and labour, and the use of the house resources to validate the authority of the head chief. And Brown in his letter wrote:

> "...there are twenty chiefs of different gradations and sixty-seven married men whom they dominate as being heads of families and possessors of lands",

And among the Babine Carrier, the Bulkley Carrier, who were the Wet'suwet'en and Gitksan, they strictly controlled their people's access to beaver harvesting. Mr. Brown noted, and this is, as I put from his perspective, that the chiefs allowed only twenty or thirty beavers to be taken each year, and then he makes a comment as to what use these beavers were to be put.

And this is consistent with the general view that you don't over harvest, but you do harvest, and that you protect those that remain.

It's not a romantic philosophy. It's very much related to survival. And this is what was the subject

of testimony by both Stanley Williams and James Morrison.

Stanley Williams described -- he didn't describe the sustained yield policy, he testified, and I am saying that it fits into the analysis of Dr. Daly. He described it as a way of living and how we survive. And I won't take you right into the quote, but I want you just to notice it and emphasize.

> "... and we do not waste anything that we kill, we always looked after it because this is the survival of our people."

And there is an equation within the philosophy of management that the survival of the animals and the survival of the people are the same. And that's what Stanley Williams was referring to.

James Morrison emphasized that the policy is based on survival and the economic well-being of the people and the animals. And he says:

> "Well, the purpose of that trapping is to conservation, and for the fur that they caught, and not only the profit but also the other things that you taken off the territory which to make your clothing, and also make your boots. Anything you can make on the fur or any animals that you took out of the territory. It's just not the profit of trapping that you can make money with. You make other things in your territory. That's why the territory divided between the Indian people earlier, thousands of years ago. That's how its been divided, uses for clothing. Now it's used for trapping. Before that the territory used for the food, also used for the berries, used for anything, used for anything, used for medicine, used for other things where you have to be looking onto the territory. That's what the territory is all about."

Now, I want to here remind your lordship that we have illustrated through the membership laws and through the trespass laws and the access laws that laws exist, and they are basically taught by the house through the oral tradition, and enforced through the house and with the houses acting collectively. And we

say that the evidence discloses that there are hunting laws too which are applicable to all the houses in the management of their house territory. It is in the management of all of the territories by the head chiefs in accordance with the hunting laws that the whole of the Gitksan and Wet'suwet'en territories are properly managed under the collective jurisdiction of the chiefs.

And just to bring your lordship into a general appreciation of the laws, I wanted to refer you to the goat hunting laws which were testified to by Art Mathews. And he summarized some of these laws which permit, we say, a sustained yield. He describes his goat hunting two years ago with his two sons, Clark, age nine, and Michael, age seven, Phillip Daniels and Glen Williams.

I am going to take you to some of the highlights of the way that the goat hunting laws were described, because we say that these laws and the way they are described here rebound throughout the system. And we'll illustrate that in time.

First of all he was asked whether or not there is laws of the goat hunt.

"A And we hunt goats here ... when we hunt, we are reminded of specific hunting laws we have to go through, and the remainder comes from my dad, that we should go through these laws or rules of hunting, you might say, the laws of the goat hunt.

Q Were you taught this by anyone besides your father?

A Yes, by my three grandfather."

And he mentions the name of Geoffrey, Jack (Morgan) and Wallace.

And I just want to here pause and emphasize that this isn't keeping with how we say all the laws are permeated. And that is it is through the oral tradition, there is specific people in the house who will be teaching according to that tradition the laws of those that will be using them. And here we got an example in the evidence of Art Mathews as to who his instructors were.

Then he goes into the law.

"A The first one is we -- depending on the hunting

group, we know we have to decide, and then we don't over kill."

And this is the same point which was mentioned by Alfred Joseph in the earlier quote that you heard, where he said the same thing, that we don't over kill.

"A The second one is the real dressing that has to be done. The raven was always there, as I pointed out through the adaawk, Biis hoon. So the second step is never forget to feed the raven that are always around."

And this is a spiritual law which I will be returning to. The next one is:

"A Yes. The other one is -- these are real top one. The next one I would say is never kill a mother sheep with young ones."

And this is another law which we will be referring to which has to do with selectively harvesting so as to not to kill those animals where the mother is calving.

"A The next one is that we, after field dressing, the cuts, the hide, whatever that we do not need has to be burned. So our system that -- this is a must. We have to burn all these lefts, for our belief in reincarnation. This is Biis hoon, like I said in the adaawk, Biis hoon."

And this is another spiritual aspect of the huntings, which I will be returning to.

"A The fifth one would be the actual roasting of the head of -- the goat. And it would be pointed at directions within our territory to show thanks or appreciation."

That's another spiritual law which I will be returning to. And then at the bottom of the page:

"A And after the drying takes place and when we are ready to go home, my dad would then divide the meat in different piles. The rulings all

the time that the elderly divides equally. When you shoot a goat, you do not fight over it, it's all done in a lump sum. When you are ready to go home, then you subdivide equally, so nobody gets less or more than others.

After we get back to the village of Gitwangax, we would then share it with the elders that cannot get around, that stays home, that have no access. Then the sharing would take place.

This is what we call in our language sharing ... and what all that means is helping each other, helping. That's the very rule, the very existence of Gitksans, are helping each other."

And I'm going to here stress the fact that there is part of the hunt and the laws related to hunting that there be sharing within the community, and we'll be running in more depth to that too. But if I could here go back to the point, his second law of don't forget to feed the raven, his fourth law about burning what's left for our belief in reincarnation, and the fifth law of roasting the head of the goat and pointing it at the directions within the territory to show thanks and appreciation. And I wanted to say about it, that unlike the hunting laws that we're accustomed to reading in the statutes of the province, the hunting laws which are described by Art Mathews and other witnesses reflect an obvious long standing spiritual connection between the people, the land and the animals.

The spiritual basis of the hunting laws was addressed by many witnesses, and there was a wonderful account by Stanley Williams, who testified to his method of hunting for bears, and in so doing revealed his spiritual connections for the life cycles within which he was playing his part. And I am reading at the bottom of page 89. Stanley Williams was talking about what he does when he gets a bear. And this is how it is:

"If I was to kill a bear, what I would do first, I would stand there and I would sing the song of the bear. I would pick up this bear and then I would put it on my shoulder and I would walk toward the village. As I get closer to

the village, I would start singing the song of the bear again and the people in the village will know that I have killed this bear because they -- they've heard the song of the bear being sung.

After the bear has been cleaned nothing is wasted. What they do is they even use the - the intestines of the bear. They clean the intestines and then they twist it and dry it and this was used for your bow and arrows. After they've -- they've cooked the meat and eaten it and the bones are left, what they do they return the bones in the fire and they -- they pray. They burn these bones in the fire and they -- and they would ask if this bear would be returned or they would get another bear like the one that the bones that they throw into the fire. They -- they do this to all the different animals that they caught. It's not only the bear, it's all the different animals that they caught that they just don't leave the bones lying or the insides lying around, they always make sure and burn these.

Q You've referred to this with reference to the bear. Is the same kind of thing done if it's mountain goat in terms of burning the bones?

A Yes, all the animals. It's the same with the fish. What they do is they -- they put back -- if you're not going to use the head, then you put it back into the river. Also the insides of the fishing, if you're not going to use that then you put it back into the river.

Q And do you still carry on these practises today?

A Yes, we still do these things."

We are not here, my lord, to persuade you to believe in the spirituality which impresses the hunting practise of the chiefs, but we do impress upon you that in the harvesting practises and the laws, which I will now be referring, woven into the laws and the teaching and the practises is a deep spirituality which guides the behaviour of the hunters, which is at the root of the laws, and also is because of the belief in the spirituality it provokes the ability of the hunters on the land to remain learning on the spiritual level and interact with their territories to

learn and discover new things. And it's a very dynamic and a very exciting thing for those that are specialists on the land to be able to hunt according to the law and stay open to the spiritual connections which their ancestors have taught them of and which they continue to practise.

Now, I would like to go into the more specific laws. I have given you a fairly general overview, and I would like to contend now with the laws which, according to the evidence of the chiefs, have been referred to, and as they are described very generally throughout the evidence, we state that they are laws of general and universal application which are applied within each of the house territories. And the first one is selectively harvesting.

Many chiefs described particular hunting laws practised by them to take enough but not too many fish or game. Their resource use was, and is, geared at taking what is needed on the basis of a long-term view of conservation.

And Joan Ryan, when she was talking about what responsibilities passed to her with her chiefly name, she mentioned that:

> "...You're encouraged to protect the species of the fish, that you don't take more than what you require so that the cycle continues and that you will continue to obtain the fish from the river in the future. We are told that we must never at any time destroy the stock."

And I am going to render this point by way of reference to a number of the different animals which were taken. The goat hunters, you will recall that the method which the goat hunters used, which was described by a number of the witnesses, that there are certain places in the territory which lend themselves to the hunters climbing up onto the mountains and a number of the hunters staying below the mountain, and the hunters below scare the goats, who then run up the mountain, and they are trapped by those that are on the top of the mountain. And Alfred Joseph and Alfred Mitchell and a number of the other witnesses spoke about that.

Alfred Mitchell spoke about the fact that this method was used before the non-Indian people arrived, and he did that by reference to the -- his testimony

about the gear that was used, and I'll just read it at the bottom.

> "...Our ancestor, they used C'en C'aa...all the clans would leave the village, go up the mountain and what they would do was to chase the goats up the mountain. The rest of them will be waiting up on top on the trails of the goats and these people as they were chasing them up the ones up on top would kill the goats with these sling-shot contraptions since in those days there were no guns."

And then he says it's bow and arrow.

> "Once the guns were introduced the Wet'suwet'en continued to practise this method of ambushing goats."

But they had to learn to use the gun, and:

> "There's nothing but hair above the shoulder ... you miss them all the time."

So he was trained to aim at the elbow. And this is -- this method permitted and still permits the Wet'suwet'en goat hunters to decide how many of the goats they are going to take, and select the number accordingly. And in the testimony of Henry Alfred he described goat hunting with Dan Michell in his territory just above Porphry Creek, and he said that they took three goats.

> "We ran into a big herd of goat and Dan was down below and he told us to go around that mountain and get up on top and we did. And we waited and Dan chased them up to us. And he said 'either one of you hear shot three times quit there. No more' and we did we got three."

And he said that they limited themselves to three goats.

> "there is four people went up there and that's good pack going back home. We want to leave some for next year."

And this business of deliberately reducing the number of animals which were taken of goats was spoken to by Dora Wilson-Kenni when she was describing the men hunting goats on Spookw's territory around Blue Lake Area.

> "at that time there used to be a lot of mountain goats and my uncle used to be one of the ones that used to go and he would have a group of guys with him and men from the village and the only thing is even though there was a lot of mountain goat they only took what they could carry. They weren't out there just to kill off mountain goats. They were there just to get ... what they could carry ..."

And Bazil Michell said the same thing, and I won't read his words, but he mentioned the same thing of people shooting only what they can carry, and no more. This is also -- also this rule of selectively taking only the numbers that can be carried and which are needed was testified to by James Morrison and also by other witnesses. And I am not going to read you the quote of Mr. Morrison, but I would certainly ask you to read it yourself. It's very much the same as what the other witnesses were describing.

James Morrison on the top of page 94, though, makes a point which we'll be returning to. And that is that in practising the laws of the Gitksan and Wet'suwet'en regarding hunting, one of the very important things which is taught is which places to go to. And he says that:

> "You have to learn all those places in order to hunt or trap, and you have to learn how to catch the animals. And concern of the people now is the population of the animal."

Now, the same method of selectively trapping beaver in order to take only the desired number was spoken to by a number of witnesses, and again Alfred Mitchell spoke about the fact that the methods which are used to trap beaver are old methods which pre-date the coming of the technology of the non-Indian person. He says:

> "...they used snares and deadfall. Also in the

winter when the lakes or creeks froze over they would make snares with cedar bark rope which they would lower in the water and they knew when they caught a beaver. They would pull it up and hit the beaver on the head to kill it. That's some of the methods they used before the traps were introduced."

The principle, though, that you take what you can -- you take what you need, was testified to by Dan Michell. And he added, with respect to beaver, another aspect of selectively hunting, which is to select the mature animal species and not kill randomly for the small ones. And he was talking about this with beaver.

"Well, we look after it by experience and that's been handed down to us by our grandfathers and our father ... we know by the size of the beaver house. And if there is smaller house then we know that there is maybe 4 beaver in there. And the way we are taught to trap them is that we have to set traps further away normally and the beaver dam below the house ... that's where you catch the bigger ones. If you set it too close to the beaver house you normally catch the smaller one."

That's what they say, so we don't do that.

And Florence Hall was testifying to the -- you will recall that her family went into the Burnie Lake territory. She was still speaking at the time when they travelled there after the summer fishing, and the Burnie Lake territory is quite a ways away. They spent their whole winter there. And she was asked how many beaver skins the family would normally take out of the area.

"We don't take all that many out. Maybe out of one beaver dam we would take two in order to conserve and if there is quite a few of us go out there one season we bring about 40 out."

And the same kind of discussion occurs with respect to bears. I am not going to draw you into it, but only to advise you that the evidence was that people learned of the bear dens, and they normally

1 would trap -- hunt bears within the dens, so they
2 could select the number that was taken. If I could
3 ask you to turn to page 96.
4 A further method of selection was testified to by
5 the witnesses, and that is that they testified to
6 killing mature animals, and to trap and hunt within
7 certain seasons of the year and not to harvest when
8 the animals are calving.
9 And if I could take you to the testimony of James
10 Morrison, which is at the top of pages 97:
11
12 "but sometimes when there is spring and there is
13 young ones starts to -- like early in spring,
14 and to be careful on that, but sometimes they
15 have to shoot to stay alive ... they know they
16 have to abide on the law that what created what
17 give at that time, not to abuse that. That's
18 why they have certain method and there is
19 hunting at that time and they are still using
20 it today."
21
22 And he's speaking about the rule practised under
23 the law of selectively harvesting, that the hunters
24 shouldn't shoot animals. As he said, sometimes you
25 have to to stay alive, but you are restrained from
26 shooting calving animals.
27 I here wanted to remind your lordship of the
28 testimony of Art Mathews' goat hunt, which you heard
29 earlier, where law number three he said was never kill
30 a mother sheep with a young one.
31 I might here mention, before moving onto the
32 second major area of law, which I will be contending
33 for, is that the hunting laws of the Gitksan and the
34 Wet'suwet'en, as you can see as it was illustrated
35 through the testimony of the chiefs, is dependent on a
36 knowledge of places within the territory, a knowledge
37 of the animals, a good capability with harvesting
38 methods, and it is by in large, and we'll be showing
39 this in more detail, carried on by specialists who are
40 trained and -- trained in very specific ways to be
41 able to go out into the land and to be able to know
42 where to go, and hunt selectively for the animals
43 according to their maturity and according to the
44 amount which they can carry out and to their
45 locations.
46 A second general law, which was testified to by
47 the evidence of the chiefs, and we say the

pervasiveness of the testimony in this area shows that this is a practise which is practised house to house, and is a general law among the Gitksan and Wet'suwet'en, and that is the rotation of harvesting areas.

I wonder, my lord, if you could be handed Exhibit 164 again.

THE COURT: Wah Tah Keg'ht's territory?

MS. MANDELL: Yes.

THE COURT: Thank you.

MS. MANDELL: Do you have that?

THE COURT: Yes.

MS. MANDELL: I am going to first take you to the bottom of page 97. I think Alfred Joseph stated the law well.

> "You don't use one area like all winter. You go into one valley and you use that for awhile and then you move to another area."

And he testified that he, for example, has given permission to James George, Christine Holland, Ronald George to use Gisdayway's territory, and to Leonard George to trap on the territory, and he told them where to trap.

> "As long as they don't keep going back to the same place every year."

Now, if I could ask you to look at the map which was tendered in evidence by the plaintiffs during Henry Alfred's evidence, and you will see that on the map in the territory controlled by Henry Alfred and not by Bazil Michell that there is five lines that are marked in red which Henry identified as being the trapping lines, the areas where those in his house trapped. And you will see that some of the lines now goes through the areas which have been logged, and you will recall that the areas in the middle of the territory demonstrate the areas which were logged. And this was taken from a map provided by the province.

Now, the evidence demonstrates that at least in the House of Wah Tah Keg'ht, and I am going to say others too, that four generations of people testified to your lordship that they rotated the trapping lines. Madeline Alfred testified to the practise. She said that:

"We take care of the land and respect it as well as the animals. You don't use one area over and over again and deplete one area. You always take care to go to the other areas."

And if I could turn you to page 98 at the bottom. When Henry Alfred went out with his grandmother to trap, his grandmother rotated the areas where she trapped. She went to a trapline one winter, and the next winter she went somewhere else.

"What I mean rotating is she got two little lines. She used one side one winter and then moved onto the other."

And I believe that she was using, according to his evidence, if you look at line one on the map, there is two forked out parts to it, and I think Henry is talking here that she would use one part in one winter and then move off to the next.

THE COURT: Is it convenient to take the next adjournment?
MS. MANDELL: Sure.
THE REGISTRAR: Order in court. Court stands adjourned.

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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(Proceedings resumed following short recess)

MS. MANDELL: My lord, I was at the bottom of page 98, the top of page 99 and the point that I was in the midst of demonstrating was that in the house of Wah Tah Keg'ht, you heard evidence of four generations that rotated a line, and the first person whose line was testified to was Lucy Pius, and I showed you how she testified how she rotated line one.

And I am going to -- I am now at page 99, the advice to rotate the lines passed with the name in the case of Henry Alfred. This isn't literally at the feast, it was when Peter Basil introduced Henry in 1963 that Henry was Peter's choice as successor. You will recall the testimony that they travelled along line three, which is marked on the map, and they went up a ways and at that time Peter Basil told Henry to use the line but said "don't over use one line, there is two, three more lines beside this. Go onto the next one."

Now, at page 98, Madeline Alfred described setting her traps at different places on the territory, she said:

> "Every year we use a different line so as we can re-populate the different lines."

She talks with Henry and her son Cecil and other members of the house:

> "Where to set traps, where to hunt and where better places, lots of good places are to allow the animals to re-populate."

I just wanted to remind your lordship that she spoke about her and her son Cecil primarily rotating between line four and also now she is presently more commonly using line one, which is closer to home, and she is following upon the footsteps of her mother.

And at page 99 Henry Alfred testified that he rotates the places where he does beaver trapping in the territory and also rotates the lines where he traps for marten. And his trapping occurred, according to his testimony, primarily on lines two, three and four. And he testified that the deer hunting that he and his brother would be on line five. And he -- you will see the dotted lines are where he

is continuing to push the trails out and his plan, his management plan, is to eventually make the trails link up and as they were once in the past.

Now, the same evidence occurred with respect to Namox's territory, and if I could take you back to page 97, many chiefs testified to how they rotate the areas in the lines used for trapping. Alfred Mitchell talked about how he and his father would alternate setting traps on short and long lines on Namox's territory. So this is -- Alfred Mitchell passed away and his father has.

At page 99, Dan Michell, who is the present caretaker of Namox's territory, testified that he continues to manage the Namox territory by rotating the lines. And he testified that Billy Michell has been directed to the southern part of Namox's territory, and when Dan came to Vancouver to testify, he directed him there, he said, "because the area wasn't trapped for a couple of years."

Dan, the caretaker of Namox's territory, explained his decision to move Billy this way:

> "He's out there trapping every winter for the last few years. And he's out there trapping right now...
>
> He's been trapping on the north side since before Christmas. When I was back home... about two weeks ago and I went and seen him to find out how he was doing and he only got nine marten so far that year. That is discounting the bigger animals. He got some squirrels and weasels. Don't count them. So I told him to move back to the south side and see how he's going to make out in that area."

Now, Basil Michell, who I drew your attention to this evidence yesterday, also testifies that they set traps and move and the the same evidence was pervasive amongst the Gitksan witnesses. James Morrison described the conservation practices of rotation this way. He said:

> "We trapped in some areas and we moved back and forth in the areas, especially a large area where we are and the same with the others. We have to trap in one area and move to the other

area to thin the animals there. Whatever you can get out of that. And that's one of the things, the method of trapping or hunting you don't stay in one place to hunt, in one corner of your territory, you got to move around. That's still used today and still use that method today how to hunt and to trap. Trapping was not the same in those days but also they have the method of trapping today fur-bearing animals, you know where you should go to trap and you should be know when to move and you know when to start and you know when it's ended. So you go back and forth on the territory in order to cover the whole territory."

And Pete Muldoe testified that his authority is -- extends to the resources of the territory and he exercises that authority by rotating the lines and limiting the catch.

"If I give anyone permission or they come to me and ask me if they want to go there, I will be showing them where to go and where to trap and where to hunt beaver or anything like that. We don't always go into the same place at the same year. We always move into different territory, because we want to preserve some of the game, so we don't clean them right out once we get in there. We just have to preserve them so if the place is getting low and species of animals or marten or beaver or anything like that we go to another territory."

What he said regarding trapping also applies to hunting.

If I could just pause here and express with respect to the law which has been practised throughout the territories of rotating lines and moving your hunting locations, in order to effectively manage within the rubric of this law, the chiefs require knowledge of who is out there, they require knowledge of what's being caught, they require knowledge of where it is that people are doing their trapping, and it also is, in the case of Henry Alfred, it's required that there

be some maintenance of the lines over time, some cutting and planning and maintaining the territory in order to effectively trap. And we say that this is the kind of knowledge which is part of the body of knowledge required by the chief or those that are caretaking in order to manage the territories as they will according to their laws involving trapping.

Now, the third law which appeared on the evidence to be pervasive throughout was the law which created an obligation to respect the animals and prohibited against waste. And this law is part of the spiritual concerns which were originally spoken about by Art Mathews in the goat hunt and the manifestations of the law required the respect of the animals, exhibitted itself in a number of different ways in the testimony.

Stanley Williams testified that the Gitksan do not waste the animal parts and treat the unused parts with respect. The practice of caring for the unused animal parts in this manner has its roots in ancient times, in telling of the adaawk of Biis Hoont, Tenimgyet's sister Mary, Art Mathews junior testified to the spiritual teachings which underpin this practice. I will just ask your lordship to read that in considering this issue. The adaawk speaks very clearly to what will happen if there is not respect paid to all of the parts of the animal.

Stanley Williams described the burning of the bones after the hunting of the goats.

> "Our ancestors looked after everything that concerns the animals. If we just leave the bones around, then these animals will see and will never return back again. In the olden days, my ancestors killed an animal, what they do is they talk to this animal and they praise the animal to tell them it was right of them to give themselves to the people. This practice continues today."

And this is all tied back to the spiritual view of the people, as you were explained it by Mr. Grant, that all of the creatures of the world, the animals and the plants and the people, are all existing as a spiritual community and they are not dependent -- they are not inter-dependent upon each other but they are dependent upon each other.

Respect in this context is shown by sometimes

deliberately leaving food to feed the animals. Art Mathews testified that according to the adaawk of his house, the bear gave spiritual power to his ancestors. Art provides food for the bears today. When fish are caught at Wilson Creek the fish are put on the beach further above the smoke house to feed the bear.

And this I believe is also referred to and is the underpinning for the law which was spoken about by Art Mathews concerning the goats, where he was saying that the second step is never forget to feed the raven that are always around. This is part of the adaawk of his house which he connects respect for the raven in the ability of he and his house members as hunters to carry out their hunting. And this respect is paid back in the paying for it through food.

Dr. Mills observed:

> "Treating the salmon and the game correctly means not wasting it or allowing any to rot, by 'working on the salmon' and the meat and opening them up and hanging them to dry. It means keeping the flesh clean, it means using every part and not wasting anything..."

Emma Michell explained that all parts of the animals must be used:

> "We treat all animals with respect. We use everything."

And the witnesses, and one example of which is Henry Alfred, testified that respect is shown by him in hanging out the carcass of the marten:

> "We would hang it up out of the reach of dogs or other predators so it would deteriorate on its own."

And your lordship will see that as to how it is that the different remains of animals are left respectfully and not wasted or treated as garbage. This is done differently in the different houses. Some of the witnesses talked about burning it, some of them talked about hanging it, but the general and pervading reach of the evidence is that people didn't trash it, didn't treat it as garbage but respectfully handled the parts of the animal which were not used.

I am going to ask your lordship to turn to page 105, between my two quotes I have just given you a number of examples of the ways the different witnesses expressed the law of caring for the parts of the animals unused. The respect which is spoken about in this law of not wasting and respecting the animals also extends to hunting practices. And it's in this sense that there is a pragmatic aspect too, there is no point in wounding an animal and then leaving them there. But the testimony of the chiefs was that the -- when there was an animal which was wounded, rather than risk wasting their lives, they were taught the practices of the animal and ways to shoot the animal to avoid that risk. And the two examples I have provided, although there were others, was Alfred Mitchell, who was taught never to shoot beaver in fast moving water. He said:

> "Just behind the beaver dam where you can get him so you don't lose him."

Also he was taught the habits of the bear which, if wounded, the bear was likely to find a swamp or a water pool to keep his wound cool and he was taught where to find the bear and then to track him down.

> "Any wounded bear would go to a swamp or water pond to keep keep his wound cold. That's where they are."

Finally, the respect which is taught to the animals extends to the preparation of the animals for food and hides. And the methods which are were used and are used to prepare the animal for food and for hides, maximizes the use which will be made of each of the animal parts. And this is part of, again, the pragmatics of hunting and also it's part of the respect which the people show to make use of what they then got. And I am not going to take you into all of the evidence involving this. I would ask you to refer to the way that Alfred Mitchell described the preparation of goat meat and the preparation of beaver meat, all of which is reflective of deep and long-standing traditions and teachings of how to prepare this meat properly to maximize its use.

And I would draw your attention to some of the uses made by other of the animal parts which are less

common within our framework, and only to state that this is part of the respect and the pragmatics of using as much of the animal as possible.

Madeline Alfred, on page 107, testified to using the moose hide for making snow shoes:

> "We make small webbing and a big webbing string for snow shoes."

Alfred Mitchell's father showed him how to use the muscle from the back of the moose to make thread which is used for making moccasins, and also part of the moose hide for making snow shoes. And Alfred Mitchell's testimony was that the moose hides are still used today to make the big weave of the snow shoe and the deer hides are used to make the smaller weave.

Dora Wilson-Kenni testified that this sinew from the moose is taken apart, dried and used for sewing. The fat from moose is dried in sheets over the stove and used for cooking and can then be used as bait for trapping.

Dr. Daly reported that the groundhog fat was stuffed into the stomach of the groundhog and hung to dry, sometimes smoked over the fire. The mountain goat fat was rendered down and preserved, the meat would be cut into thin strips, smoked and put away into cache houses with the salmon and steelhead strips.

Henry Alfred testified that goat skins are still used today for floor rugs.

Dora Wilson-Kenni testified of learning how to make Chilchat Blankets from goat hairs, and she spoke about how that's done.

And James Morrison, finally, testified to the very many clothing and utility items made from goat, bear and groundhog skins. And he spoke about the shoes, the blankets, the boots, the sleeping bags, mattresses and hats from prairie dog skin.

And we say that the law of respect and the prohibition against waste is manifest throughout the community and in the practice of it. It teaches not only the respect for the animals but also for the hunters to see their place within the cycles of nature, competitive but not dominant. And this is the essential balance which the conservation and management regimes of the Gitksan and Wet'suwet'en are

marked by.

I would next like to address some specific cases of management. This is more in the nature of stationary resources, not the ones that are as mobile as the beaver and the moose and the animals which are migratory. The first is the burning of the berry patches. Many witnesses described the practice of both the Gitksan and Wet'suwet'en chiefs to direct the burning of berry patches to produce berries desirable in taste and quantity. And this is in response to Mr. Willms, who yesterday asked whether or not common areas are also within the jurisdiction of the owning chief houses to manage. The evidence is that the owners also control access to the patches, and this is so even if the berry patches may be within an area used in common to pick berries.

Now, I would like to ask you to turn to page 110, and I have set out there two -- three examples, of Gitksan and Wet'suwet'en examples, from the evidence of witnesses who testified to the burning of berry patches. And I might here mention, my lord, the obvious, that this is not a practice which can be done in -- by the generation today without moving in violation of provincial law. But Martha Brown and Art Mathews and Alfred Joseph and others testified to its practice and to its antiquity.

Martha Brown testified:

> "That's what they used to do in the old days. Whenever there's not a good crop of berries on one side of the river grandfather (Paul Xhliimlaxha) used to burn and it's the same on the other side of the river. If there's a poor crop they will burn and just move over, to and fro.
>
> They go by the crop of the berry patch. If you don't see your footprints amongst the berries."

Art Mathews' mother, Kathleen Mathews, has the permission of the chief to manage the berry patch in Tenimgyet's territory. And you will recall the evidence that it's a very productive and very popular berry patch. The berry grounds are managed to "ensure continual production of berries":

"These berry patches, I said that the berries only grow where it was burnt, so what they did every time there was a growth, like every six to seven years, they would burn these over again so that they maintain the taste. If you leave it too long these berries will begin to lose their taste and sweetness...

...the women who do the actual job (would decide when it was time to burn) and they knew the very taste they want and the texture and as soon as that began to lose the taste they would tell the men that it's time to re-burn the area."

And Alfred Joseph testified that "the traditional way of clearing grounds for berries was to burn it over."

Dr. Daly noted that hunting societies, and he here included the Gitksan and Wet'suwet'en, have engaged in conservation practices to alter the natural cycles of growth for thousands of years. They work the face of the land to make the vegetational cycles more bountiful and sustained for human use. And he contrasted the Gitksan and Wet'suwet'en practice of berry patch burning to what was and is done by the aboriginal hunters of Australia, who:

"...for example, are said to have created the Australian outback landscape over the last several thousand years during which they practised controlled burning. This regular burning was done in order to perpetuate seral growth of the vegetation. It was this seral phase rather than the mature phase, rather than the mature growth, which most benefitted the people economically. Controlled burning created a system of fire breaks which efficiently contained lightning blazes."

And he noted that -- I won't finish reading the quote -- but that this practice of burning the berry patches is one which is -- has been reported to have existed among other of the aboriginal peoples for a very long time.

Another one of the management regimes, while it does involve a migratory resource, it also involves

everybody staying at one place at one time, and that's why it's been included in the section dealing with the management regimes. I am not going to deal with it at length, Mr. Grant will deal with the whole issue of harvesting salmon later in the argument on jurisdiction. But I would draw to your attention, at the bottom of page 112, the nature of the control which the chiefs exercise with respect to the salmon fishery.

Richard Benson testified how his grandfather controlled and directed the fish weir at Kitwancool when Richard was a child. Each house would take fish in turn, and the chief in charge of their weir would direct the young men to open the gates from time to time and let a specified number of the waiting salmon to continue upstream towards the spawning beds.

Now, my lord, the next section which I wish to address you on is, although among the laws, it's different than the general laws which I have referred you to thusfar, because it's laws which have evolved within each of the houses, based upon each house's lessons and knowledge learned and treasured, which they have gleaned from their own experience on their territories, and which they teach to the next generation to harness spirit power to manage the house territories. And I am not going to dwell on the practices of the houses, nor am I going to explain this in depth, but it is an aspect of the harvest and the management and the conservation of the territories which is very much a part of how the people do gain knowledge and do apply it in the harvesting of resources on the territory. And to that extent, I am going to explain the laws of Sestaxw and hodl'stat. Both of them are using the words of the Gitksan and the Wet'suwet'en respectively.

You will recall that Dr. Daly spoke about the fact that, and I did earlier, that the Gitksan and Wet'suwet'en, unlike us, do manage laws dealing with the relationship of people with their spiritual power. And this is where those laws are primarily found and how they are exercised.

I am going to read from the bottom of page 113 and 114.

Laws and practices have developed called Sestaxw in Gitksan and encompassed by the terms, one of them is called hodl'stat in Wet'suwet'en which embody the lessons learned and treasured by each house and which

will be taught to the next generation to enable them to harness spirit power to manage the house territories. These laws and practices, while practised by many houses, arise from the experience on each house territory and will vary from house to house.

And Art Mathews explained that these laws are part and parcel of spiritual beliefs and lessons which are both carefully protected and taught within each house. He stated:

> "When we refer to Sestaxw it is the spiritual belief and it is the purification of the very physical and spiritual, the very soul of you. So all other houses have sestaxw and is performed or done differently from other houses. This particular one that I am speaking of is from our house."

Now, Dr. Daly provided two explanations as he understood it of these laws, and I am going to refer you to them. The first is at page 114 under Art Mathews' quote, and he says:

> "The laws of Sestaxw constitute one facet of management; that is, he who follows the rules and demonstrates how the territory is to be used and cared for, this view is expressed by Gitksan Chief James Morrison: They followed the law. That's why Indian people always knew what was deep inside the animals, where they came from, where they were going and when they were killed. These hunting laws are all about your ownership."

And I think what Dr. Daly is referring to when he says it's about your ownership is that these laws flow from the unique experience of each house operating within his or her territories, and it's in that way that it's a unique experience applied to the next generation, those lessons which have been learned on that house territory by the generation before.

If I could ask you to turn to page 129, there is a fairly good summary of the laws and practices which are included in this heading. Dr. Daly again

observed:

"These procedures..."

And he called them procedures at this point,

"...viewed as practical preparations for success in all major serious endeavours, are composed of both objective and subjective practices. The objective feature include technical skils, practical workmanship, knowledge of the terrain, of the life cycles, habits of the target species, and a regimen of self denial and personal discipline considered essential for successfully achieving the target. Part of the discipline involves sexual abstinence and the physical cleansing of the body. The subjective features are equally involved with self discipline and knowledge of the terrain. And this is the subjective features, this is the aim of the training. They include elimination of thoughts from the mind which can divert attention psychic focus from the task at hand. They may involve excursions into altered states of consciousness, journeys to that portion of the subconscious where the human and natural life forces come closest to fusing with one another. By combining these objective and subjective preparations, the hunter consolidates his skill and power and focuses his forces upon a target without violating the basic principles of respect and sharing."

And that's really the, if you will, the aim of the exercise is to know enough about the land and enough about the animals and enough about the discipline of focusing your attention on one thing, mustering your forces and the forces of nature, and then going out and targeting the hunt. That's what these laws are all about.

If I could ask you to return to page 114 to 115. My lord, I don't intend to lead you into all the evidence about Sestaxw and about hodl'stat, but I just wanted to take you briefly into Stanley Williams' explanation, only for this purpose: The laws of

Sestaxw and hodl'stat, like the adaawk, we only saw in the court case just a glimpse of the body of knowledge which was there. It involves, just as the adaawk was spoken, probably a fraction of the adaawk were told, both the time it would take to tell a full adaawk and the number that are out there, similarly with Sestaxw, we just got a mere glimpse of what it was about. And Stanley Williams did a little bit of it. I am just going to take you through it to try and familiarize you with the nature of the exercise.

And he says at page 115, "I will tell you just a short one" and he is just speaking of a short little exercise:

> "If a young person, and single person, when he goes through the Sestaxw what he does, he bathes for four days. As he finishes -- each time he finishes taking a bath, they have a ring of the -- they make a ring of the devil's club, and he would go through this each time he takes a bath. Each time this young person, single person would take a bath he would go through the ring of the devil's club, and each time you would do this four days, then he would go to...bed but he would sleep the other way: where his head was his feet will be. And each time he would eat about three inches...from the plant, the -- under the bark, he would eat the plant of the devil's club. That's under the bark of the devil's club.
>
> It is the same with a married man but what he does after four days, he would lie on one side and then after four days he would lie on the other side of his wife. After the four days is over, after he has taken a bath for four days, he would move away from his wife and he would sleep alone for four days. After four days by himself then he would sleep with his wife again and they keep doing this until about a month.
>
> The person that is going through the Sestaxw has to be always busy and what he does he is usually goes on his territories just to keep busy. And if he doesn't do that then the Sestaxw won't turn out the way he want it to."

This is describing an exercise, I really want to

leave it to your lordship to simply reflect on the fact that there are practices done by the people, exercise and disciplines, which relate to the teachings within the house and the forming of the mind set for the hunt, and Stanley described a very brief and short exercise which the hunters are put through.

Another aspect of it, and I will leave you with Sestaxw at this, was described by Stanley Williams at page 118 and 119.

The reason I chose these two examples is that they appear to reflect two different ways in which Sestaxw is practised. One is through the discipline of actually performing rituals or discipline such as Stanley Williams talked about; and a second has to do with training involving repeated contact with the elements of nature, designed to toughen the will and discipline the mind. Other techniques were designed to harness the animal spirit power to enhance the quality of the hunter's ability to proceed in the animal world. And on this respect Stanley told us that his uncle, Chief Ambrose Derrick, who trained him, he said "he threw me in the water..."

> "The first one he threw me in the water in my sleep...and after that he caught a beaver and warmed the tail in the fire, take all my clothes off, and hit my back with that beaver tail when it's still hot.
>
> Q Did he explain to you why he was doing this?
>
> A He said I was going to be strong and the reason he threw me in the water was that I would be an early riser every morning."

And he was asked what time of the year it was and he said it was about March, he was about 16 years old. He then goes on to say that Ambrose was one of the people that knew all about the territories, all the things that he knows about the territories and he trained Stanley.

And then Stanley testified later, this is his training to be strong, that he and one other man packed seven goats from the village to the -- from the territory to the village on their back. I just added that because Stanley connected his ability and his great strength with the teaching which he had from his uncle.

And just to guide your reading, I am not going to take you to it, he then sets out how he was taught to

learn how not to be afraid of grizzly bears and that teaching is set out at page 120, and then on page 120 to 124, he tells how he successfully went tow to toe with a grizzly bear and came out the better. And he attributes that to his training, and I am sure it was related.

If I could ask you to turn to page 134, I wanted to here draw your attention to the evidence of James Morrison, who also spoke about the practices which had been taught to him, and he stated that it took years in order to learn that. And he stated that he was taught how to be clean, how to be lucky and he said "but you have to study that."

And then I am not going to read to you the training which he received but I would ask your lordship to review his very brief glimpse at some of this discipline which he sets out at page 135. And he stated, James Morrison, and I have paraphrased it, that the preparation is complete when the hunter is clean and clear of all vestiges of his non-hunting life. At this point the spirit of the game animals can sense the hunter's purpose.

This, by the way, relates to the sexual abstinence, which is part of the practice of getting all of your non-hunting life out of your consciousness and moving more clearly into your task.

Alfred Joseph testified how a hunter prepares to go hunting:

> "A hunter always prepares himself for hunts and they are instructed to create your own luck by preparation. They are told to have respect and they have to prepare themselves that when they go out in the wilderness that they have to be pure and they are told that when they do go out in the wilderness that they have no other thoughts but of the hunt. And they have to be careful, analyze every move they make..."

Special preparation will occur if a close relative is going through her first menstrual cycle. This is another case where in looking at the discipline which is imposed upon the young women when they first menstruate and then for every month thereafter, it's another example of the laws dealing with the relationship of people to the spiritual world. And the evidence which I have set out at page 129 to 134,

and I will just ask your lordship not to turn to it, but to refer to it when you do, sets out the preparation and the discipline which a young girl will go through and the underlying belief in putting the young women through that discipline is a belief that the life cycles of a woman are tied to the forces of nature and that the power possessed by a young woman when she first menstruates could damage the growing cycles in nature, if they are not governed according to society.

And Dora Kenni in her evidence takes the court through a very full example of what happened to her when when she turned 13, and I wanted to also stress at this point that the practice has its roots in antiquity. When Olive Ryan told the adaawk, she began by mentioning a young woman who was isolated as going through her puberty discipline as part of the adaawk. But returning to page 136, Dora Kenni described that her uncle did special preparation for hunting while she, Dora, was going through this period.

> "There is a sort of cleansing period that he would go through not only of his personal self but also of his equipment. And then he would have certain plants that he had picked in the mountains that he would have burning. He used to use it to clean all of his equipment and while he doing that he would have this plant, it would be sort of like smouldering cigarette...I had to be away from him when he was doing this. This is a ritual that the hunters themselves do...the plant is called C'unyee."

Probably said it wrong.

> "This is a Wet'suwet'en word. The cleansing of himself and the rifles would take about a week so the animals wouldn't catch the scent."

Stanley Williams testified that he practised Sestaxw when he went trapping with 'Niitsxw on the territory of Xsu Wii luu Negwit. Stanley attributes his success at hunting on Sestaxw.

Finally, Dr. Daly on page 137 noted that until the coming of the missionaries among the Wet'suwet'en, the practice was done openly in the community. It began

every year when the fish drying racks were put away in late August and it would be observed through the winter for approximately six months. During this time the chiefs acquainted the young men in the past with the many laws which governed the hunt. These laws would tell the hunter what he must and must not do to be successful on a certain territory. They instructed him to study the terrain, the plant life, the game trails, the seasonal, annual and biennial movements of the animal. There are rules for finding the animals, for killing and butchering them, showing respect to their spirits, for utilizing the whole carcass, for distributing it to the fellow villagers and for disposing of waste portions. There are laws governing the preparation of the state of mind and body of the hunter. And it was Dr. Daly's details opinion that "today the instruction of the youth continues but with varying degrees of rigour."

THE COURT: Do you want to start a new section or adjourn?

MS. MANDELL: I think so, yes. I could start a new section. I am there.

THE COURT: You mean you think we should adjourn?

MS. MANDELL: I think we should adjourn, yes.

(PROCEEDINGS ADJOURNED UNTIL 2 O'CLOCK P.M.)

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

Wilf Roy
Official Reporter

(PROCEEDINGS RECOMMENCED AFTER LUNCHEON RECESS)

THE REGISTRAR: Order in court.
THE COURT: Ms. Mandell, I have spoken to our reporters, and subject to the views of counsel, I thought we would sit in three forty minute segments this afternoon, and take a break only between the second and third. All right. Thank you.
MS. MANDELL: My lord, I am at page 124.
THE COURT: 124. Thank you.
MS. MANDELL: Just by way of continuity, I am summarizing from this morning's session, and I am at the bottom of page 124.

A hunter is trained by the exposure to the harvesting laws, the experience of hunting on the territory which is managed according to the laws and the disciplines imposed on him by the laws of Sisatxw/lhah'aha.

The testimony of James Morrison reveals the depth of knowledge and management capability achieved by a Gitksan chief who has been properly trained to manage the territory.

And I would like to take you through Mr. Morrison's testimony in this respect highlighting the aspects of the training which he reveals, which is concerning the harvesting of the resources in accordance with the Gitksan laws and spiritual practises. He begins by saying:

> "They taught me how to hunt and to trap, and certain places where I can go to hunt, and certain time of the year, and how to learn to use the territory, not to abuse it. Or whatever the animals that we need that we have to learn in all of these animals be survived in population."

And he is repeating two aspects, which we stress. And one is the aspect of the training of these laws through the oral history, and the second is the philosophy which we earlier referred to of how to use the territory and not to abuse it.

> "...There is someplaces where you can get like goat and caribou on those days. They told me certain mountains better place than other place, so you have to really study there. A

1 person can't just go hunt."
2
3 And then at the bottom of that paragraph, the
4 fourth line up:
5
6 "And you have to learn all those places in order
7 to hunt or trap and you have to learn how to
8 catch the animals. And concern of the people
9 now is the population of the animals.
10 ...That's why we have names in every territory
11 that they sent you where you going, and you
12 know where you're going when they tell you
13 where to go that place. The name of that place
14 for instance here ..."
15
16 And he mentions the place where he hunts. And the
17 point that we are here emphasizing, which James
18 Morrison is testifying to, is that part of the
19 training for a hunter is to learn the places where you
20 hunt and you trap, and as he says, that's why the
21 places have names. And that ties directly into the
22 very many place names, and how it is that the
23 witnesses know about them, as you have heard
24 throughout the evidence of the plaintiffs.
25 And then he says:
26
27 "...like if my father were to hunt beaver you go
28 where these beaver dams and the river is.
29 That's the best place to go at certain time of
30 year. This is where you go. And the goat, and
31 further up on the second camp that's where you
32 go for goat. And they call the name of that
33 place, and it shows up -- further up where the
34 prairie dogs is. That's example what they say
35 to you before you go. You sit down and listen
36 to what he has to say. I'm sitting down and
37 listen what he has to say to me where I'm going
38 and what to do."
39
40 And I just wanted to stress here not only is he
41 referring to the fact that the different resources
42 will be taken from different places which he's taught,
43 but in the course of explaining this he is also
44 talking about the fact that the hunting isn't random
45 either, and when the hunters are sent out, the oral
46 history requires, and he's explaining that somebody,
47 as he says, tells him, and he listens, and then he

goes and does what he is going to do.

"...well, they say moose in someplace they call Lax stanaast. Where the natural place is open. And that's where you hunt moose, because moose is not too many in that time. Or anywhere where your hunting ground is it's hard to locate them, but the only place is natural place. Where you can hunt is natural opening there.
...S-T-A-N-A-A-S-T is a natural open place. That means nothing growing there except the food of the animals. (This) is a good place to hunt moose ... moved around same as the moose in the early 1900 ... (Caribou) ... that's when the moose arrived the head of the Skeena."

And he then explains the reason this is a good place to hunt moose is because it's a natural open place, which is the moose habitat, and he goes on to explain that there you also find wild banana, which is a root. And he says down in the middle of the quote:

"...And you can tell the moose meat and the fat are yellow just like feeding on these other things, like all those willows and cottonwood, and all different kinds of foods there, and the balance of their diet there, and that's excellent.
...(I was taught to hunt moose where they can feed to have a balanced diet. If the moose doesn't have a balanced diet) It doesn't taste very good on some of those things they're feeding with. But like the feeding on this you can taste it. People -- or older or people today will still know where it's feeding from.
If they fed on those willows, red willows, you know, because you taste the meat. It's a little different than the other. All those people today that still do, myself, I'm still taste those meat wherever - should be balanced with feed (of) the other willows and the cottonwood. (this knowledge was acquired) mainly by my father, because I was with him all the time. And he always taught me all those things how to hunt and how to be not abusing the territory."

And if I can just stop here and emphasize that part of the management to the hunt and part of the knowledge which is taught to the hunters has to do with being able to look after the area, the vegetation upon which the animals themselves feed from. And what Mr. Morrison is here talking about is that you can taste in the meat where -- what kind of diet it is that the animals had, and he talked about the moose needing a balanced diet of a certain amount of willows and also balanced with cottonwood.

And then he says, and I am reading at the middle of the quote:

> "...Well for beaver for instance, an example when you trap beaver a certain way you can set your traps, use snares in certain places. The beaver, male beaver and female beaver and the young one are in that pond wherever in the river. And there is a house there, beaver house. And also the female hanging around close to the house to save the young ones or to protect the young ones, or to protect herself too. That's where they hanging around, closer to the house. But the male, it travel far away from -- from the house. Or when the creeks run into the beaver pond that's where, or about a hundred yards away from the house, and that's how we learn how to trap in order to save some of those -- those female. But sometimes you catch them if you can't help it, an accident or whatever they call it, and then you catch them."

And here he is speaking about the knowledge of learning the habits of the animals which are being caught and trapped, in order that they can selectively catch the male animals or the larger ones and leave behind and not accept, unless its been an accident, catch the females or the young ones.

> "I learn how to smoke and to dress (these animals). That's the main thing, 'cause you can use this -- as I say, you can use this skin for anything your clothing. You can use it in the other thing, that's why you have to be careful how to skin it. You learn how to skin it, and you must do a good job. And they have

1 to watch you as you're do doing it."
2
3 And this is Jim Morrison -- James Morrison talking
4 about the techniques which are learnt and taught in
5 order to use the skin in the animals and to use every
6 part of it.
7 At the bottom of the page:
8
9 "...Well, in someplace, you know, when the
10 animals are starting to go down, and that's why
11 you have to move around, and you know what
12 animals you taken out of there, and you have to
13 learn not to abuse it because they will never
14 come back. And after you're not leaving the
15 meat out in the bush, or whatever, where you're
16 hunting that we clean it."
17
18 And this is a reference by Mr. Morrison to what
19 you have already referred to about the hunters knowing
20 what animals have been taken, and conserving the
21 animal population by rotating their harvesting
22 practises.
23
24 "I was taught not to abuse the animals ... if
25 you shot any animals ..."
26
27 THE COURT: Haven't you given me that already, Ms. Mandell,
28 several times? Not that particular quote, but that
29 same subject. You may read it if you wish, but it
30 seems to me to be highly repetitious by the factor or
31 the power of three or four.
32 MS. MANDELL: Well, I am just going to take your lordship's
33 thoughts into mind, and refer you only to the very
34 bottom of the quote, which I wanted to stress, and
35 that is, beginning from the middle of the paragraph:
36
37 "When you go out, a person once they go out in
38 the bush and they want fresh meat, any kind of
39 meat, you go out and shot one and then you eat
40 it then you know what territory you're on at
41 that time and you feel better when you eat that
42 meat. It's not -- that's why -- I'm not saying
43 not based on the wealth and the other things
44 when you eat that meat and you know where it
45 comes from."
46
47 And the reason I wanted to take you finally into

Mr. Morrison's observation at that point is to underscore the fact that the harvest and management of the animals is based very much, as is the practises of Sestaxw hodl'stat, on the proper caring for each of the house territories. And what he is here speaking about is that there is a form of ownership or a pride in ownership which arises when a hunter or somebody who is familiar with the taste of how the different animals are from the various territories eats the animal and appreciates where the animal is from. And in some senses this is a parallel or a marrying with the procedure at the feast where the food is announced which territory it is from, and it's part of the affirmation of ownership of the territories which occurs at the feast.

I mention that Mr. Morrison's said that it's common for other Gitksan people to be taught the practises and laws and rules which were taught to him by his father.

> "They are taught the same practise laws and rules today."

And lastly that Mr. Morrison has recently succeeded to a high chief's name.

Now, I would ask your lordship to turn to page 139. I believe that I have covered -- I have highlighted what I wished to do in the pages in between, and most of it relates to Hodl'stat and Sestaxw, and I would ask that your lordship read it at your own convenience.

The next section that I would like to address is the question of the management process. And you will recall at the beginning of the argument I identified that while the chief was passed the power to do the management, and that the authority or the final buck rests with the chief in terms of the overall management of the territory, there is a process which occurs within the houses and at the feast, and with respect to how the territory is managed and decisions are made, and I would like to now address that process.

And I'm on page 139.

The house is the major unit for decision-making about the territory.

Alfred Joseph explained that the management of each house territory depends on special knowledge

about the unique features of that land.

And he says:

"A Yes. There is different -- a difference in the animals that are in each territory. Some territories are -- further out into the headwaters and some territories are closer to the main big valleys where they are lower down. So -- they have to trap each area different -- ..."

Chiefs testified to exercising of their jurisdiction to harvest, manage and conserve the resources in consultation with the sub-chiefs of their house. By this consultation the chiefs are able to keep themselves informed of the state of resources and to make informed decisions concerning the rotation of lines. In some cases sub-chiefs are delegated to caretake a portion of a large territory.

And on that point of delegation, I would like to refer you to page 145. And this is a statement made by James Morrison, and it's in the middle of the page, and he is speaking about a chief who may not know history if a successor chief has not been on the land. In order to learn about the land and management of land he or she must take steps to become informed of the territory. And he testified:

"...they have to take somebody else and send them out there of their own clan. That's one of the laws of Indian people, they have to choose one of themselves, or anyone that knows the area to learn themselves and have to send out one to the territory,"

And he mentions history.

"...and come back and report back to the Chiefs so that they know what to report from that person, the ones that give permission. And when they came back they give him report and they know what's in that area. That's the start of this learning on this territory."

And what the chiefs then testified to, and I am going to lead you through the evidence, is that within the house there will be a general management unit, and

it may not always be that it's the head chief who himself or herself is the person that will possess the knowledge to entirely manage the house territories, and in that case sub-chiefs and others will be either delegated to that, or will be part of the consultative process.

At the bottom of page 139 Alfred Joseph testified:

> "it's always about the House of Kaiyexweniits that meet about whatever is happening on the territory."

And he testified that he with the advice, and after consulting with the members of the house, may decide who can go on the territory of Gisdaywa.

Now, many chiefs testified to the consultative process within the house regarding the harvesting and managing and conserving of the resources. I am going to take you to some examples and ask you to independently read others. On page 140 and 141 the evidence with respect to the management of Wah Tah Keg'ht's House, some of it is set out. When asked whether Madeline Alfred has permission to take care of the berries on Wah Tah Keg'ht's territory, Henry Alfred the chief testified:

> "we always have meetings amongst our family ... and it's just like permission, yes."

In Wah Tah Keg'ht's House they have meetings to talk about the beaver hunting. Henry would tell his mother where he went and how many beaver he caught, and other members of the house report in meetings about where they trapped beaver and the size of their catch. And Henry said:

> "we always get together and we know where it comes from."

And this is very much important to the second law that we spoke about, which is having the knowledge inherent in the house and within the management unit to be able to rotate lines and know how to do that.

Henry mentioned that his house would meet regularly to discuss the trapping on the territory. People who trap tell him where they are going to go trapping and where they had been. And Henry says:

"And if I feel they have trapped there already I instruct them to use different area or the other side."

And it was Henry Alfred's view that the right number of people are today using the territory.

"If we had more than what we have now ... you would have over harvesting and there won't be no animals left."

And Henry Alfred also testified that when he was working outside of the territory, and the territory was primarily used by his brother Cecil and his mother and his brother Andrew, he would come back on weekends:

"we had meetings and they would inform me as to what animals had been taken."

And he in his testimony was aware of the other hunters and trappers from the next generation who are available to use the territory, and he identified the names of those people in his evidence.

The management of Wah Tah Keg'ht's territory functioned slightly differently than that which was testified to by Mary MacKenzie for the House of Gyolugyet. And I am at the bottom of page 141. Each of the chiefs in the House of Gyolugyet have a portion of the territory allocated to each of them. And she said "for our traplines", but that the whole territory is considered to be Gyolugyets, and "no one is put out of not sharing that territory."

Alfred Joseph testified that a sub-chief can be given authority over a part of a territory.

"They are told to look after certain parts of the territory. If there is a big territory and then there is two or three valleys in it each person - each Chief is told to take care of different areas."

And this is actually the way that the territory of Namox was testified to having been managed.

Dan Michell described the decision-making process concerning management of Namox's territory, which you

will recall Dan Michell participates as a caretaker.

"like now for example that I am left in charge of it ... our Chief knows my ability to look after the territory so when I manage the territory I do it without having to run back to her all the time that she would have confidence in me to take care of it. And then we sort of divide the responsibilities as have always been done in our area ... on the north side ...",

And he names it.

" ... in the south side ... so in the past in my experience Alfred Mitchell used to look after the (south) side. North side, Alfred Michell and Big Tommy Michell looked after it. When Alex Tiljoe to ok over he looked after south side."

"It's a big territory 'so we divide the responsibility to look after it'."

There was a meeting among house members about who should look after the north side and south side in recent times regarding the decision that was reached that Alfred Mitchell and Victor Jim should look after the north part and Dan Michell the south.

"We talked it over with our Chiefs and we decided that that's how it was done before our time and so we felt that was the right way to go about it. That's how we set it up again. We continue it on how it was taken care of."

And you have already heard about Dan Michell's decision to move Billy to the south part of the territory.

And finally in describing how Namox's House makes its decision, Dan Michell testified:

"Well it's an ongoing thing with all our clans and especially the ones that hold the names, the chiefs names. We get together and we all have meetings and discuss what we're going to do. Like for the use of it, and how it's going to be arranged, whose going to look after each

area of the territory and how it's to be used."

And I just wanted to remind your lordship that in the discussion of ownership found at page 181 and 182, it was there mentioned by Solomon Marsden that the caretakers of the territory, even those that are caretaking internally into the house, those caretakers will be announced at feasts. And he mentioned that they would be announced at the headstone feast to the pole raising feast where territory was the subject of the feast.

Now, the next area of the management process involves the management by the chiefs of the resources to fulfill the obligations of the house both internally to the house members and also to provide for the house's obligations at the feast. And this is part of the management process. It's part of the decision-making which the chief and the house members must go through, and it's also -- it dictates the management decisions which are made on a year by year basis with respect to the harvesting of certain resources.

If I could begin with the testimony of Joan Ryan.

THE COURT: Haven't you read that passage?

MS. MANDELL: No. No, we haven't.

THE COURT: If you say you haven't -- it sure sounds familiar.

MS. MANDELL: No, we have not read this one. She is testifying to the responsibility of the head chief to manage the territory in keeping with a management plan to know the quantity of resources harvested by house members. In response to the question "What do you mean by taking care of the resources?" she responded:

"I guess one way to get at that particular question is to say that we have a management plan as to how we take care of our resources, and one definite example that I can give you here is that when you look at your inventory you know approximately how many dried fish you need within a year, how many cans you use within a year, how many are frozen, how many are half smoked, and based on that inventory when you start to process again in the spring, and during the summer you go to the river and you only take from the river what you need. Included in that list has to do with trading as well."

Now, in order to arrive at the inventory which is taken by the chief, the chiefs must know the fertility and population growth rates of the different species in the different regions. As Dr. Daly identified, the harsher higher elevation basins tended to regenerate more slowly than lower valley bottoms, and harvesting methods conform to those varying conditions so as to use but not deplete the balances of life therein.

Now, we heard evidence, my lord, and I am going to draw to your attention chiefs who based on the -- their understanding of the population growth rates, the state of the animals and their habitats, in the interest of conservation restricted the harvesting of species and animals in order to accomplish regeneration. And this was testified to by Florence Hall. She described the decision of her house not to harvest beaver in the Burnie Lake territory based on her information and belief that the beaver population growth rate was in rapid decline. And she described a trip which she made into the territory in 1962. She noticed the beaver:

> "at that time what few beaver they did catch they were very scarce and what few they did catch was lean and they look liked they were starving. And that's what Alex said that it looked like there was no feed for them in the area. There was a lot of jackpine growing in the area but beavers don't eat jackpine ... they usually eat alder and willows and there was...no sign of...any of them trees that were around at that time."

And she described how her family made a decision about how to deal with the obvious decline in the beaver population.

> "...the family discussed the situation of what beaver population and during the discussion I myself advised them that now that beaver population is low we should leave it alone for awhile, until such a time as when the beaver population builds up again."

And by 1962 she had already acceded to the name Chief Kweese.

Now, she authorized Alex Dennis, James Dennis Michael Alfred and Alfred Michell, her brothers and others of her house, to look after the territory. It is her belief that these people went to the territory within the last few years, and that the beaver population is still poor. And based on this belief she continues to prohibit beaver trapping. And she testifies to that. That's an area in the Burnie Lake area where there was and has been, in spite of the advantage to the house in having access to beaver, there's been no beaver harvested since 1962.

Alfred Joseph testified that another aspect of the watching of the animal population is to keep a watchful eye out for the animal trails, and he testified to this as part of the function which passed to him upon receiving the chiefly name:

> "We have to make sure that the animal trails are not disturbed; like it is - what's been happening with the clear cutting is it just wipes out the animal trails and that makes it very difficult for any animal trails. They also have boundaries. A wolf has a boundary; a bear has a boundary and when that's wiped out, it really disturbs the animal population. All living creatures have boundaries and once you disturb that, it just makes it really hard for all living things. There is a conflict ... I know my uncle or grandfather all talked about seeing animals that trespass into another's territory and there's always a fight there."

Now, in terms of being able to keep abreast of the changes and the fluxes in the animals' population and in maintaining the trails and carrying out the function in that respect, and I'm going to take you to 148, several chiefs who were not in the area constantly spoke about the way in which they continued to keep abreast of the state of the animal population.

Alfred Joseph testified that in the 1950's, where he was primarily logging and doing construction work, during that time he knew that his Uncle Thomas George, Gisdaywa, was using the territories and his son was using it, and whenever they visited him they said:

> "They always talk about the territory so there is no need for us to go in while he is there

and we are working."

And I am going to only refer you to the section, but in our submission Alfred Joseph's testimony demonstrates that a chief whose not primarily the hunter on the land, is not a specialist in that respect.

If you review Alfred Joseph's testimony, in our submission what it demonstrates is that he has continued to keep himself informed about the happenings on the territory, how the territory has been used by the users, Andrew George, Leonard George, and Jimmy George before he passed away, who Alfred says have always been in the area, and Andrew would tell Alfred what's happening on the territory.

Similarly Mary MacKenzie, whose basically a non-user of the Gyolugyet territory, but others of her house are, she testified that house members continue to inform the chiefs regarding the territory to permit decisions about conservation and management. She testifies that those who she authorizes to use her territory report to her, and she mentioned that her husband made a trip and told her mother and her what happened.

And similarly Mary Ann Jack, Gwamoon, reported to her that the beavers had a disease on her territory and were dying, and as a result Mary MacKenzie directed Mary Ann not trap for a few years, and then later that she directed her husband to check the territories subsequently, and the beaver were plentiful there.

Now, my lord, you will recall the discussion yesterday where we demonstrated the guiding ethic of management for the owning house as directed by the chief as the ability to feed others. And when this ethic is implemented and reciprocated, the whole community benefits. Where this can't be done, it can ultimately affect the ownership of the house territory, and for final failure to be able to fulfill feast obligations and pay for funerals, the house territory can be forfeited.

And the next section which we are going to deal with on the management question is the management and harvesting of the resources to fulfill the feast obligations of the house.

If a chief properly manages the territory and fufills the obligations of the house to the father's

and spouse's side on the land and at the feast, the wealth of the territory and the strength of the kinship relations will feed the name of the chief at the feast.

THE COURT: Is that what that's supposed to say?

MS. MANDELL: Yes. Actually, you know, a better -- a more -- a less poetic and more literal way to say it is it would feed the dax gyet of the chief at the feast.

As Alfred Joseph says:

> "head Chiefs when he takes a name, like I said, the territory goes with it and you have to see that the rest of the sub-chiefs and other - see that all the clan members are using the territory, have a place to go, and the more people that go out to use the territory, that means the head of each house has more power and wealth to distribute or pay for anything, that is any services that have been performed by other clans, especially on the father's side."

And you will recall the discussion in organized society where it was urged upon you that a chief has more wealth, the more he or she is in a position to give, which is a contrast to how we in our society define wealth more so in terms of accumulation.

Johnny David described the relationship between the authority of the chiefs, the rights of house members to use the territory and the contribution at the feast. And I thought he said it quite succinctly:

> "...the different members of the house or the clan are allowed to use the territory with the permission of the head chief and the person who is given permission to use the territory at a feast redistributes the meat or the money to members of the house and this is our Indian law and it is not the white man's law."

A significant aspect of the jurisdiction of the chief in managing the harvest from the territories is to ensure that the circulation of goods and services available to the house are available to fulfill the house's responsibility to host or contribute to the hosting of feasts to which the chief and house members have obligations.

And Dr. Daly sets out the way in which he's

observed the chiefs accumulating in order to fulfill this obligation.

> "Until quite recently the chief had to know what each senior matron had put by for the winter in storage pits, root cellars and meat caches. In the pits they stored boxes of oolichan grease, cooking oil rendered from salmon heads and game animals, berry cakes, hemlock sap cakes, berries preserved in oil, bulbs and nuts. In raised cache houses they kept most of the smoke-dried strips of salmon, steelhead and and game. In both types of storage the items of top quality were piled on one side for feast use, and the items for every day use were piled on the other side. Today, when the medium of exchange is cash, and is no longer limited to tanned hides, salmon strips and berry cakes, many houses in Gitksan and Wet'suwet'en villages have at least a wall, if not several chests or a whole room, devoted to the accumulation of goods to be used in future feasts. The chief has to assess these piles of commodities in the homes of his or her house members and know the general state of the domestic economy and the bank balances of house members so as to be able to assess the house's ability to acquit itself well, when called upon to support a relative's feast.
> ...The chief must also oversee the storage of gifts and payments which he has received, such as those received for allowing others to borrow a net or a fishing site. Most of such items would be expended later in the course of feasting. In the course of managing the economic round, the chief has to bear in mind need to attract and hold as large a hard working a group of people as possible, whose day-to-day endeavors will eventually contribute to the house's ability to engage in feasting, and thereby pay for its ownership rights in society. At the same time, he must settle its business and pay its debts to other houses in the community."

Now, this managing of the resources and the harvest in order to satisfy feast obligations is the

economy of the people, which is in some senses the guide post or the reason for much of the harvesting. And this was testified to by Glen Williams, where he called the feast economy, and he said to you:

> "It's a redistribution of the wealth. Certain individuals are commissioned, like -- from your father's side are commissioned to undertake certain tasks, and whatever wealth that you have is transfered or given over to your father's side ... whatever money or gifts that you have got in, that is given back to your father's side. And also the food that you bring to the feast is given out to all the other guests in the feast hall. There is usually more than enough food that is given out, redistributed, and at the end there is money that is given out as well to the high ranking chiefs to your father's side or whoever you have asked to do certain things for that main house group."

And then he talks about the witnessing, and he was asked at the top of page 152:

> "Q Is there a name for that accumulation of the food goods that are brought in and accumulated at the door?"

And he mentioned a Gitksan name. And he was asked:

> "Q And what does that mean?"

He says:

> "A it means all the gifts and all the food that is in your possession, and what it represents is the wealth of a particular house. The more food you have, it indicates the wealth of that particular chief in that house group."

Now, Dr. Daly pointed out that while it's true that the feast is part of the economic exchange and distribution of the house among the other of the houses, he mentions that the feast performs other functions as well, and that at this time not to be

1 considered only a medium of economic exchange. And
2 this relates to the arguments which were addressed to
3 your lordship yesterday about the very many functions
4 of the feast celebrating at one in the same time the
5 transfer of the ownership in land in some cases, the
6 affirmation of the territory, the display of crests,
7 the assertion of authority by the chiefs, and the
8 various other demonstrations of political process and
9 ranking which the feast also does. But then Dr. Daly
10 says at the same time behind the scenes so-to-speak:
11
12 "Economic transactions are intense as the
13 funding, financing and employment or of labour
14 are mobilized to ensure that the feast is a
15 success. These activities - mobilizing support
16 of kin, taking loans, calling in loans from
17 others, insuring credits from the father's side
18 and/or spouse's side activate the real riches
19 of the host: his or her social network of
20 support, which is manifested in terms of
21 produce, handicrafts and other goods and
22 services rendered to ensure the feast's
23 success."
24
25 THE COURT: Excuse me, Ms. Mandell. We are going to change
26 reporters now.
27
28 (CHANGE OF REPORTER)
29
30 I HEREBY CERTIFY THE FOREGOING TO BE
31 A TRUE AND ACCURATE TRANSCRIPT OF THE
32 PROCEEDINGS HEREIN TO THE BEST OF MY
33 SKILL AND ABILITY.
34
35 _____
36 LORI OXLEY
37 OFFICIAL REPORTER
38 UNITED REPORTING SERVICE LTD.
39
40
41
42
43
44
45
46
47

THE COURT: Thank you, Miss Mandell.
MS. MANDELL:

> ...In other words, the surplus of the fruits of production can be invested in feast-giving internally and barter externally. Investing House surplus in such ways signals the good management of the House leadership, the hard work of its members and affines, and the good citizenship of the whole group which, in this manner, "pays its dues" for the continued right to enjoy ownership of land.

In this way it is submitted that the management of resources and their distribution at a feast constitute the exercise of jurisdiction and in so doing affirms the rights of ownership of the House.

And we say that all of this needs to be managed for and that the wealth of the House to participate in this economy is founded in the interaction -- useful interaction between the House members with the resources of the territory and the benefits of the labour which are brought into the feast as the wealth of this House.

THE COURT: Well, how do you say that relates or operates now due to the fact that what they are distributing at the feasts are volumes of commercial sugar and money.

MS. MANDELL: Well, the Wet'suwet'en do distribute sugar and money is distributed.

THE COURT: Doesn't all come from the land.

MS. MANDELL: Well, though it doesn't all come from land, it's true. But the land is still -- and must be still used in order to bring forward the wealth of the territory for the feast. And while you have heard yesterday talk of the announcement of the food which comes from the territory and is announced at the feast -- and I'll be getting into that in more detail, and that is an essential component of the feast -- you can't distribute money instead of providing the food for the guests.

There is also -- and we will be referring later to the fact that some of the ability of the chiefs to continue to provide wealth from their land has been truncated by the inaccessibility to them of resources which are now in the hands of other people. And people have continued to survive and continue to do what they can. But the principle which we are urging

upon your lordship is the fact that the territory is, and the membership in the House together is ultimately the wealth of the House as it's to be redistributed at the feast. And that's --

THE COURT: But if the chief earns wages lobbying on some other chief's land, for example, taking an extreme example, and distributes that wealth at the feast, it doesn't come from his House's land at all.

MS. MANDELL: The --

THE COURT: What -- what do you -- no. You give me your answer, rather, before I lead you into one.

MS. MANDELL: The territory is the source of the chief's wealth together with the labour of the House.

THE COURT: Not if he is working on some other chief's land.

MS. MANDELL: Well, we do not -- at the moment -- and we will be addressing you on this later.

THE COURT: Yes.

MS. MANDELL: We don't have control fully of the territory, and there has been -- and this is part of the lis of the case. And so there has been forced alterations to the ability of the chief to manage the resources of the territory to benefit himself and the House members.

And I can, for example, refer your lordship to a statement made by Mary McKenzie which is found at page 168 and 169 of this submission, where she testified that -- sorry, she testified that in the past, tanned skins of animals were used for distribution at the feast; this eventually gave way to guns and blankets, now money.

And then at page 169 she states:

> the reason why moose and deer was used and the ground hog, the Gitksan people killed these animals off their territory, and there was a season that at prime time when these first are -- and these pelts are of prime sort that they -- this is why they -- it took them many years probably, or a few months to get all these. Now, their season is open for the hunting, it's not -- although they're limited, the kill, but still with every wil 'na t'ahl and every House of a Gitksan would have these prepared for a feasting, so this comes from the territory, like the ground hog, the beaver, the moose, and the deer, but today we were not able to do that because the seasons are set now for the people to do their hunting and trapping, so

we don't use those anymore in our feasting, so we use cash, but the food is there, we still use the food off of the territory today. We don't use the hide."

And I think what she is addressing -- which I'll leave to Mr. Grant to address you on further -- is the atrophication (sic) or the inability of the chiefs to completely today rely upon the wealth of their territory. But if this case were, hopefully, decided in a way which gives the chiefs control again over their territory and the resources, the same feasting principles, the people from the House and the wealth of the territory is what will feed and continues to feed today, although in different ways, the name of the Chief at the feast.

THE COURT: So is the answer that I was going to lead you to correct then, that the distribution of nonterritorial wealth at the feast today is at least partly symbolic?

MS. MANDELL: Well, it's not -- partly symbolic -- it's not symbolic, no. There is a real distribution of wealth at the feast.

THE COURT: But it's not all from the territory.

MS. MANDELL: It's not all from the territory,

THE COURT: To the extent that it's not from the territory is it symbolic or is it something else?

MS. MANDELL: Oh, it's something else.

THE COURT: What is it?

MS. MANDELL: It's still part of the economy of the people functioning within the feast -- the feasting economy.

THE COURT: So then it's part of another facet of the social organization in the Gitksan?

MS. MANDELL: It certainly is. It's harnessing the wealth -- it's harnessing the support, the services, the labour, the talent, the ability of the House to bring together its combined surplus in order to redistribute that wealth and maintain the strength of the House at the feast. But you have to put that against what Stanley Williams said when he said that the reason we -- remember he was talking about paying in all this money at the feast, and he says that for each feast he pays in $3,000 approximately, and there is many --

THE COURT: Total of 80,000 he said.

MS. MANDELL: Sorry?

THE COURT: Total of 80,000 he says from the House.

MS. MANDELL: Puts in a lot of money. And he says, "We do that to protect our territories." So what he is saying is

that the House is there in its full strength, with its territories behind them, and even if it's money today that's being used and not food or hides from the territory alone, within the system, the economy is based on the fact that the Houses continue to redistribute it at the feast and they do it according to the way that the authority is managed to protect their territories. And that's what he was speaking about. It's not symbolic.

THE COURT: Right. Thank you.

MS. MANDELL: The -- actually, the next section, is to deal with the accumulation in the House today of surplus for feasting for use at the feast. And this is on the point of your lordship where you are asking, "Well, are the territories today still used in the feast?" And this is addressing the management of the territories today, even in its present state, in order to provide for the creation of surplus for Houses for feasting.

And I begin with a reference to -- a partial passage of Mary McKenzie which I am not going to read to your lordship, but I refer you to. What she is -- what she is talking about here and goes on further to talk about is that a lot of food is provided to the feast. That the feast is feeding oftentimes five or 600 people, and she is describing that the food is provided by the wil'na t'ahl and is primarily the responsibility of the host house to accumulate. And while I don't set out the whole quote, I do identify some of the very many types of resources which she identifies is provided for by way of food at the feast.

Now, many of the witnesses talked about their harvesting resources from the feast -- for the feast. And I think that the evidence here can generally be summarized that there is two types of management decisions which occur: One is within the House generally, there is a general putting away of resources for the feast. And this is without reference to any particular feast, but there is an overall management of the resources of the territory for the purposes of accumulating resources for distribution at the feast. And the second is where there is a specific feast in the future already targeted for, there is harvesting which is done in a more intensified way in order to provide for a particular feast which is named at a date certain.

And I'll deal first with the question of the general harvesting over -- over time but without a date fixed for a feast. And again, I return to the example provided by the House of Wah Tah K'eght, although there were many others, and I just selected this one to demonstrate the point.

Madeline Alfred testified that all animals that Henry Alfred and others in the House harvest from the territory, are bought to her house and she prepares and stores the meat at her house:

> they cook it and then small portions are given to each one of the guests that's witnessing the feast.

Henry Alfred testified to how, on a regular basis, animals, fish and plants are harvested and the food is distributed to meet the needs and feast obligations of his House, whether or not a particular feast of the clan is immediately forthcoming.

And I won't read you the quote, but that's what he is talking about.

When Henry traps beaver, his mother does all the skinning and prepares the meat for drying. Henry sells the fur to a fur buyer. His mother prepares the meat for distribution at the feast. And Henry said:

> One little square slice in little package and distribute it throughout.
>
> If we got beaver meat...it's always announced where [the food] came from.

And that the big chiefs will receive a little more than the other guests.

Now, if I could -- he then talks about several feasts which he provided meat for, and I just wanted to refer you to page 156 because it's really the description of the point.

In describing the goat hunting trip with Daniel Michell, Cecil Alfred, Henry's brother, and his oldest son Lester Alfred, Henry said that the goats from that particular hunting trip "ended up" at his older brother Andrew's feast.

And I just wanted to make a point that I forgot to mention to you this morning, that he was talking about goat hunting -- and Exhibit 164 in the area marked

"Goats" near the -- I'll just hold up the map and you can see that it's at the section --

THE COURT: Debenture Peak?

MS. MANDELL: Debenture Creek, yes.

THE COURT: Peak.

MS. MANDELL: And I forgot to mention that we were told in evidence that one of the largest goats in the world was taken there in 1949. It was the largest, sorry. This was a little known fact about a well-known goat hunting area. I was told not to sit down today until I told you that.

I wanted to make the point on page 156 that the food which is harvested for feasts may also be used to support the House members' obligations of feasts hosted by other clans not just their own. And Henry Alfred testified that steelhead from Wah Tah K'eght's territory had been distributed and announced at the feast of Alec Tiljoe and Annie Michell, both from the Tsayu clan, and this is a feast where he was helping his wife's clan and he contributed fish to that feast.

At page 157, we set out some of the evidence to demonstrate that in addition to their general management responsibilities, many chiefs detailed harvesting efforts directed to particular feasts.

The most common situation described was that of a successor harvesting for feasts in connection with the passing of a name. And in describing a naming feast, Johnny David said:

> This person who is going to take over a name he goes out to his hunting territory and a date is set. When the date is set he brings all the animals that he has killed and this is distributed at the feast.

And you'll recall Basil Michell who testified to hunting on Hadah K'umah's territory for food when he was getting his name. And he stated in general:

> between the funeral feast and the headstone feast the people who are going to be taking the name over have to begin trapping for beaver or hunting for various game this meat can be distributed at the feast. As well they would be buying other food stuff such as tea and sugar.

1 And he also said that the spouses will be
2 harvesting from their territories, and many of the
3 witnesses talked about this.
4 Henry Alfred said that during a time when he was
5 preparing to take his name:
6
7 that fall I did lots of hunting, beaver
8 trapping and get prepared for the feast.
9
10 And Dan Michell at page 159, testified that the
11 accumulating of food from the territory for
12 distribution at the feast is a feature of his
13 ownership and jurisdiction over the territory. He
14 answered the question why Namox's territory belongs to
15 him:
16
17 well it's been handed down from generation to
18 generation. Every time you know like another
19 head Chief passes on...the successor has to
20 bank up material and meat for the feast get
21 ready for the feast to take over the name.
22
23 He says, "It usually takes about three feasts before
24 it's completed." And he is -- I am referring to the
25 smoke feast and the funeral feast and the headstone
26 feast, and then the feast eventually where the new
27 chief is finally seated.
28 The next section is the preparation and storage
29 of resources for the feast.
30 Today, as in the past, the animals, berries and
31 fish from the House territory are harvested for
32 distribution at the feasts. Because the harvesting is
33 done to create a surplus which must be stored in
34 preparation for feasts, the Gitksan and Wet'suwet'en
35 have developed methods to preserve their foods to
36 ensure a ready supply of foods for distribution.
37 The chief is ultimately responsible to ensure that
38 the technologies for preserving foods are taught and
39 that his or her House members accumulate the food
40 required to fulfil the House's feast obligations.
41 Much knowledge and labour is required to prepare
42 foods for storage. The chiefs testified to the
43 preparation required to preserve fish, meat, berries
44 and furs, but we don't say that.
45 My lord, I am not going to take you into, in
46 detail, for all of these various foods, a description
47 about how they are prepared in order to preserve them

for storage. Your lordship has heard much testimony about this. I want to, though, observe that the techniques to do the food preparation and the preparation of hides which are used at feasts are passed from generation to generation, and that there is in the passing of these techniques, a direct link to the past with those who have been there before and to those who are now living.

And I also wanted to emphasize that the varied ways in which the food is prepared and the hides are prepared, and the many intricate ways in which these foods are prepared for storage reflect a deep and dynamic interface between the people and the resources. And that it's not the kind of interface which grows up over a very short period of time, it reflects a very long history with the resources and a deep commitment to the passing on of this knowledge from generation to generation.

And what you saw, and I'll lead you to some of it, not all of the evidence, is young people today being taught the same techniques and preserving the food or the hides in the same way as their ancestors clearly had done before them. And it's not something which was done once and is now part of the oral history, it's something which is continuing to live and continuing to connect one generation to the other, and to connect the people with the resources of the land.

Now, I do, though, want to stress that if we were not dealing with a society that could and did accumulate surplus, the whole feast economy would not rest as it does on the redistribution of that surplus at the feast. And so the fact that the society is one which can and does create surplus, is a fact of management. The teaching to create the surplus and also the storage and the creation of the surplus goods is something which the chiefs testified to that they were responsible to teach and to do.

Now, the first area that I set out is on the area -- is in the area of fish, and that's drying and preparing the fish. And I am not going to lead you into it in detail because Mr. Grant, in dealing with the area of the jurisdiction of the fisheries, will likely touch upon some of this evidence. But I do ask you to read the section and, particularly, Alfred Mitchell's description at page 161 of the process where fish were dried and smoked.

And one of the factors of it that I wish to draw

to your attention is the tremendous labour intensity of both the women and the men in doing their roles to get the fish and to dry it, keep the fire right and then to cut the fish in its proper way to smoke it.

And I also wish to draw to your attention the observations of Dr. Daly supported by the testimony of Art Matthews from pages 162 to 164, where Dr. Daly was observing the process of the preparation of fish at Gwin'oop, a fish camp at the confluence of the Kispiox River with the Skeena. And between his observations and that of Art Matthews, you will get a good sense of the type of management activities which occur in order to hang the lots of forty fish which are hung to dry, and the particular identification of the fish as belonging to each House.

And if I could, on that last point, draw to your attention, the quote by Art Matthews on page 162. He is testifying to the fact that once the fish have been dressed and hung and put in the smokehouse, that they are marked. He says:

> Each House have a distinctive mark -- making the way it is filleted for identification to know where it came from. This is a strict law in our House where I know it's done. My mother cut half the fillet and cut two lines this way across the fish. If that was the head and that was the tail, when they fillet, they cut two slots across like this...And when my wife, I remember I told her -- she was from Kitkatla. She makes two other lines here and I tried to tell her do it this way and she said no, it is my fish, I'll do it the way as my mother taught me as our own distinctive sign. So each House has its own distinctive sign, identification from where these fish come from.

And the reason I draw that to your attention is to re-emphasize the point that the identification of the fish allows the House chief to know where the fish are caught and this is announced at the feast when the fish are contributed.

Now, on the -- on page 165, we draw to your lordship's attention the fact that storage -- and we say for feasts, has been going on for a very, very long time among the Gitksan and the Wet'suwet'en.

Sylvia Albright gave evidence of the existence of

fish storage pits. She mapped 233 storage pits upstream from Kisgagas village on the north bank of the Babine River. She also identified a large number of storage pits at Doreen, along the Skeena River near the old village at Gitank'aat.

One of the storage pit sites, the one at Kitselas Canyon, just outside the territory downstream on the Skeena to the west, archaeological research shows to have been occupied for at least 5,000 years.

Now, your lordship will recall that at all feasts, but particularly the Wet'suwet'en feasts, there is -- where in the Wet'suwet'en feast this is an actual part of the feast procedure which requires the berries be distributed -- that berries are distributed. That was a very bad sentence.

The process to dry berries is very labour intensive, and the organization and production of berries requires management and co-operation of the House and its members. And you will recall our discussion earlier today about the ladies in Tenimgyet's House that would burn the berry batches to get them to be the right texture and taste.

I just like you -- to remind you of Exhibit 210. I've asked Madam Registrar to pull it.

THE COURT: Tab number?

MS. MANDELL: 210. I think it's tab 6.

THE COURT: I see, yes. They are all separate exhibits, I see.

THE REGISTRAR: Tab 10.

MS. MANDELL: Yes, you have got a picture there of the late Sylvester Williams and his wife Lucy?

THE COURT: Yes.

MS. MANDELL: And this is taken four or five years ago and they are just blowing the leaves and cleaning the berries. And I just wanted to remind you of the tremendous amount of labour it takes to fill up a pail of berries.

Olive Ryan testified how the berries were dried, as she has done it herself and observed the process in her lifetime using berries from Hanamuxw's House. And again, I am not going to lead you into all of the detail of it, but I would ask you to remind yourself of it. And it's at page 166 and it involves a very complicated and time-consuming process of properly cleaning the rocks and creating the fire and laying the mats out to cover the berries and saving the juice and harvesting skunk cabbage which is required for the layers, and then rolling the berries up properly in

birch bark and rubbing them and drying them and packing them and eventually putting them in boxes. And this is part of what is required in order to store the berries for the purposes of feasting, and you heard earlier, for trade.

And I won't refer to any of the other evidence in this respect, but I would ask you to yourself read it.

On the question of hides and feasts, I've already directed to your lordship's attention the fact that in the past tanned skins of animals were used. And that while this is not now used -- while they are not now used today for money, they're still distributed at the feast and used in the handicrafts which are part of the wealth of the House which is distributed.

And you will recall Exhibit 66, which was a photograph of Mr. Joseph holding up the type of mooseskin which he referred to in his evidence as being used in the feast. And you will also recall the evidence of Dora Wilson-Kenni who testified to the gift of a vest made from moose hide to Stanley Williams in appreciation for his assistance in providing fish to the families. This was one example of the very many which could be referred to as to the use of hides at the feast.

And a number of witnesses described how to create the hides for marten, lynx or beaver, and I won't take you into all of that, but I would ask you to turn to page 171 and to also have reference to Exhibit 320.

THE COURT: What is it, please?

MS. MANDELL: It's the famous five photographs of moose being -- moose hide being prepared that Dora Wilson-Kenni introduced

THE REGISTRAR: Is that 483?

MS. MANDELL: 320.

THE COURT: Exhibit 320?

MS. MANDELL: I reviewed -- they were in court earlier this morning. I am going to use words where a picture would do.

THE COURT: It's in one of the books of photographs?

MS. MANDELL: I just saw it a moment ago.

THE COURT: Go ahead.

MS. MANDELL: We can just carry on.

THE COURT: Yes. Thank you.

MS. MANDELL: I -- the photographs would have helped illustrate the intensive amount of work and effort, and also community work and effort in preparing the moose hide. And I am not going to take you through Mrs.

Wilson-Kenni's description in detail, but you will recall that she moved you through the photographs and showed how the hide is first scraped and then greased and then the grease worked into the hide. It's washed and then there is that community process of it being twisted to wring out the water. And then the softening process which takes quite a long time. And then finally the smoking of the hide. And it's actually a very a good description of how long it takes and how much value there is in the moose hide, as it then is distributed at the feast and it represents the labour of the household as it was put into making the hide happen.

THE COURT: Yes, we have it.

MS. MANDELL: Okay. I'll just give you a minute to review the photographs.

THE COURT: Yes, I remember them now.

MS. MANDELL: Right. And my lord, if I could remind you, we haven't been able to find this Exhibit unfortunately, but I did want you to see it and perhaps you still will have an opportunity before the day is over to look at Exhibit 479 to 483.

THE REGISTRAR: I have those.

MS. MANDELL: Oh, you have it now.

THE REGISTRAR: Yes.

MS. MANDELL: These are, if you will recall, the photographs which were put into evidence by Pete Muldoe who was describing how he stretches marten on Delgamuukw, Kwinageese territory. And the photographs were describing -- he was showing how:

> If you got a big animal you got to have a big stretcher. Like fox, coyote, lynx or anything like that. Wolf, wolverine. It all depends on the size of an animal. You got to make a bigger stretcher for each one of them.
>
> ...on a stretcher you turn the hide on the outside, the fur is against the wood.

And then he showed photographs of his grandsons on the territory taken in 1988 where he was skinning a marten and his grandsons were learning how to do it. And then a photograph of his grandsons on the territory, the oldest one was stretching a marten, and Pete said:

"Oh, they were catching -- they set a few traps and they catch a marten of their own. ...Well, they learned from me by showing them what to do and how to skin a marten and Irvin -- they can skin a marten and they can stretch a marten. And even now he can skin a beaver and he shoots a few beaver, too.

And the last two photographs, one was a photograph showing his grandsons holding marten which the two young boys had caught on Delgamuukw's territory at Kwinageese. And the two photographs, Pete said in identifying the photograph:

...they were catching these marten by themselves.

And finally, the last photograph was a photograph of fresh marten caught during the trip to the territory in 1988 by Pete and his grandson, and he identified them. And I'm reading at page 175-176, which review the sequence.

And the main points to take, we submit, from the photographs, are both the hard work and also the passing on of the oral tradition as to how to do that. Very recently by Pete to his grandchildren in territories to which they have rights of access.

Now, I would like to address you with respect to other resources from the territory, which are distributed at the feast. And in part --

THE COURT: Where are you now?

MS. MANDELL: At page 177.

THE COURT: Yes, thank you.

MS. MANDELL: This is the distributing of wealth from the territory which is developed by the labour power of the House, and this is wealth circulated at the feast.

And this can apply to special resources from the territory. And Mary McKenzie testified that there is a place on Gyolugyet's territory where the Gitksan obtain red dye. And this dye is used by the carvers on their totem poles.

And the red dye from her territory is used by the Halayt as dye for painting their faces.

Mary McKenzie's grandmother gave permission for people to get this red dye from her territory. In return, her grandmother was gifted in the feast as payment for the red dye.

And the distribution at the feast includes wealth generated by new economic opportunities. When Mary McKenzie was small she remembered that the people of Gitanmaax and Kispiox had cattle, some of which they slaughtered for the feasts. And you will recall her testimony that at Kwamoon's feast in 1942, which is where she took her name, her grandmother who had a herd of cattle, killed three of her cows to use at the feast, and every chief would have a portion of the meat.

And finally, I would like to address the management and harvesting of the resources to feed the kinship relations. And this is outside the feast hall, but as you will see, it also reflects upon the relationships which are important to the proper operation of the collective authority of the chiefs at the feast.

Now, you've heard earlier, in describing the first laws of goat hunting by Art Matthews, that when he described the last law, the seventh and last law, he said that the food is divided and he spoke about taking it to the elders and sharing it equally among the hunters. He also testified to the distribution of all foods from the territory, and he explained that it's done according to kinship relationships. And he explained how he distributed a large number of goats caught on a hunting trip in the Wilson Creek territory in 1986. And he said:

> A After we get back to the village of Gitwingax, we would then share it with the elders that cannot get around, that stays home, that have no access. Then the sharing would take place.

First he says:

> A And some of these would go to my mother's side. Her wilxsileks on her side goes to Gitsegukla.

And he says later:

> A We would do this and so would all the other hunters that came. I believe when Phillip came with us he would share it with his dad, George Daniels. Holds the

name Gasx.

So he says it goes to first of all to his mother's side then it goes to his father's side. And then he says in the bottom -- in the middle of page 180 that he gave meat to Fred Johnson and that he is the 'nii dil, the first speaker of the feast. And you know what the 'nii dil is?

THE COURT: Yes. The other side.

MS. MANDELL: That's right. The infamous other side.

A This is what we call in our language sharing...and that all that means is sharing, helping each other, helping. That's the very rule, the very existence of Gitksans, are helping each other.

And then he says:

A It depends on how much we got, then we would give more to more elders. But these are two incidents I can remember now.

And the major point that I wanted here to stress is that the distribution of the wealth of the territory among the House members is not random, that it's done according to kinship relations and that the kinship relationships first are based on a respect for the elders and then after that, the mother's side who, as your lordship will recall, will have rights to the territory, the father's side, and then the 'nii dil who will have a very influential role to play both in the feast and will have access to the territory.

Now, my lord, I haven't written out what I now want to say to you, but --

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

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED AT 3:25 P.M.)

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

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

1 (PROCEEDINGS RESUMED AT 3:35 P.M.)
2
3 MS. MANDELL: My lord, I was corrected at the break by many of
4 the people who said that there certainly wasn't much
5 surplus for feasts, although people do feast with
6 their surplus.
7 I wanted to summarize the conflict which emerges as
8 a result of the evidence presented by the way that the
9 chiefs hunt and manage and conserve, harvest, manage
10 and conserve their territories, as it can be seen
11 factually against the regime of the province. And I
12 might here advise your lordship that the issue of the
13 operational conflict between the provincial laws will
14 be dealt with later in the argument but because the
15 facts are close at hand I wanted to summarize some of
16 the places where I hope it will be obvious to you that
17 regardless of who owns the territory, regardless of
18 who owns the animals or regardless of whose basic
19 right to the land we are speaking about, on the issue
20 of jurisdiction there is a conflict between the
21 jurisdiction exercised by the chiefs in the area and
22 that by the province. And if I could just run through
23 some of the places which, in our submission, we say it
24 emerged today, based on the discussion, the first area
25 is on the question of the power or the jurisdiction to
26 harvest, manage and conserve the resources.
27 And your lordship will recall the evidence that the
28 chiefs were passed that jurisdiction or power, as part
29 of the daxgyet when they succeeded to a chiefly name.
30 And as contrasted to the fact that under the
31 jurisdiction exercised by the province, it, the
32 province, assumes jurisdiction in respect of this
33 area.
34 Now, the chiefs testified that in the exercise of
35 their laws involving hunting, and I particularly will
36 here refer you to the law which involves the
37 traplines, where the traplines are rotated and the
38 chiefs are -- decide who is going to go out to the
39 lines and where they are going to go and when, that
40 that requires specialized knowledge and detailed
41 knowledge on the part of the chiefs as to who is in
42 the area, what they are trapping, when and where. And
43 it's on that basis that the chiefs can make informed
44 decisions about the animals which they are mandated to
45 protect, their life cycle, the life cycle of the
46 animals for the next generation. And I also refer to
47 you at this point the specialized knowledge and

training which somebody like James Morrison or Alfred Mitchell brings to the hunting, so that once they are sent out by the house chief to actually do the hunting and trapping, they bring to bear a tremendous amount of knowledge about the animal population and the harvesting, which isn't possible from the territory, in order to hunt and trapping selectively. And I put that against the regime of the province, where basically anybody with $5 can go and get a permit and go and hunt and trap animals in the territories of the chiefs, and it leaves the chiefs' management regime out of control, because they, the chiefs, have no way of knowing who is taking what animal, when and where, and it's also disruptive to the harvesting practices which, from the chiefs point of view require a much more precise and refined training and instead you have untrained people out in the bush and as many of the witnesses testified to, "we just don't go out when there is open season", because it's not, from their point of view, a safe time to hunt and trap in the area.

MR. GOLDIE: My friend said she was talking about hunting and trapping, I assume she is now referring to hunting. I don't think people can get a licence to go out and trap wherever they feel like it. I take it from the description she has just given us that she is describing a provincial regime with respect to hunting?

THE COURT: I thought you were talking about trapping when you said the $5 fee, and you get a permit to trap wherever you want. But now you have added hunting.

MS. MANDELL: I thank my friend and I can make it clear and avoid ambiguity. With respect to the $5 fee, maybe it's gone up, but it's approximately $5, that is with respect to hunting. It's a fee which will authorize, it's a system which authorizes non-Indian users into the area by complying with the permit system of the province.

THE COURT: Is there any evidence of this?

MS. MANDELL: We will refer you to the acts when we talk about the operational conflict.

THE COURT: Well, there is a theoretical conflict, clearly, but the evidence is that there is more game now or almost as much game now as there ever was.

MS. MANDELL: There is evidence, and we can certainly draw it to your lordship's attention, of the chiefs stating that they -- they can't continue to hunt and to manage

1 their territories as they formerly were able to and
2 would continue to like to be able to, because of the
3 inundation of sports hunters inside their territory.
4 And that evidence is manifest throughout.
5 THE COURT: There is a lot of evidence of inconvenience or
6 irritation or frustration or annoyance, and a sense of
7 loss, but there isn't any evidence that I can recall
8 that the resource is any less than it ever was, except
9 for timber.
10 MS. MANDELL: Well, we are not -- there is two points to be made
11 about that, we are not talking only about a depletion
12 of resources, we are talking at that point about a
13 depletion of access to resources which the chiefs
14 otherwise would have. And this afternoon you have
15 seen the testimony of Mary McKenzie, who said there
16 was a major shift in the procedure of the feast as a
17 result of the constrained access which the chiefs have
18 to the resources under the provincial regime. But the
19 point which I intended to first make was that the
20 management regime of the chiefs, as you heard it
21 testified to, requires a much greater control over the
22 knowledge of who is out there and who is doing what.
23 And it's that lack of control which has been
24 introduced as a result of the access granted to
25 outsiders without reference to the chiefs.
26 THE COURT: Ms. Mandell, what is the point of this? Because if
27 you succeed in your action, you regain the control you
28 say you're complaining about. If you don't succeed in
29 your action, you don't. What is the advantage of
30 comparing the two regimes? They are competing,
31 clearly, and that's a live issue between yourself and
32 the province. So I am not able to put a legal handle
33 on what you're telling me.
34 MS. MANDELL: Well, I still don't know whether or not we have
35 persuaded your lordship that there is an area of
36 jurisdiction to harvest, manage and conserve the
37 resource, which may -- especially migratory and
38 renewalable resources -- which may become included
39 should there be a finding of ownership or whether or
40 not the chiefs may, according to law, may end up with
41 ownership to the territory based upon aboriginal
42 rights, but then still be subjected to the
43 jurisdiction or the management of the resources by the
44 province or elsewhere. And it's that area that I am
45 addressing you.
46 THE COURT: But surely you get your ownership rights, if any, by
47 history and by what you do, not by what someone else

1 has done?
2 MS. MANDELL: That's right.
3 THE COURT: So what difference does it make what someone else
4 has done? If you're right in your basic proposition,
5 well then the provincial Crown, if not a trespasser,
6 is at least breaching or disregarding your aboriginal
7 rights in what they do.
8 MS. MANDELL: That's correct.
9 THE COURT: So, I don't think you need to -- I think the
10 evidence is pretty clear that the province has assumed
11 an active role in the management and use of the
12 territory. You don't have to stress that. I doubt
13 if -- your friend's whole alienation project proves
14 that for you. So, what is the advantage of the
15 comparison you are giving me? It wouldn't matter, it
16 seems to me, if your system was better or worse than
17 theirs.
18 MS. MANDELL: It's not a debate about whose system is better or
19 worse.
20 THE COURT: So what is the purpose of the comparative analysis
21 that you're now advancing?
22 MS. MANDELL: Well, if your lordship is of the view that the
23 jurisdiction to harvest, manage and conserve the
24 resource is part and parcel of the incidence of
25 ownership, and that's what you're saying, then you're
26 right, there is no further purpose to the comparison.
27 But if at this point you're not of that view and that
28 you are still of the view that there may be an area of
29 jurisdiction which may remain to the province to
30 harvest, manage or conserve the resources, separate
31 from the question of ownership, and you wish to be --
32 we wish to persuade you that that jurisdiction is in
33 conflict with the jurisdiction exercised by the
34 chiefs, it's only on that point that the comparison is
35 now being addressed. But if your lordship says that
36 that's unnecessary, then we needn't pursue it.
37 THE COURT: I am not prepared to say anything is unnecessary
38 now, all I am prepared to do is ask you what does all
39 this mean? And be assisted by your answer. I don't
40 see it at the moment. I think, although I speak
41 subject to correction, I think this subject of
42 jurisdiction is a ghost that's getting in our way
43 here. Jurisdiction is the result or the conclusion of
44 what else happens. But that may be too theoretical.
45 But I am looking for a way to -- where I am going to
46 slot this submission, and what I am going to do with
47 it, and what I am to conclude from it. At the moment

1 I don't see it. That's why I am raising it.
2 MS. MANDELL: Well, my lord, in light of your comments, perhaps
3 the plaintiffs will get on with another aspect of
4 jurisdiction and will consider our position and to the
5 extent that it's necessary we will make this point at
6 a later date.
7 THE COURT: Within the time that's available to you, I would be
8 glad to hear you at any time. I should say, with
9 fairness, I have been giving some thought to the
10 scheduling problem we talked about yesterday, and in
11 view of the difficulty of dealing with this, I think
12 that the plaintiffs are going to have to be happy with
13 the extra six days they want the week after next. It
14 will have to end at 4 o'clock on that Saturday
15 afternoon. Seems to me the plaintiffs must be
16 finished then.
17 All right, who's next?
18 MS. MANDELL: Mr. Grant.
19 MR. GRANT: If you give me a moment I will stand --
20 THE COURT: Yes.
21 THE COURT: Where does this go, Mr. Grant?
22 MR. GRANT: That would go at the end of the binder, my lord, the
23 binder on ownership and jurisdiction.
24 My lord, here I am going to review the ownership
25 of the fishery with respect to the Gitksan and
26 Wet'suwet'en, and the management or authority of that
27 fishery by the Gitksan and Wet'suwet'en chiefs.
28 I submit that the fishery resource is somewhat
29 unique or different than those other resources which
30 my colleague, Ms. Mandell, dealt with, because it's a
31 resource that of course is migratory within and
32 outside the territory. That is the first point of
33 distinction. The second point is that you have heard
34 a wealth of evidence from both the Gitksan and
35 Wet'suwet'en chiefs, from the anthropologists, even I
36 may say -- daresay -- Dr. Robinson conceded this, that
37 the importance and significance of the salmon resource
38 has a major impact on the type of society, and of
39 course Marshall Sallin's book, Tribesmen,
40 distinguishes the northwest coast as one of those few
41 "hunting" societies, which has got tribal components
42 because of a stable resource, and in this case it's
43 the salmon fishery.
44 As I say to start, the salmon resource is one of
45 the most important resources for the Gitksan and
46 Wet'suwet'en. It's shown in the historical record,
47 and I refer you to Brown, Harmon and Connolly, and the

use of the management and management of the fishery itself. Mr. Morrell mapped this resource on Exhibit 358-20 and 358-23, and his mapping demonstrates the predominant place of salmon in the territory.

THE COURT: I doubt if that's really in dispute, Mr. Grant.

MR. GOLDIE: I would be delighted to agree that salmon is an important part of the resource of the Gitksan and Wet'suwet'en.

MS. KOENIGSBERG: Not only is there no disagreement, I am sure there has been mutual evidence on this, and I have just, in case I might have missed something on the days I didn't happen to be here, if this is a submission that is asserting the ownership and jurisdiction of the fishery under the jurisdiction of the federal government, then I came into the wrong courtroom, because I didn't think that was an issue in this one.

MR. GRANT: The federal government does not own the fishery in this province, and that's been settled by the Privy Council. So my friend is mixing apples and oranges there. This is a lawsuit against the province over the ownership of the fishery and it's also a component of the fishery of the Gitksan and Wet'suwet'en how they, that is the Gitksan and Wet'suwet'en, manage the fishery. We have already gone through the debate.

THE COURT: I think you can proceed on the assumption that everyone agrees that salmon is an important resource within the claimed territories.

MR. GRANT: Thank you.

THE COURT: I shouldn't say I think, I know you can proceed on that assumption.

MR. GRANT: I have referred you -- and Exhibit 358-20 and 23 are -- the large maps are there as well, I have referred you to Mr. Morrell's explanation of Exhibit 358-20, in which he demonstrates the significance of the salmon resource. And I would like to show you that because I think it's the reflection of the different species with respect -- within the territory, is relevant, and you may recall this map and that the large scale, the two graphs are the pink salmon, refer to the pink salmon, the sockeye is the dark brown areas and then when -- of course when you move up into the Skeena area, Upper Skeena area I should say, the watershed, the sockeye is a very predominant species, and there is the enhanced sockeye from the Babine, and then the graph demonstrates the chum, which are very, very small, relatively speaking,

there, and you also have the chinook or spring salmon, which is a very significant species for the Gitksan and Wet'suwet'en, and then you have the coho. And that -- this pie chart map depicts the relative allocation of the resource within the territory and the significance of it.

The bottom of the first page, my lord, I have quoted from Mr. Morrell, in which he reflects on those and describes, better than I can, what they symbolize. He says:

> "Within any one segment of the pie chart the more darkly shaded section indicates actual escapments, the average escapment during the period 1980 to 1986, and according to data that were available to me. The more lightly shaded area represents target escapment. Those terms are defined just to the left of the pie diagram in the legend section."

Now, what's significant with respect to the Gitksan and Wet'suwet'en territory, the Skeena-Bulkley-Babine, is that you see the actual escapment of sockeye is much larger than the light red line which you probably -- you can hardly see it from this distance -- which shows the target escapment. It's 1.17 million over 944,000, is the target escapment in the average of those years. Of course that's because of the enhanced sockeye on the Babine runs.

Now -- and I refer to that and the numbers, and Mr. Morrell's explanation to your lordship of those numbers on that chart on page 2 of my argument.

Now, I would just like to say, my lord, that -- and I don't need to refer to that, I have referred to the example of the upper Skeena pie chart or Mr. Morrell did. On page 3, I think that the quote should be: "There are situations like sockeye in the Upper Skeena area when you aggregate..." That should be aggregate, not aggravate.

THE COURT: Are you sure?

MR. GRANT: I am sure Ms. Koenigsberg will agree with me on that.

MS. KOENIGSBERG: Depends who we are talking about.

MR. GRANT: A-G-G-R-E-G-A-T-E. And all the stocks in the system like the actual escapment exceeds the target. Now, the Gitksan and Wet'suwet'en houses own specific

fishing sites, and I am going to come back to these, and unfortunately there is not a large exhibit map of that. I will return to that later. But the location of the site is dependent on the history of the specific site. Each of the chiefs has demonstrated that they have a system of ownership and a system of harvesting management, and utilization of fisheries in the territory. Because the salmon are a moveable resource, the chiefs' exercise of authority over the fishery is more complex than it is over other resources.

I would like to briefly refer to the relationship of the history of the fishery and the history of the people. And, of course, you have heard the argument and evidence of the history of the people. The history of the fishery, and the fact that specific houses own specific fishing sites is directly connected to the adaawk and the Kungax. An example of this is the fishing site at Ankii iss, which is described as belonging to the Eagle Clan by several witnesses. Nevertheless, this was a joint fishery of the Eagles and Wolves at Gitwangak. This fishing site connects to the history of the migration of the Eagles and the Wolves upstream toward Gitwangak from their former location. My lord -- and Mr. Matthews described that.

I should just give you some other examples. For example, the fishing site of Wiigyet, across from Kitsegukla on the Skeena River is a fishing site given by Gwis Gyen, Stanley Williams' grandfather, and it was described in evidence and it's shown on the map. Similarly, you the same situation with respect to Wet'suwet'en fishing sites. Of course the Wet'suwet'en lake fishing sites, as I will come back to, are within the territories of the houses, unlike their river sites in the canyons.

Now, with respect to the ownership and authority over the sites, Mr. Morrell, after seven, eight years of work on the Upper Skeena analyzing the fishery and the fishery resources, concluded that:

> "It was striking that the fishing was widely distributed throughout the system and that particular people fished at particular sites. And in conversation with those people, I learned that there was a reason for that distribution and I learned about the system of site ownership."

Now, this system of ownership, my lord, of specific sites has been described in evidence at length by Mrs. Olive Ryan, who described all of the Kitsegukla and many of the Gitwangak sites; Martha Brown, who described a number of the Kispiox River sites; Madeline Alfred, who described the fishing sites in the Moricetown Canyon as well as on their territory; Johnny David, who described Moricetown fishing sites; Stanley Williams, who described the Gitwangak sites; and Florence Hall, who described sites on her territory as well as at the canyon. And I should add, my lord, Walter Wilson senior who described the Bulkley River sites and some -- and the four mile canyon sites on the Skeena. I should say the Lower Bulkley River.

The fishing sites maps, my lord, specifically show specifically designated house-owned sites. Exhibit 8 shows the fishing sites at Kuldo; Exhibit 29-5 maps the Kitsegukla fishing sites; Exhibit 31 maps the Kitwanga fishing sites; and of course Exhibit 358-22 maps a large number of fishing sites throughout the territory, and replicates the first three in part. I shall -- I don't want to deal with these sites now, because I would like to refer to them in a broader context, and I am going to return to the fishing sites specifically. As has already been described, there was substantial evidentiary reflected, ultimately reflected in Exhibit 358-2.

Now, I now refer to the boundaries on the bottom of page five, and Tenimgyet in his evidence explained the boundaries, and I have already referred you to that, with respect to the fishing site going to the middle of the river. On page six, though, I was talking about the boundaries of territories and on page six at the top I referred to Mr. Mathews, where he explained that where a house owns a fishing site, but another house owns the territory surrounding that fishing site, the ownership of the site is more distinctive:

> "Our rights only includes these fishing sites, but does not go over the bank. It belongs to somebody else. Just our sites I have mentioned belongs to us."

THE COURT: Mr. Grant, what are you saying in this regard, that the plaintiffs are alleging ownership of sites and

1 should have a declaration, title to that site?
2 MR. GRANT: The aboriginal rights of the plaintiffs includes the
3 right of ownership and authority over their fishery.
4 And that encompasses the fishery within the boundaries
5 of the territory.
6 THE COURT: But is that a small enclave of real property? Or is
7 it some kind of a licence that you seek from the
8 owner? Or do you say you get it in fee simple? Or
9 what do you say? What judgment do you want the court
10 to pronounce with respect to those fishing sites with
11 respect to which you succeed in this action?
12 MR. GRANT: Well, with respect to those sites, my lord, I say
13 that the cumulative, the cumulation of those sites is
14 that the Gitksan plaintiffs together have ownership
15 over the fishing sites within their territory.
16 THE COURT: Of the real property?
17 MR. GRANT: They have ownership of the place, yes, and they have
18 ownership of the fishery. And I think it's in
19 Saanichton Marina, if I recall rightly, that fishery
20 is a place as well as a right.
21 THE COURT: That was the construction of a treaty though.
22 That's a site-specific position.
23 MR. GRANT: Yes, yes, it's construction of a treaty but, my
24 lord, in terms of analyzing what a fishery is, the
25 court found that it was a place as well as a right.
26 THE COURT: Well, I don't have, and I don't want to delay you
27 and I don't have any trouble with -- well, I do have
28 some trouble with the real estate because there is no
29 definition of it. And I am not sure what you're
30 suggesting the judgment of the court should be with
31 respect to that. I will be glad to wait for your
32 submission on the fishery aspect of it.
33 MR. GRANT: Well, I am going to, and I cross-referenced the map
34 to the evidence to establish the sites for your
35 lordship.
36 THE COURT: But I don't know whether the sites are an acre, a
37 half acre, hectare, 20 hectares, I don't know what the
38 dimensions of these sites are alleged to be. The
39 location is made clear by many maps.
40 MR. GRANT: Right, right. I am just going to maybe help you
41 with that.
42 THE COURT: Are they all a uniform size? I doubt it.
43 MR. GRANT: No, they are not all a uniform size. But I hope I
44 can redirect the focus of your question. What I say,
45 my lord, is from here on the Skeena, up to the
46 headwaters --
47 THE COURT: From the southern boundary of the westerly bulge,

yes, on the Skeena.
MR. GRANT: To the headwaters of the Skeena. And with respect to the Wet'suwet'en, from the territory, the boundary between Djogaslee and Wah Tah Keg'ht, just south of Beaumont on the Bulkley-Morice system, the Gitksan chiefs collectively have a right of ownership over the entire fishery within that territory. I mean, we have not -- we have not put a metes and bounds, it was a dismal effort was made in 1912 to '16 to do that kind of thing. It's inappropriate to put a metes and bounds on the fishery. In fact, my lord, as I will come back to later in argument, it's now said that the -- the federal government says that they never did protect the fishery. But in any event -- even on the reserves -- but in any event, what we say is that the ownership of the fish, which is within the province constitutionally, within that territory is part of the rights of the Gitksan and Wet'suwet'en.
THE COURT: I understand you are saying that with respect to the fish, but what about the sites?
MR. GRANT: As to the house ownership of the sites?
THE COURT: Yes. Or the chief or house ownership of the sites, yes, what are you asking by way of -- let's postulate that you fail in this section in every respect but fishing sites, what judgment would you expect from the court with respect to the fishing sites?
MR. GRANT: I would ask for a declaration that those sites depicted on Exhibit 358-22 belong to those houses.
THE COURT: What are the dimensions of them or the size? Are you asking for a reference to the Registrar? I have threatened to do that with respect to the whole case from time to time.
MR. GRANT: I think one of the things we have asked is or ask that your lordship keep continuing jurisdiction if there is problems between the parties for defining it.
THE COURT: There is no evidence as to the size of these sites.
MR. GRANT: Yes, there is, I would say. There is evidence of the size but not in a metes and bounds, within the term of an order of metes and bounds.
THE COURT: Nothing that would satisfy a surveyor or conveyencer.
MR. GRANT: I dare say, my lord, that many of these sites, the evidence of Mr. George and the evidence of Mr. Morrell, as to the recording of these sites does depict them fairly accurately with respect to some of those components.
THE COURT: As to location but not as to size.

MR. GRANT: Not as to size of the site. And some sites are a bay and some sites are a point. Particularly, of course, in the canyon. There's a perfect example. That's why I say the collective jurisdiction, the collective ownership of the Wet'suwet'en chiefs to the Moricetown Canyon is an example. The Wet'suwet'en chiefs, the Wet'suwet'en chiefs have delineated the sites within the Moricetown Canyon.

THE COURT: At great and painstaking length, Mr. Joseph and Madeline Alfred and others, Henry Alfred, pointed out what appeared to me to be no more than standing room locations on the Moricetown Canyon, where they said "that is our spot." And I am left uncertain as to whether it's the space a man can -- a person can stand on, or whether it's surrounded by some -- it's an enclave or it's some larger area. I don't know.

MR. GRANT: Well, the canyon sites, I mean what you have, of course, especially such a wealthy site as Moricetown Canyon, you have a situation there where I say that that's where we are seeking a declaration that the Wet'suwet'en together, the Wet'suwet'en chiefs together, own and exercise authority over that fishery. Because otherwise, because the terms of the order I would be seeking are not that you delineate each and every point.

THE COURT: I don't think any witness said that he or any chief claimed or any combination of chiefs claimed the whole of the Moricetown Canyon.

MR. GRANT: No. But what I am saying to you, my lord, is there are individual sites belong to chiefs. You see, what you're coming up with, and I know you don't like the terminology, but what you're coming up with is the very concept of the authority of the system of authority that Ms. Mandell and Mr. Jackson and myself have been raising with you under the heading of jurisdiction.

THE COURT: You have been arguing it but all through the evidence I was led to understand that these were specific locations which had distinctive names and were pinpointed on maps.

MR. GRANT: Yes, that's right.

THE COURT: But not the whole bank.

MR. GRANT: Well, at Moricetown Canyon there is no space left except where the fish ladders are.

THE COURT: There is no evidence with regard to that, Mr. Grant.

MR. GRANT: I will refer you to the map, and I think I can substantiate that.

MS. KOENIGSBERG: I wonder if I could just rise in this context, Moricetown Canyon, as far as I know, was always in the land claim, and are my friends now asking this court to make a declaration as to ownership and authority? And if we don't want to worry about authority for the moment, ownership of the fishery within the reserve. Because if that's so, then, in my submission, that's new and it's it not before this court.

MR. GRANT: Well, my friends -- I won't say the words. They go one way and the other. The federal government, my lord, right now says that the Wet'suwet'en have no fishery at Moricetown, that the ownership of that river bed is in the hands of my learned friends' -- not my learned friends' hands, but clients of Mr. Goldie, the provincial defendant.

THE COURT: I don't recall hearing anyone say that.

MR. GRANT: They are before another court saying that. They are before another court, and I have alluded to that and they are saying that -- they are arguing, they are arguing, and they have made their position clear, that the river bed at Moricetown belongs to the provincial -- the province and that there is no -- there is no fishery at Moricetown that is within the reserve. And --

THE COURT: Well, I can only deal with what happens in another lawsuit in response to a specific plea of estoppel or waiver or some recognized legal principle.

MR. GRANT: Well --

THE COURT: What they are saying, or admissions even, which would require evidence, what a party is saying in another lawsuit of which there is no evidence, is not something that I can -- to which I can give any cognizance. But I am not worried now about the legal question about the fishery, I am merely trying to get a definition from you of what it is that I am expected, in the view of the plaintiff, to do with respect to your claim for fishing sites? I think -- I don't remember now how you pleaded it, but I think they are pleaded by that name, are they not, fishing sites?

MR. GRANT: Fishery.

THE COURT: Just fishery?

MR. GRANT: As I recall. I don't have the pleadings right in front of me.

THE COURT: Well, your evidence has all been with respect to individually-named, specific locations which, throughout the evidence, have been called fishing

sites.
MR. GRANT: The evidence is certainly as to the specific fishing sites. The evidence of the specific fishing sites has been led to demonstrate how the Gitksan, on the one hand, and the Wet'suwet'en on the other hand, exercise authority over the fishery. What I say, my lord, is that there is nowhere within the territory that the Gitksan on the one hand and the Wet'suwet'en on the other hand, do not have authority over the fishery.
THE COURT: Well, if you're not asking me for a declaration of ownership of fishing sites, then I don't have a problem at the moment.
MR. GRANT: I am asking for declaration of ownership of the fishery.
THE COURT: I don't need to worry about this problem of metes or bounds or legal description or anything of that kind.
MR. GRANT: I don't want you to be misled on the point, my lord, I am not suggesting that the evidence of the fishing sites is not important in terms of the ownership.
THE COURT: I am not able at the moment to strike it out of the record or anything like that.
MR. GRANT: No.
THE COURT: And I am not intended to do so. I just want to have an understanding of what it is I am being asked in this case to decide, and this is the time that I should find out these things. And what you have told me now is that I am going to be asked to make a declaration regarding a fishery, and I am not being asked to make a declaration of ownership with respect to certain individually-named locations which have been variously described as fishing sites.
MR. GRANT: Well, you're being asked to make a declaration of ownership of the entire fishery.
THE COURT: I can add to what I just stated, except to the extent that the fishery includes fishing sites?
MR. GRANT: Yes, and places. And that, of course, is an interesting -- an interest in the land. I mean the fisheries.
THE COURT: There we have the trouble. If you want an interest it in land, I have got to have dimensions, I think, or some machinery to resolve that, such as a reference to the registrar, appointment of special commissioners or some artful device that the law has resort to when it gets into these kinds of difficulties.
MR. GRANT: I would like to just mull exactly the framework of your question. I see that point and I am glad you raised it.

THE COURT: Thank you.
MR. GRANT: Mr. Mathews, my lord, explained the distinction between the river as a boundary where the surrounding territory goes to the middle of the river, and where the fishing sites are along the river, the owner of the fishing site owns that part of the river. He described in this exchange with the court that when the court asked if this applied to the Skeena but not other rivers, he says:

"If you have fishing sites on both sides, naturally you own right across. But when you just claim one side then just that bank side."

Now, this is the delineation of the framework of the fishery among the Gitksan.

"Q Well, in that case where you only claim one side and another house claims the other side, is there any -- what Gitksan chief or chiefs claim the middle?
A Well, I would claim the middle of it on my bank and this guy would claim the bank on half of the river on that side.
Q So the river would be divided?
A Yes."

And you asked:

"So there is a difference between river as a boundary and river as a fishing site?
A Yes.
THE COURT: In other words, if a river is a boundary between two houses then the real boundary is in the middle of the river?
A If they were opposite banks from each other, yes."
THE COURT: But if you have a fishing site on one side if a river then you have the river right to the other bank?
A Yes."

Now that, my lord, is a framework for the delineation of the sites on Exhibit 358-22.
THE COURT: That is that the big map?
MR. GRANT: That -- the fishing sites map, yes.

THE COURT: The big one. Because there was one that -- was it Mrs. Johnson or Mrs. Ryan?

MR. GRANT: Both. 358-22 is the one in the map atlas, my lord. I have got to come back to that map and the sites there in the context of the evidence.

Now, Mr. Matthews gave an example of the territory across the river from Wilson Creek. This territory is owned by Gwis Gyen's house. Art Mathews explained that Gwis Gyen owned the land from the bank up away from the river.

This particular fishing site, by the way, my lord, is the one which Henry Wilson has rights, privileged rights of access with the consent of Art Matthews.

Mrs. Ryan explained the ownership of the fishing site as with the territories is in the house and the chief.

THE COURT: But that's not a statement that's universally correct, is it, because sometimes, as you have already said, the fishing site is owned by someone from outside of the house in whose territory the fishing site is located.

MR. GRANT: No, there is -- what I think I should do is refer now to the map.

THE COURT: Well, I think maybe, Mr. Grant, we will have the pleasure of having you do that tomorrow morning. 9 o'clock? Thank you.

(PROCEEDINGS ADJOURNED TO THURSDAY, APRIL 26, 1990 AT 9:00 O'CLOCK A.M.)

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

Wilf Roy
Official Reporter