VANCOUVER, B.C.
April 17, 1990

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this 17th day of April, 1990, Delgamuukw versus Her Majesty the Queen, at bar, my lord.
THE COURT: Mr. Rush.
MR. RUSH: Yes, my lord. I indicated on Friday that I would speak to your lordship about the timing of the plaintiffs' argument.
THE COURT: Yes.
MR. RUSH: And on that question we've examined the options, and we would like to propose that the plaintiffs be allocated a further week for the purposes of completing their argument, and we propose that that follow the break in May, and we do think that it will take a week, and we're -- we estimate that we're about three and a half to four days behind now, so I don't see any other way of making it up, my lord. We've examined evening sittings and Saturday sittings, and all of those options seem not feasible. So that's the plaintiffs' proposal.
THE COURT: Yes. Mr. Plant.
MR. PLANT: Well, my principal concern of course is whether that's going to have an effect on the amount of time that we have -- I guess both the week off, that we were anxious to have consecutively the 15 days.
THE COURT: Yes.
MR. PLANT: I don't know that's something that needs to be spoken to now. I don't think my friend is saying he's suggesting we give up one of our weeks.
THE COURT: Well, he might suggest it, but not seriously.
MR. PLANT: I do have one other observation, though, and that is that by my reckoning plaintiffs need about eight more days. That is that up until now, working on the assumption that the calculation I did this morning has some accuracy, that they delivered a seven-volume summary, and roughly speaking they're about two and a half volumes into that after nine days of argument. If you extrapolate from that, then my guestimate is that they are really going to be needing seven or eight more days rather than five, and I assume that my friend is suggesting that we're going to be sitting longer hours more consistently. I just want to be sure that the week estimate is realistic.
THE COURT: Well, we can't do much about it if it isn't, can we.
MR. PLANT: No. And it would help us in our plans, but that's

about all.
THE COURT: You don't see any -- or do you, Mr. Plant, see any extension of the time that you might require?
MR. PLANT: We're looking at that question, my lord, and as of now I think we're okay, but obviously we're going to have to respond to some interesting questions, as the Cherokee removal, and whether Andrew Jackson was a racist, and other issues that have been raised by the plaintiffs which we had not thought were relevant to this case. We're having to examine those on a day-to-day basis, but as of now we're okay, the 15-day estimate is the one we're working on.
THE COURT: All right. Mr. Macaulay.
MR. MACAULAY: I hoped to be in a position to say that we would need less than our 15 days to make our argument, but having regard to the extended character of the Province's counter-claim, that doesn't seem too likely. Their interpretation of the history of this province is an unusual one, it needs to be answered in detail and with reference to many documents. Most of the documents they have referred to in their summary. So we will -- we may need all of our 15 days, a great deal of it, to deal with the counter-claim. This trial having gone on so long and the issues being so important, it's -- in my respectful submission on the question of cutting the plaintiffs off in an arbitrary way, clearly they need another week, and they may need three or four days after that. So be it. And the plaintiffs, and I think it's extremely important to all of the parties, particularly the plaintiffs, to have every opportunity to make their fullest argument possible.
THE COURT: All right. Well, thank you, Mr. Macaulay. Well, Mr. Rush, I don't have any difficulty with the extra week that you're seeking, and I think we should make that assumption. I would assume though that it would be in Vancouver for the simple logistical reason there's going to be a gap in order to get the exhibits to Vancouver, and if we don't carry on in Vancouver as we planned, there would be even a further up-and-down period to get documents to Vancouver and sort it out, and while that may not be the most important thing in the world, I have made substantial commitments that are going to be awkward to be away from Vancouver after this four-week period plus the additional down week where I have to be away then as well, I can't be away longer than that. I also have to say that if it

was only an extra week for the plaintiffs and the defendants were still within their time it would seem to me we would still finish by June 30th at 4:00 p.m. If the Defendants need more time as well, then we will be into July, and I have to say that it may be that we would have to set it for sometime later in July rather than in the first two weeks. I had made some commitments in there that I would find very awkward to rearrange, because so many other people are involved and they've all made plans, and people have holidays at that time. So it seems to me that if we go beyond June 30th it may be -- I wouldn't put this any higher than a maybe -- then we would have to set it for the last one or two weeks in July and maybe the first week in August. I'm sure that's inconvenient to everyone here as well, and I hope it won't come to that, but I see no escape. I also think, in view of what happened this morning, that we should try and plan to start at the regular time next Monday, if that's convenient to counsel, that is at either 9:00, 9:30 or 10:00 o'clock, whichever we settle on, rather than the late start on Monday mornings, if that's -- I mean if arrangements can be made. I would think that those of us who have later reservations could probably get them changed. All right, Mr. Rush.

MR. RUSH: Yes. Just to comment on your last point first, whatever is convenient for the court to start on Monday morning is certainly convenient for us.

THE COURT: I think we need the time, so we better use it.

MR. RUSH: Yes. To respond to two points raised by Mr. Plant; firstly, it is our intention to suggest to the court that there be longer hours, the proposal of the week was premised on our desire and hope that the case could be completed on the 30th of June.

THE COURT: Yes.

MR. RUSH: So I don't dispute my friend's reckoning that possibly eight more days would be more comfortable to the plaintiffs, but our present feeling is that we were going to try to do it in five with extended hours. Just on the point of venue, my lord, I would ask your lordship to consider what submissions we've made previously on the issue of venue. I recognize both the concern logistically of moving the court and the exhibits to Vancouver and your lordship's schedule. Nonetheless, I do ask your lordship to consider the fact of the necessity of the plaintiffs' presence during the course of their argument, that one

of the main motivations for locating in Smithers during the course of the argument, and it is -- it continues to be our wish that the plaintiffs' argument be heard here.

THE COURT: I understand all that, Mr. Rush, and we've been through it, but I have noticed that there hasn't been substantial attendance all of the time, and secondly, there has been four solid weeks, or there will be four solid weeks, and thirdly, I don't mind confessing to some weakness. I'm wearing out, and I think I'll be more weak when we're finished than I am now, and when we're finished at 4:30 or 4:00 o'clock June 30th you people will be finished and I will have an enormous job ahead of me. I don't think I can keep up that pace. And you may speak to the matter again, if you wish, but at the moment I would say if the plaintiffs are going to be needing more time, I'm happy to provide whatever reasonable amount of extra time you need. I don't think it will be here. That's my present view.

MR. RUSH: Thank you.

THE COURT: I also should report, it may be a bribe, somebody left an Easter egg on my desk following the old practise. If it's a bribe, it's not enough, and if it's not a bribe it's too much. But I'm grateful anyway. All right, Mr. Jackson, you were on page 218, I think.

MR. JACKSON: Yes, my lord, depending on my voice, my lord, I may be in need of your Easter egg.

THE COURT: I'm sure I have the right to alienate it without having a public meeting about it, Mr. Jackson. I have some Lifesavers if you need them.

MR. JACKSON: Yes, my lord. We were at page 218, and your lordship will recall I had finished by very briefly summarizing --

THE COURT: Sorry, just before you start, Mr. Jackson.

(DISCUSSION WITH REPORTER)

MR. JACKSON: My lord, on Thursday afternoon I had just summarized the shifts in American policy from the period of removal, which takes us through to the late 19th century, and how at that point treaty making was brought to an end and American policy shifted to assimilation model in which tribal holdings were broken up, and how in the 1930's the policy shifted again to one of retribalization, reinforcement of

tribal government, and how in the 40's and 50's again assimilation became the dominant theme leaning to the large shift in the 1970's, in what is called the self-determination era. And what I want to do now, my lord, is to turn to the jurisprudence, the American jurisprudence in the Post-Marshall era, and I've divided the material into two broad categories. The first deals with the Post-Marshall Jurisprudence on Aboriginal Ownership and the proprietary interest in lands and territory. And the second part of the material deals with the issue of aboriginal jurisdiction. And the first case to which I would refer your lordship is Beecher and Weatherby in 1877, and I say that, my lord, that Beecher and Weatherby is of significance insofar as it forms part of the jurisprudential chain culminating in the decision of the United States Supreme Court in Tee-Hit-Ton in 1955. And Tee-Hit-Ton itself is of great significance insofar as it was one of the principal authorities relied upon by Mr. Justice Judson in the Calder case. A preliminary point before I deal with Beecher and Weatherby and the cases that follow it, is that reviewing these cases, my lord, particularly in terms of the propositions which emerges from them, is somewhat akin to the kind of enterprise which sometimes is engaged on by parties in which a person will give a message to the person next to them, it is then passed on and comes back through a series of retellings to the original hearer in a form which bears very little relationship to the original recitation, and I will be submitting that this jurisprudential chain is somewhat akin to that. The final culmination of the recitation of principle we say in Tee-Hit-Ton is absolutely no relationship to the original formulation of the Marshall principles. The facts in Beecher and Weatherby are set out in page 218, and they were as follows: In 1846 an Act of Congress authorized establishment of the State of Wisconsin, and by this Act this was a common feature of congressional acts authorizing establishment of new states, promised to convey section 16 in every township, in fee, to the State of Wisconsin to the use of schools or educational purposes. The State, having acquired section 16s in fee in 1870 issued a patent to a logging company to log the land on a particular section 16. After the logs were cut, the plaintiffs asserted title to the logs by virtue of holding

patents from the United States issued in 1872.
THE COURT: Were the plaintiffs Indians?
A No, my lord. Neither the plaintiffs or the defendants were Indians.
THE COURT: Yes, all right.
MR. JACKSON: In this sense, the facts have a familial ring to them in the sense that there was logging involved and the dispute was between people claiming title, neither of whom were Indian. The argument made by the holder of the 1872 patent from the United States was that in 1846 the territory was subject to unextinguished aboriginal title and the United States could not therefore grant the land in fee to the State of Wisconsin. The case therefore raised the question of the legal effect of Indian title on the power of the federal government to make a grant in fee to lands subject to that title. Mr. Justice Field in delivering the opinion of the court said this:

> "It is true, that for many years before Wisconsin became a state, the (Menomonee Tribe) occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of land claimed by different tribes of Indians as between themselves and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case... But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States."

And we say, my lord, that to this point Mr. Justice Fields' statement is a restatement of the principles first enunciated by the U.S. Supreme Court in Fletcher and Peck as to the legal co-existence of what in this case is referred to as the "naked", what is in St.

Catherine's Milling was referred to as the underlying title and the Indian title. Mr. Justice Field went on to say:

> "It is to be presumed that in this matter" --

That is in the determination of the Indian title:

> "the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them" --

That's the Indians:

> "has always been recognized by this court from the foundation of the government. It was so ruled in Johnson v. McIntosh."

This proposition, this passage was cited by Mr. Justice Reed in Tee-Hit-Ton for the proposition that extinguishment by the United States of Indian title is a political and non-justiciable matter. But it should be pointed out, as we do, my lord, that Mr. Justice Field in Beecher and Weatherby specifically limits his comments regarding the justiciability of extinguishment to disputes between third parties. He does not say that in a suit brought by the Indians themselves, they would be foreclosed from challenging the propriety of an extinguishment. We were referring you back, my lord, in this regard to the statement by Mr. Justice Chapman in Symonds, set out in the bottom of page 220, in relation to the Marshall decisions:

> "Although the courts of the United States, in suits between their own subjects" --

Which of course is exactly the situation in Beecher and Weatherby:

> "would not allow a grant to be impeached under pretext that the native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians."

As we will see in looking at subsequent cases, in particular Tee-Hit-Ton, Beecher has been cited as authority to the proposition that the United States has an unreviewable discretion as to how it extinguishes Indian title. In light of its citation for that proposition, we say it is important, following up your lordship's on-the-ground analysis, to note by what method the Indian title was in fact in this case extinguished, and what one finds, as the next passage makes clear, is that the aboriginal underlying title, the title of the Menomonee tribe was extinguished in accordance with what we say are the fundamental principles by treaty. And there Mr. Justice Field makes this very clear:

> "The greater part of the State was, at the date of the compact, (admitting Wisconsin into statehood) occupied by different Tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant date the State would be settled by white people, and the semi-barbarous condition of the Indian Tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, 'its ancient and honoured policy' of devoting the central section in every township for the education of the people. Accordingly, soon after the admission of the State into the Union means were taken for the extinguishment of the Indian title. In less than eight months afterwards the principal Tribe, the Menomonees, by Treaty, ceded to the United States all their lands in Wisconsin, though permitted to remain on them for a period of two years, and until the President should give notice that they were wanted."

And as in St. Catherine's --

THE COURT: Before you go on, from what is that a quotation, is that from Beecher and Weatherby?

MR. JACKSON: That's from Beecher and Weatherby, my lord.
THE COURT: All right, thank you.
MR. JACKSON: And so we see that, as in St. Catherine's Milling itself, Beecher and Weatherby is a case in which Indian title was extinguished by consent through treaty-making, and yet it is a case which has been cited, as has St. Catherine's, for the proposition that Indian title can be extinguished at the pleasure of the sovereign unilaterally.

The second case to which I refer your lordship is the case of Buttz and Northern Pacific Railroad, and again, I would make the point I made last Thursday, my lord, that these cases are not, to use the phrase of my friend last Thursday, the plaintiffs cherry-picking through the orchard of American jurisprudence. I have chosen these cases principally because they are cases which crop up in the leading Canadian decisions, and therefore they have been seen as cases which are viewed by Canadian courts as ones which are important in terms of looking at American jurisprudence.
THE COURT: I have a problem about Beecher and Weatherby that you can assist me with. The patents in dispute in Beecher and Weatherby were issued in 1872, and the treaty was when?
MR. JACKSON: The treaty was, I believe, my lord, way before that. I haven't made a note of that in the --
THE COURT: All right. Well then, what I'm wondering about is whether or not the title having been extinguished by the treaty, assuming -- well, I'm sorry, I don't know if it's by the treaty or not, but did the Indians remain in possession?
MR. JACKSON: No, my lord. My understanding is that under the terms of the treaty the Indians were allowed to remain in possession as the last cited passage makes clear, until the lands were required, and under the terms of the treaty they were then to move to a reservation.
THE COURT: Well, it said until the President gave them notice.
MR. JACKSON: Yes. And by the time the patents were issued in this case the Menomonees were no longer in possession of the lands. The argument, of course, was that because of the type of the grant to Wisconsin, the lands were held by Indian title, Wisconsin could not obtain any rights to the lands because the United States had no rights to give. And what the court in fact said was it's consistent with St. Catherine's that the United States did in fact have rights to grant to Wisconsin, those rights being the underlying

title, which is Wisconsin got the underlying title in section 16s, and at such point as the Indian title was extinguishable by treaty, the State of Wisconsin then had the entire beneficial interest in the land and could make a grant of those lands, as it did to a patentee who took the title and the United States had nothing left.

THE COURT: I'm having some trouble with the facts, because the Act of Congress establishing the State of Wisconsin was 1846, and the State having acquired section 16 in 1870, so the argument then comes along that the patents were not issued until 1872. And it may be that if I sat down I could figure it out, but at the moment I have a little bit of uncertainty as to exactly what the contest was and what the -- well, you don't know the date of the treaty?

MR. JACKSON: Well, we're just endeavouring to find that.

THE COURT: All right.

MR. PLANT: Well, I found three references to treaties. There's -- in the first passage cited by my friend, there is a reference to an undertaking made by the United States in 1825, that would be in the passage cited --

THE COURT: Yes. I see that.

MR. PLANT: -- by my friend.

THE COURT: That says they undertook to settle by treaty. I suppose that's the same thing.

MR. PLANT: That's right. And then the last passage cited by my friend, the last sentence says -- or the last two sentences say:

> "Accordingly, soon after the admission of the State into the Union" --

Which would be 1846:

> "means were taken for the extinguishment of the Indian title. In less than eight months afterwards the principal Tribe, by treaty, ceded the land."

And that -- that's the passage quoted on page 221 of my friend's argument. Now, in the report of the case following that passage there are references to other treaties in 1853 and 1854, but I haven't yet followed the sequence.

MR. JACKSON: Those are the treaties, my lord, I understand the

ones in 1853, 1854 by which the Menomonees ceded their lands. So the sequence was the establishment of the State of Wisconsin, the grant to the State of Wisconsin of the section 16s in fee, and then some years after that, the extinguishment of the Indian title by treaty, and then subsequent to that the grant of the patents.

THE COURT: All right, thank you.

MR. JACKSON: And that, my lord, is at page 442 of the report, that's volume 11 tab 2 of our book of authorities.

THE COURT: All right, thank you. And your understanding is that the Indians did leave the lands shortly after the treaty?

MR. JACKSON: Yes, my lord. These were lands in the same way as in St. Catherine's Milling, these were lands in which the Indians no longer laid any claims based on aboriginal title, having given them up by virtue of the treaty process.

THE COURT: Yes, all right.

MR. JACKSON: The second case, my lord, is Buttz against Northern Pacific Railroad in 1886, again a decision written by Mr. Justice Field, and the facts here were that the lands were in the territory of Dakota, a railway company, Northern Pacific Railroad, asserted title to the premises under a grant laid by an Act of Congress in 1864. The Defendants asserted that he settled upon the premises in 1871 and had taken the necessary steps to perfect a right of pre-emption under the relative pre-emption law in the Territory. The Congressional Act in 1864 establishing the railroad was entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast by the Northern Route". By its third section this Act provided that:

> "There be and hereby is, granted to the Northern Pacific Railroad Co. its successors and assigns for the purpose of aiding in the construction of said railroad and telegraph line...every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State and

> whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights."

At the time this Act was passed, the land in controversy and other lands covered by the grant were under the occupation of the Sisseton and Wahpeton Bands of Dakota or the Sioux Indians. In the grant to the railroad company Congress was not unmindful of the title of Indians to the lands granted, and the Act stipulated, as did a number of the Acts passed at this time, the Act stipulated for the extinguishment of the Indian title by the United States as rapidly as might be consistent with public policy and the welfare of the Indians. And you see, my lord, those words appear again in Santa Fe Railroad Company, a case to which I will shortly be returning. After the passage of the Act "the United States took steps, first to obtain from the Indian the right to construct railroads, wagon roads and telegraph lines across their lands, and to make such other improvements upon them as the interests of the government might require, and afterwards to obtain a cession of their entire title." My lord, this process bears some resemblance to the process which I apprised your lordship of last week, when in Upper Canada the government required the Surveyor General of Upper Canada, Mr. Collins, to purchase lands from the Missisauga Indians in order to complete the communication from the Bay of Quinte to Lake Huron, and in relation to the discussion we had last week, in which my understanding of Ontario geography, was demonstrated to be wilfully inadequate, since then Mr. Rush has taken me to a map and has showed me that in fact that purchase we talked about last week, the Toronto purchase, starts from the Bay of Quinte and goes along the shores of Lake Ontario to a point close to Toronto, and then up to Lake Simcoe. But my point here, my lord, is to make the point that this process of acquiring the right-of-way was one which is reflected in the provisions of this Congressional Act. And at page 224 we see that the acquisition by the United States of the right to construct railroads and telegraph lines was accomplished through a treaty concluded between the United States and the Indian tribes in 1867. And the extinguishment of the aboriginal title to the rest of

their lands was accomplished through a further agreement, the terms of which were first proposed by the Indians in 1872, but this was not finally ratified until some years later. And my lord, you will see that the first reference is to a treaty and the second reference is to further agreements. That reflects the fact in 1871 congress had terminated the treaty-making process, that didn't stop agreements further -- being made further by congressional orders, but they were no longer called treaties.

The Supreme Court held that the grant by the United States to the railway company in 1864 passed a fee to the company subject to the Indian title and that under the terms of the statute the lands hereafter were not subject to pre-emption by third parties. The court rejected the argument that land subject to Indian title could not be the subject of a grant. And in the course of his judgment Mr. Justice Field said:

> "At the time the Act of July 2nd, 1864, was passed, the title of the Indian Tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the lands subject to the Dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government and are not open to contestation in the judicial tribunals. As we said in Beecher v. Weatherby 'it is to be presumed that in this matter the United States will be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race...'"

And the quote goes on to recite the full passage I've already given to your lordship in Beecher and Weatherby.

THE COURT: At the start of that passage, Mr. Justice Field said that the fee was in the United States subject to the right of occupancy. By what path or route do you say the fee was in the United States?
MR. JACKSON: Through the doctrine of discovery, my lord. These cases build upon the platform of the original Marshall principles that by virtue of the doctrine of discovery the underlying fee in the lands vest in the discovering nation, and according to the American doctrine is subject to grant, subject to, however, the right of the aboriginal peoples.
THE COURT: Is there any discussion of that in the judgment, or is that just a given?
MR. JACKSON: As I recall, there's -- there's a citation to Johnson and McIntosh --
THE COURT: All right.
MR. JACKSON: -- but by this point these principles, as it were, are viewed as being well-established and well-grounded as part of the common law.
THE COURT: But this land is -- is it west of the Mississippi or east of the Mississippi?
MR. JACKSON: This is west of the Mississippi. This is the Dakotas.
THE COURT: Is there any discussion in the judgment about the breach of Royal Proclamation.
MR. JACKSON: No, my lord. In relation to the Johnson and McIntosh there is a discussion --
THE COURT: Yeah. There is in Johnson but not in this case.
MR. JACKSON: He cites Johnson and McIntosh but there's no discussion of the Royal Proclamation.
THE COURT: Thank you.
MR. JACKSON: By this time the Royal Proclamation in the United States had sort of receded into the midst of distant memory.
THE COURT: It was replaced by statutes?
MR. JACKSON: Yes, my lord. And you'll find at page 335, my lord, in the first column of Buttz that Mr. Justice Field starts off his judgment having said that the fee was in the United States. He cites Johnson and McIntosh and he cites the doctrine of discovery for that proposition. And immediately after citing Johnson and McIntosh, Mr. Justice Field cites another one of the cases decided in the early days of the Marshall court, which I've already referred your lordship to, Clark and Smith for the proposition that:

> "The ultimate fee (encumbered within the Indian

> right of occupancy) was in the Crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unencumbered fee."

And again, my lord, looking at the factual matrix of Buttz, we see that this case, as in Beecher and Weatherby, did not involve a dispute in which the Indians sought to set up their title as against a grantee of the underlying fee who was seeking to dispossess them from their lands. And recital of the facts as I've given them to your lordship shows that congress recognized its lawful obligations to obtain a consensual surrender prior to construction taking place and prior to its grantee in fact taking possession and entering into actual occupation of the territory. In both the Buttz case and in Beecher and Weatherby, we say, my lord, at the bottom of page 225 that the court's reliance on Johnson and McIntosh for the relative relationship between the underlying fee, referred to as the native fee in Buttz -- in Beecher, and the Indian title is well founded, but we say that the further obiter remarks regarding the non-justicability of the manner of extinguishment are not supported by the Marshall judgments, nor, and this is perhaps more significant, nor were they required or relevant to any of the issues before the Supreme Court in these two cases. In both cases the issues were ones as between parties competing for an interest in lands to which the Indian title had already been surrendered by consent. The reference in the cases, my lord, to this general language as to the non-justicability of the -- of Indian title and the presumption that the government will, in its dealings with Indian people, be governed by such considerations as a Christian nature would bring to bear upon an ignorant and dependent race is, we say, referable to one of the significant, if in fact probably the most significant changes which took place in the way the Indian tribes were characterized legally and in general discourse in the late 19th century. And I refer you, my lord, at page 226 for what we say is the explanation for Mr. Justice Fields' assertion as to the non-justicability of extinguishment is to be found

in the context of the major shifts which had been taking place in the American Indian policy. And those are best reflected in the decision of the United States Supreme Court in the Kagama case, United States and Kagama in 1886, and that case arose out of a previous decision of the U.S. Supreme Court in the case of Ex parte Crow Dog. And in Ex parte Crow Dog, my lord, in 1883 the Supreme Court had taken the position that in relation to an Indian charged with the murder of another Indian on an Indian reservation, that case was only amenable to the tribal court system. The federal courts had no jurisdiction over intertribal crime, and the court in Ex parte Crow Dog -- and I've set out passages from the judgment of page 227, I'm not going to take your lordship to them, but in the course of its judgment, in saying indeed that the federal courts had no jurisdiction over this case, the courts made certain references to the character of Indian tribal justice as demonstrating why in fact it would not be within the purview or jurisdiction of federal courts, and the language refers to the red man's revenge. And what happened following that decision was that congress acted to deal with the fall out from that vacuum, so it appeared, in the criminal justice system, and they passed the Major Crimes Act of 1885, which subjected intertribal crimes, crimes committed on a reservation by Indians against other Indians, that was subjected to federal jurisdiction in relation to certain major crimes, murder for example, robbery, rape, and a number of other crimes, major felonies, were subjected to the jurisdiction of the federal courts. And in Kagama, what happened was that that jurisdiction was challenged. The Major Crimes Act was challenged by Kagama following his prosecution and conviction under the Major Crimes Act, and the Supreme Court in upholding the Major Crimes Act as being within the jurisdiction of congress in relation to Indians, stated, and I've set out at the top of page 228 part of their holdings, that Indian tribes were not foreign nations, of course asserting what had already been established in the Cherokee cases, and that within the borders of the United States "the soil and the people...are under the political control of the Government of the United States, or of the State of the Union". From this point the court concluded that Indians must be subject to the power of either one or

the other, because, as the court says, "there exists within the broad domain of sovereignty but these two". And that is an argument, my lord, which is, as I understand it, both the Province and the federal government make as being applicable to this case, not relying upon Kagama, but relying upon provisions of the Canadian Constitution, that the Canadian Constitution recognizes federal jurisdiction, and the Canadian Constitution recognizes provincial jurisdiction, but it says nothing about Indian jurisdiction. And therefore, the claims of the plaintiffs asserting jurisdiction have no place within Canadian confederation. In 1886 the U.S. Supreme Court took a similar view of the Constitutional arrangements in the United States, but as we will demonstrate to your lordship later, the call came back to what we say is a more consistent position, consistent with the original Marshall principles. Because we say, my lord, at page 228 that the analysis of the Supreme Court in Kagama in 1886, while it referred to the Cherokee cases, including Cherokee Nation and Worcester v. Georgia, ignored in fact Chief Justice Marshall's unequivocable affirmation of the inherent pre-existing rights of internal self-government of Indian nations. And the omission, we say, is revealed in the following passage from Mr. Justice Miller's judgment, and you will see, my lord, he says:

> "These Indian nations are wards of the nation."

And my lord, "are" should be underlined, this was emphasis in the original one by Mr. Justice Miller:

> "These Indian nations are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness so largely due to the force of dealing with the government with them and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the

> Executive and by Congress and by this Court whenever the question has arisen...
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."

Now, my lord, we say this language stands in stark contrast to the language of Chief Justice Marshall in Worcester. In that case, Chief Justice Marshall, in articulating the duty of protection as an international law obligation, which had been domesticated in the context of particular treaties, he said that the duty of protection did not strip the protected nations of their "right of government". This, we say, was turned on its head in Kagama as the justification for what is known as plenary federal power over Indian tribes. And the extent to which Kagama was a departure from the fundamental principles of the Marshall decisions, is we say well described by a recent American commentary.

THE COURT: Before we get to that, did -- I haven't looked at it, but I don't recall you reading to me anything from Chief Justice Marshall and any of his judgments which dealt specifically with the overall application of the criminal law. I thought he talked as you quoted here, right of government. Did he talk about criminal law?

MR. JACKSON: There was, my lord, inferentially in that in the beginning of -- and I'm not sure whether it's Cherokee -- it's the beginning of Worcester and Georgia, there is a recitation of the effect of the Georgia laws.

THE COURT: Mm-hmm.

MR. JACKSON: And one of the effects of the Georgia laws was that for the Cherokees to try one of their members in a Cherokee court and impose a death sentence, was rendered by the Cherokee -- by the Georgia laws as an act of murder because it dismantled the Cherokee institutions. So I think to that extent, in talking about the rights of self-government even though that wasn't an issue particularly before him, he envisaged the right to self-government to be cast in very broad terms, but specifically no, my lord, there was no argument addressed in that case, that whatever might be the rights of self-government in relation to other matters, so far as the criminal law was concerned,

there might be special considerations. And I think, my lord, the point was well taken, because if we review the early treaties, there often was in those early treaties, going back into the -- 17th century, there was special clauses often regarding what would happen if in fact a crime was committed, albeit within the Indian country, against a British colonist, or what would happen if an Indian committed a crime while residing within the boundaries of the Colonies. So I right from the early point there was a recognition that in relation to the criminal law special considerations might be relevant.

THE COURT: It seems to me you read me a passage from the early days after the piece from Paris where in Canada it was stated that if there was a crime of murder that it would be tried in the ordinary course.

MR. JACKSON: Yes, my lord. Well, in fact, the -- I think one of the maritime treaties.

THE COURT: I thought -- I think you gave me that in a section dealing with Quebec, but I speak subject to your better recollection.

MR. JACKSON: Many of those treaties did in fact make very special provision for the criminal law.

THE COURT: I wonder if this goes as far as -- that you're contending that it turned Marshall's principle on its head. I wonder if Marshall really was talking about what he had talked about the right of government, he was talking about the criminal law.

MR. JACKSON: I think to the extent that Kagama, my lord, was limited -- if Kagama was seen as being limited to criminal jurisdiction, I would not be contending that the case was as inconsistent as I say it is with Marshall. Kagama, however, has been seen in subsequent cases as authorizing the very broad federal plenary power in areas outside of the criminal law, and it's for the broad propositions rather than its application in the particular situation in Kagama, which was the assertion of criminal jurisdiction, not generally, but in relation to particular major crimes.

THE COURT: All right.

MR. JACKSON: The commentary I'm referring to, my lord, opines this statement:

> "The holding in Kagama...grossly overstated the extent of federal power. Because of the historical military and political position of the colonies, the Framers never conceived of

> exercising power over Indian nations, but instead provided a framework in the constitution for conducting relations with them as equal sovereign nations.
> In establishing a theory of inherent federal power over internal Indian affairs, the Kagama court misinterpreted the discovery doctrine, disregarded Indian sovereignty, manipulated the federalism concepts embodied in Worcester and the 1871 Act."

Which abolished treaty making:

> "treated federal Indian policy as a non-justiciable political matter, and relied on a historically inaccurate characterization of the Indian tribes as weak, helpless and diminished dependent wards in need of protection. The court created a power in Congress over Indian nations which was unlimited, unconstitutional and unreviewable."

Now, my lord, we don't necessarily adopt all those propositions, nor is it necessary for your lordship to come to any determination as to whether or not Kagama fits into that. My point is simply to explain how it was that in Beecher and Weatherby and in Buttz the courts could add to the conclusions which were necessary to their decision certain statements which were not necessary to the decision which talks about a very broad unreviewable position, discretion in congress. And while on this point, my lord, if I may just make this comparative reference, the -- this re-characterization of tribes as in fact being helpless, dependent and therefore their being within congressional or federal central authorities, the need to in fact protect them, as it were, from themselves, is, we say, reflective in the judgments of Chancellor Boyd in St. Catherine's Millings, the judgment of Mr. Justice Henry and Mr. Justice Tacherau, who also re-characterized the nature of the tribes of Indian nations in Canada, and in so doing we say recharacterized the nature of their rights. And this is something which was not just limited to the United States and to Canada in the last part of the 20th century. Last week, my lord, when I was dealing with the Treaty of Waitangi, I referred your lordship to a decision of the New Zealand High Court in 1877 at the

same time roughly as we're talking about here in the decision of Wi Parata, spelled W-I, P-A-R-A-T-A, and The Bishop of Wellington. And, my lord, in that case Chief Justice Prendegast said something which your lordship will readily see bears a close relationship do what the court said in Kagama. Chief Justice Prendegast made this statement in relation to a claim by the Maoris in relation to land which had been granted to the Bishop of Wellington without their title having been extinguished before. And the court in Wi Parata said "We can't hear your claim. The court cannot go behind the Crown grant", and in the course of so concluding said:

> "In the case of primitive barbarians, the Supreme executive Government must acquit itself as best it may, of its obligations to respect native proprietory rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based."

And in that same case, my lord, in relation to the Treaty of Waitangi, as I told your lordship, the court concluded that the Treaty of Waitangi was a nullity because, and in this sense presaging what his honour Judge Patterson said about the Mic Macs in relation to their treaty with the Crown:

> "No body politic existed capable of making cession of sovereignty, nor could the thing itself exist."

So we find, my lord, at this particular juncture in history, the courts in Canada, in the United States and in New Zealand taking a position that there is with the federal executive, whoever is constitutionally charged with responsibility in relation to Indian affairs, a broad unreviewed discretion which gives rise to statements that their rights exist at the pleasure of the sovereign. And we say, therefore, that there is direct unity between the way in which the Indian peoples are seen on these hiararchy of civilization and the way in which their rights are viewed. And we say this explains why certain statements are made at this juncture in

history which seemed to be inconsistent with previous statements made by the same courts in the era before.

THE COURT: Is it convenient to adjourn?

MR. JACKSON: Yes, my lord.

THE COURT: All right, thank you.

THE REGISTRAR: Order In court. Court stand adjourned until 2:00.

(LUNCHEON RECESS TAKEN AT 12:30)

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

_____

Graham D. Parker
Official Reporter
United Reporting Service Ltd.

(PROCEEDINGS RECONVENED PURSUANT TO LUNCHEON ADJOURNMENT)

THE REGISTRAR: Order in court.
THE COURT: Mr. Jackson, before you start, perhaps I could just say to Mr. Prelypchan, I spoke to him on the plane this morning about the difficulty I was having with his disks. And I can tell you, Mr. Prelypchan, the problem was that I hadn't encountered the write protect problem before. This is a little clip in the bottom of the disk. And if you don't have it in the right position it doesn't function. And I don't think it makes any difference whether the disks are high density or low density.
MR. PRELYPCHAN: But you are able to do it now with no problem?
THE COURT: Yes. And you can have your disks back, and I will keep the originals.
MR. PRELYPCHAN: I will leave it with your lordship.
THE COURT: All right. You have the first set.
MR. PRELYPCHAN: I will just presume that the second set you have will be sufficient?
THE COURT: Yes. I haven't tried them yet because they are low density. I haven't tried low density because that is a new experience. I have had no trouble with the Plaintiff's disks, except that I am having trouble because the content of each part is so long.
MR. JACKSON: They are very high density.
THE COURT: Intensity I think is more. But that's a small problem I can deal with. I think now I have solved the problem with the Provincial's disks.
MR. PRELYPCHAN: Thank you.
THE COURT: All right. Thank you. Mr. Jackson.
MR. JACKSON: My lord, you had made the comment before we took the lunch break that Kagama, given the facts and the issue before the court, was one whose very special issue of criminal jurisdiction was at stake. And my response to that was that the plenary doctrine, which the case has been seen as authority for, was one which was quickly applied outside of the criminal law area. And you see the working through of the Federal plenary power in the form of the General Allotment Act of 1887. And I can just refer your lordship to page 209 where previously I have set out the general prescription of the General Allotment Act of 1887 which had the effect of allotting tribal lands on an individual basis and making them marketable.
THE COURT: Yes.
MR. JACKSON: And it also worked its way through in relation to

the courts taking the position within the 20 years after Kagama that, in fact, treaties previously made prior to 1871, or agreements made after 1871 were subject to federal abrogation. And that is reflected in the next case I want to refer your lordship to, Lone Wolf v. Hitchcock in 1903. And the facts there are set out in the bottom of 230 and over to 231. The Medicine Lodge Treaty which was signed with the Kiowa and Comanche Tribes in 1867 provided that heads of family might select a tract of 320 acres from lands held in common by the tribe which would then be in the exclusive possession of that family so long as that land was cultivated. In another article the treaty provided that no future treaty would be operative to cede any lands held in common by the tribe, that is those lands which had not been allotted, unless executed and signed by at least three-quarters of the male adult members. In 1871, further treaty making with the tribes was suspended. And in 1900 an Act of Congress was passed providing for allotments out of tribal property and the giving of compensation for surplus lands not allotted but taken by the United States. The Kagama claimed that the effect of the 1867 treaty was to vest in the tribe the land held in common until they should divest themselves of it by treaty negotiated and executed in the manner stipulated and, since the consent principle, that is that the agreement had to be signed by at least three-quarters of the adult male members, had not been complied with, the Act of 1890 were an abrogation of their vested rights. The Supreme Court while recognizing that the 1890 -- it should be 1900. I beg your pardon, not 1890, 1900. The Supreme Court while recognizing that the 1900 legislation abrogated the treaty provisions justified this by reference to the broad plenary power as relected in Kagama. And the court said:

> "The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continued to bear... Plenary authority over the tribal relations has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government...
> The power exists to abrogate the provisions of an

> Indian treaty, though presumably such power will be exercised only when such circumstances arise which will not only justify the government in disregarding the stipulations of the treaty but may demand, in the interest of the country and the Indians themselves, that it should do so. When therefore, treaties were entered between the United States and the tribe of Indians it was never doubted that the power to abrogate existed in Congress and that in a contingency such power might be availed or from considerations of government policy, particularly if consitent with perfect good faith towards the Indians."

And the court ended its judgment on this note:

> "If injury was occasioned, which we do not wish to be understood as implying, by the use made of Congress of its power, relief must be sought by an appeal to that body of redress and not to the courts."

My lord, we say that the assertion in Lone Wolf and in Kagama that from the very beginning Congress had a broad fedary -- broad plenary power over tribal relations is not supported by the Marshall cases. And if your lordship would think back to Worcester v. Georgia, in that case the exclusive federal power was formulated and affirmed in the context of a federal-state competition for control over Indian affairs. And exclusive federal power in Worcester was seen by Chief Justice Marshall as excluding the jurisdiction of the State of Georgia not as authorizing a complete federal plenary power over Indian affairs and certainly not to permit the taking of Cherokee lands by the federal government without consent where it suited government purposes.

Lest it be thought, my lord, that during this period the principle which we say is the hallmark of the Marshall principles disappeared completely from the legal horizon in the United States, I want to refer your lordship to a case decided just two years before Lone Wolf v. Hitchcock, Minnessota v. Hitchcock. That case was one in which the Supreme Court asserted that the principle of consent was not one which simply had been, as it were, excised from the legal lexicon of aboriginal rights in the United

States.

The facts in Minnessota v. Hitchcock are rather complicated. I have set them out in some detail on pages 234 to 237. They bear some resemblance to the facts in Beecher v. Weatherby in that what was an issue here was the effect of a grant by the federal government to the state of Minnessota of its section 16 lands for educational purposes. It was complicated by a series of transactions with the Indian nations concerned which contained also certain guarantees to them that lands which they had surrendered up would be the funds for the lands when they were sold would be used for educational purposes.

The principle for which we say the case's authority is set out is at page 236. And one of the issues in the case was whether or not the lands which the Indians ended up with were a reservation or whether they were unceded Indian lands held by aboriginal title. And what the court said, and I set out at page 236, is:

> "Whether this tract, which was known as the Red Lake Indian Reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occcupancy held by the Indians."

And, of course, that is the common denominator of all these cases.

> "That fee the government might convey, and whenever the Indian right of occcupancy was terminated (if such termination was absolute and Unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time the Indians' right of occcupancy has always been held to be sacred: something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

And the facts in this case, again as in Beecher v. Weatherby and Buttz were ones in which an agreement or treaty had been entered into for the surrender of Indian land.

THE COURT: Is that the Supreme Court of the United States?
MR. JACKSON: Yes, my lord. These are all decisions of the Supreme Court of the United States.

What is significant, we say, about Minnessota v. Hitchcock is that in the passage I have cited there, more than a passing resemblance is to be found between that passage and the decisions both of the Privy Council in the Star Chrome case and of Mr. Justice -- or Chief Justice Dickson in Guerin that the nature of the Indian interest in land is the same whether or not it is a reserve so designated as a result of some legislative act or Executive Order, or whether it is unceded Indian land held by aboriginal title. We say, of course, it is also of significance in that it affirms that for Indian lands to be taken the doctrine of consent as well as the need for compensation are incidents of the taking. And the final significance is one of omission, perhaps, as we will see when we deal with the U.S. Supreme Court decision in Tee-Hit-Ton in tracing the chain of jurisprudence which the Supreme Court in 1955 says is the chain of jurisprudencial title, Minnessota v. Hitchcock is nowhere to be mentioned. It is not the only case which is not mentioned in that decision, either.

The next case in this chain, my lord, is one which has been referred to in almost all the recent Canadian cases, the decision of the United States v. Sante Fe Pacific Railroad Company. It is a decision decided in the early days of the Second World War in 1941. And exstensive passages from this judgment are to be found in the judgments of Mr. Justice Judson in Calder, as well as the judgments of Mr. Justice Hall. And it is also a case which is relied upon by Mr. Justice Mahoney in Baker Lake. And the case is one to which we will be coming back to in some detail when we address your lordship on the tests for extinguishment.

The case, in fact, presented a number of issues to the court, some of which it was required to rule on, most of which it was not required to rule on. And as in some of these other cases to which I have referred, the propositions which we say were overture which were not necessary for the decision in any way have been used in support of the proposition that aboriginal title can in fact be extinguished unilaterally.

The facts of the case are set out on page 238. And they also bear some resemblance to the facts in Buttz. This legislation situation arose at around the

same time during the great western drive when railroads were the principal mechanism for opening up the west in the United States, of course, as in Canada.

The predecessor to the Sante Fe Railroad had been granted certain lands in what is now the State of Arizona by an Act of Congress in 1866. Under section 2 of the Act it was provided that "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians..." the words in the statute for the Grand Pacific, Northern Pacific Railroad as well, "...and only by their voluntary cession, the Indian title to all lands falling under the operation of this Act and required in the donation to the road named in the Act". A Federal Executive Order of 1883 created, out of their aboriginal territory, a reservation for the Indians of the Walapai Tribe in Arizona. The lands granted to the railroad included both lands which fell within the reservation and outside the reservation, but within the original aboriginal territory of the tribe. The United States, as guardian of the Walapais pursuant to its conception of its trust responsibilities to Indian nations, brought suit to enjoin the Sante Fe Railroad from interfering with the possession of the lands of the Walapais. The action was in two parts. One in relation to those lands within the reservation, and those lands outside the reservations comprised the second part of the action.

And one of the reasons why the case is important, my lord, and why we will be coming back to it when we deal with extinguishment, your lordship will readily see that one of the arguments which was made in this case by the Railroad was that the creation of a reservation necessarily had the effect of extinguishing all rights outside of the reservation. And as we understand the Province's argument, that bears some analogy to their argument that the policy in British Columbia prior to confederation in creating reserves had the necessary effect of extinguishing any aboriginal title that might have existed outside of the areas of the reserves. And that's why from the point of view of both the plaintiffs and the defendants in this case Sante Fe is a case to which your lordship will be referred again, more specifically in relation to extinguishment.

The United States argued that aboriginal

possession from time immemorial created a possessory right legally enforceable against everyone except the United States; that recognition of Indian possessory rights by a prior sovereign is not essential to the validity of such rights under the United States law; that the Act of 1866 safeguarded whatever rights of occcupancy the tribe enjoyed; that Indian title was based in law on aboriginal occcupancy, whether or not such occcupancy had been recognized by treaty, statute or otherwise, and that in the absence of express language to the contrary, a federal grant of public lands did not constitute an extinguishment of Indian occcupancy rights. Counsel for the Railroad Company argued that the 1866 Act conveyed full beneficial ownership of the lands to the railroad and that the Walapais had no legal rights to the lands because no such rights had been legally recognized by Congress. And in the course of his judgment, Mr. Justice Douglas, writing for the court, dealt with a number of issues relating to the proof of aboriginal title, its legal enforceability, the need for congressional or other executive recognition, and the issue of extinguishment.

In terms of the first issue of proof, I will be coming back to that later, my lord, because the test suggested by Mr. Justice Douglas that aboriginal title is based upon exclusive possession is the principal source which Mr. Justice Mahoney relies upon in Baker Lake in stating that as a matter of Canadian law also aboriginal title is founded in part upon exclusive possession. And as I say, I will be coming back to that.

In terms of legal enforceability, Mr. Justice Douglas said this, on page 240 is the quote:

> "Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occcupancy which could only be interfered with or determined by the United States...As stated in Mitchel v. United States, Indian 'right of occcupancy is considered as sacred as the fee simple of the whites'. Whatever may have been the rights of the Walapais under Spanish law, the Cramer case assumed lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the Cramer case involved the problem of

> individual Indian occcupancy, this court stated that such occcupancy was not to be treated differently from 'the original nomadic tribal occcupancy'... Certainly it would take plain and unambiguous action to deprive the Walapais of the benefits of that policy."

And the plain and unambiguous test, my lord, is part of the land with which Mr. Justice Hall in Calder saw as requiring a clear, plain, legislative expression to extinguish aboriginal title. You will find in this case a number of sources of assertions which come up later in Canadian cases. The court unequivocally in Sante Fe, building on what it had said in its previous decision in Cramer, that some form of federal requisition was not a prerequisite to a claim based on aboriginal title. The court said:

> "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute or other formal government action. As stated in the Cramer case, 'the fact that such right of occcupancy finds no recognition in any statute or other formal government action is not conclusive'."

And, my lord, in Calder in the Court of Appeal the judges there had, in fact, concluded that in the absence of some express colonial recognition or imperial recognition of aboriginal title pre-1871, the Nishgas could not bring an action to enforce its aboriginal title. The U.S. jurisprudence is quite to the contrary. That may be one of the reasons why in the Supreme Court judgment Mr. Justice Calder, although he agreed in some respects with conclusions of the Court of Appeal, he, in fact, did not endorse that position that some form of express recognition of rights is a legal prerequisite to their enforceability in a Canadian court of law.

And we say at page 241 in this regard that a claim based upon aboriginal title is not dependent upon some form of governmental recognition. That proposition is one which we say is now foreclosed from discussion in a Canadian context both by the decision in Calder and, more specifically, by its unequivocal rejection by Chief Justice Dickson in Guerin. And the reference in Guerin, my lord, in terms of these materials is page

169 of these submissions. I have set out the particular passage in Guerin where Chief Justice Dickson makes that statement.

The next point which Mr. Justice Douglas refers to is the issue of extinguishment. And this next statement, my lord, is one which is relied upon by Mr. Justice Judson in Calder. This particular passage is cited exactly in the way it is set out here by Mr. Justice Judson in Calder.

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues. And Buttz is given as the authority for that. As stated by Chief Justice Marshall in Johnson v. McIntosh, 'the exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occcupancy, or otherwise, its justness is not open to inquiry in the courts."

And that last phrase "by the exercise of complete dominion adverse to the right of occcupancy" was the particular proposition which Mr. Justice Judson cited Sante Fe for, and is a proposition which he said was the relevant legal proposition prevailing in Canadian law.

My lord, in relation to this particular passage, we say that Mr. Justice Douglas, even though he relies upon Beecher v. Weatherby, if your lordship compares -- I am not asking your lordship to do this at this very moment. But if your lordship goes back to page 220 of these submissions where I have set out the passage in Beecher v. Weatherby, your lordship will see that the re-statement of the Beecher proposition has been considerably expanded in terms of what will bring about an extinguishment. This is part of my preliminary remarks, my lord, that the re-statement in the re-telling takes on a rather broadened colouration.

It is our submission in any event, my lord, that the proposition that aboriginal title can be extinguished "by the exercise of complete dominion

adverse to the right of occcupancy" is a proposition which we say is inconsistent with the fundamental principles of the common law, is contrary to the provisions of the Royal Proclamation and is one which should be rejected by this court. It is our further submission that the proposition that the justness or legality of extinguishment is not open to judicial inquiry is also one which this court should reject. And we say, and we will come back to this, that subsequent decisions of the U.S. Supreme Court have themselves repudiated that very broad proposition. And we also say that in the Canadian context the decision in Guerin is pro tanto a repudiation of this non-justiciable argument.

Your lordship will recall last week I made the point that in Guerin one of the arguments made by the federal government was that it did, indeed, have obligations towards the Musqueam Band in relation to the surrender of their reserves. And, indeed, they were high obligations, but they were obligations of a non-justiciable kind. They were in the land which Federal Crown trusts of a higher order which, while they might give rise to political obligations, did not sound in legal remedies. And the Supreme Court of Canada soundly rejected that proposition. And it is a proposition which, as I say, gained some currency in the late 19th century in the United States. And, as we will demonstrate, has since been revisited. And the Supreme Court has made it clear that issues of extinguishment are not beyond the ken of the court as they were asserted to be some 40 years ago.

But in any event, my lord, we say that the broad statements about the manner in which extinguishment may be brought about other than by Indian consent is overture in the context of Sante Fe. Having made these introductory statements, as it were, as to the issues I've referred to, the great bulk of the judgment in the Sante Fe decision is devoted by Mr. Justice Douglas to an inquiry to find out whether, and I've referred your lordship to the precise words, there was "a clear and plain indication in the public record" that Congress intended to extinguish aboriginal rights, or whether there was "any plain intent or agreement on the part of the Walapais to abandon their ancestral lands".

And there was, in other words, no cognizance taken of any possibility of extinguishment in any of the

other ways in which the Supreme Court seemed to suggest it was possible to extinguish aboriginal title. And the reason why the rest of the judgment is focused in that particular way, and again given the language "a clear and plain indication in the public record" to extinguish, your lordship can see why it was relied upon in Mr. Justice Hall in Calder for his view of extinguishment that only a clear and plain record is extinguishment suffices. The reason why it was so focused is that the content or the context of Sante Fe was reflected in the Act of 1866 which imposed an obligation on the United States to extinguish the aboriginal title of the Indians provides that it should be done "only by their voluntary cession". And what we find, therefore, is that Sante Fe is part of this chain of cases in which on the ground what we find is an inquiry directed to was there Indian consent clearly expressed to the extinguishment or to the abandonment? And yet the case crops up as being authority for a much broader proposition which appears to contravert the need for Indian consent.

The next case, my lord.

MR. PLANT: Perhaps I can just rise then if my friend is moving on. My friend on page 240 has an extract from the judgment of the Supreme Court in Sante Fe. The last sentence of which is underlined, I can't find that yet in the report.

MR. JACKSON: It is on page 270, my lord, the top of the page. I appreciate Mr. Plant's intervention there.

MR. PLANT: Thank you.

THE COURT: Thank you.

MR. JACKSON: The next case, my lord, is in fact two cases. It is usually referred to as the Tillamooks litigation which consists of Tillamooks 1 and Tillamooks 2. The American courts seem -- I don't know whether the citing of this litigation is the precursor to the one found in films in which films become referred to by their numerical number. But there are a number of cases which I will be referring your lordship to in which we have a first case and a second case. And they are referred that way in subsequent jurisprudence.

But the Tillamooks litigation, together with the next case I will be looking at, Tee-Hit-Ton, merits close analysis insofar as it was to these cases that the closest attention was devoted in the Supreme Court

of Canada in Calder. And Mr. Justice Judson, in particular, relied upon the Tillamooks and the Tee-Hit-Ton cases for the proposition, as we understand the Provincial position in this case, it is this position that aboriginal title is not a property or proprietary right and may be extinguished without any legally enforceable obligation to compensate. In relation to that second proposition, I am not sure if the province does, in fact, say that. It is certainly its position that the interest is not a legally -- is not a proprietary interest.

The Tillamooks litigation arose out of this fact situation. In 1855, the Tillamooks agreed to cede certain of their lands in the Pacific Northwest in what was then the Oregon Territory in return for monetary compensation and a reservation. That Treaty was submitted to the Senate, but was never ratified. In November 1855, shortly after that unratified Treaty, an Executive Order created a reservation for both the Tillamooks and other tribes. Another Executive Order reduced the the size of the reservation in 1865, and in 1875 Congress enacted a law approving the 1855 and 1865 Executive Orders and withdrew further land from the reservation. The boundaries of the reservation were confirmed by Congress in 1884, and henceforth no more land was taken without paying compensation. The issue, therefore, was in relation to land withdrawn from the reservation without compensation prior to this. In 1935, Congress passed an Act granting the Court of Claims jurisdiction to adjudicate cases involving "any and all legal and equitable claims arising under or growing out of the original Indian title, claim or rights in ... the lands ... occupied by the Indian bands and tribes described". And there were certain unratified treaties mentioned, including this particular treaty. And the Tillamooks brought an action under this jurisdictional Act for the 1855 surrender of their lands, as well as the reductions of their reservation in 1865 and 1875.

And the Supreme Court in Tillamooks 1 held that they were entitled to compensation for the appropriation of their aboriginal lands. Three judgments were rendered by the court. As your lordship will be well aware, three judgments does not signal well for subsequent principals of stare desisis, and so it was to be in this case. The Chief

Justice of the Supreme Court, Chief Justice Vinson, wrote the plurality judgment in which three other distinguished judges concurred, including Mr. Justice Frankfurter and Mr. Justice Douglas. And the thrust of Chief Justice Vinson's judgment was that the involuntary extinguishment of Indian title gave the Indians a legally enforceable claim for compensation. And Chief Justice Vinson took the position that the effect of the 1935 Act was to remove the jurisdictional bar of sovereign immunity from suit of the United States so as to allow the Court of Claims to entertain the action. And in his judgment he made it clear that the Indians' right to compensation for involuntary extinguishment of their aboriginal title was a pre-existing right, not a right created by the jurisdictional Act. And he said:

> "The Act removes the impediments of sovereign immunity and lapse of time and provided for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one. The cases are to be heard on their merits and decided according to legal principle pertinent to the issues which might be presented under the Act. Accordingly their 1935 statute permits judicial determination of the legal and equitable claims arising out of original Indian title."

What the court in fact was saying, as I understand that, my lord, is the court now has to determine whether or not as a matter of legal or equitable principle they have aboriginal title and whether or not its expropriation without compensation gives rise to a cause of action. And in assessing whether or not they had that title and what its instance might be, Chief Justice Vinson refers back to Johnson v. McIntosh and the other Marshall decisions and summarizes the effects of the discovery principles in this way:

> "It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. That title was deemed subject to a right of occcupancy in favour of Indian tribes, because of their original and previous possession."

Again affirming what Chief Justice Dickson was to affirm in Guerin that these rights are pre-existing rights. As to the content of aboriginal title, Chief Justice Vinson said, and I have set it out at the top of page 246:

> "As against any but the sovereign, original Indian title was accorded the protect of complete ownership."

He continues, however:

> "Original Indian title was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occcupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness of the methods used to extinguish the right of occcupancy, nor could Indians themselves prevent the taking of tribal lands or forestall a determination of their title."

Now, my lord, the apparent approval reflected in that particular passage, and that should be of the power of Congress to extinguish aboriginal title "at will". And that, of course, is a proposition which we understand both the provincial and federal government take --

MR. PLANT: Excuse me. I'm sorry, another problem here. That word "determination" in the last line there, at my reference to the case the word is "termination". That's what the judge actually says.

MR. JACKSON: Yes, my lord, I accept Mr. Plant's --

MR. PLANT: And while I'm up, about four lines up where it says "the justness of the methods used" should be "the justness or fairness of the methods used".

THE COURT: "Or fairness"?

MR. PLANT: Yes.

THE COURT: Well, while we are at it, is there an error in the second line, too? "Original Indian title" -- no, I'm sorry. It is the previous quote I think there is a preposition up there, isn't there? It doesn't matter, go ahead.

MR. PLANT: Yes. In fact, what my friends have done is that they have broken up one sentence into two. The

sentence at the top of the page --
MR. JACKSON: Just continues on.
MR. PLANT: -- just continues on.
THE COURT: All right.
MR. JACKSON: My lord, back to page 246, the second paragraph there.
THE COURT: Yes.
MR. JACKSON: I say that the apparent approval reflected in this passage, and that should be of the power of Congress to extinguish aboriginal title "at will" without regard to the principal of Indian consent which we say would be contrary to the principles of the Marshall court, and also contrary to what the court said in Minnessota v. Hitchcock which we say must be read in light of the subsequent passages in Chief Justice Vinson's judgment where he affirms that Indian consent was not in fact rejected by the court in this case. And you will see the cite at the bottom of page 246:

> "Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid ... In our opinion taking original Indian title without compensation and without consent does not satisfy the 'high standards for fair dealing' required of the United States in controlling Indian affairs. The Indians have more than a merely moral claim for compensation."

THE COURT: Well, he is getting that something more than a moral claim from the legislation, congressional legislation initially and the setting up of the Court of Claims, is he not?
MR. JACKSON: I don't think so, my lord. Because if your lordship will go back to page 245 where he is looking at the Jurisdictional Act in terms of what rights the Indians have here, he says the third line of that quote:

> "No new right or cause of action is created. A merely moral claim is not made a legal one."

In other words, there was previously a legal claim and the effect of the Jurisdictional Act was to remove a jurisdictional impediment of sovereign immunity. And I think his latest statement that the Indians have more than "A merely moral claim" is meant to refer

back to their rights to aboriginal title were not originally moral, they were legal, and hence their rights to compensation are --

THE COURT: Well, he is talking there about "the Act does not create a new right". But didn't -- is it arguable that the right arose out of the original statutory authorities or direction to -- not to extinguish title, but to resolve these problems? And you gave me that quotation quite some time ago as to getting these problems resolved. And you told me that there was a statute that --

MR. JACKSON: This statute was prior to the Indian Claims Commission Act, my lord. These are the Jurisdictional Acts --

THE COURT: I wonder if Chief Justice Vinson was talking about, when he is saying "no new claim", is he saying no new claim under the Court of Claims legislation?

MR. JACKSON: No, my lord, I don't think he is. Because this case arose, as I say, out of a 1935 Jurisdictional Act prior to when the Indian Claims Commission Act was in fact passed by Congress.

THE COURT: All right. Thank you.

MR. JACKSON: It is certainly my view that the juxtaposition of the statements that they claim is not merely a moral one refers to both the natures of their claim based upon original Indian possession and also the nature of their claim to compensation. But I should point out, my lord, that the interpretation which your lordship has suggested is one which has been taken and was taken in Tee-Hit-Ton of this particular statement.

THE COURT: All right.

MR. JACKSON: It is our view that Chief Justice Vinson's statement at 245 is quite unequivocal in terms that the effect of the legislation in 1935 was not to create a legal right in the Indians, that their rights were based upon pre-existing aboriginal possession which gave them a title and gave them a right to compensation, save and except for the jurisdictional bar of sovereign immunity. And that was, in fact, the effect of the 1935 Act.

The next passage, my lord, I think perhaps clarifies this somewhat. The Chief Justice says that if, in fact, no compensation was due for the extinguishment of the Tillamooks' rights, and this is the quote, this would:

"...ignore the plain import of traditional methods

> of extinguishing original Indian title. The early acquisitoin Indian lands in the main progressed by a process of negotiation and treaty. The first treaties revealed the striking deference paid to Indian claims ... It was usual policy not to coerce the surrender of land without consent and without compensation. The great drive to open Western lands in the 19th century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiating extinguishment of original Indian title ... Something more than sovereign grace prompted the obvious regard given to original Indian title."

And, my lord, we say that is significant as your lordship has heard the term "sovereign grace" is one which the province says is in the nature of the recognition of aboriginal title. It exists only, and to the extent that it is recognized, as a result of the exercise of sovereign grace, and that in the context of British Columbia that existed only to the extent of recognition of rights in relation to reserve lands. Chief Justice Vinson, we say, in this case clearly stated that the recognition of aboriginal title was something more than sovereign grace. And that something more, we say, is the original Marshall principles that by virtue of the doctrine of discovery aboriginal people were recognized as having under fundamental principles of a common law a legal as well as just claim to obtain possession and it was not a moral claim. In that sense, the Chief Justice Vinson's statement that it was "Something more than sovereign grace", that the effect of this legislation was not to transfer a moral claim into a legal one is fully consistent with the original Marshall principles.

In Tillamooks 1, my lord, the United States had argued that only where extinguishment was made of Indian title which was recognized by a statute or a treaty was there any legal obligation to compensate. And they argue that in relation to what they called unrecognized aboriginal title, that is where there was absent any treaty or statute, no compensation was due. Chief Justice Vinson rejected this distinction. He said:

> "Furthermore, some cases speak of the unlimited

power of Congress to deal with those Indian lands which are held by what the petitioner would call 'recognized' title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of 'recognized' title. We think the same rule applicable to a taking of original Indian title."

And the court then cites Minnessota v. Hitchcock:

"Whether this tract...was properly called a reservation...or unceded Indian country is a matter of little moment...the Indians' right of occcupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

And we say, my lord, that the location of Minnessota v. Hitchcock at this particular place in the judgment makes it clear that the principle of consent is one which is and remained a polar star star in the jurisprudence. This particular passage from Chief Justice Vinson's judgment was cited extensively by Mr. Justice Hall in Calder, my lord.

The Chief Justice concluded his judgment with an important qualification on the nature and extent of the federal plenary power as it relates to the extinguishment of aboriginal title. He said:

"The power of Congress for Indian affairs may be of a plenary nature; but it is not absolute. It does not..."

And quoting from a previous decision of the United States v. Creek Nation case:

"It does not "enable the United States to give the tribal lands to others or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."

THE COURT: Of course that's a wholly different position than that mentioned a moment ago requiring the consent of the Indians.

MR. JACKSON: I agree, my lord. I am not suggesting they are interchangeable. But what they do suggest is that the very broad statement that extinguishment is non-justiciable and gives rise only to redress to Congress rather than to the courts is one which goes too far. I think the Chief Justice was saying there that the power of Congress has limitations. It may be an exclusive power, but it is not an absolute power. My lord, at page 249 there was an important dissent in Tee-Hit-Ton -- sorry, in Tillamooks. And its significance is that it was authored by Mr. Justice Reed who wrote the majority judgment in Tee-Hit-Ton. And the reasoning in this dissent in fact resurfaces as the majority reasoning in Tee-Hit-Ton. And Mr. Justice Reed drew and found important the distinction which Chief Justice Vinson rejected between recognized and unrecognized Indian title. And he described the difference in these terms --

THE COURT: This is a quotation from Tillamooks 1?

MR. JACKSON: This is a quotation from Tillamooks 1, dissenting judgment of Mr. Justice Reed.

THE COURT: Yes.

MR. JACKSON:

> "The character of Indian occcupancy of tribal lands is at least of two kinds: first, occcupancy as aborigines until that occcupancy is interrupted by governmental order; and, second, occcupancy when by an act of Congress, they are given a definite area as a place upon which to live. When Indians receive recognition of their right to occupy lands by act of Congress, they have a right of occcupancy which cannot be taken from them without compensation. But by the other type of occcupancy, it may be called Indian title, the Indians get no right to continue to occupy the lands; and any interference with their occcupancy by the United States has not heretofore given rise to any right of compensation, legal or equitable."

And later on that same page Mr. Justice Reed expresses this opinion:

> "Indians who continue to occupy their aboriginal homes, without definite recognition of their right to do so are like paleface squatters on public lands without compensable rights if they are evicted."

And, my lord, at the bottom of the page, and I should say that that sentiment of Mr. Justice Reed in many ways is the similar sentiment of Mr. Justice Taschereau, Mr. Justice Henry in St. Catherine's Millings. Your lordship may recall that he said that "a grant to others of Indian lands would not forestall an action by those others against the Indians. The Indians would have no rights to protest their eviction."

This passage also may be regarded, my lord, as the source of the passage in the judgment of Mr. Justice Tysoe in the Court of Appeal in Calder where he concluded that as a result of the pre-Confederation ordinances and proclamations, the so-called Calder 13 I think my friends refer to it as in their argument, the 13 proclamations and ordinances, Mr. Justice Tysoe concluded that:

> "The Indians of the Colony of British Columbia became in law trespassers on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians."

And it is the plaintiff's submission that both the statements of Mr. Justice Reed in Tillamooks 1 and Mr. Justice Tysoe in Calder are contrary to fundamental principles of justice and, in the words of Mr. Justice Hall in Calder: "represent a proposition which reason itself repudiates".

We say, my lord, that the judgment of Mr. Justice Reed is, with the greatest of respect, rife with doctrinal distortions and inconsistencies and, as we will submit in relation to his judgment in Tee-Hit-Ton, flies in the face of the Marshall court principles even though Mr. Justice Reed purports to rely upon those judgments. Thus, we say Mr. Justice Reed in Tillamooks 1 quite erroneously asserts that the distinction between recognized and unrecognized title springs from the doctrine of discovery set out in Johnson v. McIntosh. And, my lord, simply there is nothing in Johnson v. McIntosh that relates to this distinction.

He goes on to say that "while Indians were permitted to occupy these lands under their Indian title, the conquering nations asserted the right to

extinguish that Indian title without legal responsibility to compensate the Indians for his loss." And the authority for this assertion, my lord, is found in a footnote as the Treaty of Paris of 1783, which "...confirmed the sovereignty of the United States without reservation of Indian rights". And, my lord, you should add footnote 6 to that first citation.

THE COURT: At 91?

MR. JACKSON: At the end. It is footnote 6.

THE COURT: Okay.

MR. JACKSON: And, my lord, if you just consider that proposition for a moment, what it totally ignores is the doctrine of continuity which, of course, was the express subject of pronouncement by the U.S. Supreme Court in the Mitchel case, and the elementary proposition that the British Crown could only convey such proprietary rights as it possessed. And as we have already demonstrated, both the British Crown authorities and referring to Lord Dorchester and the American authorities in 1791, when addressing the representatives of Indian nations, specifically disavowed any pretension that the Treaty of Paris had negatively affected the pre-existing rights of the Indian nations. And when we deal with Tee-Hit-Ton, my lord, we will have more to say as to the quality of Mr. Justice Reed's historical scholarship.

THE COURT: Can we take the afternoon adjournment?

MR. JACKSON: Yes, my lord.

THE COURT: I thought if counsel find it convenient that we will take the adjournment now. And we will then go to about quarter after four and take a short break, and then go to 5:30 or something like that. And then if counsel are so disposed, we can come back for a couple of hours this evening.

MR. JACKSON: Well, my lord, I thought perhaps we will go to 5 or 5:30. And then perhaps I can advise your lordship accordingly.

THE COURT: Yes, thank you.

THE REGISTRAR: Order in court. Court stands adjourned for a short recess.

(PROCEEDINGS ADJOURNED AT 3:00)

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

_____

LISA FRANKO, OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RECONVENED AT 3:15 P.M.)

THE REGISTRAR: Order in court.
THE COURT: Mr. Jackson.
MR. JACKSON: Thank you, my lord.
My lord, as a result of the Tillamooks I case, the case was sent back to the Court of Claims, and it awarded the Tillamooks $3 million compensation with interest from the date of taking. And the date of taking, of course, was some considerable time before. The amount of the interest was some 17,000 -- sorry, $17 million, and not surprisingly, the U.S. -- United States Government appealed the award on the basis that the court ought not to have awarded interest.
And at the Tillamooks II case, my lord --
THE COURT: I'm sorry, I thought the first judgment was in the Supreme Court in the United States?
MR. JACKSON: It remanded the case back to the Court of Claims.
THE COURT: Yes. And the Court of Claims -- oh, I see. And the Court of Claims gave interest?
MR. JACKSON: That's right. The Court of Claims said the compensation is three million plus interest.
THE COURT: Yes, all right.
MR. JACKSON: Which, as I said, had a very enhancing effect on the award.
THE COURT: So the first judgment didn't deal with interest at all.
MR. JACKSON: No.
THE COURT: No. Thank you.
MR. JACKSON: The United States, when the case wound its way back up to the U.S. Supreme Court the second time as to whether or not the Court of Claims was right in awarding interest, placed before the court the implications of such an interest award. And what the U.S. government did in its brief, my lord -- because your lordship will recall that the Indian Claims Commission Act had now been passed and it had authorized the filing of a whole body of claims without the need for special jurisdictional acts as had characterized the Tillamooks I litigation.
And the United States government pointed out to the Supreme Court that if this interest award was sustained, the implications of such a ruling would be that if all the claims presently then before the Indian Claims Commission were subject to interest from the date of taking, the United States would face a potential total liability of some $9 billion. Of

course that's 1950 dollars, of which eight billion would be interest.

THE COURT: Wouldn't bother a Texas jury.

MR. JACKSON: It bothered the United States government, my lord.

THE COURT: Bothered Texas too.

MR. JACKSON: In any event, my lord, the case went back to the United States Supreme Court on the narrow issue whether the Court of Claims erred in making the interest -- the award subject to interest.

And the -- the Tillamooks II decision is very -- is a per curiam decision and it reversed the Court of Claims on the issue of interest. And at page 252, my lord, I've set out the basis for that.

The court, after citing what is referred to as the "traditional rule" that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract, the only exception being a taking under the Fifth Amendment. And the Fifth Amendment, my lord, provides that, "Private property shall not be taken for public use without just compensation".

The court, basing itself upon its assessment of the opinions in the Tillamooks I case concluded:

> Looking at the former opinions in this case, we find that none of them express the view that recovery was grounded on a taking under the Fifth Amendment. And since the applicable jurisdictional Act contains no provision authorizing an award of interest, such an award must be reversed.

And it's difficult to clearly articulate what the U.S. Supreme Court was saying in the Tillamooks I decision. We know quite clearly they are saying that interest can't be awarded. The Tillamooks II case has been seen by some judges as amounting to a reversal of its position in the Tillamooks I case. And that in fact, in the Tillamooks I case, the court was really saying that the liability depended upon the special jurisdictional Act.

As I've suggested, my lord, if you look at Chief Justice Vinson's judgments, he seemed not to be saying that, but whatever the proper interpretation of Tillamooks II is, what was very clear was that the court found in the absence of an express direction to pay interest, such interest was not to be awarded on

these claims.

The next case, my lord, and you'll see in Calder this issue of what Tillamooks II means, is the subject of some debate between Mr. Justice Judson and Mr. Justice Hall. But in some ways, the debate about what the court meant in Tillamooks II is overtaken by the decision of the Supreme Court in the next judgment, which it rendered on this issue of the nature of aboriginal rights in 1955 in Tee-Hit-Ton.

And I say at page 254, my lord, that the judgment of the Supreme Court of the -- in Tee-Hit-Ton which was cited with approval by Mr. Justice Tysoe and Mr. Justice McLean in their judgments in the Court of Appeal in Calder and by Mr. Justice Judson in his judgment in the Supreme Court of Canada in the same case, has received the most criticism of any judgment on aboriginal rights delivered by the U.S. Supreme Court. And it is our submission that this criticism is justified and that the decision of Mr. Justice Reed in Tee-Hit-Ton is so inconsistent with fundamental principles that its findings should be completely rejected by this court. They are strong words, my lord, and perhaps I will endeavour to explain why we make that submission

But first, the background to the case which is set out at the bottom of page 254:

The Tee-Hit-Ton Indians are a small band belonging to the Tlingit Tribe of Alaskan Indians. In 1947, Congress passed a joint resolution directing the Secretary of the Interior to sell the right to cut timber from the Tongass National Forest which was part of the traditional territory of the Tee-Hit-Tons. The joint resolution authorized the sale "notwithstanding any claim of possessory rights". The resolution defined "possessory rights" as "all rights, if any should exist, which are based upon aboriginal occupancy or title".

My lord, perhaps before I go any further, I should just advise you and my friends, when I was reviewing this material over the weekend, I found that the citations which I had originally put in Tee-Hit-Ton, which were to my -- my copy of the case, when these materials were placed in our authorities, the people compiling the authorities went to the only available copy they had which was a lawyers' edition which is a different edition. And to save both you and my friends the trouble of having to translate what

I did, if I can find them, is I -- I had our secretary redo these pages yesterday, so that what your lordship has is exactly the text from pages 255 to 266, but you have the alternative citation so that your lordship will be able to find the citation in the book of authorities which your lordship has.

THE COURT: Do I delete my pages 255?

MR. JACKSON: Take 255 to 266 out and substitute these.

THE COURT: Fine. And are these pages now different from your disk?

MR. JACKSON: No, my lord. The disk -- you haven't got the disk for this yet.

THE COURT: I see.

MR. JACKSON: When you get the disk you'll have the amended pages.

THE COURT: I see. I better start calling them diskettes is what they are properly called. Sometimes they can both be very painful.

MR. JACKSON: I'll start at the top of page 255, my lord.

The joint resolution authorized the sale "notwithstanding any claim of possessory rights". The resolution defined "possessory rights" as "all rights, if any should exist, which are based upon aboriginal occupancy or title, whether claimed by native tribes, native villages, native inhabitants, or other persons, and which have not been confirmed by patent or court decision or included within any reservation". The resolution also provided that all receipts from the sale of timber should be maintained in a special account until the timber and land rights were finally determined. And Section 3(b) of the resolution specifically provided:

> Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest.

I suppose one might also refer to that, my lord, as a without-prejudice clause, my lord.

Once the merchantable timber in the 350,000 acre forest had been cut down, the Tee-Hit-Tons, relying upon a previous decision of the U.S. Supreme Court to which I will be later referring, a decision of the Shoshone Tribe v. the United States, which had held that aboriginal title included ownership in standing

timber, the Tee-Hit-Tons sued for compensation arguing that the sale of the timber constituted a compensable taking by the United States of a portion of its proprietary aboriginal interest in the land.

The claim was brought pursuant to the Indian Claims Commission Act. That -- my lord, while the principal part of that Act was to permit claims pre-1946 under a variety of heads -- which I'll be going into later today or early tomorrow morning -- the statute also conferred a broad jurisdiction on the Court of Claims to adjudicate claims arising after 1946, although for claims arising after 1946, the claims were limited to a much narrower basis and they were limited to claims in law or equity arising under the Constitution, laws, treaties of the United States and Executive Orders of the President. And what was before the court in Tee-Hit-Ton was whether the aboriginal title of the Tee-Hit-Tons conferred any legal or equitable rights to compensation as against the United States.

The Tee-Hit-Tons claimed that the taking of the timber from lands belonging to them by aboriginal title did in fact constitute a taking, giving rise to a claim for compensation under the Fifth Amendment.

And Mr. Justice Reed, writing for the majority of the court this time, identified what he regarded as the essential problem which -- central problem presented to the Court for adjudication:

> The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a "full proprietary ownership" of the land; or in the alternative, at least a "recognized" right to unrestricted possession, occupation and use. Either ownership or recognized possession, petitioner asserts, is compensable.... It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land

> permanently and therefore the sale of the timber off such lands constitutes a taking pro tanto of its asserted rights in the area.

Mr. Justice Reed described or characterized the nature of the United States government's defence to the claim in the following way:

> The government denies the petitioner has any compensable interest. It asserts that the Tee-Hit-Ton's property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.

And my lord, subject to the issue of compensation, that characterization of the nature of the title of the Indians seems to me, from reading provincial and federal government's defence, to be an argument they subscribe to.

Mr. Justice Reed reiterated, in his judgment, the distinction between recognized and original Indian title which he had asserted in dissent in the Tillamooks I case:

> Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.

However, Mr. Justice Reed, looking at the resolution of Congress and the other relevant Congressional record, concluded that nothing in that record indicated "any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the status quo until further Congressional or judicial action was taken". And we don't quarrel with that characterization of the Congressional record, my lord.

In the absence of there being any Congressional recognition of the Tee-Hit-Ton rights, Mr. Justice Reed then turned to a consideration of their claim on

the basis of their original Indian title. And the passage next set out sets out Mr. Justice Reed's conception of the nature of aboriginal or Indian title:

> The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty", as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

THE COURT: Does he say what he refers to by this term "conquest"?

MR. JACKSON: My lord, that is the point I will next refer you to.

THE COURT: All right.

MR. JACKSON: We say, my lord, that what we call a remarkable redefinition of aboriginal title as "permission from the whites to occupy" is linked to the parallel Mr. Justice Reed drew in the first Tillamooks case where he equated the position of Indians and "pale-faced squatters on public lands".

In relation to your lordship's point as to the authority for this proposition of Mr. Justice Reed, he sought as authority for the proposition I've just set out, he sought as the principal authority what he called "the great case of Johnson v. McIntosh". We say, my lord, that his citation to that case is extremely selective; indeed -- and I use these words

advisedly, my lord -- we say that his selection is so limited that if counsel were to suggest to your lordship that the passages cited by Mr. Justice Reed represented the central tenets of "the great case of Johnson v. McIntosh", counsel could be accused of misleading the Court.

There are two paragraphs cited. The first one contains the statement which your lordship also asked a question about, where the Chief Justice said "conquest gives a title which the courts of the conqueror cannot deny". And your lordship may recall when I read that out from Johnson v. McIntosh, your lordship said, "Well, what conquest is he referring to?" And in the same way, your lordship's question, "What conquest is Mr. Justice Reed referring to," he gives us no clue at this stage of his judgment.

THE COURT: Probably a reference to Campbell v. Hall, isn't it?

MR. JACKSON: Campbell v. Hall is not cited, my lord.

THE COURT: At least there was a conquest there.

MR. JACKSON: Well, as we -- we saw in Johnson v. McIntosh, the only way to make sense of the reference to conquest there and the statements that territory was held by the soldiers as far west as the Mississippi was by reference to the conquest in relation to the French. In Tee-Hit-Ton, it appears that Mr. Justice Reed -- in a passage which I will later refer your lordship -- was not in fact talking about the conquest over the French, but rather was actually talking about the conquest over the Indians. But anyway, that's the first passage from Johnson v. McIntosh which is a passage where Chief Justice Marshall does talk about the title of the conqueror.

The second passage -- and we say at 259, that in relation to that particular passage, that nothing in Johnson v. McIntosh turned on conquest, and the theory of conquest giving a title, excepting very limited areas, was expressly repudiated by Chief Justice Marshall in Worcester v. Georgia. But the second paragraph from Johnson v. McIntosh, which is referred to by Mr. Justice Reed, deals with the acquisition of title to lands being no longer occupied by its ancient inhabitants.

What is not contained in Mr. Justice Reed's judgment is any reference to any other of the Marshall Court decisions. He doesn't refer to Worcester v. Georgia, he doesn't refer to Mitchel. And we say, my lord, that in terms of the selection citation, even if

it were limited to Johnson v. McIntosh, what Mr. Justice Reed did not take into account what we have said your lordship should be fully alive to, is the fact that the jurisprudence of the Marshall Court went through an evolution and Johnson v. McIntosh cannot be plucked out of the air as if it marked the end point of that jurisprudence.

Also, nowhere in the judgment is there to be found any reference to the unanimous court -- unanimous decision of the Court in Minnesota v. Hitchcock, that Indian title "has always been held to be sacred; something not to be taken from him except by his consent". And of course in Mitchel, where we saw, my lord, the courts talking about the Indian title being as sacred as the fee simple of the whites.

In further support of the proposition that Indian title was not a proprietary interest and was not compensable, Mr. Justice Reed cited two of the cases we have previously dealt with in this chain. He cited Beecher v. Wetherby, and the passage relied upon is set out at page 260. And it is the -- includes the proposition that:

> ...the proprietary or justice of their [the United States] action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

And as we had previously said in Beecher v. Wetherby, the court did not say that the justice or propriety could not be adjudicated in a contest between the Indians and the United States. In Tee-Hit-Ton, the case was cited for exactly that proposition, that it applied and in fact prevented the Tee-Hit-Tons from suing the United States for compensation for a taking of their lands. The citation to Santa Fe, my lord, is even more selective than the references to Johnson v. McIntosh. And in fact, there was only one passage in which Mr. Justice Reed refers to Santa Fe, and it's the passage which is set out at the bottom of page 260, which I've already referred to your lordship, in which Mr. Justice Douglas said that:

> The manner, method and time of such extinguishment raises political, not justiciable, issues.

My lord, we say the selective use of Santa Fe to support the proposition that all aspects of Congressional authority to extinguish aboriginal title are unreviewable is quite extraordinary. In that case, my lord, the United States had brought suit as guardian of the Walapai to enjoin the railroad's interference with the tribe's enjoyment and possession of its territory. The railway company had defended on the grounds that the tribe's aboriginal title had been extinguished. The central analysis of the case was directed to judicial review of whether or not Congress had expressed a clear and plain intention to extinguish the Walapai's title by the creation of a reservation and whether the Walapai's had expressed a clear and plain intention to abandon their ancestral lands. Moreover, in the course of its decision, my lord -- and I've set this out previously -- the Supreme Court specifically stated that a tribal claim to particular land did not have to be based on "a treaty, statute or other formal government action". Of course that's a proposition directly contrary to the central thesis of Mr. Justice Reed in Tee-Hit-Ton, that only recognized title gives rise to a proprietary interest.

It's not surprising we say therefore, my lord, that Mr. Justice Reed made no further reference to Santa Fe because it would appear upon any proper reading of Santa Fe, to directly, unequivocally, reject the proposition that there is a distinction between recognized and unrecognized title.

My lord, in relation to Tillamooks, the -- Mr. Justice Reed took the position that in light of Tillamooks II, the decision of Tillamooks I must be viewed as based upon an expressed direction to pay under the jurisdictional act, even though Chief Justice Vinson in Tillamooks I having expressly disavowed any such intention. Having thus distinguished Tillamooks I, Mr. Justice Reed concluded:

> This leaves unimpaired the rule derived from Johnson v. McIntosh that the taking by the United States of unrecognized Indian title is

not compensable under the Fifth Amendment.

This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.

And it is our submission, my lord, that Mr. Justice Reed's statement that Johnson v. McIntosh is authority for the proposition that the taking of unrecognized aboriginal title is not compensable under the Fifth Amendment is totally without foundation. In that case there was no issue regarding the compensability of aboriginal title because, as your lordship will remember, the land in question had been ceded to the United States by treaty. And we say that Mr. Justice Reed, in relying upon Johnson v. McIntosh for that proposition, demonstrates a shocking and selective reliance on precedent.

Mr. Justice Reed, in his judgment, acknowledged that the authorities which he had previously cited; Santa Fe, Beecher v. Wetherby and Johnson v. McIntosh itself, dealt largely with the Indians of the Plains and east of the Mississippi. He therefore addressed the argument made by the Tee-Hit-Tons "that their stage of civilization and their concept of ownership of property takes them out of the rule applicable to the Indians of the States".

The evidence of the Tee-Hit-Tons presented to the Court of Claims in this case, my lord, was limited to a single witness from a Chief of the tribe supplemented by anthropological evidence. The Chief's evidence showed that at the time of the lawsuit the Tee-Hit-Tons had been reduced to a total membership of some 65. The witness pointed out that the Tee-Hit-Tons' claim of ownership was based on possession and use. Although the area claimed covered some 350,000 acres, the witness pointed to only six places in the area to show Indian use. And this is all taken from the judgment of Mr. Justice Reed, my lord.

Quite clearly, the evidence before the court in

Tee-Hit-Ton was of a wholly different order qualitatively and quantitatively than that which has been placed before your lordship.

And on the basis of admittedly very limited evidence, Mr. Justice Reed found that the Court of Claims had properly concluded that "the Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to the rights to use identified territory to those activities as well as the gathering of wild products of the earth. And he concluded that this evidence confirms the Court's conclusion that the petitioner's use of its land was like the use of the nomadic tribes of the States' Indians."

My lord, Mr. Justice Reed ended his judgment with a statement which I think answers your lordship's question about what conquest was he referring to. He said:

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation. Every American school boy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land...
>
> In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make Congressional contributions for Indian lands rather than to subject Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness towards the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

My lord, that proposition and those concluding remarks were cited with approval by Mr. Justice Judson in Calder as having "equal application" to the Nishga's claims, even though in that case there was no claim to compensation. As your lordship is aware, the action was for bare declaration.

My lord, page 265, we set out our submissions in relation to Tee-Hit-Ton, and we say that supported by the weight of scholarly writing, that Mr. Justice Reed's concluding paragraphs represent a distortion of both legal principle and of history. Tee-Hit-Ton amounts to a revival of an historically unfounded conquest theory to legitimate judicial nullification of Indian proprietary rights, justified by an appeal to "manifest destiny".

We have previously cited in these materials, my lord, the statement by Professor Felix Cohen, at a time when he was an Associate Solicitor for the United States Department of the Interior, where he said that despite what "every American school boy is taught [and this was before Tee-Hit-Ton] the historic fact is that practically all of the real estate acquired by the United States since 1776" -- and we would add, my lord, for your lordship's own noting -- before 1776 as well, was purchased not from Napoleon or any other emperor or czar but from its original Indian owners.

And we have in our submissions --

THE COURT: That clearly isn't right, is it?

MR. JACKSON: No, my lord. In terms of --

THE COURT: Alaska is almost as big as the American west, less Louisiana, isn't it? Doesn't matter. Alaska plus Louisiana comes pretty close to --

MR. JACKSON: I think we may be in a situation of parody here, my lord.

THE COURT: Pretty close.

MR. JACKSON: But in terms of Louisiana, most of Louisiana was in fact purchased from the Indian original owners through treaties, my lord.

THE COURT: Yes, I suppose that's right. After acquiring France's rights, the Americans did acquire the rest of it -- then went through an extinguished title by treaty, yes, quite right.

MR. JACKSON: Yes, my lord. And in fact, my lord, when we dealt with the Baker Lake tests and some of the Indian Claims Commissions Act, many of those artifact cases arise from purchases in the -- in what was Louisiana.

THE COURT: Yes.

MR. JACKSON: Our previous submissions have documented the extent to which Professor Cohen's assertion is an accurate description of historical reality. And in that sense we are talking about the acquisition by purchase from Indian proprietors. Yet eight years later, after Professor Cohen's statement, the majority of the Supreme Court of the United States can assert, as a factual predicate to its finding that Indians have no legal compensable rights to their land, that "every American school boy knows that the savage tribes of this continent were deprived of their ancestral ranges by force". And we say, my lord, no less appalling than this distortion of the historical reality is the court's justification for its finding which subordinates the rule of law to political expediency. The necessity of the growth of the United States is seen as an historical imperative and any legal principle which might impede this advance of civilization is to be rejected. In this way, my lord, Indian rights become transformed from rights "as sacred as the fee simple" -- to use the words of Mr. Justice Baldwin in Mitchel -- into -- to use the words of Mr. Justice Reed -- "permission from the whites to occupy"; treaties negotiated in accordance with Indian and European diplomatic protocol are no more than expressions of the "the sovereign's will" and mutual covenants of alliance, assistance and protection are no more than "gratuities". And we say, my lord, that Tee-Hit-Ton is a blatant example of power distorting the face of justice. And it is our submission that Tee-Hit-Ton is inconsistent with fundamental principles, that Mr. Justice Judson's reliance on the case is misplaced and that this court should repudiate both its reasoning and its conclusions in the context of Canadian law.

My lord, at pages -- the bottom of page 266 and pages 267 and 268, I have set out, using the commentary of Professor Newton, a distinguished American Indian rights scholar who has looked at the reasons why the Supreme Court in Tee-Hit-Ton was compelled to come to the conclusions it did. And I don't intend to go into it in any depth, my lord, I leave it to your lordship to read, but there is just two points I want to make:

One of them is that Professor Newton makes the point, which I think is one which has merit, that the effect of Tee-Hit-Ton was to say that you can't come

to court and sue the United States under the Fifth Amendment for compensation for a taking. By this time, of course, what was in place in the United States was the Indian Claims Commission which permitted actions for compensation, and the effect of the Tee-Hit-Ton ruling was, in fact, to make the Indian Claims Commission process the exclusive forum for those claims, rather than permitting a parallel route through the courts, with implications for very significant and potentially crippling awards of interest.

Also, my lord, what Professor Newton suggests is that to the extent that the Indian Claims Commission process was meant to be a final resolution of these claims, the court's findings in Tee-Hit-Ton in precluding any other extraneous route for compensation, was consistent with the final adjudication of these issues once and for all in a particular forum set up by Congress.

In that way, my lord, we are not asking you to re-characterize the case in any way, but it -- to my mind, it makes sense of a judgment which otherwise seems to be so inconsistent with fundamental principles that one is left sort of scratching one's head as to what could have forced the court to come to that conclusion.

And you will see, my lord, that I make the point that Tee-Hit-Ton in this way seems to fit into the general thrust of Congressional Indian policy in the 1950's, in much the same way as the decision in Kagama in 1886 fitted into the general thrust of the federal government in relation to the allotment in general, broad, federal power.

The next cases I wish to refer to, my lord, are also a sequence of cases which are referred to as the Oneida cases, Oneida I.

MR. PLANT: Before my friend does that, there is just one minor matter of correction that -- on page 259 of my friend's submission with respect to Tee-Hit-Ton, the bottom of the page he says, "Strikingly absent is any reference to the judgments in Worcester." Does your lordship have that?

THE COURT: Yes.

MR. PLANT: Yes. The reference to Worcester in Tee-Hit-Ton is found on page 317 of the judgment at footnote two.

Turning on to page 260, where he says, "Nowhere to be found in the judgment is any reference to the

unanimous decision of the Court in Minnesota v. Hitchcock," the reference to that case is at page 322 in footnote 15.

THE COURT: Thank you.

MR. JACKSON: My lord, my references to lack of references are intended to be citations to propositions or principles. You will find in the footnotes a litany of references to cases, my lord, with no discussion and no recognition that those cases in any way detract from or deviate from the propositions which are asserted in the body of the text.

My lord, at the time of the decision of the Supreme Court of Canada in Calder, Tee-Hit-Ton was the most recent Supreme Court of United States decision dealing with the nature of aboriginal title. And at page 269 you will see that I set out what Mr. Justice Judson stated in relation to it as being "the last word on the subject", as indeed at that point it was.

Since Calder, my lord, the Supreme Court of the United States has rendered two other important judgments which have addressed the nature of Indian title in a manner which reaffirms, we say, the original Marshall Court principles and which, we further say, implicitly rejects Tee-Hit-Ton. And the first of these cases is Oneida I.

The Oneida litigation is part of what is referred to as the Eastern Land Claims litigation. And we say, my lord, that there is a certain historical symmetry involved in these cases, not only because they mark a return to the original Marshall principles, but also because the suit was brought by the Oneida Nation, one of the six Nations of the Iroquois Confederacy. In their 1970 action the Oneidas alleged that from time immemorial down to the time of the American Revolution, they had owned and occupied some six million acres of land in the State of New York. In the 1780's and 1790's, they had entered into various treaties with the United States confirming the Indians' right of possession of their lands. And of course one of those, my lord, was the Treaty of Fort Stanwix. The Oneidas' complaint further alleged that in 1790, the treaties had been implemented by federal statute, the Trade and Nonintercourse Act, forbidding the conveyance of Indian lands without the consent of the United States. And in 1788, the Oneidas ceded some five million acres to the State of New York, retaining some 300,000 acres. And later in 1795,

100,000 acres of those lands were ceded again to the State of New York. And the Oneidas asserted that the 1795 cession was without the consent of the United States and hence was legally ineffective to terminate the Indians' right of possession under the treaties and the applicable federal statutes. It was also alleged that the cession in 1795 was for an unconscionable and inadequate price. The tribe sued for damages for the fair rental value of that part of the land presently owned and occupied by the Counties of Oneida and Madison, in upper New York, for a period of two years.

So the litigation, my lord, was in the nature of a test case, limited to these two years. The amount of land and the amount of compensation was not -- was not large but it was intended to raise issues of some considerable importance because there were other examples of treaties of cession made by the eastern states after the passage of the Trade and Nonintercourse Act without the consent of the United States, and hence in violation of that statute.

So the case was of some considerable importance to the security of land title and the financial implications of noncompliance with the Trade and Nonintercourse Act.

The United States District Court, in which the case was first dealt with, dismissed the complaint in Oneida I on the ground that it failed to state a claim arising under the laws of the United States (and therefore should have been initiated in a State Court). This decision was affirmed by the Court of Appeals for the Second Circuit. The case went to the Supreme Court which held unanimously that, for jurisdictional purposes, the Oneidas' case stated a claim for possession arising under federal law and hence within the jurisdiction of the District Court. And this question of a federal claim arising under federal law, my lord, is one which our own Supreme Court, in the Roberts case, has recently concluded -- gives rise to a similar kind of issue, that aboriginal title is a matter of federal common-law. Oneida, as it were, anticipated that kind of judgment in the American context.

But the Supreme Court, in determining the nature of the possessory right alleged by the Oneidas, stated at the passage set out at page 271:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign - first the discovering European nation and later the original States and the United States - a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was recognized (sic) --

THE COURT: "Organized". "Organized".
MR. JACKSON: "Organized", yes, my lord.

> Once the United States was organized and the constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States.

And later in this judgment, my lord, the court cited the passage from Worcester v. Georgia. This is not a passage or reference, my lord, lodged in a footnote, but in the body of the text in which Chief Justice Marshall had spoken of the:

> universal conviction that the Indian Nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent ... that within their boundary they possess rights which no state could interfere; and that they (sic) whole --

That should be:

> -- the whole power of regulating the intercourse with them, was vested in the United States.

And we have previously submitted, my lord, and its affirmation and recitation in a recent decision of the Supreme Court makes it very clear that the exclusive power of the United States to regulate

relationships with Indian Nations is an exclusive power in the sense that it precludes state interference. But this exclusive power, which includes the power to extinguish Indian title, can and must be exercised with Indian consent.

The court in Oneida I, my lord, in the course of its judgment, affirmed its previous decision in Santa Fe. But in stark contrast to the court's judgment in Tee-Hit-Ton, the court in Oneida I recites the passage in Santa Fe omitted from the judgment in Tee-Hit-Ton, to the effect that Indian title, to be protected, need not be "based upon a treaty, statute, or other formal government action".

And we say, my lord, in this regard, by specifically reciting that passage in Santa Fe, the Supreme Court in Oneida I has, by necessary implication, rejected the distinction which it had previously rejected in Tillamooks I, which draws a distinction between unrecognized and recognized Indian title.

My lord, before I get into Oneida II, would this be a convenient place to take the break?

THE COURT: Yes. All right.

THE REGISTRAR: Order in court. Court stands adjourned for a short recess.

(PROCEEDINGS ADJOURNED AT 4:10 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.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE COURT: Mr. Jackson.
MR. JACKSON: My lord. Moving now, my lord, to Oneida II on page 273. As a result of its decision in --
THE COURT: I gather Oneida I it was only decided that it was a fair question to be argued in Federal Courts.
MR. JACKSON: Yes, my lord. Federal Court had jurisdiction to hear the matter. So it was remanded back to Federal Court. And that Court, my lord, trifurcated trial of the issues. It is not my word, my lord.
THE COURT: No. Its a dreadful word. Goodness sakes.
MR. JACKSON: That seems to be the consensus of counsel table as well. There you have it. That's what they did. In the first phase of the case, the Court found the two New York Counties liable to the Oneidas for possession of their land; in the second phase, it awarded damages in the amount of some sixteen thousand dollars plus interest and in the third phase, it held that the State of New York, a third party defendant, must indemnify the Counties for the damages owed to the Oneida. The Court of Appeal affirmed the District Court's rulings with respect to liability and indemnification. And the Counties and the State appealed to the U.S. Supreme Court, which recognizing the importance of the Court of Appeal's decision in relation to all Eastern land claims, granted certiorari on the issue "to determine whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago."

The Supreme Court, in a five-four majority decision, affirmed the finding of liability and in doing so traces the early history of the Iroquois and of the passage of the Trade and Nonintercourse Act. And I have set out, my lord, that early history at page 274, 275. It's a rather longer version of what I have already --
THE COURT: This is a quote from the Supreme Court of the United States?
MR. JACKSON: Yes, my lord. It's a rather longer version of what I have already explained to you. So I don't think it's necessary for me to --
THE COURT: All right.
MR. JACKSON: -- go into it. On page 275 the -- and of course, the essential issue was the fact that the Trade and Nonintercourse Act had not been complied with.

The Counties did not dispute the District Court's finding that the 1795 conveyance did not comply with the requirements of the Nonintercourse Act. They argued that the Oneidas did not have a Federal common law cause of action for this violation and that if such an action existed, it was pre-empted by the Nonintercourse Act. Additionally, they maintained that any such cause of action was time-barred or non-justiciable; that any cause of action had abated and finally, that the United States had ratified the conveyance.

The Supreme Court found that the courts below had concluded that the Oneidas had a right to sue for violation of the 1793 Act on two theories. First, a common law right of action for unlawful possession and second, an implied statutory cause of action under the Nonintercourse Act. The Supreme Court in its judgment did not deal with the second basis of liability, that is the statutory basis of liability, finding that the Indians' common law right was firmly established. My lord, in so finding and writing the decision of the majority, Mr. Justice Powell provided the following statement of the Court's view of Indian land rights as a matter of Federal common law.

> "By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial. The 'doctrine of discovery' provided, however, that discovering nations held fee title to these lands, subject to the Indians' right of right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign.
>
> With the adoption of the Constitution, Indian relations became the exclusive province of federal law. Oneida I (citing Worcester v. Georgia) From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the 'unquestioned' right of the

> Indians to the exclusive possession of their lands, (Cherokee Nation v. Georgia) and stated that the Indians' right of occupancy is 'as sacred as the fee simple of the whites,' (Mitchel v. United States). This principle has been reaffirmed consistently. Thus, as we concluded in Oneida I, 'the possessory right claimed is a Federal right to the lands at issue in this case.'.
>
> Numerous decisions of this Court prior to Oneida I recognized, at least implicitly, that Indians have a Federal common-law right to sue to enforce their aboriginal land rights. In Johnson v. McIntosh, the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent. Subsequently, in Marsh v. Brooks it was held:
>
> > that an action of ejectment could be maintained on an Indian right to occupancy and use, is not open to question. This is a result of the decision in Johnson v. McIntosh.
>
> More recently, the Court held that Indians have a common-law right of action for an accounting of 'all rents, issues and profits' against trespasses on their lands. Finally, the Court's opinion in Oneida I implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights. Citing United States v. Santa Fe, we noted that the Indians' right of occupancy need not be based on treaty, statute or other formal government action. We stated that 'absent federal statutory guidance, the governing rule of decision would be fashioned by the Federal Court in the mode of the common law.'.
>
> In keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on Federal common law."

My lord, in Oneida I, the only reference made by the

Court to Tee-Hit-Ton was in a footnote. Much the same way as my friends pointed out, the only reference made to Worcester v. Georgia in Tee-Hit-Ton was to a footnote. And I should say a footnote which is not terribly germane to any of the principles to Worcester v. Georgia. It is highly significant that in Oneida II, in a judgment dealing with the Federal common law of aboriginal title, no mention is made of Mr. Justice Reed's judgment in Tee-Hit-Ton. Instead, the Supreme Court finds the roots of the common law to be those established in the classic Marshall Court decisions. Moreover, in reiterating the passage from the Santa Fe case on which the Court had relied in Oneida I, the Supreme Court in Oneida II, as it were, underlines its rejection that there is any validity in the distinction asserted in Tee-Hit-Ton between recognized and unrecognized title in relation to the ability of an Indian Nation to vindicate their aboriginal rights.

My lord, in at page 278. In rejecting the two Counties' argument of abatement - essentially that the cause of action for violation of the 1793 Nonintercourse Act abated when the statute expired and was replaced in 1796 with a new version - the Court found that the pertinent provision of the 1793 Act and all subsequent versions of the Nonintercourse Act codified the restraint on alienation of Indian land to anyone except the United States.

And it is our submission that this view of the Nonintercourse Act, as a codification of common law principles, conforms precisely to the position taken by Mr. Justice Strong in St. Catherine's Milling and Mr. Justice Hall in Calder that the Royal Proclamation is a codification of common law principles. And my lord, as Mr. Rush has already submitted to you, the American cases, not just the Oneida cases, but cases of Mohegan Nation and Conneticut, which Mr. Rush referred you, these cases on the application of the Nonintercourse Act supports the plaintiffs' argument that the Royal Proclamation should be given a prospective geographical application, in light of the mischief in which it was designed to remedy.

We will in fact be returning to the judgment in Oneida II later in these submissions in relation to the relevant principles or canons of construction governing extinguishment of Indian rights. This issue arose in the Oneida litigation because the Counties

contended that the United States had ratified the unlawful 1795 conveyance and thus, in effect, had lent federal imprimatur to the extinguishment of the Oneida title. In rejecting this argument, the Court stated, is the passage we are coming back to:

> "The canons of construction applicable in Indian law are rooted in unique trust relationship between the United States and the Indians. Thus, it is well established treaties should be construed liberally in favour of the Indians ... with ambiguous provisions interpreted to their benefit ... The Court has applied similar canons of construction in nontreaty matters. Most importantly, the Court has held that Congressional intent to extinguish Indian title must be 'plain and unambiguous' and will not be 'lightly implied.' Relying on the strong policy of the United States 'from the beginning to respect the Indian right of occupancy,' the Court concluded that it 'certainly' would require 'plain and unambiguous action to deprive the (Indians) of the benefits of that policy.'.
>
> In view of these principles, the treaties relied upon by petitioners are not sufficient to show that the United States ratified New York's unlawful purchase of the Oneidas' land."

And as I say, my lord, we will be coming back to that in terms of the argument of extinguishment.

My lord, in reaffirming that aboriginal title is a legal right, not dependent on treaty, statute or other formal government action, secondly, that aboriginal title can be vindicated in a court of law, thirdly, that the federal government had as a matter of federal common law exclusive power to extinguish aboriginal title, and fourthly, that there is a unique fiduciary relationship between the United States and the Indians, the majority judgment in Oneida II parallels the judgment of Chief Justice Dickson in Guerin. Guerin talked about fiduciary obligations as opposed to trust obligations, but both of them characterized it as unique or sui generis. And we say, my lord, that this parallelism should exist is not surprising given that in both judgments the Courts traced the

source of their findings to the Marshall Court principles.

My lord, I would now turn to the second part of our submissions on the Port-Marshall jurisprudence, and this deals with the issue of what we have referred to as aboriginal jurisdiction. At page 280, we have previously submitted that one of the fundamental principles governing --

THE COURT: Mr. Jackson, before you leave Oneida II, when they -- when you summarized their findings about federal number three, the federal government has exclusive power to extinguish aboriginal title --

MR. JACKSON: Yes, my lord.

THE COURT: -- did they deal with the question of with or without consent?

MR. JACKSON: No, my lord.

THE COURT: With or without compensation?

MR. JACKSON: No, my lord, they didn't. In light of the fact that of course in the -- in that case the question of compensation was held to flow from the fact that the Counties, given that they had never acquired any legal title to the land, were in unlawful possession and therefore the Court treated compensation as flowing from a violation of unextinguished aboriginal title. So by necessary implication, my lord, the Court found a grantee of Indian lands to which title had not been extinguished was in fact in trespass and in fact that gave rise to compensation.

THE COURT: Yes. All right. Thank you. The County, of course, never would have had power to extinguish.

MR. JACKSON: No, my lord.

THE COURT: All right. Thank you.

MR. JACKSON: As I said, my lord, at page 280 we have previously submitted that one of the fundamental principles governing the relationship between aboriginal peoples and the Crown is the recognition of the jurisdiction or power of self-government of Indian Nations and this principle is reflected in the distinctive pattern of treaty-making which we have given -- made extensive submissions on.

It has been our further submission that this principle ripened into a rule of the common law as applicable to British colonies and that the concept of Indian jurisdiction was recognized by the Marshall Court in the clearest terms in Worcester v. Georgia. The only limitations on Indian jurisdiction were those that flowed from the doctrine of discovery, the first

being that Indian Nations could not sell their land to any authority other than the British Crown and subsequently the United States and secondly, that they could not enter into any intercourse with any other nations. Except for these limitations and subject - and this is an important matter - subject to the terms of specific treaties, Indian Nations could exercise jurisdiction over their tribal members and in their tribal territories. And it was, of course, because the Georgia Indian laws sought to assert jurisdiction within Cherokee territory and over Cherokee tribal members that the Supreme Court in Worcester v. Georgia held those laws inconsistent with the laws, treaties and Constitution of the United States.

Since Worcester, the concept of Indian jurisdiction as articulated by Chief Justice Marshall has been the subject of much litigation in the United States, litigation which has taken place within the structure of American federalism and the ebb and flow of American Indian policy as we have described it. The contemporary American jurisprudence of Indian jurisdiction - which is referred, my lord, both in the literature and the cases as 'inherent tribal sovereignty' - is complex, confusing and often contradictory. Your lordship will be relieved to know that it is not the plaintiffs' submission that this body of law, developed in the crucible of American constitutional and historical experience, should be adopted pari passu by this Court as the legal touchstone of the plaintiffs' claims to jurisdiction over its territory.

The plaintiffs assert such jurisdiction as a pre-existing common law right which is integrally related to their ownership of their territory. And, my lord, we have sought in our summary of the plaintiffs' evidence, to which my friends will be referring you later this week and next week, to demonstrate the nature of this integral relationship between ownership and jurisdiction. It is our submission that this jurisdictional component of aboriginal rights should be recognized by this Court either as a pre-existing legal right parallelling the pre-existing proprietary interest or, alternatively, as an integral element of the sui generis nature of aboriginal rights. Conceptualizing jurisdiction and ownership as constituent elements of a sui generis aboriginal right corresponds more closely with the way

in which the plaintiffs articulate, legitimate, administer and transmit their rights, and we say therefore, it most closely reflects the mode of analysis set out in Amodu Tijani where the Privy Council pointed to the need to engage in a 'study of the history of the particular community and its usages' in order to properly conceptualize the nature of its title.

The American jurisprudence in dealing with the concept of Indian jurisdiction has tended to view it as parallelling Indian title to land although, my lord, rarely are the two matters discussed in the context of the same decision. The references to the American jurisprudence on the jurisdictional aspects of aboriginal rights which follows, my lord, is tendered not to provide this Court with the precise contours of the plaintiffs' jurisdiction but to demonstrate that Indian jurisdiction as a concept, as a legal concept, is a pre-existing and continuing part of the common law of aboriginal rights. So, my lord, we are not going to take you to American cases and say this is what the Courts said the Navajos have by way of jurisdiction, therefore we argue this is what the Gitksan and Wet'suwet'en have. This is what the Court in another case said the Indians of Puget Sound have in relation to jurisdiction, therefore pari passu this is what the Canadian plaintiffs should have. We are making the statement, my lord, that the concept of jurisdiction as a component of common law aboriginal rights is a pre-existing right, it was recognized as such by American Courts in the nineteenth century, not as American law, but as part of the inheritance of British colonial law and that it has been continued to be refined and developed and that it is a concept which this Court can adopt as part of the common law.

THE COURT: Sometime no doubt you will give me some assistance in how I carve that out of sections 91 and 92?

MR. JACKSON: Yes, my lord.

THE COURT: Thank you.

MR. JACKSON: We have previously described, my lord - bottom paragraph of page 282 - how some 50 years after Chief Justice Marshall's judgment in Worcester v. Georgia the U.S. Court in U.S. and Kagama following the Congressional termination of treaty making, reinterpreted the discovery doctrine to assert a brought federal plenary power over Indian tribes. Although since Kagama U.S. federal Indian policy has

ebbed and flowed between termination and self-determination, the plenary power of Congress has remained very much in force. What has changed, however, is that the Supreme Court has significantly modified its position on the justiciability of the exercise of a Congressionally plenary power. And we previously recited how in Lone Wolf, in 1982, the Court had ruled that 'the power of Congress has always been deemed a political one, not subject to be controlled by the judicial department.'.

And the reference there, my lord, should be to these submissions page 231 instead of of 507.

THE COURT: Instead of 507?

MR. JACKSON: Yes, my lord. It should be 231. Thus, my lord, to refer you to three such examples of the Court's current position. On page 283 I refer your lordship to the Delaware Tribal Business Committee and Weeks and to the United States and Sioux Nation and to Oneida II itself where the Court has clearly stated that issues of aboriginal rights, the question of taking of aboriginal lands are matters which give rise to justiciability and not are exclusively matters for politicians and for Congress.

At page 284, my lord, I alert your lordship to the fact that the principal area in which Indian jurisdiction has been litigated has been in relation to the assertion of State laws on Indian reservations and the application of Indian jurisdiction to non-Indians. And it is important to understand the context of this litigation because it is directly related to developments in U.S. federal Indian policy. As a result of the sale of "surplus" land during the Allotment period from 1887 to the early 1930's, and the sale of this land to non-Indian homesteaders, some tribes now find themselves outnumbered within their own reservation with non-Indian neighbours who have taken up permanent residence. And their numbers have been augmented by white traders and in more recent years by the holders of leases and licenses to develop Indian lands and resources which the Tribes have granted in order to build up capital and revenue to finance tribal governments and social and economic programs.

MR. PLANT: I am not sure where the evidence is of this or whether it's important that your lordship consider these factual assertions as facts. But there is no reference given for that paragraph.

THE COURT: Do they appear in the judgments?
MR. JACKSON: No, my lord. Or they appear in some of the judgments, but the principal references to that is an article by Mason, which is in our book of authorities which I can give my friends.
MR. PLANT: I know the Mason, I have seen the reference in his authorities.
MR. JACKSON: And also, my lord, in a comment in the Harvard Civil Rights and Civil Liberties Law Review, which I set out at page 289, it's not a point of great moment, but it explains, my lord, why so many of these cases deal with the assertion of Indian jurisdiction over non-Indians on reservations which would appear to be rather paradoxical, particularly in a Canadian context where in most cases very few non-Indians live on Indian reserves. In the United States, my lord, as I say, because of this historical development in which lands were sold off although remaining within the general boundaries of a reservation you have these sort of checkerboard arrangements in which Indian people find themselves living alongside non-Indian people.
THE COURT: That's probably the situation as the Musqueam.
MR. JACKSON: It's somewhat akin to the situation in urban areas.
THE COURT: I think their voting rights are kept separate.
MR. JACKSON: Yes, my lord, and that checkerboard approach is much more prevalent in the United States because of the selling off of Indian lands to non-Indian people. The cite to that, my lord, is in volume 15 of our book of authorities.
THE COURT: That's Mason?
MR. JACKSON: Mason. It's tab 22.
THE COURT: Thank you.
MR. JACKSON: My lord at page 284 we say that a review of some of the leading cases on Indian jurisdiction reveals the degree of continuity and change in the Marshall Court's doctrine of tribal self-government. In 1959, in the decision of Williams v. Lee, a non-Indian who was a licensed trader attempted to sue an Indian customer in a State court to recover the purchase price of goods sold to a customer on the Navajo Reservation. The Navajo Reservation, my lord, again one has to realize that in contrast to the Musqueaum Reserve, of which your lordship would be most familiar, the Navajo Reservation straddles the States of Nevada, New Mexico and Arizona. And I believe has

a territorial base larger than some of the Maritime provinces. It's an enormous reservation covering, you know, many thousands of square miles. The Supreme Court in that case in an opinion written by Mr. Justice Black held that the Navajo Tribal courts had exclusive jurisdiction over the case. And one of the products of Indian jurisdiction in the United States has been the development of a system of tribal courts. In a passage which is much cited in later cases, Mr. Justice Black stated:

"Despite bitter criticism -- "

THE COURT: Does that quotation start with "Despite bitter criticism and defiance -- "
MR. JACKSON: Yes, my lord.
THE COURT: Yes. Thank you.
MR. JACKSON:

"Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester, the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not -- "

I think "would not be jeopardized"

"-- but the basic policy of Worcester has remained."

Mr. Justice Black went on to hold to allow the State court to exercise jurisdiction in derogation of the tribal court's jurisdiction:

"... would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there... The cases in this Court have consistently guarded the authority of Indian governments over their Reservations."

And again, my lord, these cases almost without exception deal with Indian jurisdiction in relation to reservations. What your lordship should be aware of is that in contrast to the position in British Columbia and with the exception of Alaska prior to 1971 there are very few, if any, places left where there is unextinguished aboriginal title. The only lands which are viewed as being the subject of Indian rights in the United States are in relation to reservations, because the process of treaty making and the process of making claims where treaties weren't made has in fact been completed through the Indian claims commission process. And of course, in the Canadian context the treaty process has not been completed in British Columbia and there has not been any claims commission process paralleled in that of the Indian claims commission.

Beginning in the 1970's the U.S. Supreme Court in resolving disputes between states and tribes has shifted its approach to what is referred to in the American literature as the pre-emption analysis, which bears no relationship to the pre-emption analysis which your lordship will hear argument in relation to British Columbia colonial law and policy pre-confederation. The shift can be traced and is generally traced in the American jurisprudence to a decision of the U.S. Supreme Court in 1973 in McClanahan and the Arizona State Tax Commission. In McClanahan the Supreme Court unanimously held that the State of Arizona could not impose an income tax on the income of an Navajo on the reservation. Mr. Justice Thurgood Marshall, writing for the majority, instead of simply ruling that the tax, imposed upon an Indian in Indian country, interfered with the tribe's self-government, he approached Indian jurisdiction in a rather different way by pointing out that the doctrine of tribal sovereignty had evolved since Chief Justice John Marshall's day. And the passage set out at page 286, I think, my lord, faithfully and accurately captures the shift in the Court's position.

> "It would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people from State jurisdiction, and therefore State tax legislation may not extend... This is not to say that the Indian sovereignty doctrine with

> its concomitant jurisdictional limit on the reach of State law has remained static during the 141 years since Worcester was decided. Not surprisingly, the doctrine has undergone considerable evolution in response to changed circumstances... Notions of Indian sovereignty have been adjusted to take account of the States' legitimate interests in regulating the affairs of non-Indians... Finally, the trend has been away from the idea of of inherent Indian sovereignty as a bar to State jurisdiction and toward reliance on federal pre-emption... The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of State power... The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues... but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent sovereign nations, and their claim to sovereignty long predates that of our own government."

My lord, using what is called this pre-emption analysis which essentially involves balancing competing tribal and State interests, the Court has delivered a number of decisions which, because of the different weight accorded these interests by different majorities of the Court, can only be described and if it has been described by scholarly writer's as extremely fact-specific. And the jurisprudence is rather dizzying, my lord, when one gets into it. I have given several examples just by way of illustration, my lord, in the case of California and the Cabazon Band of Mission Indians, the Supreme Court struck down an attempt by the State of California to regulate tribal bingo and certain other gaming enterprises that had been established to provide jobs for Indians and to raise tribal funds for social services. And in so striking down the California law, Mr. Justice White stated that the inquiry into whether State authority was pre-empted by the operation of federal law:

> "is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

And, my lord, in that case the Court referred to the statement of President Reagan regarding tribal self-government which I have set out previously in these submissions at page 218.

THE COURT: But did California seek to regulate bingo as an enterprise or did it resort to its criminal law jurisdiction?

MR. JACKSON: As I recall that case, my lord, it was part of an -- I suppose what we could call sort of strict liability public welfare type regulatory statute which required the filing with the State authorities of the nature of the enterprise, getting certain permits from the State, to conduct facilities. It was that kind of regulatory scheme, which in the course of which would in fact impose certain kinds of penalties for non-compliance with the statutes.

THE COURT: Because I can see the same thing happening here if the Province of British Columbia said we're going to regulate gaming or gambling, I don't think it would apply to a reserve or unless it was caught by Federal criminal legislation.

MR. JACKSON: That might well be the --

THE COURT: I am not sure just where this gets me.

MR. JACKSON: My lord, where this is intended to get you, as I said, is not to the point where your lordship would be applying the wording in the Cabazon case to Canada, but that the notion, the concept of Indian jurisdiction as a continuing part of the common law is a continuing part of the common law in the United States and our purpose in citing this case is in fact to establish that proposition that while aboriginal sovereignty, tribal sovereignty as it's defined in the form of internal self-government, while it has changed and evolved is in fact a continuing, a live concept in the United States and therefore its incorporation or its recognition as part of the common law subject to your lordship's concern, appropriate concern regarding section 91, section 92 is something your lordship can affirm in Canada not as a borrowing from the United States but rather as an affirmation of a principle

which we say has always been part of the common law, albeit hitherto unrecognized in any Canadian judgment. And the purpose of citing these cases, my lord, and I go on for a few more pages but not at very great length, is to avoid any implication that we somehow say well, this is what the law was in 1832, aboriginal jurisdiction is there, just forget about everything else that's happened in the 140, 160 years since then. And I am trying to give your lordship the benefit of a very compressed view of how aboriginal jurisdiction has been developed in the United States, not as I say that your lordship can borrow that and say that's what exists as a matter of Canadian common law, but that the concept exists and it will be the burden of the plaintiffs, my lord, to describe for your lordship what the sui generis nature of the plaintiffs' jurisdiction looks like on the ground and it will be the purpose of the plaintiffs to explain to your lordship how your lordship can recognize that as part of Canadian law within the context and contours of Canadian Confederation. My lord, at page 287, the citation to Cabazon, California and Cabazon is 244 and it should be at page 259, not 239.

THE COURT: Thank you.

MR. JACKSON: And by way of illustrating the facts specificity of this case, my lord, there is a brief reference to a case in which the Court held that a tribal tax on cigarette sales to non-tribal members coming onto the reservation for the purposes of raising tribal revenues was in fact not immune from a parallel State tax on the basis that that didn't interfere with essential tribal relations. So it is very difficult to predict how the Court will rule. It oftentimes depends on whether or not the Court finds that there are other means to raise tribal revenues through natural resources and again the idea of these cases being introduced is not to recommend to your lordship that you adopt this complex and somewhat confusing array of cases but that the concept has been well worked in the United States. One of the ways in which the U.S. Supreme Court has modified the original Worcester principles is particularly reflected in tribal assertions of authority over non-Indians. And I refer your lordship at page 287 to the Oliphant decision, a decision written by Mr. Justice Rehnquist as he then was. The issue is one which is close in geography to us involved the Susquamish Tribal court

and the small reservation of Port Madison in Washington which sought to try two non-Indians under its tribal code of offences with assaulting a tribal officer, driving at high speed on the reservation and damaging the tribal police vehicle. And my lord, there is a new page 288 which you should substitute. It's necessitated by a problem in the citation.

THE COURT: Thank you.

MR. JACKSON: The Ninth Circuit Court of Appeals held the jurisdiction of the tribal court to deal with these matters, but the Supreme Court in majority judgment ruled against the tribe's jurisdiction on the basis that tribal criminal jurisdiction over a non-Indian was lost upon the tribe's incorporation into the United States. Now, Mr. Justice Rehnquist acknowledged that this limitation could not be found in any specific treaties or congressional enactments and in effect was a novel restriction on the original jurisdiction of the tribe beyond the limitations recognized in Worcester v. Georgia and he formulated the new limitation in this way:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments... Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their dependent status'"

And that phrase "inconsistent with their dependent status" was a new limitation on tribal jurisdiction. I point out the bottom of page 288 the Court cited no authority for this third restriction beyond the two original restrictions that they could not sell their land to anybody but the United States and that they could not have any dealing with anybody in the United States. And from the judgment of Mr. Justice Rehnquist, what was of particular concern was the fact that in this case tribal court criminal jurisdiction was being exerted over non-Indians and that was felt to be an unwarranted intrusion upon fundamental principles of liberty.

My lord, my friend Mr. Rush has pointed out to me despite my efforts to change the cite to make it faithful to the original, the words in the middle of

that quote "inconsistent with their dependent status" should simply be "inconsistent with their status."

THE COURT: All right.

MR. JACKSON: Dependent status, these are left over from my citation of Kagama, my lord, where that was the words used there.

THE COURT: All right.

MR. JACKSON: Page 289, my lord, I note that in the same year as the judgment in Oliphant the Supreme Court decided the case of United States and Wheeler, and the issue in Wheeler was whether a conviction in a Navajo tribal court for a criminal prosecution barred a subsequent prosecution in a federal court in respect to the same incident. It was a double jeopardy issue. And to dispose of that issue the Court had to determine whether the Navajo tribe constituted a separate sovereignty to the United States or merely exercised powers delegated by the latter. The Court held that the Navajo tribe and the United States were separate sovereigns for the purposes of the double jeopardy argument and that the powers of the Navajos to punish members of their tribe were attributes of their residual internal jurisdiction and were not delegated powers from the United States, although those powers were subject to plenary federal authority. And in this important respect, my lord, the Supreme Court seems to have revised its position in Kagama consistent with the original Marshall position that there was in the United States in fact a third order of government. You didn't simply have but the two referred to in Kagama, the United States and the separate States, you also had a third order of tribal governments, albeit of a unique distinctive kind. And Mr. Justice Stewart, my lord, in describing the nature of retained Indian jurisdiction, and I have set out the quote at page 290. It's a long quote:

> "The powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.' Before the coming of Europeans, the tribes were self-governing, sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and punish infractions of those laws.
>
> Indian tribes are, of course, no longer

> 'possessed of the full attributes of sovereignty.' Their incorporation within the territory of the United Statess, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty of which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute in the exercise of its plenary control, Congress has removed still others.
>
> But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory....'"

There is another passage, my lord, I wanted to refer you to there. The Court goes on to say, and your lordship might want to insert this into your text:

> "They are a good deal more than private voluntary organizations."

And I have taken the liberty of inserting that, my lord, because you hear from my friends as part of their submissions that that is in fact the way you should characterize the distinctive internal governments of the plaintiffs, akin to a voluntary organization which adopts certain rulings but those rules do not betoken or bespeak anything which legally could be referred to as an authority or a jurisdiction. And my lord, the quote goes on and I will leave that to your lordship.

THE COURT: Well, what do you say about the next paragraph? "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress".

MR. JACKSON: Yes. My lord, at page 291, I will read that to your lordship:

> "The sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts the tribes retain their existing sovereign power. In sum, Indian tribes still

> possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

I think that's where the dependent status crept in, my lord. And then there is a recitation of the nature of the limitation.

And I say, my lord, at page 291 that the description of Indian jurisdiction being "at sufferance" is reminiscent of the way in which Mr. Justice Reed described the nature of Indian title in Tee-Hit-Ton. And we say, my lord, that in the same way as the Supreme Court in its subsequent decisions in the Oneida litigation has returned to a position more consistent with the original Marshall principles, so the U.S. Supreme Court in cases subsequent to Oliphant and Wheeler had been more protective of the assertion of tribal civil jurisdiction over non-Indians where that is related to the political integrity or economic security of the tribe. And I refer your lordship to a subsequent decision in Montana and the United States where the Court said, after describing the nature of the limitations on inherent tribal sovereignty as it's referred to:

> "To be sure Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee land. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements... A tribe may also retain inherent power to exercise civil authority over the conduct of the non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

And, my lord, I have set out on the facts of Montana the Court found that the particular exercise in that case did not so affect any of those matters. And I have set out some other cases where the Courts found

that in fact tribal authority over non-Indians on reservation lands did affect the important interests of the tribe. In a subsequent case of Kerr-McGee, again involving the Navajo Nation, a non-Indian energy company challenged the authority of the Navajo Tribe to impose a severance tax in the absence of approval by the Secretary of the Interior. The Navajos had never adopted an Indian Reorganization Act constitution or any by-law which required the Secretary's approval of tribal council actions. The significance of that, my lord, is that a number of -- a number in fact taken of the Indian tribes had in fact adopted, as it were, as part of their constitution tribal constitutions which built in a requirement that in order to impose taxation, for example, there had to be express permission or consent of the Secretary of the Interior. The Navajos had never done that and therefore the decision was what was their inherent rights to impose this tax. The Court, in upholding the tax, concluded that federal approval of the tribal tax was not required by any congressional enactment and characterized the tribe's power to impose the taxes as one of the pre-existing powers that were recognized in the enactment of the Indian Reorganization Act itself. In the course of his judgment, Chief Justice Burger noted that the federal government "is firmly committed to the goal of promoting self-government" and that "the power to tax members," that's tribal members, "and non-Indians alike is surely an essential attribute of such self-government." And the cite should end at that point, my lord. Citing Profess -- President Reagan's 1983 statement on Indian policy, he also observed that the Navajos "can gain independence from the federal government only by financing their own police force, schools and social programs."

And the last case to which I am going to refer your lordship, my lord, was decided in the same year as Kerr-McGee. It's a very well-known case called National Farmer's Union and the Crow Tribe of Indians in Montana. And it concerned the jurisdiction of the the Crow Tribal Court over a suit filed in that court by a tribal member seeking damages from a State school district for injuries sustained on non-Indian lands within the Crow Reservation. This was a school built on lands which had been alienated to the school district. It was within the reservation but it was --

the fee of the lands was not in the tribe. The Supreme Court upheld the jurisdiction of the tribal court, declining to apply the Oliphant ruling to a tribal court's civil jurisdiction over a non-Indian defendant. And in its judgment, the Court, while acknowledging the plenary power of Congress to curtail the retained inherent powers of Indian tribes, noted that the principles the Courts had developed "provide significant protection for the individual, territorial and political rights of the Indian tribes."

On the particular issue of the extent of tribal civil jurisdiction over non-Indians, the Court stated:

> "Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction -- "

This was in relation to a tort matter.

> "-- over non-Indians in a case of this kind is not automatically foreclosed, as an extension of Oliphant would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of the relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of 'procedural nightmare' that has allegedly

> developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."

My lord, the final point in making this section, my lord, is by way of what I suppose is a personal comment and it's in the context of a remarkable seminar which was held late last year, my lord, at the University of Manitoba law school in which the Aboriginal Justice Inquiry in Manitoba under the chairmanship of Mr. Justice Hamilton and Judge Sinclair had a number of tribal court judges, including the judge who entered actually a multi-million dollar award as a result of the Court's upholding the jurisdiction in National Farmer's Union, who explained to an audience of distinct Canadian judges and lawyers the way in which original tribal jurisdiction in the United States, was very much an alive part of the law of aboriginal rights. And not something which is based upon platonic ideas of tribal sovereignty, but is in fact a living part of the law which has evolved, has developed, but remains something which is reflective of and responsive to the original conception of aboriginal jurisdiction as espoused in Worcester v. Georgia.

That is the end of that section, my lord, and what I was going to turn to at this point is the elements of proof of aboriginal rights. And I am in your lordship's hands in terms of the time. One of the, as I see the alternatives, my lord, is we could come back this evening for awhile or we could start very early tomorrow morning. And I don't know what is preferable to your lordship or what would be more convenient to Madam Reporter and her colleagues.

THE COURT: Well, I don't think we have a problem with the reporters, because we have the extra reporter and in view of what Mr. Rush said this morning I rather think we should do both. I think we should come back, say, at 7 o'clock and go for an hour and a half or two

hours.
MR. JACKSON: That's acceptable to me, my lord.
THE COURT: Anyone say nay? All right. And then what -- do counsel want to fix a time to start in the morning now or do you want to leave it until later?
MR. JACKSON: I would prefer to leave it to later to see how far I get.
THE COURT: All right. Is 7 o'clock satisfactory? All right.

(PROCEEDINGS ADJOURNED PURSUANT TO THE EVENING DINNER RECESS)

I hereby certify the foregoing to be an extract of the proceedings herein to the best of my skill and ability.

Laara Yardley, Official Reporter,
United Reporting Service Ltd.

(PROCEEDINGS RESUMED AT 7:00)

THE REGISTRAR: Order in court.
THE COURT: I have spoken with the reporters, and my suggestion is that we sit this evening in three segments of about 40 minutes each so that we change reporters every 40 minutes. If that's convenient or -- and if we can't use up all that time, that won't be the worst thing in the world. I would also like to suggest, to bring some certainty to light, that perhaps we start at 9:30 in the morning and go say until 5:30 or 6:00 and then perhaps not sit tomorrow evening, because I don't think you can sit every evening, and then we sit again on Thursday evening, and then maybe until 5:00 or so on Friday. Now, that's tentative, and I would be glad to hear counsel if they want to deviate from that in any way.
MR. JACKSON: My lord, what I intended to do tonight was to try and aim for a certain point in my materials, and if I can reach that point prior to the expiry of that time I'll advise your lordship.
THE COURT: Yes, sure. The times I have stated will be maximums.
MR. JACKSON: My lord, the next section of the argument which has been handed to you is a section which deals with the elements of proof of aboriginal rights, which might be generically referred to as the Baker Lake section, and in the book -- our book of materials at volume 5 at tab 29 we have a version of a Baker Lake in one with many reported versions, and the one I've given your lordship is the one reported in the Western Weekly Reports, which is the one to which we have referenced the text.
THE COURT: All right.
MR. JACKSON: And if that could be inserted in your book of materials.
THE COURT: Where are you suggesting that I should conveniently --
MR. JACKSON: That, my lord, should be substitued for what is now tab 29 of volume 5.
THE COURT: Oh, all right, that's all right. What is it again?
MR. JACKSON: Volume 5, tab 29. And you will be substituting the Western Weekly Law Reports for --
THE COURT: Shall I keep this handy?
MR. JACKSON: It might be useful for your lordship. As usual, I have put in all the quotations in the body of the text.

THE COURT: All right, thank you.
MR. JACKSON: My lord, the leading Canadian authority on the elements which the plaintiff must prove to establish an aboriginal title cognizable at common law is Hamlet of Baker Lake v. The Minister of Indian Affairs affairs and Northern Development, in which case the Inuit of Baker Lake sought a declaration that the lands comprising their traditional territory were, in the terms of the statement of claim, "subject to the aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon." In the course of his judgment, my lord, Mr. Justice Mahoney sets out four elements of proof. My lord, as your lordship is aware, the so-called Baker Lake tests were the subject of recent comment by our Court of Appeal in Pasco and Canadian National Railway on an interlocutory matter relating to whether the plaintiffs could amend their statement of claim to change the manner in which the plaintiffs were described and the manner in which their representative action was being maintained. In the course of its judgment in the Court of Appeal, the court there referred to Baker Lake and the various elements of proof with approval. My lord, on a subsequent appeal to the Supreme Court of Canada, the appeal of the respondent railway company was dismissed on the basis that the pleadings should have been allowed to be amended, and there was an application made by the Indian plaintiffs for a rehearing to determine certain matters which were left unclear. The Supreme Court recently denied rehearing, and in the course of so doing, and I have a copy of that judgment, my lord.
THE COURT: I have it here.
MR. JACKSON: Your lordship will see on page 2 that the Supreme Court made the point that the only issue before the courts on this appeal was whether the amendments to the pleadings ought to be allowed, and the court ruled that they ought to have been allowed and that any other comments made by the Court of Appeal in relation to the appropriate tests for aboriginal title, particularly the issue of whether the plaintiffs had to establish that they were members of a nation which existed as at the time of the inception of the cause in addition to the time of the assertion of sovereignty, those considerations were all obiter and ought not to be pronounced upon at such an early interlocutory stage.

My lord, our position in relation to Pasco and the decision of the Court of Appeal is that the references by the court to Baker Lake do not in any way preclude your lordship from reviewing the Baker Lake tests in order to determine whether or not they are consistent with a purposive analysis of aboriginal rights. And we say, my lord, at page 297 that, at the bottom of the page, it is our submission that certain elements of the Baker Lake tests to certainly appear to adopt a "frozen rights" approach to aboriginal rights are to that extent inconsistent with such a purposive analysis and ought not to be adopted by this court. And as we go through the test, my lord, we will identify particular points of which we say Mr. Justice Mahoney's approach, as it has been interpreted, may be so inconsistent. Our position is not that your lordship should start afresh, but in looking at Baker Lake, you should do so with a view to consider whether the tests as stated are complete or whether or not they require some modification in light of what we say as a purposive analysis.

The four elements of the tests, my lord, are set out at page 298 as they appear in Mr. Justice Mahoney's judgment. The authority relied upon by Mr. Justice Mahoney for those four elements in a compendious way at the beginning of his judgment are the decisions in Kruger and Manuel, the two Marshall cases of Johnson and McIntosh and Worcester and Georgia and the Santa Fe Case. Later in his judgment his lordship makes reference to the use of American authorities, and he states, my lord, and I've cited this at the bottom of page 298:

> "The value of early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian courts, at all levels, as not now to require rationalization. With respect, the American decisions seem considerably more apposite than those Privy Council authorities which deal with aboriginal societies in Africa and Asia at the upper end of the scale suggested in Re Southern Rhodesia. Americans decisions as to the existence of aboriginal title rendered since creation of the Indian Claims Commission... must be approached with considerable caution. The Commission, whose decisions are the subject of

most recent American jurisprudence, is authorized, inter alia, to determine "claims based upon fair and honourable dealings that are not recognized by any rule of law or equity, a jurisdiction well beyond any that Parliament has yet delegated to any Canadian tribunal."

Thereafter, Mr. Justice Mahoney does not refer to any of the decisions rendered by the Indian Claims Commission or the Court of Claims on appeal from the Commission. And since this body of jurisprudence constitutes the most developed case law on the question of proof of aboriginal title and in several important respects rejects Mr. Justice Mahoney's formulation of the tests, we say that it is necessary to consider whether his lordship's dismissive remarks are well-founded. And it is our submission that although this body of jurisprudence must indeed be assessed in light of the particular jurisdiction of the Commission and the nature of the claims presented to it, the legal analysis contained in this body of case law is of relevance to any Canadian formulation of the tests for proof of aboriginal title and, with respect, Mr. Justice Mahoney's blanket dismissal is not well-founded.

THE COURT: You mean his blanket dismissal of the American recent jurisprudence?

MR. JACKSON: Of the Indian Claims Commission jurisprudence, my lord, yes. In referring to the Claims Commission jurisdiction, Mr. Justice Mahoney refers to one of the five categories of claims which are within the Claims Commission jurisdiction. And I've set out at page 300 section 2 of the Indian Claims Commission Act of 1946, which has four -- five categories on jurisdiction. And you will see, my lord, that it's the fifth one to which Mr. Justice Mahoney made reference:

"Claims based upon fair and honourable dealings that are not recognized by any existing rule of law or equity."

And if your lordship looks at paragraph 4, you will see that it confers jurisdiction on the Commission for:

"Claims arising from the taking by the United States, whether as the result of a treaty or

cession or otherwise, of lands owned or occupied by the claimant without the payment of such lands or compensation agreed to by the claimant."

And if your lordship looks at claims 1, 2, and 3, they are also claims in the nature of claims arising in law or equity, claims which would result where the treaties were revised on the grounds of fraud, duress, unconscionable consideration. Claims, in other words, which sound illegal, inequitable remedies. And it is our submission that the jurisprudence which hinges upon these other sections is one to which this court can advert and look at with a view to taking some guidance.

And we say, my lord, at the bottom of page 300, that the Court of Claims has taken the view that this fourth head of claim, and I should say also claims 1, 2, and 3, that it confers on the Commission jurisdiction to entertain pre-1946 claims based upon aboriginal title as well as recognized title. As we have seen, my lord, that was a distinction drawn by the court in Tee-Hit-Ton, a distinction which has subsequently been rejected by the Supreme Court in its most recent decisions in the Oneida litigation, but the court has very clearly stated that the Indian Claims jurisdiction is not limited to recognize title, but paragraph 4 in conferring claims arising out of the taking of lands owned or occupied includes lands owned or occupied by what the Americans call original Indian title. That is title which has not been confirmed by statute or a treaty or in some other act of the executive.

The effect, therefore, we say, of paragraph 4 of the Indian Claims Commission Act is to provide an avenue for recovery of monetary compensation for the pre-1946 taking of both recognized and unrecognized aboriginal title, and in claims based upon paragraph 4, the commission has developed legal criteria for establishing aboriginal title, and the Court of Claims and the Supreme Court in reviewing the Commission's decisions, have developed a body of jurisprudence in which the Marshall cases are regularly cited, and we say that this body of jurisprudence is entitled to consideration in any Canadian determination of the appropriate tests for proving aboriginal title. The fact that under paragraph 5 the Commission has a broader jurisdiction to hear claims that are not

recognized by any existing rule of law or equity is, we say, no basis to reject the relevance of its decisions under other paragraphs which are based upon legal and equitable basis.

But we also say, my lord, that we are not asking this court to slavishly follow the Claims Commission jurisprudence, only to the extent that it throws light on the purposes of analysis those decisions may contribute to a principled Canadian jurisprudence. It is also important, and in this respect we agree with Mr. Justice Mahoney, that in considering the Claims Commission decisions, and I think this is a point which from perusing my friend's arguments they would agree with me, that it is important to realize that the Claims Commission jurisprudence is based upon a particular jurisdiction under which the Claims Commission is limited in the relief it can provide. And the only relief it can provide is the awarding of monetary compensation. The claims, in other words, sound exclusively in damages. It cannot make rulings or declarations as to the continued existence of rights, and that means that in certain areas, particularly in relation to how the Commission approaches the issue of extinguishment these decisions have to be treated cautiously, having regard to a purpose of analysis. And the reason for that, my lord, is that in any case coming before the Commission the parties have to be ad idem on one point, often it's the only point at which they are at ad idem, and that is that there has been extinguishment, because if there hasn't been an extinguishment then you have no remedy for a taking without proper consideration, and often times on the cases where the court is determining has there been extinguishment, the issue is not so much that has there been, the question often times is when did it happen, and you usually find that the Indian plaintiffs are arguing for one date and the defendants are arguing for another date, principally by reference to which will be the largest or lowest monetary compensation resorting from the relevant date, but many of the cases that is not an issue, and the court has, in determining the issue before it, has looked at other issues other than the question of extinguishment. So bearing in mind that it is a distinctive jurisdiction and that it has its limitations for Canadian purposes, it is nevertheless one which is relevant to your lordship.

So with that preliminary point firmly in mind, I want to look at the four elements of the Baker Lake tests.

THE COURT: Before you do that, Mr. Jackson, I've been troubled by this for some time. You keep talking about the purposive analysis. What is it that you say is to be examined purposively? I thought that when Chief Justice Dixon used that happy phrase which has just suddenly been -- has gained great currency, that he was talking about the Charter, and to give the Charter a purpose of analysis and a purposive operation in application, but what is it you say should be examined or analysed or applied in that special new particular way.

MR. JACKSON: My lord, what we say is the relevance of Chief Justice Dixon's purposive analysis is that in looking at the nature of aboriginal rights and in the -- and the content of aboriginal rights, this court should have regard to the reasons which gave rise to their recognition, the ways in which that recognition is designed to sustain and nourish the continued existence of aboriginal nations.

THE COURT: What is the source of the -- or the basis for saying that they should be given a purposive analysis or application?

MR. JACKSON: My lord --

THE COURT: We have lots of things, like with -- we had the law of libel and we had the law of various forms of action which have now been discarded. They weren't given a purposive analysis significance. Or do you say they were; when they were found to have no purpose they were discarded?

MR. JACKSON: We say, my lord, in light of the fact that aboriginal rights have been given constitutional entrenchment, that this court -- that's a position which the Court of Appeal in Sparrow(?) has also affirmed in relation to aboriginal rights, that the broad approach taken in relation to Charter rights as rights are viewed of now having an integral entrenched place in the Canadian Constitution, that approach is no less appropriate in looking at rights entrenched in Section 35, and --

THE COURT: Isn't that a bootstraps argument?

MR. JACKSON: In what way, my lord?

THE COURT: Well, you're saying -- you're saying that because they're entrenched in the Charter they should be given a purposive analysis, but don't they have to be

satisfied they exist before they are protected by the Charter and therefore entitled to the purposive analysis?

MR. JACKSON: Well, certainly, my lord, the purposive analysis is predicated in relation to other rights on the fact of their existence by a reference to the fact that they are affirmed in the Charter in the same way.

THE COURT: They're not affirmed in the Charter, they're preserved.

MR. JACKSON: In the -- they're preserved, my lord, in the same way --

THE COURT: To the extent they exist they're preserved, or there will be another argument, but that's one view of Section 35.

MR. JACKSON: Well, they're affirmed and recognized, my lord. We're not saying that Section 35 brings into existence that which has been extinguished or that which no longer exists, but what we are saying is that in looking at the nature of aboriginal title, in looking at the test, for example, of extinguishment, in looking at what is comprised in aboriginal title by way of substantive content, your lordship should approach aboriginal rights in the same way as the courts have said we should look at other fundamental rights in terms of looking at the historical origins, the purposes for which they were designed to serve, and their place in the overall legal system. In that sense, we say that aboriginal rights should be given the same ruled approach which befits their status as what we say the reflection of fundamental principles of the common law, quite apart from the fact that they are affirmed in Section 35.

THE COURT: I would never have even been troubled by this except for your attack on Mr. Justice Mahoney's treatment of the claims process, and I -- what I've been troubled by is it seems to me that perhaps what he was saying is that that legislation should be given a purposive analysis in construction, which isn't available here, because one of the purposes was claims based upon fair and honourable dealing, and there's a whole code here set up to deal with the Court of -- I think it's called the Court of Claims, is it?

MR. JACKSON: Yes. Indian Claims Commission is the first body.

THE COURT: Yes. And there's a code or a process that deal with those and apply in Canadian law to that, we would say that code should be given a purposive analysis.

MR. JACKSON: In that regard, my lord, I'm at ad idem with Mr.

Justice Mahoney to the extent what he was saying is that you have to look at the Indian Claims Commission Act with a view to the purposes and to the extent that one of the sections was to confer on the court a jurisdiction to recognize and compensate for claims which are not compensible on any basis which exists under current common law. To that extent, Mr. Justice Mahoney was on eminently sound ground, because to apply tests for that kind of inquiry to an inquiry in Canada where the rights we say have to be trenched in common law, would in fact be applying American cases to a situation quite different. Our position is that to the extent that these other heads of jurisdiction are entirely analogous in terms of the court's initial inquiry as to was there aboriginal title which is subject to a remedy. That particular part of the purpose of the inquiry, we say, is one which is as applicable in a Canadian context.

THE COURT: What I'm really coming to is to make sure that I understand it's the aboriginal rights that you say should be given the purposive analysis and not Section 35 of the Charter, or do you say both?

MR. JACKSON: We say both, my lord.

THE COURT: So you get a double purposive approach to aboriginal rights?

MR. JACKSON: What we say, my lord, is to the extent that aboriginal rights are a reflection of fundamental purposes or a reflection of fundamental principles, that they speak the same kind of critical inquiry as would the appropriate four rights entrenched in the Constitution by virtue of the fact they are fundamental principles.

THE COURT: You don't think the purposes of aboriginal rights change over 150 years?

MR. JACKSON: We say, my lord, that the essential purposes remain the same, although they have been reinterpreted at various points.

THE COURT: That's why I have trouble with it. I have no trouble applying purposive analysis to a Charter or a Statute, Legislation, but when you come to the purposive approach to aboriginal rights, then I -- my first thought is that they -- the purpose should always be the same, and the next question is are they always the same.

MR. JACKSON: I think --

THE COURT: I'm -- you're leading me into a tortuous approach to this that I'm not sure --

MR. JACKSON: I think your lordship may be assuming a much larger critical attack on Justice Mahoney than what in fact --

THE COURT: Pat's a dear old friend of mine, but that doesn't matter at this stage. He was president of the Calgary Stampeders, I was president of the Lions. We've had our fights in the past.

MR. JACKSON: You will see, my lord, that the point where this becomes an issue is to the extent that some interpretations of Mr. Justice Mahoney's decision have suggested that you look at aboriginal rights at the point of assertion of soveriegnty. At that point you say what kinds of rights existed, and you, as it were, say "Well, what were you doing, were you hunting and fishing"? Well then, those are the extent of the rights which you can have as a matter of aboriginal rights". And we say, my lord, in relation to a purposive analysis, that given that aboriginal rights we say were recognized to ensure the continuation of Indian nations, and to permit them being economically self-sufficient to participate in the life of the community as indigenous people with distinct societies to freeze their economic modes of existence, as it were, in some kind of capsule as of the date of the assertion of sovereignty and to say that's all you can do with the lands. To the extent that you have changed your practises, then you have, and this is the Federal Government's position, abandon those rights, because you are no longer using the land in the same way, we say that is inconsistent with the purposive analysis. And that really is the main point.

There's another issue which comes up, my lord, which again relates to this question of the assertion of sovereignty as being the critical element and the critical time point, and the issue is if after the assertion of sovereignty Indian -- an Indian claimant, an Indian plaintiff acquires land from another Indian nation through either a peace settlement or through hostilities, that land has been acquired after the assertion of sovereignty. On one reading of Baker Lake, that subsequent land acquired after what may be a hypothetical, so far as they're concerned, assertion of sovereignty, through assigning of a peace treaty between England and Spain or whatever, we say that to freeze the land holdings as of the day of the assertion of sovereignty is also inconsistent with the purposive analysis, for reasons which I'll explain.

That's the level, my lord, of which we say that certain elements of the Baker Lake tests are inconsistent with the purposive analysis in terms of what we say are the purposes which the recognition of aboriginal rights is designed to serve and the reasons why it has been recognized by common law.

THE COURT: Well, it may be that when you have finished dealing with the four or five categories that Mr. Justice Mahoney talked about, I will have a better grasp than I now have of how you apply a purposive approach to a right which is said over and over again has existed from time immemorial, and I would be grateful for your assistance on that.

MR. JACKSON: There is a section of this material on which I focus very specifically on that, and at the end of that, my lord, you're still in doubt, my submission will have failed.

THE COURT: You'll have done your best.

MR. JACKSON: The first element of the four-part test, my lord, is what may be referred to as the Organized Society element. As expressed by Mr. Justice Mahoney, the requirement that the plaintiffs and their ancestors were members of an organized society. And his lordship derives this requirement from passages in Mr. Justice Judson's judgment in Calder and Chief Justice Marshall's judgment in Worcester and Georgia. Both of these passages have been cited on more than one occasion, but because they are the critical link, I've set them out again at page 303. The particular passage from Worcester and Georgia, your lordship will find that at page 225 of Mr. Justice Mahoney's judgment, and it is this passage:

> "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own and governing themselves by their own laws."

And as I note there, my lord, that the underlining which appears in Mr. Justice Maloney's judgment, he himself notes, is the underlining which in turn was made by Mr. Justice Hall in Calder. The parallel statement from Mr. Justice Judson's judgment in Calder is also set out on page 303:

> "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help in the solution of this problem to call it a personal or usufructuary right. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had done and that this right has never been lawfully extinguished."

My lord, you will find that passage in Mr. Justice Mahoney's judgment at page 224. In articulating the rationale for this part of the test, that the plaintiffs and their ancestors were members of an organized society, Mr. Justice Mahoney refers specifically to the passage in Re Southern Rhodesia, which we have already set out, but again it bears repetition what the Privy Council said:

> "Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than their own."

THE COURT: "Than our own".

MR. JACKSON: "Than our own", yes. And that is set out in previous submissions, my lord, at page 189. And the reference in Baker Lake is at page 226.

Applying this test of organized society, Mr. Justice Mahoney found that the Baker Lake Inuit met the test, and his views are expressed in the following passages:

> It is apparent that the relative sophistication of the organization of any society will be a function of the needs of its members - the demands they make of it. While the existence

of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect, by the regime that prevailed before."

And the authority for that is the Omodu Tijani case:

"The fact is that the aboriginal Inuit have an organized society. It was not a society with very elaborate institutions, but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: Hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.

The organized society of the Caribou Eskimos, such as it was, and it was sufficient to serve them, did not change significantly from well before England's assertion of sovereignty over the barren lands until their settlement. For the most part, the ancestors of the individual plaintiffs were members of that society; many of them were themselves members of it. That their society has materially changed in recent years is of no relevance."

My lord, I note the time. This perhaps might be appropriate.

THE COURT: We'll adjourn just long enough to change reporters.

(PROCEEDINGS ADJOURNED AT 7:40)

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

_____

Graham D. Parker
Official Reporter
United Reporting Service Ltd.

(PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)

THE REGISTRAR: Order in court.
THE COURT: Mr. Jackson.
MR. JACKSON: Page 305. As Mr. Justice Mahoney points out in the passage I have just cited, the only aboriginal rights asserted by the Baker Lake Inuit was the right to hunt and fish. It is clear, however, that the passages from Worcester v. Georgia and Calder were not so limited. The passage emphasized by Mr. Justice Mahoney from Worcester - "having institutions of their own, and governing themselves by their own laws" - unambiguously addressed the pre-existing jurisdiction of Indian nations. As we have already seen, Chief Justice Marshall in that case found that the Indian nations had the right to internal self-government upon which the State of Georgia could not intrude. And as for the passages from Calder - "the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" - it is the Plaintiffs' submission that the way in which their forefathers occupied their territories was in accordance with an organized system in which both proprietary rights and jurisdiction were vested in her hereditary chiefs on behalf of House groups. Mr. Justice Mahoney, in citing Amodu Tijani, makes the point that the common law gives effect to those incidents that were themselves given effect by the regime that prevailed before the assertion of Crown sovereignty. Subject to what we will have to say about the implication of this in terms of "frozen rights", it is the Plaintiffs' submission that prior to the assertion of British sovereignty the land tenure regime of the Gitksan and Wet'suwet'en is capable of being delineated with great precision and so dilineated it is properly characterized as one of ownership and jurisdiction in the manner further described in the Statement of Claim. In neither Calder nor Baker Lake was the Court called upon to make any rulings regarding the jurisdictional component.

My lord, there is a matter of what we say is great significance which arises from the way in which Mr. Justice Mahoney relates the rationale for the requirement that the Plaintiffs and their ancestors were members of an organized society with reference to the Privy Council comments in Re Southern Rhodesia.

From his Lordship's comments following the citation of that case and his comments elsewhere in his judgment, one to which I have already referred, that the American cases "seem considerably more apposite than those Privy Council authorities which deal with aboriginal societies in Africa and Asia at the upper end of the scale suggested in Re Southern Rhodesia", an inference which comes from his lordship is that he is of the view that aboriginal peoples in North America fit within the lower end of the scale of social organization on that sort of hierarchy. The concern expressed by the Privy Council was that for those aboriginal peoples at the lower end of the scale, the common law not impute to them rights greater than those which they themselves recognized. And we have previously made the point with reference to the way it was used by Mr. Justice -- Chief Justice Davey in Calder that that point, that citation in Re Southern Rhodesia, if not given very careful attention, is capable of reinforcing what we call negative stereotypes. And we say, my lord, that with great respect to Mr. Justice Mahoney in describing the nature of Inuit society is one which reduces it to the right "to hunt and fish and survive", that does not give full and proper respect for the nature of Inuit society.

THE COURT: But that's all he was asked to do.

MR. JACKSON: My lord, I accept that proposition in that case. The only issue before him was the right to hunt and to fish.

My lord, in this case we have placed before this Court a rich evidentiary record of the nature of the Plaintiffs' organized society, not to enable this Court to "grade" the Plaintiffs in any way on the Re Southern Rhodesia scale, but to demonstrate that they do not just "use and occupy" territory but that their presence within that territory is impressed with their history, their social structure, their changing economic modes of production, consumption and trade, all of which is underpinned by a system of proprietary interests in particular territories and a system of jurisdiction determining the management and utilization of resources. And we say it is that ownership and jurisdiction which is the foundation of their organized society.

And as your lordship points out, in Baker Lake Mr. Justice Mahoney was not called upon to define the

nature of the Inuit rights in any more expansive way. But in this case your lordship is. And we say that it is by reference to the nature of their organized society that your lordship can properly define the precise nature of their rights. And, again, not in any way to place them on a spectrum, but in terms of what the court required in Amodu Tijanki, to understand the nature of that organized society, the nature of the rights which were recognized within that society, and the nature of the rights which then can be given effect to by the common law.

And, my lord, the description of the Inuit society as one of hunting, fishing and surviving is related very much to the evidence which was before the court in Baker Lake which talked of aboriginal title in terms of "use and occupation". And, my lord, I have set out at page 307 to 309 a brief extract from Mr. Hugh Brody's evidence which makes the point that the way in which social-scientific research was done in the 1950s through to the 1980s itself went through an evolution in which, depending upon how aboriginal rights were conceptualized, so the scientific inquiry changed. And Mr. Brody describes how the initial research he did was based upon an assumption that the Inuit and other northern peoples would assimilate. And, therefore, the question was doing research to see how they could be best helped to do that and how in the 1970s at that time when the Baker Lake case was before the courts the focus of social-scientific research, some of which was in fact placed before Mr. Justice Mahoney in Baker Lake was on "use and occupation", and that that research gave very important clues as to the nature of aboriginal societies in terms of the extent to which in fact they has not abandoned their preferred economic modes of production and consumption, the extent to which they in fact were maintaining in an invigorated but transformed way their life on the land.

And Mr. Brody goes on to say that the current generation of social-scientific research has moved beyond use and occupation and is looking at the ways in which aboriginal societies organize themselves to make decisions about resource use, about management of resources in the context of institutions which, to our eyes, are very difficult to see because they don't fit in with what we are used to seeing by way of institutions. But that once analyzed properly, it is

possible to, in fact, see those societies as societies which have institutions of ownership and jurisdiction. And Mr. Brody's evidence, my lord, is inserted at this point in your legal argument not to suggest that social-scientific research is the litmus test for what legal rights should be. Mr. Brody is a social scientist, not a lawyer. But what we say, my lord, at the bottom of page 309 is that Mr. Brody's evidence was tendered not to provide legal content to the concepts of ownership and jurisdiction, but to show that the way in which concepts such as "use and occupation" continue stereotyped perceptions of the nature of aboriginal societies and prevent us from seeing those societies as our equals and contemporaries.

And the evidence in this case, my lord, we say at 310 on the nature of the Plaintiffs' organized society was tendered as a potent antidote to the detendency -- to the tendency in judicial pronouncements such as Mr. Justice Mahoney which may be interpreted on some analysis to --

THE COURT: Well, do you say that's how you interpret it? That's the way I should read Mr. Justice Mahoney's judgment? I must say, I didn't interpret that at all when I read it.

MR. JACKSON: My lord, to suggest that it is read that aboriginal rights is limited to the rights that existed at the time of contact and that the rights are limited to use and occupation, we say that it is confining as to the true content of aboriginal rights.

THE COURT: Well, you say he is wrong, then?

MR. JACKSON: No, my lord.

THE COURT: Why not just say he is wrong, if that's the view, instead of --

MR. JACKSON: To the extent.

THE COURT: -- analyzing why he is wrong.

MR. JACKSON: To the extent, my lord, in that in that case all he was asked to decide upon as to whether the Inuit had a right to hunt and fish, it was not necessary for him to go beyond that and to determine, as it were, ex cathedra that their rights included half a dozen other rights which were not necessary for any ruling. But what we say is the extent to which Baker Lake, my lord, is relied upon to say that aboriginal title is the right to use and occupy territory and no more, that it cannot contain any other component, we say to that extent Mr. Justice Mahoney's judgment ought not

to be so limited. So we are not in that sense, my lord, saying that in the circumstances of that case his lordship improperly confined aboriginal title because he was not asked to give an expanded definition. But we do say that the judgment ought not to be read as limiting rights to the way in which they were defined in Baker Lake.

THE COURT: Perhaps I'm just being overly protective, Mr. Jackson. But it just seems to me that if a judge deals with a problem that's before him he is accused of not going on and saying anything else. And if he goes on and says something else, he is accused of not having kept himself within the proper bounds that he is supposed to be within. It seems to me that you are going way beyond where you have to go to make the submission you have to make. And this goes back to what I said on Friday, why do I have to worry about why he is wrong? Why do I have to worry about all of these possibilities, these nuances of racism or ethno-eccentricity and all of these things? Why don't we just deal with the legal problem we have?

MR. JACKSON: Well, my lord, a point on this is that to the extent the courts have defined aboriginal title in a particular way which would appear to preclude the kind of relief which --

THE COURT: I don't see where he did that. That's why I'm having trouble with your submission.

MR. JACKSON: Well, my lord --

THE COURT: I don't see where there is any possible complaint you could have with Mr. Justice Mahoney's judgment. He found there were aboriginal rights to the extent they were claimed. How could you have any criticism?

MR. JACKSON: Our criticism is to those who would use the judgment to circumscribe the rights of the Plaintiff.

THE COURT: You say that you are afraid that I will use his judgment to reach a wrong conclusion?

MR. JACKSON: No, my lord. In light of the way in which Baker Lake is used --

THE COURT: Yes.

MR. JACKSON: -- by the defendants in this indication and has been used in other cases, we are alerting your lordship to certain limitations of Baker Lake, both by virtue of the nature of the rights asserted and the nature of the relief sought, and urging upon your lordship that in looking at the language it not be viewed in a context inappropriate to the case and applied, as it were, to say in this case the only

kinds of aboriginal rights which can be asserted is a matter of common law are rights to use an occupy lands.

THE COURT: Well, I haven't read the Defendants' argument on this point yet, so maybe you are anticipating something that is in their argument, are you?

MR. JACKSON: Well, my lord, that is certainly an essential thrust of the argument in that the rights, aboriginal rights as a matter of common law, are rights to use and occupy. And that is the persistent theme of the Defendants' position, my lord. And to the extent that Baker Lake on a literal wording seems to confirm that, what we are saying, my lord, is that if you look at the judgment both in terms of the light of the relief sought, and in light of the evidence led in that case, the case ought not to be viewed as precluding relief which seeks to characterize the Plaintiffs' utilization of resources as ownership, and which seeks to characterize their authority in relation to the territory as a jurisdiction.

THE COURT: Well, I think I understand what you are saying, Mr. Jackson. I never would have read Baker Lake that way.

MR. JACKSON: Well, my lord, then I am much relieved. Perhaps we have been guilty of too much abundant caution in approaching it.

And at page 310, my lord, perhaps I come back to the point of fairness to Mr. Justice Mahoney which, more appropriately, I should have started with. We say that in using the language of ownership and jurisdiction the Plaintiffs submit that this conceptualization of aboriginal rights, while it may appear as a new departure for social scientists and/or Canadian courts, is an accurate reflection of those fundamental principles which were built up through centuries of treaty making and which are at the core of the common law doctrine of aboriginal rights that is reflected in Worcester v. Georgia. Mr. Justice Mahoney was correct in tracing the common law source of aboriginal rights to Worcester v. Georgia and was equally right in emphasizing the key words of "having institutions of their own, and governing themselves by their own laws". He did not, however, draw from this citation the necessary legal implications that aboriginal rights encompasses rights which go far beyond the right to "hunt and fish and survive". To be fair to Justice Mahoney in Baker Lake, no argument was addressed to him that the rights of the Inuit

extended beyond the right to hunt and fish in light of the fact that the mining activity objected to was alleged to directly interfere with Inuit hunting and fishing. The arguments in this case, of course, are not so constrained, and it is submitted that this Court ought not to be constrained by the approach of Mr. Justice Mahoney.

My lord, this question of the existence of an organized society has arisen before the Indian Claims Commission. Section 2 of that Act provides that the Commission shall hear and determine claims which are brought against the United States "on behalf of any Indian tribe, band or other identifiable group of American Indians residing within the territorial limits of the United States of Alaska".

And in the second paragraph, my lord, we say that as a matter of jurisdiction therefore, the Commission's rulings have had to address the question of whether a particular claimant consitutes a tribe or an identifiable group of Indians. But quite independently of that question, the Commission has also had to determine, as a substantive matter, whether this identifiable group or tribe is the successor in interest to the group or tribe which held the land at the time that it was taken. And thus the Commission has had to determine first that land was owned or occupied by an identifiable group of Indians at the time of the alleged taking of the land and, secondly, that the petitioners are a tribe or identifiable group of Indians who are the successor in interest to that land-holding -- land-owning Indian entity. And what this has involved is proof that the petitioners include living members or descendants of members of the identifiable group of Indians who held the land at the time of the taking. And thus throughout there were two inquires.

My lord, the cases which I refer your lordship to at pages 312 to 315 are all cases which deal with the substantive issue of whether at the time of the taking of the land there was an identifiable Indian land-owning entity. And what that entity has -- what criteria that entity has to fulfill in order to be accorded aboriginal title. And the one case I am going to refer you to specifically, my lord, is the 1966 case of the Mescalero Apache Tribe v. United States. The Mescalero Apaches claimed, among other things, that the tribe and the various bands of which

it was comprised aboriginally used or occupied to the exclusion of others certain lands in what is now the State of New Mexico. The Plaintiffs contended that these lands were taken by the United States without any compensation.

At page 314, my lord, you will see that the United States as part of its defense to the Mescalero's claim contended that since there was no tribal organization prior to American sovereignty, there could not have been a tribal ownership of the claimed area giving rise to a collective aboriginal title. In rejecting that argument, the Commission made the following statement.

> "This contention has been urged a number of times in previous cases. It has been held that the lack of political cohesion, in itself, was no defense when it was shown that among the autonomous villages in a small area there existed an identifiable group of American Indians with strong ties of kinship and friendship, close cultural ties, and also that there were areas of land used in common by all the people of the group. The Commission in this case has found that the character of the Mescalero Apache follow the precepts in these cases. Although not having an overall political organization, they did form a distinct ethnic group composed of people bonded together by a common language, a common culture and social organization, common customs, common descent, interlocking kinship, inter-related economic activities, and a consciousness derived from these bands that they were one people. The solidarity of the Mescaleros received its most concrete expression in the recognition of the common right of all Mescalero people to subsistence resources throughout the Mescalero" --

It should be region, my lord.

MR. PLANT: Range.

MR. JACKSON:

Q I'm sorry, range.

We say, my lord, at page 315 that the Commission's definition of the Mecalero owe Apache as "a people" corresponds closely to a definition of people which has come to be accepted in international law, a point to which these submissions will return. More

directly, of course, it's a conception of an organized society capable of holding rights. And we say that this definition can be applied to the Gitksan and Wet'suwet'en with the exception that their conceptions of ownership do not give the same broad rights to all Gitksan and Wet'suwet'en over all of the territories. But this, of course, is a function of the distinctiveness of the Gitksan and Wet'suwet'en system as compared to that of the Mescalero Apache. In this regard the Mescalero Apache land regime of according broad rights to all members of the band over the whole area bears closer resemblance to the Inuit of -- Inuit rights which were in issue in Baker Lake.

And the second case I refer your lordship to is the Hualapai Tribe. This, in fact, was the action which preceded as a result of the decision of the U.S. Supreme Court in Sante Fe. I am content to leave that to your lordship's own reading.

The second, and tomorrow, my lord, Mr. Grant will be addressing you on the issue of the nature of the Plaintiffs' organized society sufficient to meet the first test in Baker Lake. The second test in Baker Lake is possession of a defined territory, as expressed by Mr. Justice Mahoney that the organized society occupied the specific territory over which they assert the aboriginal title. And, my lord, although the language of use and occcupancy has been often used in describing aboriginal title as the land was used in Baker Lake, it is submitted that from the Marshall cases down to the decision of the Supreme Court of Canada in Guerin, it is clear that aboriginal title as an interest in land is founded on aboriginal possession.

And I have set out at page 316 over to 318, my lord, a number of citations starting with Johnson v. McIntosh through to statements of Mr. Justice Hall in Calder, and ending with a statement from Mr. Justice Dickson in Guerin that:

> "Indians have a legal right to occupy and possess certain lands."

My lord, the case law establishes that in determining whether aboriginal peoples can be said to possess certain lands, reference is to be made to the way of life of the particular society, its distinctive economy and the resources available to it. And this

proposition can be traced back to the statement of Mr. Justice Baldwin in Mitchel, a statement which Mr. Justice Mahoney relies upon in Baker Lake. And your lordship will recall that statement perhaps.

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the Whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."

And, my lord, in citing that passage in Baker Lake, Mr. Justice Mahoney added to it his own comment which is set out at the top of page 319.

> "The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title, is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barren lands lent themselves to human occupation, the Inuit occupied them."

My lord, the next case to which I would refer you is the decision of the U.S. Court of Claims which, in my research, is the most exstensive discussion I have found anywhere in the jurisprudence on the nature of possession which is necessary to sustain a claim based upon aboriginal title.

THE COURT: Nature of possession?

MR. JACKSON: Yes, my lord. And I was going to read a significant portion of it, so perhaps this might be an appropriate point to take a short break, my lord, to change --

THE COURT: We have got another ten minutes to go. You don't play enough team sports, Mr. Jackson. You could have watched the clock more closely than I have.

MR. JACKSON: In this case, my lord, it is a 1967 case. The United States had appealed from an interlocutory decision of the Indian Claims Commission holding that the Seminole Indians had established their

aboriginal -- their Indian title to all of the present State of Florida (with specific areas excepted) as of the date of an 1823 treaty by which they ceded their lands. The Court of Claims in upholding the decision exhaustively discussed the question of the nature of Indian possession.

THE COURT: What were they seeking to establish, their --

MR. JACKSON: Aboriginal title to the --

THE COURT: Present State of Florida?

MR. JACKSON: The whole of the present State of Florida.

THE COURT: And with that under one of the head of the Indian Claims Commission?

MR. JACKSON: Yes, my lord. As I recall, as many of these cases council in advising join every head of jurisdiction under the Claims Commission, you often find that the Claims Commission pleadings allege a cause of action under one to five of the heads.

THE COURT: Yes.

MR. JACKSON: In this particular case, my lord, and I can check for you --

THE COURT: On page 300.

MR. JACKSON: I believe that the case was brought under clause four.

THE COURT: All right.

MR. JACKSON: But I can check that, my lord. Most of these cases were cases in which the principal allegation was that the compensation paid was, in fact, not in fact an appropriate compensation in light of the value of the land.

MR. PLANT: Would that be a two, four claim?

MR. JACKSON: Yes, my lord, I believe it is a two, four claim rather than a five claim.

MR. PLANT: As opposed to an one, two or three claim?

MR. JACKSON: I will check that from the --

THE COURT: Thank you.

MR. JACKSON: One of the problems with these cases, my lord, and I have provided copies to my friends in the book of authorities, but a lot of the Indian Claims Commission cases, the Court of Claims cases are all reported in regular, proper --

THE COURT: Yes.

MR. JACKSON: -- reported series. The Indian Claims Commission, until very recently, were available only on microfiche. And for the purposes of this case, my lord, I had the microfiche photocopied from the University of Washington and shipped to UBC. And what I have provided the court and my friends is a

photocopy of a photocopy of a microfiche.
THE COURT: Yes.
MR. JACKSON: And because of the nature of the reproduction, we have sort of black on white reproductions which are difficult to read.
MR. PLANT: Actually, I hate to interrupt, but I have answered my own question. At any rate, perhaps my friend can look at this particular place in the judgment of the Court of Claims in his brief of authorities, Volume 13, tab 9 which is where this judgment appears. It looks as though on page 378 that the claim in chief of the claimants in this case was under section 2(3) which was attempting to set aside treaties on the grounds of fraud or duress. And that's a footnote at the bottom of the page.
MR. JACKSON: Yes.
MR. PLANT: Now, that's the only reference I've seen so far.
MR. JACKSON: I think my friend may be right on that, but I will check over the adjournment.
THE COURT: Thank you.
MR. JACKSON: The significant point, my lord, is that the claim was not one which was founded on subsection 5, which is that the claim is one not arising under any rule of law or equity. As I said, the first four claims are all ones which give rise to a claim which is predicated upon a legal or equitable base.
THE COURT: Yes. All right.
MR. JACKSON: The Court, in determining what the nature of Indian possession would be to sustain a claim, said this:

> "The concept of Indian title is a shorthand means of expressing a right of occcupancy based upon exclusive aboriginal possession. Proof of such possession rests in the "showing of actual, exclusive and continuous use and occcupancy 'for a long time' prior to the loss of land." It is claimed by the United States not only that the Commission's findings failed to support the conclusion that the Seminoles had such title, but further, that the history of the Seminoles is such that this conclusion could not have been reached. The elements necessary to establish Indian title provide the focus of discussion.
>
> There can be little question that, in their occupation of the land, the Seminoles held a virtual "monopoly". While expert witnesses

concede the contemporaneous existence of other Indians in Florida (remnants of original inhabitants located primarily in the southern half of the peninsula), these scattered groupings were few and far between, and the record offers no challenge --"

THE COURT: "No evidence".

MR. JACKSON:

"-- no evidence to suggest that the Seminole dominion was ever challenged by these vestiges of aboriginal cultures. Instead, the pattern that prevailed was one of cultural assimilation - the Seminoles simply absorbing these "foreign" elements into their own ranks. We may take it as an uncontradicted fact that, but for the different European interests, the Seminoles enjoyed an unrivaled position in the Florida peninsula. Hence, the matter in issue turns not upon whether the Seminoles were the exclusive occupants of the land, but whether they availed themselves of their exclusive position. In short, was the Seminoles use and occupancy of the land of an extent sufficient to support a recognition of Indian title encompassing virtually all of the Florida peninsula? The government urges several factors which it insists compel a negative answer.

First, reference is made to the fact that, as late as 1802, Seminole "occupancy", as reflected by the village settlements, was limited both in number and range of distribution. It is pointed out that permanent Seminole settlements were confined almost exclusively to the northern half of Florida; moreover, the permanent settlements do not appear, at this time, to exceed seventeen in number. In conjunction with this fact, the government also stresses population figures, point out that, up to 1814 (the year in which many "Red Sticks"...",

These were Indians from further north,

"...joined the Seminoles), total Seminole population did not exceed 2,500 individuals. The combination of these two factors is said to compel but one conclusion, namely, that the Seminoles neither did occupy, nor were they numerically

capable of occupying, a territory as vast as all of the Florida peninsula.

Had the Seminoles chosen to live by food-raising alone, we would regard the "village" evidence (stressed by the Government) as a persuasive consideration in limiting the Seminoles "title" to the land falling within the compass of their permanent homesites, that is the northern half of the peninsula. Cultures that stake their survival on a close union with the soil, as in the case with primitive food-raising economies, would not demand the vast tracts of land required for a nomadic, hunting existence. But the Seminoles - as was the case with many other Indian groups - survived not simply through farming, but by food-gathering and hunting as well. In other words, Seminole land-use clearly encompassed more than the soil actually "possessed". Therefore other aspects of the Seminole pattern of life demand consideration.

Not only did these Indians wander in search of food supplements, but as already indicated, the appearance of the English in Florida spurred a demand for hides that compelled the Seminoles to make extensive use of the southern penisula. On this point, the records admits of no doubt. It is clear, from the Government's own evidence, that the Seminoles' "hunting preserve" extended to the Florida Keys. Such exstensive penetration of the penisula could be accomplished only by resort to temporary encampments - a home away from home. This, too, the record confirms. Again, it is worth empasizing that the Seminoles hunted not only for subsistence, but also to sustain the trade which the British had initiated and which the Spanish, after them, were obliged to continued. Under such circumstances, the Indians use of the land would not be minimal; moreover, this trade could reasonably demand a use of the land ranging well beyond the immediate environs of permanent village sites."

I am just going to stop the -- go over the next paragraph, my lord, which talks about the Seminoles ocean-going voyages to Havana.

"Given these facts, which are not in the slightest

way disputed - we believe that the Commission, as the trier of fact, could reasonably have concluded that Seminole "use and occcupancy" was adequate to sustain a claim of original title to the Florida peninsula. The area acknowledged by the Commission as being within Seminole dominion constituted a definable territory occupied exclusively by the Seminoles. And since the "use and occcupancy" essential to the recognition of Indian title does not demand actual possession of the land, but may derive through intermittent contacts, the Commission's determination that the Seminoles occupied all of Florida may not be regarded as legally defective.

Nor does the Government's reference to "a population thinness" compel a different result. In stressing this consideration, the government leans far too heavily in the direction of equating "occcupancy" (or capacity to occupy) with actual possession, whereas the key to Indian title lies in evaluating the manner of land-use over a period of time. Physical control or dominion over the land is the dispositive criteria. Thus, when consideration is given to the fact that the Seminoles hunted throughout the southern peninsula and that they also travelled this country - much of which was covered by water - and, further, that their emergence as a distinct Indian group was achieved through the amalgamation of many diverse elements, some of which had always dwelled within the southern peninsula - then, we believe, there exists a reasonable basis for accepting the Commission's determination that Seminole title embraced the entire peninsula."

And, my lord, there is a second case which I'm going to refer your lordship to after the break.

THE COURT: All right.

MR. JACKSON: Because it deals with some of the evidence very similar to the evidence you've heard in this case.

THE COURT: All right. We will take less than a ten-minute adjournment.
THE REGISTRAR: Order in court. Court stands adjourned.
(PROCEEDINGS ADJOURNED AT 8:20)

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

_____
LISA FRANKO, OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RECONVENED AT 8:30 P.M.)

THE REGISTRAR: Order in court.
THE COURT: Mr. Jackson.
MR. JACKSON: Thank you, my lord.

The second case, my lord, which I want to refer you to -- and again, it's one which I will take your lordship in some depth because I think it does bear directly on the evidence, the nature of the evidence you've heard in this case. It's the case referred to at page 322, Clyde F. Thompson v. the United States. This was a case, my lord, it was a consolidated claim on behalf of all the Indians of California. And at page 322, the top of 323, the nature of the consolidated case and why it was a consolidated case is set out.

I want to start referring your lordship to the passage in the last half of page 323 where the Claims Commission identified what lands were held by aboriginal title and proceeded upon this analysis:

> We can proceed with our enquiry with the basic fact, which nobody questions, that Indians occupied and used California lands from time immemorial and as the original inhabitants thereof. The native population is unknown, but estimates range from a high of 700,000 to 260,000... These Indians were not an homogeneous group, but were made up of many groups or tribelets which composed many linguistic divisions or nationalities in California. It has been estimated by Dr. Kroeber that there were five hundred or more Indian groups in California about the time we acquired California from Mexico in 1848. These tribelets occupied and used fairly well-defined areas dependent in size upon the economic resources of the particular area and the population requirements of those living in it. Of course the degree of use of lands varies with the conditions, as Dr. Beals, a witness for defendant, described:

And my lord, I would go now to page 324. I would refer all of this to your lordship. I'm trying to just take you to the most significant parts.

The difference in use was caused, as the above statements imply, by the variations in climate, topography, elevation, soil, vegetation, etc. all of which determine the quantity of economic resources in the various sections of the State. It is not necessary that the Indians prove that each of the 500 or more tribelets occupied and used every acre of the lands they claim; this was not and cannot be done, as witnesses for the petitioners have frankly admitted. There is comparatively little proof of actual occupation and use of specific tribelet areas in California, and if proof of such use is necessary, the petitioners have failed in their proof; however, there is proof by noted anthropologists, based upon years of study of Indian culture, habitats and ways of providing their subsistence, that the Indian groups used and occupied the lands in accordance with the Indian way of life. It must be borne in mind that in aboriginal times these Indians obtained their subsistence from the natural products of the soil and waters of the areas they occupied. Such an economy did not require an intensive cultivation of the soil for the Indians of necessity exploited the places which provided the necessaries of life. The resources the Indians relied upon for subsistence were not uniformly distributed; they were largely seasonal and in scattered places, requiring travel of considerable distances in their gathering, fishing and hunting activities. Game animals moved from place to place in search of food and had to be followed. The importance of flora and fauna in all regions of the state cannot be gainsaid, and the search for such resources was continuous and covered areas that were unproductive as well as those that were, because of the variations in the production of the natural resources from year to year or even from season to season in many years.

Furthermore, it is plain that because of the uneven and rather sparse distribution of the available natural resources in the State, large areas of land were needed to provide

> subsistence. The Indians' permanent and main habitats were, in general, in locations which provided the greatest abundance of natural resources, but they were required, and generally did, extend their searches over large areas beyond their places of permanent settlement. The record is replete with proof of temporary camps occupied by the Indians in their seasonal gathering, fishing and hunting operations which covered large areas in the mountains, plains and deserts. It is no doubt true, as the Government contends, the higher elevations in the mountains and some large desert areas produce little of economic importance to the Indians, but such places have limited use and were part of the areas claimed and defended where necessary by the tribelet occupying it.

My lord, in the Indians of California litigation --

THE COURT: Is that the same case?

MR. JACKSON: Yes, my lord.

THE COURT: Yes.

MR. JACKSON: It's usually referred to as the Indians of California. In that litigation, the government introduced an ecological analysis of the natural resources of California available to the Indians and the way those resources affected land utilization. And in light -- and I should say, my lord, that in introducing the ecological evidence in this case, the plaintiffs were not aware of this case, so it wasn't -- that particular evidence was not intended to reflect this. But in light of the fact that evidence of that kind was introduced in this case, it may be interesting and useful to your lordship to note what the Claims Commission said as to its relevance and significance to the inquiry before it, as to the lands and the extent of the lands claimed:

> The primary value of the ecological approach to the problem of land-use and occupancy by the Indians of California lies in the paucity of proof of actual use and occupancy of the lands, as we understand the Government's position. The proof of actual use is in the main based upon anthropological studies and research.

Proof of actual use by Indians of given areas is of the most general character, and, considering it in the aggregate, the areas constitute but a relatively small part of the total lands involved in this case... We must, as the anthropologists did, reason and assume from our knowledge of the culture of these aborigines that they lived and had their permanent abodes in places best suited to their economic life and which they exploited as the primary source of their subsistence and at the same time, at least in connection therewith, they exploited the available resources in the less productive territories surrounding or in the vicinity of their settlements.

An ecologic analysis of the area here under study involved the division of the territory into a number of zones according to their economic importance:

> (1) Those of intensive use - those generally included the settlements or surrounding territory consisting of about one-fifth of a claimed area from which as high as 80% of the subsistence was derived; then follows; (2) zones of less intensive use; (3) seasonal use; (4) infrequent use; (5) the least use of any but, nevertheless used for crossing, trailing or occasional use of sacred places located therein, and perhaps, on occasion, to defend the more important areas...

We believe the study of the economic resources of the state and their relationship to the quantity of land required to support the Indians in their way of life has value in understanding the economic picture. However, we cannot accept the Government's thesis that the resources of the state or any part thereof can be determined mathematically by assigning a large percentage of subsistence derived from a small part of a given territory and reduced percentages of subsistence in other areas of a territory claimed by a particular tribelet. The testimony and the ethnographic literature,

> of which there are volumes in evidence, show that the Indian groups ranged throughout their respective territories in their gathering, hunting and fishing. While these Indians were never considered nomads, their exploitation of the available resources in a given territory required frequent and extended travelling within territories claimed. We believe it unrealistic and contrary to the Indian mode of life to restrict Indian territorial rights to the lands which would simply provide adequate subsistence and disallow their land claims to the areas which were of secondary importance or supplemental to the main sources of supplies. We suspect territorial expanse was as much the desire of these primitive peoples as it is characteristic of the White Man for there is much ethnographic evidence that the Indian groups in California moved about their respective domains gathering wild foods as they ripened or captured available wild game, and during a normal season would visit and use the whole territory to which they asserted ownership as their exclusive places of abode.
>
> We know of no decision by the courts or the administrative offices of the Government which limited Indian lands to those lands which provided them with the common necessities of life. The requirements of the Indians were so varied that they could only be obtained from a large area for salt, edible seaweeds and insects, flint and other important supplies where in most cases not available in the confined areas of valleys but obtainable from desert areas.

The Claims Commission, my lord, we say, in this passage, indicates that the ecological evidence was of particular value because of the limited proof of actual land use. In this case, my lord, the plaintiffs have provided a substantial evidentiary record of resource harvesting throughout their territories as revealed in the archaeological record, oral histories, and the evidence of elders. But in addition, the ecological evidence which Mr. Grant reviewed for you some two weeks ago, establishes the

various ecological zones and the distribution of resources within the plaintiffs' territories and shows how this distribution is integrated into the plaintiffs' resource harvesting and economic seasonal round or cycle. And it is submitted that as in the Seminole and the Indians of California cases, this court has a sufficient evidentiary basis upon which to conclude at the legally relevant time the plaintiffs were in possession of their territories.

My lord, the third element of the Baker Lake tests is the element of exclusive possession: That the occupation was to the exclusion of the organized societies.

And in Baker Lake, Mr. Justice Mahoney traced the source of this third of the four requirements to a passage in the Santa Fe case in which Mr. Justice Douglas said:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constitute definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes) --

And that is the contrast, my lord.

> -- then the Walapais had "Indian title" which unless extinguished survived the railroad grant of 1866.

THE COURT: So he is saying there, if you just wander over it, that's not enough?

MR. JACKSON: That seems to be the approach of Mr. Justice Douglas, in the context that if you wander over it along with many other Indian groups, then if that is the pattern of utilization of resources then that is not enough to establish an aboriginal title in those groups.

In the context of Baker Lake, my lord, the government defendant admitted that the Baker Lake Inuit exclusively occupied the whole of the claimed area. But Mr. Justice Mahoney, in light of the

archaeological evidence which was presented to him, took the position that even in the face of a government admission, if the evidence did not support that, then he could not make a finding.

THE COURT: Right.

MR. JACKSON: And he found that in relation to one of the southerly parts of the Baker Lake area, the archaeological evidence suggests intermittent occupation on the one hand by the Inuit, and on the other hand, by the Chipewyan Indians to the south, and he viewed that as fitting into this character of territory over which the Inuit and the Chipewyan intermittently wandered and therefore neither could have exclusive possession sufficient to satisfy this test. But in all other regards, there was no dispute as to the exclusive occupation of the Baker Lake Inuit.

The concept of exclusivity, my lord, is one which has been well developed by the Indian Claims Commission and the Court of Claims. And in terms of a purpose of analysis perhaps in the context of the Indian Claims Commission, my lord, and also for the purposes of determining aboriginal titles as a matter of common-law, the decision of the Court of Claims in Strong v. United States is one which your lordship may wish to pay particular attention. In explaining why exclusive possession is regarded as an important incident of aboriginal title, the Court of Claims said this:

> ... The obstacle facing the Indian claimants in this litigation is the requirement of "exclusiveness". Generally, mixed and non-exclusive use and occupancy of an area precludes the establishment of any aboriginal title by any of the users of the subject property. The purpose of this requirement is fairly obvious. In order to award compensation to the Indians for the value of land ceded to or taken by the government, it is essential that the Commission first determine that the land in question was truly "owned" by the ancestors of the particular claimant or claimants. Certainly, one of the primary characteristics of ownership is the desire and ability to exclude others from the area over which ownership is claimed. Confronted with a

similar issue recently the court stated in United States v. Pueblo of San Ildefonso:

> Implicit in the concept of ownership of property is the right to exclude others. Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups. True ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups.

And my lord, the court goes on to deal with applying exclusiveness in the particular context of the evidence facing it.

If your lordship would go to page 330, near the top of the page, the third line:

> Although normally no tribe will be deemed to have proven aboriginal title when others used and occupied the land in question, there is a "built-in exception" to the "exclusivity" requirement. Actually, this "exception" merely creates a method of analysis of "exclusivity" in certain rare situations. In the past, the Court has held on several occasions that two or more tribes or groups might inhabit an area in "joint and amicable" possession without erasing the "exclusive" nature of their use and occupancy... To qualify for treatment under "joint and amicable" occupancy, the relationship of the Indian groups must be extremely close.

And my lord, the balance of 330 continues with an analysis of several cases where the court defines what the precise nature of that close relationship must be in order for groups to have a joint and amicable possession so that both would have aboriginal title.

And over at page 331, the court continues -- the

court makes the point that in its decision in the United States v. Pueblo of San Ildefonso -- rather, this is a later case, my lord, which was referred to in that case, in the United States v. Pueblo and San Ildefonso, the Court of Claims made this statement about this joint and amicable possession:

> Iowa Tribes decision did not purport to set down any rule that two or more tribes must first conclusively prove that they are a single or closely integrated entity before they can claim joint ownership of land... The complete merger of two or more tribes into one is not a prerequisite for claiming joint aboriginal title.

In the San Ildefonso case, my lord, the land in issue lay between two pueblos or villages of Santo Domingo and San Felipe, and was used for pasturing cattle, sheep and goats and had been the subject of a Spanish grant to the two pueblos equally. The land had been used in common for a long time but was subsequently included in a reservation exclusively for one of the pueblos. And the commission found that the land was held under "joint aboriginal title" and that the Santo Domingo pueblo was entitled to half of the compensation.

My lord, the point at which this is an issue in this case, we say, arises in the context of some of the evidence which you have heard, and my friends, Mr. Grant and Ms. Mandell, will be going into it in some detail. Evidence was led before you of certain areas which were described as common areas, areas usually of extreme productivity of a particular resource, which were used by a number of house groups. And what we say is the extent that your lordship would see those areas as being used and utilized by a number of house groups, your lordship could find that those areas are held in joint and amicable possession consistent with the U.S. jurisprudence and sufficient to satisfy Mr. Justice Mahoney's test of exclusiveness.

In terms of what is -- my lord, Mr. Rush has brought to me a fact that the Strong case at page 328 has not been referenced. It is Volume 12 tab 45.

THE COURT: 328?

MR. JACKSON: 328, the reference to Strong.

THE COURT: Yes.

MR. JACKSON: It's Volume 12 tab 45. And the San Ildefonso case on page 331 is Volume 13 tab 7.

THE COURT: Thank you.

MR. JACKSON: My lord, the requirement of exclusivity has, as most other things in the area of aboriginal rights, been the subject of academic commentary, and I've set out on page 332 some comments of Dr. -- Professor Slattery, where he -- he makes the point that in considering the context -- in considering this requirement of exclusivity, it should be viewed in the context of the sui generis nature of aboriginal title, and it should be flexible rather than be a requirement which has certain rigid parameters, and that is a proposition which the plaintiffs agree. It is also a proposition, my lord, which the Court of Appeal in Sparrow seems to have viewed with some favour.

At page 333 at the top, my lord, we note the fact that in Sparrow, where an aboriginal right to fish was asserted, the B.C. Court of Appeal in affirming that right -- and I say there, my lord, "the Court stated". To be more accurate, I think I should have said, "the Court recited the evidence of Dr. Suttles, an anthropologist." From my reading of the case, my lord, the court recited the evidence with approval, but that I'll leave for your lordship's judgment. But that evidence, in talking about the Musqueam aboriginal right to fish, described it in this way, my lord:

> As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area, but as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.

And my lord, that did not seem to be of concern to the Court of Appeal in the sense that it was not viewed as being a preclusion of their aboriginal right to fish. And we say that that suggests the -- the exclusiveness is being viewed by the courts in the context of not imposing a grid upon Indian utilization, but looks at it in the context of the particular society which -- which rights are in issue.

It is our submission, my lord, that the plaintiffs' evidence in this case does describe a system which includes the concept of "exclusivity" even as it is defined in the Strong and Ildefonso cases. As those judgments indicate, exclusivity in the sense of having the right to exclude others, is one of the principal hallmarks of ownership. And my lord, as your lordship heard evidence -- and we will be referring your lordship again specifically to this evidence -- Dr. Daly in his report sought to articulate a cross cultural definition of ownership, which incorporated the common-law but which was not limited to the common-law, and one of the hallmarks of that cross cultural definition included exclusivity also as a principal component.

The passages we have recited from the Strong and Ildefonso cases provide further support, we say, my lord, for the plaintiffs' argument that although aboriginal title has been described in much of the case law as "use and occupancy" -- and indeed was described in that way in these cases -- this is done in large measure to distinguish it from the underlying crown title. And such description of Indian title as "use and occupancy" should not be taken -- and this was the gravamen of my comments in relation to Baker Lake that it not be read this way -- such a description of Indian use and occupation should not be taken to deny the characterization of Indian title as one of ownership. In both the Strong and Ildefonso cases, the Court of Claims identified the concept of exclusiveness precisely because it is one of the principal hallmarks of true ownership. And just to reiterate what the court said in Ildefonso:

> Generally speaking, a true owner of land exercises full dominion and control over it; a true owner possesses the right to expel intruders. In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups.

And it is our submission, my lord, that the evidence presented by the plaintiffs in this case demonstrates that the Gitksan and Wet'suwet'en hereditary chiefs and their houses are "true owners"

of their territories.

And my lord, that would be a convenient point. That was the point at which I was striving to reach this evening.

THE COURT: Yes, all right. I will look forward to hearing the balance of your submission at 9:30 tomorrow morning.

MR. JACKSON: Yes, my lord. Thank you.

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

(PROCEEDINGS ADJOURNED AT 9:00 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.