Vancouver, B.C.
May 23, 1990

(PROCEEDINGS RECONVENED AT 9:30 A.M.)

THE REGISTRAR: Order in court.
THE COURT: Miss Sigurdson.
MISS SIGURDSON: My lord, I left off yesterday at page 23 and the summary was going to resume at paragraph 46.
THE COURT: Thank you.
MISS SIGURDSON: And we say a third category in our discussion on the laws of the Gitksan and Wet'suwet'en is that the evidence shows that there is rationalization rather than enforcement of the laws. And we say in other areas the evidence indicates that the plaintiffs do not govern themselves according to their laws. Rather, non-compliance is rationalized or "legalized".

Heather Harris expressed the opinion that, and I quote:

> The essential law involved in Gitksan marriage partner choice is the proscription against marriage within the clan; this is called gaats by the Gitksan and incest by anthropologists.

In earlier times a person who married within his or her clan was put to death. Now, one spouse is adopted into the house of another, house and clan of another.

In the area of use and -- territories use of resources, the law said to be a very important law is that permission is required. And in paragraph 50, we submit that it was pointed out to Alfred Joseph that Christine Holland's -- and that's -- she held the name Knedebeas -- registered trapline extended into the territory of Gisdaywa. Mr. Joseph asserted that Mrs. Holland had permission to trap there. And if I could ask you to turn to the yellow book, tab 50, and at line 14, Mr. Goldie refers to Christine Holland and then at line 18, the question is:

> Q Did she have your permission to trap?
> A Yes.

However, further on in the cross-examination, Mr. Joseph said that Mrs. Holland had never asked him for permission. And if you could turn to the next page,

page 2 in the yellow binder, starting at line one:

Q No. I say does she --

And that refers to Mrs. Holland.

-- have permission?
A Yes. She's following her -- the same territory that they've used in the past.
Q Yes. I appreciate that she is trapping on a line which has been in her family for some time, but that -- the trapping on that line takes it into the territory claimed by Gisdaywa, and did I understand you correctly to say that so far as your territory is concerned she has your permission to trap there?
A Yes.
Q Do you recall when you gave her that permission?
A I have never given her permission, but they've been using that territory as it was for years and years.

And going down to line 32:

Q Well -- and you tell me that when Katherine Michell --

And I pause to say she is the present holder of the name Knedebeas.

-- and whoever traps on her behalf, is trapping on your territory she is doing so because that's what she and her family have done for many years?
A There may have been arrangements between my grandmother and Christine Holland.
Q There may have been?
A Yes.
Q But that's -- if there is you don't know?
A Yes.
Q But you think there may have been?
A There may have been, yes.

And we say by the assumption that permission was granted without any knowledge of whether permission

had been granted, an apparently "unlawful" act was simply assumed to be a "lawful" act.

What the plaintiffs assert as "laws" are perhaps better described as moral or social principles. This can be seen from Stanley Williams' assertion that, and I quote:

> Ever since time begun when our people were created, they made these laws and these laws are -- still remain today, and there is no new laws today.

And it is our submission that where the "laws" are so vague that it cannot be determined what constitutes a breach of the law, where allegedly important laws are broken without apparent consequence and where violations of laws are rationalized rather than penalized, the evidence does not show that the plaintiffs govern themselves according to the laws that this court can give effect to. That they attempt to preserve a code of conduct limited to internal relationships is immaterial to this case and does not advance their claim.

In the next section we make submissions on the institutions of the Gitksan and Wet'suwet'en.

The plaintiffs allege that they have maintained their institutions and exercised their authority over the claim area through their institutions. And I refer to the Statement of Claim, paragraph 57 (f).

And I leave the written summary to note that the plaintiffs' counsel argued that it is these institutions that round out the meaning of ownership that they claim, and the reference I can provide your lordship is transcript 330, page 25389.

THE COURT: 389?

MISS SIGURDSON: Yes.

And I carry on to say that throughout the trial several institutions were referred to. And I will not read that paragraph, but I will say that what we deal with in these submissions is the feast and the system of hereditary chieftainship, institutions such as the kinship system or the house system have been the subject of comment already. Other institutions such as gambling that Dr. Daly said was an important institution, we say is not one that can go to a claim of ownership and jurisdiction. In any event, Dr. Mills denied its importance.

1 Carrying on at paragraph 56. The plaintiffs have
2 adduced a massive amount of evidence on the feast as
3 it is presently practised. The plaintiffs argue that,
4 and have pleaded that in all its essential
5 characteristics the feast has been maintained since
6 time immemorial.
7 And we say the evidence of the current feast
8 system must be evaluated in the context of the society
9 in which the feasts have been held.
10 John Adams did his field work among the Gitksan in
11 the mid 1960's. In his treatise "The Gitksan
12 Potlatch" published in 1973, he states, and I quote:
13
14 That the potlatch survives today in a state of
15 considerable complexity is undoubtably due to
16 its value in the Natives' eyes as a means of
17 furthering their land claims against the
18 government, but it is also a touchstone of
19 Indian identity in a world increasingly
20 dominated by the Whiteman's values.
21
22 Included in "The Gitksan Potlatch" are Mr. Adams'
23 "Notes on the Funeral Feast for Silas Inness, Eagle of
24 Kitwanga," and that feast was held, apparently, on the
25 29th of October, 1965. And as recorded in Mr. Adams'
26 notes that Harold Sinclair spoke of the "land
27 question."
28 And in 1973, Neil Sterritt was asked by the
29 Tribal Council "to prepare a submission to further the
30 land claim of the Gitksan-Carrier, as it was called
31 then, and to help out in putting together a
32 submission." And in 1977, the Gitksan and
33 Wet'suwet'en filed the Comprehensive Claim with the
34 federal government.
35 The plaintiffs acknowledge that the "land
36 question" is "brought up at every feast in the last
37 ten years", and before that, as Mr. Joseph said, "it
38 was always raised by a few of the older chiefs."
39 Thus the plaintiffs' evidence with respect to the
40 present form of the feast (as with evidence of all of
41 their traditional culture) reflects the practices of a
42 society that is immersed in land claims; comprehensive
43 claims and negotiations.
44 It is not disputed that some Gitksan and
45 Wet'suwet'en people attend various formalized
46 gatherings called feasts.
47 However, a feast attended by both peoples -- and

by that I mean the Gitksan people and the Wet'suwet'en people -- is neither a common event today nor is it claimed to have occurred historically.

And we submit that the evidence shows that the feast as it is presently practised is not what it was at the time of contact in the claim area.

There are two bodies of evidence in the maintenance or continuation of the feast system: the assertions of the lay witnesses that the feast existed before the arrival of Europeans and the historic record.

Reverend Tomlinson and Mr. Turner-Turner describe activities markedly different from the activities described by the plaintiffs' witnesses.

Reverend Tomlinson refers to the competitive nature of the potlatch, the destruction of property, the beggaring of the family hosting the potlatch, and dog-eating ceremonies. Mr. Turner-Turner also notes the dog-eating ceremony and the impoverishment resulting from the feasts. Mr. Loring commented on the wilful destruction of the property and the dog-eating ceremony.

In 1897, Mr. Loring --

MR. GRANT: Sorry, my lord, I am a bit concerned about the Tomlinson reference. Much was made of it during -- when it was introduced and my friend, of course, has put it in at tab 68. But my recollection of that evidence was that in fact what he -- although Mr. Tomlinson was at Kitwanga, he was digressing and discussing something that was happening on the Nass, and it was clear from the evidence of the witnesses that it was not with respect to the Gitksan. So this narration that my friend is relying on is not a situation with the Gitksan only and Dr. Daly spoke to that.

THE COURT: What was the reference to tab 68?

MR. GRANT: It would be Exhibit 901-21. In the argument, my lord.

THE COURT: Oh, it would be in this tab 68?

MR. GRANT: Yes, yes. That is a reference -- his description there is a reference to what was happening on the Nass, although he was at Kitwanga at the time he was talking about the event.

MISS SIGURDSON: Well, my friend can raise that. As I recall the evidence, Mr. Grant raised that objection during Mr. Daly's evidence -- Dr. Daly's evidence. And the reference to Tomlinson refers to being in Kispiox and

1 talking about the Nishga-speaking people, but being in
2 that area. I took it from that that he is referring
3 to the area around Kispiox and the Nishga-speaking
4 people there.
5 THE COURT: All right. Well, I'll have to -- I'll have to look
6 at it some time and see whether I think it applies to
7 this area.
8 MISS SIGURDSON: Carrying on at paragraph 69. In 1897, Mr.
9 Loring referred to "the holding of the festivals
10 described as the Potlach (sic)" to Mr. Vowell,
11 Superintendent of Indian Affairs, and I quote:
12
13 ...in regard to the festival the bands of the
14 Hoquel-get [Hagwilget] Indians do not observe
15 it, for reason, no doubt, having been for many
16 years under advices of the Roman Catholic
17 priests.
18
19 Each of the bands of Kit-Ksuns is divided in
20 respect to holding the feast. The old of the
21 band favor it, whilst the younger of the
22 population are against it... The majority of
23 the Indians [I say "were asking"] advice of the
24 new provisions for an enforcement of the Indian
25 Act greatly distracted, pleading they would be
26 deprived of their only diversion, during the
27 long winters, etc.... Seeing in the
28 potlatching only one objectionable feature that
29 of wilful destruction of property, I arranged
30 for quietly meeting in feast under modified
31 forms, and it is pleasant to reflect that the
32 parties interested met us half way by promising
33 the moose skins, blankets and other offerings
34 to the departed in spirit-land, instead of
35 being consigned to the flames, to be carefully
36 divided up amongst the poor and aged and that
37 agreement was carried out to the letter...
38
39 And your lordship may recall the evidence we
40 heard on the distribution of property in the case
41 these days.
42 And I leave the text to refer back to an earlier
43 tab which I will not ask your lordship to turn to, but
44 if you make a note that at tab 22 of the yellow book
45 there is the Dominion Order in Council 153, and at
46 that time --
47 THE COURT: Tab 22 of this yellow book?

1 MISS SIGURDSON: Yes. The provincial --
2 THE COURT: What volume is this?
3 MISS SIGURDSON: Nine.
4 THE COURT: Nine?
5 MISS SIGURDSON: Yes.
6 THE COURT: Thank you. Yes?
7 MISS SIGURDSON: And that is where the Provincial Government had
8 asked the Dominion to conduct an inquiry into the
9 potlatch ban. And in Dominion Order in Council 153,
10 they had conducted the inquiry and concluded "that
11 the -- that in the Babine and West Coast Agencies
12 it" -- and that's the potlatch -- "still exists, but
13 without the degrading features of mutilation and dog
14 eating." And then it says it did not carry on to the
15 same extent as former, and that's in February 22nd,
16 1898.
17 In paragraph 70 I say that in 1916, Mr. Loring
18 repeated that observation.
19
20 As wont - in a custom which not obtains with
21 the Hagwilgets of late years - during this
22 month the Kitsuns, by way of diversion, spent
23 some time in attending feasts in memory of
24 those of their number departed by death during
25 the year just ended; and happily thereat every
26 semblance of the whilom objectionable features
27 of the potlach [sic] is being departed from.
28
29 And in 1921, the Corporal in charge of the
30 Hazelton Detachment of the Royal Canadian Mounted
31 Police reported on a meeting with "many of the Indian
32 Chiefs of the Skeena River" at Hazelton and he said,
33 in part:
34
35 ...another Indian gave 9 instances of potalch
36 [sic] customs which had [been] dropped,
37 [namely] the eating of raw dog meat, the
38 burning of canoes and blankets, the burying of
39 live slaves etc, etc, and they all stated that
40 the potlatches did not impoverish them.
41
42 According to the plaintiffs' evidence, what
43 Loring described as the "objectionable" features of
44 the feast, the dog eating, the destruction of the
45 property, et cetera, are absent from the feast today.
46 And indeed, the feast as described by the plaintiffs'
47 witnesses bears little, if any, resemblance to the

events observed in the late 1800's.

Careful seating arrangements, orderly food service, and the collection and distribution of money to pay, for example, for the costs incurred in a burial, appear to be the hallmarks of the present day feast, and these features are not referred to in the early recorded observations of potlatch activity. And we say that the present features are, however, in keeping with the "modified" form of memory feast referred to by Mr. Loring.

When the evidence as a whole is taken into account, it appears that between 1886 and 1921, the former practice of potlatching was replaced by something resembling or called feasting. The feast, as described by the witnesses, has not been maintained since "time immemorial".

It is also possible to consider the maintenance of the feast system by comparing the practices within the feast as the Plaintiffs say they should be to the way they are: and this may be called the ideal or the belief versus the reality. And it is our submission that in order to establish ownership and jurisdiction over the claim area, as the plaintiffs have alleged and must show, they must show that the territorial aspects of the feast are practised.

And in paragraph 76 and 77 I gave examples from the plaintiffs' opening and from assertions during the course of the evidence of what they say are the territorial aspects. More recently, this has been mentioned in the plaintiffs' argument, and I may refer you to Mr. Jackson adopting Dr. Daly's definition of ownership. And in transcript 327 -- and this is not in the written material, my lord.

THE COURT: Where shall I put it?

MISS SIGURDSON: If you can put it below paragraph 77.

THE COURT: Yes.

MISS SIGURDSON: And that is transcript 327 page 24988.

THE COURT: Yes.

MISS SIGURDSON: Mr. Jackson adopted Dr. Daly's definition and the first point was ownership implies the concept of exclusive possession. Implicit in this aspect is a delineation of boundaries.

And in transcript 328, page 25114 --

THE COURT: 25114?

MISS SIGURDSON: Yes. Ms. Mandell said, and I quote:

> In any system which includes rights of

exclusive possession, there must be a widely dispersed knowledge of the persons or groups in whom those rights of possession reside and of the boundaries of the territories. Among the Gitksan and the Wet'suwet'en this announcement of rights and boundaries is carried out, above all else, in the feast hall.

At paragraph 78 we say that when the evidence is examined, it is seen that the territories are the subject of little comment in the feast.

Martha Brown who held the name Kliiyem lax haa was asked in her examination in chief:

> Q Did anyone from the Wolf tribe talk about your territories at the feast?
> A No, they don't talk about territory things. In the old days they used to talk about it. Nowadays is feast doesn't talk anything about territory...

And later in her direct examination:

> Q ...Do you remember at any of the Xhliimlaxha [Kliiyem lax haa] feasts in your lifetime that the description of the territories of Xhliimlaxha were given?
> A They don't remember the territory during the feast.

And still later:

> Q They will speak about the territory at the feast?
> A They don't usually discuss it in the feast.

And on cross-examination, Mrs. Brown confirmed those answers:

> Q I understood her to say that at feasts today territory is not talked about, is that correct?
> A We don't talk about territories today.
> Q Why is that?
> A We're forgetting, we're white people now.
> Q Is it because people no longer use the

1 territories that they are not talked
2 about at the feasts?
3 A Yes.
4
5 And Mrs. Quaw was asked, "Have you ever heard
6 anyone describe the Honcaagh Ben territory in the
7 feast?" And she said, "No."
8 And to the extent that territories are discussed
9 at feasts, the plaintiffs admit that they are not
10 described in detail, that there is no delineation of
11 boundaries.
12 Mr. Joseph said:
13
14 ...Usually our people when they give a
15 description of their territory at a Feast, all
16 they do is mention one area and the rest -- the
17 people that know the territory know what area
18 they are talking about.
19
20 Mrs. McKenzie said -- gave evidence to a like
21 effect, and also said that the last time she had heard
22 Gyolugyet's territory described at a feast was at
23 Marian Jack's feast in 1959.
24 Mary Joseph admitted they never described the
25 boundary at a feast.
26 And I also have a reference to Madeline Alfred's
27 evidence.
28 Now, Mr. Sterritt said he acquired detailed
29 information on territories during the course of the
30 feast. That information was not part of the formal
31 business of the feast and said, rather, it was from
32 private conversations during the event. And it was
33 suggested during his evidence that the "feast has a
34 multitude of functions", and that information
35 gathering was "part of the interaction that goes on
36 during the course of a feast." And we submit that
37 that may be a part of the feast that Mr. Sterritt, as
38 a land claims researcher participated in, but chiefs
39 do not.
40 And if I could ask you to turn to tab 82.
41 THE COURT: 82?
42 MISS SIGURDSON: 82, my lord. And pages -- page 3, and this is
43 the evidence of Mary McKenzie who held the name
44 Gyolugyet. And starting at line 33, Mrs. McKenzie was
45 asked:
46
47 Q For how many years has Jeffrey Harris

1 held the name Luus?
2 A When his brother Chris Harris, the late
3 Chris Harris, died, and he was the one
4 that had the name of Luus.
5 Q And was that ten years ago or so?
6 A About seven or eight years.
7 Q And you've sat beside Jeffery Harris
8 senior at the Feast Hall ever since then?
9 A Yes.
10 Q And before that you've sat beside Chris
11 Harris for many years didn't you?
12 A Yes.
13 Q And did you ever during that time discuss
14 with Chris Harris or Jeffery Harris
15 senior the location of the territory of
16 the House of Luus?
17
18 And the next page:
19
20 A No. I don't discuss that with them at a
21 Feasting.
22 Q And did you ever attend a Feast at which
23 either of those two gentlemen described
24 the location of their territory of their
25 House?
26 A No.
27 Q Do you discuss matters of territory
28 outside the Feast Hall?
29 A We have to discuss it firstly by our own
30 wil'nat'ahl, then it goes to the Feasting
31 House.
32 Q Outside the Feasting House, have you ever
33 had discussions with Jeffery Harris
34 senior or Chris Harris while they were
35 Luus, while they held that name, about
36 the territory of Luus?
37 A No.
38
39 And Exhibit 702 contains Mr. Sterritt's notes of
40 73 feasts he attended between 1980 and 1988. And
41 during his evidence he recalled that "territories were
42 spoken to in some of those feasts", and identified his
43 notes of 15 feasts. Now, I reviewed those notes that
44 he identified and, in my submission, in seven of the
45 15 notes there were no recorded references to
46 territories. In the other notes, the context in which
47 the reference to territory were made is unclear.

1 But it is my submission that in most of those, if
2 the plaintiffs' evidence on feast procedure is correct
3 and was followed, those feasts, then, it would not
4 have been part of the formal business of the feast.
5 And we say also that the confusion over
6 boundaries and ownership revealed in the mapping and
7 territorial affidavit process --
8 MR. GRANT: Just if my friend could assist me. I see that at
9 the tab, these -- these notes of 15 such feasts,
10 Exhibit 702, I know what she is referring to but the
11 notes of the 15 feasts aren't there. I wonder if my
12 friend could provide me at least with the reference,
13 not right now, but later, as to which she alleges of
14 the seven there are no recorded references -- seven of
15 the 15 there are no references. In other words, she
16 has made that statement -- that assertion, but when I
17 go to her binder, I have no way of knowing what she is
18 particularly referring to, except Exhibit 702 which is
19 a binder of all of his notes.
20 THE COURT: Are they conveniently located -- collected together?
21 MISS SIGURDSON: I could do the research again. What I did is I
22 went to Mr. Sterritt's evidence, identified the 15
23 feasts that he referred to and read the notes. I --
24 if my friend finds that he can't do that, then I can
25 do it, but I --
26 MR. GRANT: Well, she didn't -- if she doesn't have a list of
27 the seven where there are no recorded references -- I
28 thought that she would have made a list of such, but
29 it's okay.
30 MISS SIGURDSON: I don't have a list handy, my lord.
31 THE COURT: All right.
32 MISS SIGURDSON: And we say the confusion over boundaries and
33 ownership revealed in the mapping and territorial
34 affidavit process and discussed in Part IV of Section
35 5 -- and you'll hear submissions on those later in the
36 day and tomorrow -- shows that the plaintiffs do not
37 know territorial boundaries or owners. Public
38 delineation of territories does not occur in feasts.
39 Passing references to territories in feasts held
40 within a society immersed in land claims do not
41 support an assertion of ownership and jurisdiction
42 over the claim area.
43 The plaintiffs also argue that the feast is where
44 oral histories, their evidence of title, is told,
45 witnessed and validated. And in this area, too, it's
46 our submission the practice falls short of the ideal.
47 And submissions on the oral tradition have been made

already and I've referred you to Part II, Section 3 of the summary of argument.

And it is submitted that the elements of the feast system which the plaintiffs say support a claim of actual, effective ownership and jurisdiction over an area of 22,000 square miles have not been maintained.

Hereditary chieftainship has also been put forward by the plaintiffs as an institution evidencing ownership and jurisdiction.

The plaintiffs argue that the authority and responsibility are vested in and exercised by the hereditary chiefs, in accordance with a structure or within an institution that has been in place since time immemorial.

Submissions under this heading are directed to two propositions which define the limited scope and extent of the authority:

(1) Management of "municipal" affairs on reserve lands, which we say are the concerns of everyday life, such as education, housing, roads, health care, lies with Band Councils. And the Council's authority derives from federal legislation. And off-reserve neither the Bands nor the chiefs exercise effective authority.

(2) The authority of the hereditary chiefs is limited to internal practices which are unregulated at law, and is exercised by way of moral suasion based on the respect accorded them by members of the community who attend feasts. And that authority is exercised on an ad hoc basis.

The effect of government regulation and resource use is discussed later. And there it is submitted that the primary forms of resource use are regulated by the federal and provincial governments. And the plaintiffs' acceptance of the government's authority is demonstrated by their compliance with and participation in the regulatory process.

And we turn now to band councils. Many of the tasks that, in the non-native community, are considered to be governmental responsibilities are handled by band councils in the land claim area. And I use for an example the Hagwilget Band Council, Mr. Joseph's evidence. Mr. Joseph explained that the

Hagwilget Band Council was responsible for housing, sewage lines, water, fire, and other safety matters, education (in part), large improvement projects, and resolving disputes concerning competing claims to reserve lands. And except for an area of overlapping responsibility for education, those matters are not dealt with by hereditary chiefs in the feast hall.

The chiefs' authority is exercised through the feast system and that system, Mr. Joseph explained, deals with other concerns.

We say in paragraph 93, the hereditary chiefs' authority is that of advisors or supervisors with respect to cultural, social and family matters within the community, in areas that are not regulated at law. Like all citizens, the plaintiffs are at liberty to maintain their internal practices, so long as those practices are not in violation of provincial or federal law.

While contending that Gitksan and Wet'suwet'en laws prevail over provincial laws and that the laws are made by the hereditary chiefs, the plaintiffs also acknowledge that the hereditary chiefs have no mechanism for making such laws. And I refer to the evidence of Mr. Sterritt, and if I could ask you to turn to tab 94, and Mr. Sterritt has just explained what he means by sovereignty, and his assertion that the Gitksan and Wet'suwet'en have sovereignty within the land claim area and has explained that "Gitksan and Wet'suwet'en laws prevail over the laws of the province within that territory."

And starting at line 37, your lordship asked:

> THE COURT: Well, Mr. Sterritt, what do you want me to understand you mean when you say that the Gitksan and Wet'suwet'en have sovereignty and the power to make laws for the territories? Who makes the laws, the chiefs, the houses, the clans, the tribal council, the band councils, who?
> THE WITNESS: The hereditary chiefs.
> THE COURT: Each for his own territory?
> THE WITNESS: On behalf of the houses.
> THE COURT: But by that answer do you presuppose the possibility of 50 or 60 different laws within -- separate laws for each territory?
> THE WITNESS: No, there are -- based on the past

there have been -- laws have evolved over time for the Gitksan and Wet'suwet'en, and they -- they are similar laws from one house to the next. They apply throughout the territory. And in a similar way laws passed by the Gitksan and Wet'suwet'en would be common throughout the territory. And there may be unusual circumstances in a given area or situation, but those would have to be dealt with as they arise, but the laws would apply throughout the territory.

THE COURT: Well, what is the mechanism that you foresee for the making of these laws? Just hereditary chiefs would get together and make a law?

THE WITNESS: The hereditary chiefs would have to -- there might be a situation arises where a law has to be developed. In the -- they might outline the parameters for which they wish to consider that law, but in the present times I think they would resort to a secretariat of advisers, who would provide them with information based on which they would make a decision about the law that is to be incorporated.

THE COURT: Well, if, for example, they decide that there is some very choice timber that they want to log in the upper reaches of the Skeena, would the Wet'suwet'en chiefs have a say in that?

THE WITNESS: Not necessarily, but I wouldn't exclude that possibility. Similarly for the Gitksan and the Wet'suwet'en territories. They wouldn't necessarily, but it's possible that Gitksan and Wet'suwet'en chiefs, hereditary chiefs, would all be at the meeting in which they laid out the -- the general concerns and general goals and objectives that they want a secretariat to work on and to bring back and advise in terms of the details that they could make a decision on.

THE COURT: I take it there is no such mechanism in place at the moment, no secretariat or

equivalent?
THE WITNESS: Well, no.

And we say at paragraph 95 that the institution of hereditary chieftainship lacks the structure necessary to make or enforce laws over the claim area. And the lack of a decision-making process (be it of Band Councils or Hereditary chiefs) is also apparent from the unresolved disputes over estate properties.

And if I could ask you to turn to tab 95, and the preceding page of the transcript explains what is going on there, so if I could ask you to insert that in your binder. And this is Mr. Atkinson who was called by the plaintiffs to -- with respect to the estate files.

THE COURT: Yes.

MISS SIGURDSON: And at page 23439, which I've just handed up, at line five, this series of questions explains what the witness was talking about:

> Q Now, I want to take the situation then where you had property left in a will to certain people. And I understand that from time to time it would come to the attention of your staff or yourself that there were others who claimed an interest in that property through the crest system, as it is sometimes called, or the feast system, are you with me?
> A Okay.
> Q So you have the possibility, at least in theory, of two different sets of claimants, at least in theory?
> A In theory.
> Q The will says one thing but you understand that, independent of the will, there is another claim to that property?
> A Um-hmm.

And then the witness explains what he had in mind when he talked of traditional property. And starting again at line 40:

> Q All right. Well, my understanding of your practice in these situations is this: That if the various interested parties agreed on what should be done

1 with the property, then you or your
2 department or your office, would give
3 effect to that agreement?
4 A Yes.
5
6 And then turning to --
7 MR. GRANT: Well, I certainly would ask that your lordship -- if
8 my friend isn't going to read in that answer at line
9 21 to 40 that she left out, that you make a note of
10 that as well, my lord, for reference.
11 THE COURT: All right. Yes.
12 MISS SIGURDSON: And at the typed number 1, line 8:
13
14 Q But if the parties did not agree on what
15 should be done --
16
17 And I pause to remind your lordship that they are
18 dealing with what they consider traditional property,
19
20 -- then my understanding is that the
21 practice in your district was simply to
22 do nothing until the matter was resolved
23 by them?
24 A Yes, if there was no agreement of heirs
25 as to how the property should be disposed
26 of, then we tried to reach a consensus
27 and it wasn't that we did nothing, we
28 would have many, many meetings with the
29 family members to discuss this. But if
30 you are familiar with the
31 consensus-making process of decisions,
32 it's a very time-consuming, lengthy
33 process.
34
35 And on line 29:
36
37 Q That would explain, would it not, your
38 statement in paragraph 18 that you have
39 seen in your experience, lots of files
40 that were closed, lots of estate files
41 that were closed, without ever being
42 concluded in the formal sense?
43 A Yes, that was one of the reasons, yes.
44 Q Waiting around for agreement?
45 A Part of the problem was, you would have a
46 turnover in staff and so the previous
47 estates officer who had been working on

this and trying to bring consensus within a family would move on, a new estates officer would come in and gradually it would be forgotten and simply closed and put away on the shelf and their property situation never resolved.

Q And there was certainly a prospect of difficulty down the line?

A Oh, yes. There was the difficulties down the line.

And over to the next page, my lord.

A Yes, our -- I suppose you might say our oversight in not more actively pursuing the resolution of these created a number of difficulties within the community, with overlapping lots and people living in, you know, ill-defined boundaries and all that.

Q Now, could you look at the first sentence of paragraph 16 again. And here you say: "A further recognition of the Gitksan and Wet'suwet'en laws by our department was the acceptance by departmental officials of transfers of traditional property to the proper successor in the feast hall notwithstanding the fact that the property may have been referred in a will as going to another person."

My first point, then, is this: That the transfers that you speak of here, the transfers of traditional property, they would only be accepted if the persons who were apparently entitled under the will, consented?

A Yes, which they did.

Q But not in every case, because in some cases you have government files lying around for 10, 20, 30 years waiting for the parties to agree?

A Yes, and there is always all sorts of reasons why that agreement may not be reached.

An and we say that --

MR. GRANT: I just want to point out, my lord, that I think at

1 line -- the 23440 line 41, when he says, "and their
2 property situation never resolved," the context of
3 that, of course, is never resolved by D.I.A. When you
4 look at it, where he is talking about the change of
5 estates officers --
6 MISS SIGURDSON: Well -- and he also refers to the problems keep
7 popping up year after year after year.
8 And we say that's another example from the
9 government official of what they consider traditional
10 property. There was a problem and it wasn't dealt
11 with for 10, 20, 30 years.
12 THE COURT: By either system?
13 MISS SIGURDSON: That's right. Well, I probably should qualify
14 it and say primarily by the traditional system, if I
15 can call it that, because the -- Mr. Atkinson said it
16 was his policy to try to follow those rules.
17 It is submitted that the hereditary chiefs'
18 authority is directed to the preservation of cultural
19 integrity internal to the community. And in this
20 area, the authority is exercised on an ad hoc basis.
21 The municipal matters within the community are dealt
22 with by band councils acting pursuant to and under
23 guidelines issued by the federal government. The
24 proposition that the hereditary chief system is an
25 institution of exclusive authority is not maintained
26 on the evidence.
27 And in paragraphs 97 and 98, my lord, I refer to
28 oral tradition just to say that it's considered in
29 another part of the summary of argument, Part II
30 Section 3.
31 And on page 45 I continue:
32 The plaintiffs claim ownership and jurisdiction
33 over the claim area because they say they have lived
34 on the territory and have (in accordance with their
35 laws) harvested, managed and conserved the resources
36 on the territory.
37 And I should add, the clarification of that in
38 final argument I've already referred to is they claim
39 ownership based on possession.
40 The specific assertions are set out in Section 57
41 of the Statement of Claim and there they plead that
42 they have (a) lived within the territory; and (b) they
43 have harvested, managed and conserved the resources
44 within the territory; and (d) governed the territory
45 according to their laws and spiritual beliefs and
46 practices.
47 With respect to the claim -- they have lived

within the territory. We say some Gitksan and Wet'suwet'en persons live within the claim area. Most live on Reserves. Many plaintiffs live outside the claim area. Many of those who live within the claim area are recently descended from persons who came from elsewhere. And by that we refer to marriage with neighbouring peoples, non-native peoples, and adoptions. And many persons who are neither Gitksan nor Wet'suwet'en live in the claim area.

And I'll come back later to the present day possession, but I will note here that the evidence of past occupation of the claim area was considered in Part IV, Section 3(a), and Mr. Willms made a submission on that point on Friday and yesterday.

The plaintiffs assert that they governed their territory according to their laws. And the plaintiffs say that one of their most important laws with respect to territories is that resources cannot be taken from a territory without permission from the head chief of the territory. And we say that law has been repeatedly ignored.

Logging -- and I do this on a resource by resource basis. There are several instances where witnesses said permission was not sought of the head chief to log. And I note that Mr. Basil Michell, Mrs. Emma Michell, and Mr. Johnny David all gave evidence as to that respect.

With respect to hunting, if I could ask your lordship to turn to tab 104(b).

THE COURT: 104(a)?

MISS SIGURDSON: 104(b), my lord.

THE COURT: Yes.

MISS SIGURDSON: And these are some of the examples where there is evidence that witnesses have not sought permission to hunt. The first one is Walter Joseph. He is a Wet'suwet'en chief of the House of Kloum Khun. And at line 39 of page 1, he was asked:

> Q And where do you hunt, Mr. Joseph?
> A You mean for game?
> Q Yes, I mean for game.
> A Well, anywhere in Hazelton area, Telkwa, or up the Babine -- Babine Trail. That's up towards the 24 mile, eh.
> Q And that's east of Hazelton as you described to us?
> A Yes.

Q Do you know in whose territory you hunt?
A No. If you're hunting for game, you know, you can -- I can go hunt anywhere, but if you had a trap and then it's a different -- you have to have permission before you go in there.
Q I see. So you don't need to ask permission for hunting game, you just chased the game?
A No.
Q Pardon me?
A You just go wherever it takes you.

And on the next page, page 3, there is Charles Austin who was of the House of Hag wil negh. And at line 43 of page 3, he was asked:

Q And really you can hunt anywhere, can't you?
A When we're hunting big game we usually get them almost anywhere because within the territories there's no fences.

And onto the next page, the cross-examination of Mr. Austin continues at line 8:

Q Now, when you're hunting for moose you hunt all over the territories. You don't have to ask permission to go to hunt moose, do you?
A I never asked anybody in springtime when I go hunting on a saddle horse. When I get any game nobody questions me, so I don't say anything.

And the reference to Roy Morris, I had the incorrect page and didn't replace it. If you could just cross out the reference to Roy Morris in paragraph (b).

THE COURT: Yes.

MISS SIGURDSON: Thank you. And thirdly, I turn to Solomon Jack's evidence at page 5, starting at line 22:

Q Okay. Do you ask permission of that chief before you go hunting in their territory?

1 A No. We hunted on the road so we don't
2 ask their permission.
3
4 And with respect to prospecting, Mr. Wright
5 explained that permission was not sought to
6 prospect -- prospect according to the Whiteman's law.
7 With respect to purchasing land, Mr. Neil Sterritt
8 Senior explained that permission was not required to
9 purchase land.
10 For trapping, I've referred already in paragraphs
11 36 to 38 that David Gunanoot and Sylvester William
12 trapped on territories now claimed by other hereditary
13 chiefs because the Game Warden gave them permission to
14 do so.
15 And with respect to fishing, Walter Wilson gave
16 evidence in his out-of-court cross-examination that
17 chiefs would not control fishing because people relied
18 on the DFO, Department of Fisheries and Oceans,
19 permits. And Solomon Jack who held the name Gwinin
20 Nitxw, and he was -- gave a territorial affidavit and
21 was cross-examined out of court and explained he "must
22 be fishing on different chiefs' territory", but does
23 not ask permission.
24 And we say these examples also show that resource
25 use has been controlled by the provincial and federal
26 governments and that the plaintiffs complied with
27 those laws.
28 I mention Sylvester William and David Gunanoot as
29 people who trapped by "permission" of the trapline
30 registrations issued pursuant to provincial
31 legislation. And other examples of that are that:
32
33 When asked if Tommy Morris asks permission of
34 Goohlaht to have a trapline in the Honcaagh Ben
35 territory, Elsie Quaw replied, "Not after the
36 government registered them to trap.
37
38 [And] Mary Skin testified that the trapline in
39 the Skins Lake area was hers and not Goohlaht's
40 because the Game Warden had picked her family.
41
42 Charlie Austin registered a trapline in an area
43 that unbeknownst to him was in Goohlaht's
44 territory. Mr. Austin registered the line in
45 response to a letter sent by the Game Warden to
46 the Hagwilget Band Council Office seeking a
47 registrant.

And Mr. Robert Jackson Sr. said that he didn't trap full time in the territory until he was registered to do so.

Trapline registration was implemented by the Provincial government in 1926. A registered trapper (either an individual or a group or "company" of trappers) was granted the privilege of exclusive trapping rights to a designated area.

Mr. Boys, who was originally called by Canada and then he was recalled for our cross-examination, was an Indian agent -- or an Indian Superintendent of the Babine Agency in the 19 -- from 1946 to 1951, and he explained the registration process and he was asked:

> Q Can you describe the procedure which you followed when you wished to have areas within your Agency registered as trapping areas?
>
> A Well, the applicant for a trapping area would come to my office and explain the area as best he could that he would like to register and we kept in the office maps of all of the area of the Agency that were kept specifically for trapping purposes, for trapping registration purposes. And we would attempt to locate to this map the area that the applicant wished to register and then attempt to describe the area to the applicant's satisfaction. We would then have him sign an application and we would forward a tracing of the map and a description of the area together with his application to the game department in Smithers.
>
> Q What happened after that?
>
> A Well, if the application was acceptable to the game branch, they would in most cases redefine the area in a manner that was acceptable to them, perhaps to make it more easily identified and perhaps to eliminate any possible conflict with an adjoining trapline, and then they would make out amended -- an amended description and amended tracing from their maps and return that to my office for acceptance by the applicant. We would then contact the applicant and if

he accepted the amended trapline he would sign the amended application and the trapline then would be registered in his name.

And I should note that it's Exhibit 1213F, my lord.

MR. GRANT: This is, I take it, the examination-in-chief of Mr. Boys not his cross-examination in which he certainly modifies that summary.

THE COURT: Well, I think what Ms. Sigurdson said was that this was the province's cross-examination of Mr. Boys.

MISS SIGURDSON: That's correct.

MR. GRANT: He was called as their witness.

THE COURT: No. He was called by Canada.

MR. GRANT: Yeah. But he was -- the province was not entitled to cross-examine him and they recalled him.

THE COURT: Yes, yes.

MR. GRANT: Oh, I see. I understood the reference is that he was examined in chief. He was called by the province as a provincial witness on the second occasion.

THE COURT: Was he examined in chief?

MISS SIGURDSON: Yes, he was.

THE COURT: All right.

MR. GRANT: Because your lordship directed that he could not be cross-examined.

THE COURT: All right. Thank you.

MISS SIGURDSON: My lord, the 21 volumes of trapline documents marked during Mr. Brody's examination, marked as Exhibit 995-41A and other trapline documents marked throughout the course of the trial reveal a history of participation in the trapline registration system by Gitksan and Wet'suwet'en people.

Examples of early participation in the trapline registration system include the registrations marked as exhibits -- and I give the numbers there -- and several of those are included in the 21 volumes.

It is submitted that the plaintiffs and their ancestors acknowledged and acceded to the authority of the Provincial Government in this regard. The evidence of Mr. Boys, Indian agent and superintendent for the Babine Agency is apposite:

Q You have described the process of application for traplines and the participation of the applicant in that process. During your time as

Superintendent in the Babine Agency, did any person object to the authority of the Indian Government over trapping in the --

I think that's an error. Pardon me.

-- trapping in the Babine Agency so far as you can recall?

A No. I don't recall any objection.

THE COURT: What were the years of Mr. Boys' superintendence?

MISS SIGURDSON: He was in the Babine Agency, my lord, from 1946 to 1951.

THE COURT: Thank you.

MISS SIGURDSON: Mr. Steventon and Mr. Marshall of the Skeena Regional Office of the Fish and Wildlife Department gave evidence of the present trapline registration system, and that participation by the plaintiffs in the system continues.

And I leave the text to note, my lord, that in Part IV, Section 3(c), paragraphs 16 and 17 -- and that was in the submission of Mr. Willms yesterday -- it was submitted that there was a linguistic confusion between trapline and territory and that the two terms meant trapline. And you'll recall that he also submitted that the traplines were the product of the -- or as a response to the European fur trade.

And back to paragraph 113. It was suggested by Stanley Williams and has been repeated by the plaintiffs in final argument, that the plaintiffs' ancestors registered their "territories" only because government officials promised that registration would protect their territories for all purposes. And if I could ask your lordship to turn to tab 113.

MR. GRANT: I think 111, the reference to that exhibit is that 1213 instead of 1713?

MISS SIGURDSON: Yes. Thank you, Mr. Grant.

THE COURT: Where is that?

MISS SIGURDSON: In paragraph 111 below the quote of Mr. Boys, it should be Exhibit 1213F.

THE COURT: 1213?

MISS SIGURDSON: Yes.

THE COURT: Thank you.

MISS SIGURDSON: And this is the evidence of Basil Michell, and he was asked:

Q Did the game warden -- do you know, did

he approach all the hereditary chiefs about their territory?

THE INTERPRETER: Bazil said that they weren't notified when the government first came and began registering the traditional lands. He doesn't know how they knew who owned that territory. When they first registered the traplines they were told by the government that they will not be allowed to trap and this is why many of them registered their traplines.

And to page 2 of that tab, at line 30, Mr. Michell was asked this question:

Q The last time that we were talking we were talking about the registration of the traplines and I have one more question to ask before we pass on that subject.

Bazil, were you told by anyone that by registering your territory it would be protected from being further taken over by white man?

--- OFF THE RECORD DISCUSSION.

THE INTERPRETER: No.

And if I could ask you to turn to page 3, to the evidence of Mary McKenzie, and at line 6 she was asked to:

Q Describe what -- you were explaining why you registered your trapline and you said the Indian agent came around and told you you would lose the trapline. What did you understand by that?

A Well, he said that it will be just registered in the place of a trapline. Well, at that time he only said the trapline, so this is why my mother registered Xsa'an Lo'op.

Q Because she thought all that was required was to register that part where Mediik's trapline was?

A Yes.

The acceptance of the provincial trapline registration system can also be seen in the evidence on how trapline disputes were handled. When there are conflicting claims to traplines or trespassers, the plaintiffs turn to the Game Warden, or in some instances to the Indian Agent, for assistance.

For example, Roy Morris, who holds the chief name Woos, W-O-O-S, called the Game Warden about poachers and he said:

> I called the Game Warden because they deal with white people, and they were destroying the dams, beaver dams and things like that, that is why we were -- we called the Game Warden.
>
> Pete Muldoe acknowledged that he had a registered trapline to protect his interests in trapping and stated that: "If anyone sets a trap on my part territory all I have got to do is go to the Game Warden, he picks up the trap and gives it to me, whoever owns the territory".
>
> Solomon Marsden acknowledged that it is not in accordance with Gitksan law to have trespass disputes resolved by the Game Warden but that's what the chiefs, in the situation he described, chose to do.
>
> Bazil Michell reported trespassers to the Game Warden; and.
>
> Dan Michell admitted that if a trespasser would not leave when requested to do so, he would go to the Game Warden and probably take him to court.

And we say that it's not just recently that the plaintiffs have sought the assistance of the Game Warden. Thomas George, Alfred Joseph's predecessor to the name Gisdaywa, took his dispute with Matthew Sam, who was Woos, to the -- and I ask you to change Game Warden to Indian Agent -- in 1945. A dispute involving ancestors of the plaintiffs over who had rights to trap in the Nangeese Valley was taken to "court" before the Indian Agent in 1932.

And I've included several other examples of

earlier incidents where the plaintiffs' ancestors took disputes or problems to the Game Wardens or the Indian Agents over traplines.

And we say authority over trapping and other resources in the claim area is exercised by the Provincial Government. Hereditary chiefs exercise their authority, if at all, within the constraints of provincial regulation. And I ask you to turn to tab 116 and there is the evidence of Alfred Joseph starting at line 23:

> Q Well, they trap according to where they think they will get the best returns, don't they?
> A They trap where -- an area where they not use repeatedly. They can't go into an area and just stay there year after year. They would have to keep moving to replenish an area.
> Q The reason why they keep moving is that if they stayed there their trapping returns would go down?
> A Yes.
> Q Wouldn't they?
> A Yes.
> Q And they trap there because of the money?
> A Yes.
> Q And they do -- and this is all within their registered trapline, they move around within that area?
> A Yes. Yes.

And it's not only in trapping, my lord. We say that acceptance of government authority can also be seen in the logging activities carried out by the plaintiffs. Basil Michell was asked:

> Q Bazil, did you get Paul Ah'wagwus permission to take logs from the land?
> THE WITNESS: The land where the trees stood on used to be purchased from the government people, Forestry, and the logs were paid for similar to the way you pay for things in stores.

And Emma Michell, of the House of Namox, was asked:

Q You were taking poles off Gitksan territory?
A Yes. Because the Forestry was given permits out on that, or selling them.
Q Did you know the Gitksan person that owned that land that you were taking the poles off?
A They knew about it but we still took it because the Forestry was giving permission.

And we say the Gitksan and Wet'suwet'en people have continued to log under permits and licences granted by the Provincial Government. The Moricetown Band Council applied, successfully, for timber sale licences and cutting permits, and logged and, so far as the evidence goes, continues to log around the Corya and Boulder Creek area. Peter Muldoe had several Timber Sale Contracts and related permits from the Provincial Government. And, my lord, you may recall those are binders of documents on the contracts and related papers and they are not included in the yellow binder.

Thomas Wright did not ask permission to prospect, and he said:

> I knew Indian law. But it was the government that sent these prospectors out and it was only the money that I wanted, that's why I went with them.

And on re-examination, Walter Wilson, Djogaslee, acknowledged that many native persons fish pursuant to permits issued by the Department of Fisheries and Oceans. And he said in part, and the passage I would commend to your lordship in its entirety, but this part is:

> What can we do when Fisheries do that, issuing out permits to everyone. As long as you have dark skin and you ask for a permit, they will write it out...
>
> We can't control it now, because high chief ask a certain person, "What are you doing in my fishing hole? You have no rights there", and this person pulls out his wallet and give me a

1 permit. "Fishery give me a permit to fish any
2 place on the river." High chief got nothing to
3 say."
4
5 MR. GRANT: Well, my friend -- that was an answer that -- that
6 all was -- this is taken out of context and my friend,
7 even in the extract, has only put in one page which is
8 a part of the answer, it's not the entire answer, and
9 I would ask if at this tab my friend would provide at
10 least the entire answer from which these two
11 paragraphs were taken out. I think it's at least two
12 and a half or three pages.
13 MISS SIGURDSON: If my friends undertake to do the same job for
14 their arguement I'll do that, but I have the reference
15 for your lordship if that's a concern and I do commend
16 the whole answer that he gave.
17 THE COURT: And you've shown the three dots to show that it's
18 not complete.
19 MR. GRANT: But when you go to the tab, my lord -- my friends
20 have chosen a process of using the yellow binders and
21 when you go to the yellow binder, the complete answer
22 isn't there, and I think my friend should put in the
23 complete answer. That's how they've elected to do
24 this.
25 MISS SIGURDSON: That's right, my lord.
26 THE COURT: What is here?
27 MISS SIGURDSON: It's one page from Exhibit 602A which is the
28 transcript of his out-of-court cross-examination and
29 re-examination.
30 THE COURT: Yes.
31 MR. GRANT: I can arrange to copy those extra pages for the
32 answer that my friend wants, that's no problem.
33 THE COURT: You can do that if you wish, but I have noted it
34 here and I can look up the evidence if the plaintiffs
35 feel it necessary to do so.
36 MISS SIGURDSON: We carry on at paragraph 123 and we note that
37 Exhibits 984-B to E -- and those are the volumes of
38 fishing permits your lordship may recall -- and
39 according to the count of plaintiffs' counsel, there
40 contain some 1,885 separate permits. Counsel for the
41 plaintiffs admitted that the licensees in 95 to 99
42 percent of the permits issued from the Hazelton office
43 would be Gitksan or Wet'suwet'en persons. And while
44 another percentage may apply to those issued from the
45 other offices, we say it is clear that many Gitksan
46 and Wet'suwet'en persons had fishing permits.
47 And since the imposition of provincial and

1 federal laws for trapping, fishing, hunting, logging,
2 and prospecting, the plaintiffs have complied with
3 those laws.
4 On occasion compliance was grudging, but it was
5 compliance nonetheless. Evidence of noncompliance,
6 such as road blockades, for the purpose of furthering
7 their claims made in this litigation is self-serving
8 and of no evidentiary value to your lordship.
9 And we conclude by saying the evidence of the
10 plaintiffs with respect to ownership and jurisdiction
11 postulates the existence of rules which in almost
12 every instance are either contradicted or qualified by
13 the exceptions to the rules in the evidence, and the
14 result is neither self-government nor resource
15 management.
16 Now, I've added an addendum to respond to the
17 point of possession as the basis for ownership and
18 continuing ownership.
19 And we say that during the course of their
20 argument, the plaintiffs asserted that their ownership
21 arises out of possession. Other factors, such as the
22 feast, are "an integral part of how they are on the
23 land" and "round out the meaning" of the ownership
24 that they claim. But in other words, on the
25 plaintiffs' construction of their case, they contend
26 that possession is a necessary, albeit not exclusive
27 basis of their claim for ownership. And it may be
28 better said that possession is a factual pre-condition
29 of their claim.
30 The exclusive possession required at law for a
31 claim of ownership has been considered in Part III,
32 Section 4. And the nature of the occupation of the
33 claim areas as revealed in the historical and
34 archaeological record was addressed in Part IV,
35 Sections 3(a) and 3(b).
36 But as the plaintiffs claim continuing ownership,
37 it is necessary to consider the extent of the
38 plaintiffs' present day possession of the claim area.
39 And we note that the present day possession of
40 village sites that have been set aside as reserves are
41 not in issue.
42 We say the claim to ownership made in these
43 proceedings is that each house owns discrete
44 territory, and this was clarified in their -- the
45 plaintiffs' last day of their final argument. And
46 your lordship said:
47

THE COURT: So then you would say, yes, you would want a separate declaration for each chief and each house as to ownership?

And Mr. Grant explained:

MR. GRANT: Yes, as to ownership. But I say it can be dealt with as two declarations. One for the Gitksan and one for the Wet'suwet'en. And the delineation of the houses is set out on 646 of 9A and 9B.

And we say that the assertion of exclusive possession by house members of specific house territories is not supported by the weight of the evidence.

The evidence reveals that many resources are used in common. And the plaintiffs have acknowledged in argument that there are several common-use areas in the Wet'suwet'en territories. For example, areas that are abundant in goat, ground hog, caribou, berries and other plants, or where there are minerals, are open to all. Johnny David described how people from Kitselas, Babine Lake, the Skeena, Hazelton and Moricetown would all come to the Kilwoneetz area -- and my lord, that's an irregular area west of Moricetown and an area now claimed, I think, by Hag wil negh -- for berries and fish. Witnesses testify that they hunted, trapped, prospected, logged, fished and purchased lands on territories claimed by other chiefs, and they did so without permission of the claimant house chief. And I've made submissions and given your lordship some examples of that this morning. Therefore, we say that as amongst the Gitksan and Wet'suwet'en themselves, house members do not exercise exclusive possession as against members of other houses.

Nor do house members exercise exclusive possession against members of the neighbouring nations. Cheslatta, Nutseni and Carrier-Sekanni people live in the reserves in the southern portion of the claim area. And my lord, I cite these as examples. There are many -- all of these types of things. Cheslatta persons such as the territorial affiants Elizabeth Jack, Thomas K. Morris and Elsie Quaw have travelled and trapped or otherwise used the resources on the territories they describe in their affidavits. In the Petition of Right, the Kitwancool

chief Yak Yak claimed a fishing site in the present claim area. And Mr. Brody, amongst others, described the overlapping claims in the Bear Lake region.

And since the arrival of Europeans in the claim area, the plaintiffs and their ancestors have not exercised exclusive possession against the settlers. For example, Mr. Shelford described how he and his father fished, hunted and picked berries in the same area as, and often with, Jimmy Andrews. Mrs. Peden described how her family hunted, trapped and fished and picked berries in the Francois Lake area since the 1930's. Dr. Steciw described his guiding expeditions through the central and northern part of the claim area. And Mr. Fletcher described his trapping and hunting activities in the Driftwood Creek area. And Dr. Steciw and Mr. Tourand and Mr. Fletcher saw little sign of native hunting or trapping during their travels.

It is this defendant's submission that activities such as hunting, fishing (off reserve) and berry-gathering are participated in by all persons, native and non-native, in the claim area on a non-exclusive basis.

Trapping by both native and non-native trappers is done on traplines registered pursuant to provincial legislation. Registered trappers are granted exclusive privileges to trap on unoccupied Crown lands within their registered areas. This privilege of "exclusive use" is the product of provincial legislation and is enforced by provincial regulation. The plaintiffs and others have applied for and enjoyed the benefits of the trapline registration system.

And we note that registration is evidence of a privileged use but is not evidence of actual use.

And if I could ask that you insert these in the yellow binder, my lord, I've given a few examples of that to clarify what I'm saying.

THE COURT: At the end?

MISS SIGURDSON: Yes, my lord. So by way of example we note that Mary McKenzie, Gyolugyet, has a registered trapline, and that is found at page 1 of the new tab 137.

THE COURT: Yes.

MR. GRANT: Is that one where the description was pasted on top or is that not like that? I can't tell from this photocopy.

MISS SIGURDSON: I don't recall, my lord.

1 And at page 2 of the yellow binder, Mrs. McKenzie
2 was asked at line 37:
3
4 Q And there's a trapline registered in your
5 name isn't there?
6 A Yes.
7 Q But you've never trapped there yourself?
8 A No, never been there.
9
10 And that is Exhibit 10, that trapline.
11 And indeed, at page 4 of the material I've just
12 given you, Mrs. McKenzie was asked:
13
14 Q Can you explain to the Court why you have
15 not been out in Gyolugyet's territory
16 personally?
17 THE COURT: Well, I'm sorry, is that true that
18 you have never been on the territory?
19 THE WITNESS: No, I have never been there, but my
20 husband went there and I am familiar with
21 the names, and especially my husband
22 there, he draw a sketch or a map for us.
23
24 So there is an example of the plaintiff -- of a
25 plaintiff or chief having registered a trapline but
26 never having been on the territory.
27 And Vernon Smith -- and I won't direct you to
28 this, my lord -- recognized that Dora Morrison had a
29 registered trapline at Fiddler Creek, but so far as he
30 was aware he didn't think she had ever been there.
31 In any event, there is an abundance of evidence
32 of witnesses who said that the last time they trapped
33 was in the early 1950's.
34 And by way of example, at page 6 is Mr.
35 Morrison's evidence, and at line 42 where he was
36 asked:
37
38 Q I think you said that you were last on
39 the territory at Xsi Maahla Saa Giiblax
40 or the northern Waiget territory in 1952?
41 A Yes.
42
43 THE COURT: Where is that, please?
44 MISS SIGURDSON: That's at page 6 starting at line 42, my lord.
45 THE COURT: Page 6? Oh, of this tab?
46 MISS SIGURDSON: In the new material.
47 THE COURT: Yes.

MR. GRANT: I think, of course, Mr. Morrison did give evidence that he continued to trap after 1952 but not at this specific place.
THE COURT: Yes.
MISS SIGURDSON: That's correct. He stopped trapping in many areas in the 1950's and probably -- the reason may have been put by Mr. Richard Benson at page 7 of the new material. And at line 42, he was asked on his direct examination:

> Q Okay. Now, can you remember what time -- when you last trapped out on Gyolugyet's territory? What was the last year that you were there?
> A The last time I was there is '51.
> Q Okay. And did you remember why you stopped going out there, why did you stop trapping that year?
> A Well, see, the reason why I stopped there, you know, because, you see, the Hudson Bay Company, I got stuff to take out there like groceries and things like that, and I was out there all winter. Oh, gosh, I just about went through the ground when I got home. The price of fur went down so low there is -- I just actually get nothing for all the furs that I got. So that's the reason why I stopped trapping -- everybody, not just me, the whole works of us.

THE COURT: "Of them".
MISS SIGURDSON: Thank you, "of them".
And so we say we find that evidence is repeated through the course of many witnesses' evidence that the trapping did virtually stop in the 1950's when the prices fell. And so people may still have registered traplines but that does not mean continuing use of those traplines or continuing possession of those areas, if I can put it that way.
Therefore, it is submitted that the plaintiffs have not shown that "each chief and each house" enjoys a continuing, exclusive possession of territory sufficient for a declaration of continuing ownership of what in total amounts to 22,000 square miles of land now claimed. The only form of exclusive use shown to have been exercised by certain of the

1 plaintiffs is that afforded by provincial legislation
2 to registered trappers.
3 And those are my submissions, my lord.
4 THE COURT: Thank you.
5 MR. WILLMS: My lord, I have one short point before -- we might,
6 perhaps, take the break a bit early to get organized
7 for the next section.
8 THE COURT: I can't. I can take a long break but I've made --
9 I've made a commitment to deal with a matter at eleven
10 o'clock.
11 MR. WILLMS: Yes. Well, I'm suggesting that we break before
12 11:00.
13 THE COURT: Well, I can do that, but I can't come back before
14 11:15.
15 MR. WILLMS: That would be fine.
16 THE COURT: That means a longer break.
17 MR. WILLMS: Yes.
18 THE COURT: Which we are all against.
19 MR. WILLMS: Yes. My lord, the point that I would like to come
20 back to is in Section 3(a).
21 THE COURT: Roman three?
22 MR. WILLMS: No, sorry. Roman four, Section 3(a).
23 THE COURT: Yes?
24 MR. WILLMS: And you'll recall, my lord, on page 21, paragraph
25 33, I had made a submission about Downie travelling
26 through the area, and that is where Mr. Rush pointed
27 out that the -- a handwritten -- yes, and I'll deal
28 with that.
29 Mr. Rush had pointed out that the typed
30 version -- which is at the tab of the yellow book --
31 didn't include the words "village at the forks",
32 whereas a handwritten version mentioned the "village
33 at the forks". And I have here, my lord, and this can
34 just be -- at the present time, if your lordship
35 wouldn't mind either making a note -- this is the
36 handwritten version that was reproduced in the typed
37 version, and this is the version from the Colonial
38 Office. Now, the reason why I don't ask that your
39 lordship simply insert it in the yellow binder at the
40 appropriate place is it's not an exhibit in these
41 proceedings. And Mr. Rush was here, and of course I
42 want to know whether Mr. Rush has got any
43 difficulties, and I've handed my friend a copy of
44 this.
45 THE COURT: Yes.
46 MR. WILLMS: But that copy which is in Downie's handwriting is
47 the version that went to the Colonial Office and was

reprinted in the typed version. So the version that Mr. Rush referred to, which is an exhibit in the proceeding, the other handwritten version, they are both in Downie's writing, in Downie's hand. One is from the public -- they are both from the Public Archives of British Columbia but this one was the one that went to the Colonial Office.

THE COURT: And the typed copy is what exhibit number?

MR. WILLMS: The typed copy is at Exhibit 1174-1.

THE COURT: And it's -- and what tab is it, do you know, in which volume of the yellow?

MR. WILLMS: Two will be in tab 33.

THE COURT: Of which volume of the yellow books?

MR. WILLMS: Volume 3 -- I think it's volume 3, my lord, of the yellow book.

THE COURT: And it would be tab?

MR. WILLMS: Tab 33.

MR. GRANT: The problem with my friend's proposition here, my lord, is this: is that I think --

MR. WILLMS: Oh, I don't need to deal with it now, my lord. I'm just alerting my friends to this and Mr. Rush can speak to it, if he has got any objection to it, we can speak to it at the time. Perhaps Mr. Rush has no objection to it.

MR. GRANT: Well, my friend shouldn't tender it until I have a chance to talk to Mr. Rush about this matter, my lord.

THE COURT: He has asked me not to put it in the books.

MR. GRANT: Oh, he is not tendering it. He said that he would give us an opportunity to discuss this out of court and then he stood up and now he has dealt with it, because I think there is a serious -- potentially a serious problem. Maybe there isn't at all, but I don't know why we are going through this process now.

MR. WILLMS: Well, my lord, it's simply so that my friends have ample notice of the submission that I am going to make and perhaps Mr. Rush will have no objection when he reads this document and sees the hand and traces it line for line. He can see it traced into the printed version, and perhaps Mr. Rush will then say, "I have no objection." Perhaps he does, and that's why I'm just suggesting, my lord, it needn't go in the yellow book now, but it is the Colonial Office version from Downie.

THE COURT: I'll leave it just loose on my table here and we'll hear about it further in due course, I guess. All right. Do you want to adjourn now?

MR. WILLMS: Yes, my lord.

THE COURT: All right. I'll be back as soon as I can.
THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED AT 10:55 A.M.)

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

_____
Toni Kerekes,
Official Reporter,
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Mackenzie.
5 MR. MACKENZIE: Thank you, my lord. My lord, I have handed up
6 an addendum.
7 THE COURT: Yes.
8 MR. MACKENZIE: Which, as it says, is an addendum to Section IV,
9 part 5(b).
10 THE COURT: Yes.
11 MR. MACKENZIE: So that can be inserted just ahead of part IV,
12 Section 5(b) in your lordship's argument.
13 THE COURT: Before 5(b)?
14 MR. MACKENZIE: Yes, my lord. At general comments on boundary
15 and territorial evidence, my lord.
16 THE COURT: Yes. All right.
17 MR. MACKENZIE: I have also handed up to your lordship Volume 10
18 of the yellow binders which contains the source
19 documents and references.
20 THE COURT: How long do you expect to detain us this afternoon,
21 Mr. Mackenzie?
22 MR. MACKENZIE: My lord, as I understand it, we are scheduled to
23 sit until 4:30 today.
24 THE COURT: Yes. All right.
25 MR. MACKENZIE: That is our intention. I may not be finishing
26 my submissions today, but as part of the ongoing
27 schedule arrangements for the defendant's case.
28 THE COURT: Yes. All right.
29 MR. MACKENZIE: I am handing up Section IV to go in the case
30 authorities. This will eventually go in the
31 defendant's case authorities, my lord. But I would
32 ask your lordship to keep it out because I will be
33 referring to it this morning as an authority.
34 THE COURT: I am not sure what you mean by your case
35 authorities. I have lost track. Oh, that's the grey
36 books?
37 MR. MACKENZIE: Yes, my lord.
38 THE COURT: All right.
39 MR. MACKENZIE: My lord, I take your lordship to the table of
40 contents at Part IV, Section 5 of the defendant
41 province's argument. That's the very beginning.
42 THE COURT: Yes.
43 MR. MACKENZIE: That is the subject of my submissions, my lord,
44 the extent and significance of boundaries. And in
45 that table of contents is set out the general areas
46 that I propose to cover in these submissions starting
47 with a general introduction, my lord, and general

comments on boundary and territorial evidence.

And in that general section, part (b), I will be discussing reputation evidence. And then, my lord, at Section 5(c) is set out chronology of the territorial evidence. And I don't propose to go over that in detail, but I will refer your lordship to that. Part (d) of this, or Section (d) of the submissions deals with territorial affidavits and a discussion of those affidavits in general. Part (e) then goes into the question of traplines and their relationship to boundaries. Part (f) is overlapping claims. And there is a substantial appendix at part (f) not noted in the table of contents. Mr. Willms will deal with that subject.

And then part (g) is a detailed analysis of examples of the territorial evidence. There are five examples given in these materials. I will be concentrating on Slamgeesh Lake which is C in that list. And if your lordship might note now for convenience under that last section, I will give your lordship the page references for each of those subsections. So Gyolugyet, my lord, which is subsection A is page 1. Antgulilbix South which is B would be page 13. And Slamgeesh Lake which is C is page 24. And Samooh, Tatsa Lake is page 62. And the Madeek, Buck Creek is page 81. All within that subsection G.

Now, my lord, I pass on now to the general introduction of this topic. In the Statement of Claim, my lord, paragraphs 56 and 56A, the Plaintiffs assert that since time immemorial they have owned and exercised jurisdiction over lands delineated by the boundaries on Exhibits 646-9A and 646-9B. And that is the territory I referred to in the Statement of Claim. And we have a map of the 9A and 9B set out before you, my lord. And I will be referring to that in some detail in these remarks.

In section 2, paragraph 2, I note in the Statement of Defence in paragraph 8 and 8A the Province denies the allegations and at paragraphs 56 and 56A. And this general denial includes a denial of the boundaries. And the territory within those boundaries is referred to in the Province's submission as the claim area, and that is the way in which it will be

1 referred to in these submissions.
2
3 My lord, in paragraph 3 I note the importance of
4 boundaries for the Plaintiffs' case. And I don't
5 think it is necessary to go into detail. The
6 Plaintiffs will agree that this case is about land.
7 And your lordship has made that very clear in your
8 lordship's comments throughout the Plaintiffs'
9 arguments that your lordship understands the land
10 aspect of this.
11
12 I have a digression, my lord, related to paragraph
13 3. I direct your lordship to the claim area 9A and
14 9B. Your lordship has seen a lot of that. But that
15 is a mosaic of perfectly interlocking territories. It
16 is said to be based upon precise detailed boundary
17 descriptions contained in the territorial affidavits.
18 My lord, this continues, these remarks related to
19 paragraph 3. This case differs from previous
20 aboriginal title cases in this respect, no attempt was
21 made in previous cases to prove boundaries with such
22 precision.
23
24 In the Calder case there was an agreement between
25 counsel on the territory covered. It did not arise as
26 an issue. In Baker Lake the federal government
27 admitted the boundaries of the territory. In Bear
28 Lake there was little or no discussion of boundaries
29 with such precision. And in Milirrpum boundaries were
30 acknowledged to be vague and did not constitute a
31 subject of extended discussion by Mr. Justice
32 Blackburn.
33 THE COURT: That was only about 35 square miles, wasn't it?
34 MR. MACKENZIE: Yes, my lord. In the Milirrpum case it was the
35 Gove, G-O-V-E, Peninsula which is the subject of the
36 claim resulting from, as I understand Mr. Justice
37 Blackburn's comments, permits which had been issued to
38 mining companies in that area.
39
40 And continuing this point, my lord, in this case,
41 in the case at bar, the Plaintiffs have assumed the
42 burden of proof of all these boundaries in the
43 Statement of Claim, particularily paragraph 57, and
44 more particularily paragraph 57G.
45
46 Carrying on to paragraph 4, my lord. On the basis
47 of the evidence, many, if not most, of the chiefs are

not familiar with these precise territorial boundaries. And I note as an example here, my lord, Mary Johnson in her evidence identified maps which conflict with the boundaries shown on map 9A. That is discussed in detail in these submissions at Section 5(g), pages 13 to 23.

THE COURT: Of Roman IV?

MR. MACKENZIE: Yes, my lord.

THE COURT: You'll be coming to that?

MR. MACKENZIE: I am not going to be going through that in detail in these oral submissions, my lord.

THE COURT: 5(g)?

MR. MACKENZIE: Yes, my lord, pages 13 to 23.

THE COURT: What is the reference to page 220, page 15993?

MR. MACKENZIE: That is the answers of Marvin George on cross-examination to Mr. Willms' comments. And that's at tab 4.

THE COURT: That's all I need to know.

MR. MACKENZIE: And that relates to the point that many of the affidavits are not sworn by the hereditary chiefs who claim the territories.

THE COURT: Thank you.

MR. MACKENZIE: And I give examples of Pete Muldoe who spoke about several territories of which he was not the hereditary chief. Walter Blackwater spoke about many territories which were not claimed by his house. And on and on through the evidence.

MR. GRANT: My lord, I would ask that you make a note to look at the reference because although the answer of Mr. George does contain the proposition set out by my friend, there is a further explanation by Mr. George in the answer at that tab 4, line 24 to 30.

THE COURT: Thank you.

MR. MACKENZIE: My lord, it is submitted that the chiefs called as witnesses in this trial did not know the precise boundaries of the territories which were claimed. On the evidence it is questionable whether these boundaries as set out in the territorial affidavits and on maps 9A and 9B in fact exist or existed.

So far as the evidence at trial goes, my lord, we submit that these precise and contiguous boundaries owe more to the industry of Neil J. Sterritt and Marvin F. George than to the independent recollection of the lay witnesses. It is submitted that Mr. Sterritt and the other researchers collected much conflicting information from many informants, in

addition to territorial affiants, as to ownership and Indian names for geographical features within the territories.

And I add a line here, my lord, in the face of this conflicting opinion evidence, the information was in our submission rationalized and transferred to working maps by Mr. Sterritt and other researchers. And I will get into that in detail, but an example of that will be the Slamgeesh area and the research that led up to the production of maps for that area. Mr. George took the working maps, amended them and then prepared composite maps of the area. My lord, it was these composite maps which went to Mr. Skoda and became the foundation, in our submission, of maps 9A and 9B.

It is submitted, therefore, that the working maps with some subsequent amendments are the true basis for maps 9A and 9B. To summarize, if these working maps are deficient, it is submitted that maps 9A and 9B have no foundation in admissible, reliable evidence. If maps 9A, I add here, my lord, if maps 9A and 9B are based on the territorial affidavits as alleged, and if the territorial affidavits are deficient, maps 9A and 9B have no foundation.

Now, paragraph 6 and 7, my lord, I refer to the Baker Lake case. That reference to Baker Lake should be after paragraph 6. And your lordship is familiar with the requirement in Baker Lake that the plaintiffs to establish aboriginal title in that case, not the ownership and jurisdiction, must prove that their ancestors exclusively occupied a specific territory. And the Plaintiffs, of course, have pleaded that exclusive occupation, I am adding to paragraph 6 here, my lord, as against other aboriginal peoples.

And carrying on in paragraph 7, my lord. I have dealt with the first sentence on the burden here. The boundaries, I say, are of fundamental importance to the Plaintiffs' claim whether or not one accepts the Baker Lake criteria. And I add, my lord, exclusive jurisdiction, exclusive ownership requires proof of precise boundaries in the Plaintiffs' strategy, unlike the more general claims in the other cases as I have earlier commented.

Now, my lord, I submit that without reliable evidence of all house boundaries, the Plaintiffs' claim must fail. This is paragraph 8.

Carrying on at paragraph 9 with my argument, my lord. And I note in paragraph 9, as I have already indicated, my lord, that this is fundamentally a claim for territory. And without a defined territory there can be neither ownership nor jurisdiction. The Plaintiffs have taken the position that the houses and their territories are inextricably linked. I refer to Dr. Daly's evidence.

THE COURT: That means land base, not landed?

MR. MACKENZIE: Yes, my lord. That was the position repeated in Plaintiffs' argument by counsel, my lord.

Paragraph 10, my lord, I think the Plaintiffs' counsel would agree that the fundamental element of the social structure alleged is the House. And the reference there, my lord, should be transcript 324, page 24606, lines 12 to 14. That's Mr. Grant's argument.

MR. GRANT: Instead of that?

MR. MACKENZIE: Yes. My lord, carrying on to the end of paragraph 10, our submission is that to establish a "hole" or a land for which there is no evidence of claims in the territory claimed is to find that that House claimed in that territory does not exist on the Plaintiffs' theory.

Paragraph 11, my lord, I carry on with this concept of the every House claiming a specific and identifiable territory. And Ms. Sigurdson dealt with that. And Mr. Grant dealt with that in his argument.

And in paragraph 12, my lord, I point out again, the Plaintiffs have provided witnesses for every territory. I have dealt with paragraph 13, my lord. Because of the mosaic character of this claim, all the boundaries are interrelated in our submission.

Carrying on with paragraph 14, the Plaintiffs purport to distinguish between "internal" and "external" boundaries. But in our submission all boundaries must be are important on the Plaintiffs' theory. And we have dealt with the concepts in

1 paragraph 14, my lord. Pull one territory in our
2 submission is to lead to the collapse of all
3 surrounding territory. That is the metaphor used as
4 pulling one thread and the fabric of the structure
5 unravels.
6
7 And so concluding with paragraph 15, my lord, as a
8 result of this analysis, our submission is that it is
9 not necessary to analyze every territory if it can be
10 shown, as I say in paragraph 15, serious deficiencies
11 for the boundaries of several territories or the way
12 that the Plaintiff has attempted to prove the case,
13 all territories in the structure must inevitably
14 follow.
15
16 Finally, my lord, in our submission this project
17 of territorial definition by map and affidavit conveys
18 a misleading picture of the way territorial
19 information is known and used by the Plaintiffs. What
20 we have here is a jigsaw puzzle. In fact, the
21 evidence shows that the world of the Plaintiffs was
22 lines and nodes and traplines and valleys.
23
24 Carrying on to general comments on the evidence,
25 my lord, in subsection 5(b) of this part. I have
26 handed your lordship an addendum. I refer before I
27 get to the addendum to paragraph 1 of section 5(b).
28 As your lordship has indicated, all the boundary
29 evidence adduced by the Plaintiffs in this case is --
30 your lordship may not have dealt with this. Your
31 lordship dealt with the importance of territorial
32 evidence. In this case most evidence is hearsay
33 evidence. The only basis on which it can be admitted
34 is as reputation evidence, an exception to the hearsay
35 rule.
36
37 And, my lord, I am handing up an excerpt from your
38 lordship's reasons for judgment in July 1987. And
39 that is now reported. If your lordship would make a
40 note at paragraph 2 and section 5(b) at 1987.
41 THE COURT: Are you in the addendum or 5(b)?
42 MR. MACKENZIE: I'm sorry, my lord, I am in section 5(b). I am
43 starting paragraphs 1 and 2 before I get into the
44 addendum.
45 THE COURT: Where does 5(b) start?
46 MR. MACKENZIE: It is just after the addendum which your
47 lordship has inserted.

THE COURT: How long is the addendum?
MR. MACKENZIE: 16 pages, my lord.
THE COURT: I'm having some trouble, Mr. Mackenzie. You're in Roman IV, 5(b)?
MR. MACKENZIE: Yes, my lord.
THE COURT: Paragraph?
MR. MACKENZIE: Paragraph 1. I have just run over paragraph 1. I am referring to paragraph 2, my lord.
THE COURT: Yes, all right.
MR. MACKENZIE: My lord, what you have in your binder are the unreported reasons at pages 13 to 17 following this paragraph 2. I have handed up to your lordship the reported reasons, pages 341 to 343. Does your lordship have that?
THE COURT: Yes.
MR. MACKENZIE: Those should be substituted for the unreported reasons, my lord.
THE COURT: This is just a part of the judgment?
MR. MACKENZIE: Yes, my lord.
THE COURT: What is the citation?
MR. MACKENZIE: The citation is 1987, my lord, 15 B.C.L.R. (2), page 326. That is in the case authorities as well, the whole judgment.
THE COURT: All right.
MR. MACKENZIE: My lord, I wish to direct your lordship's attention now to this question of reputation evidence. And your lordship dealt with that at pages 341 to 343 of your reasons for judgment. And may I direct your lordship to some comments. And before I get into the addendum which deals with this in more detail, on page 341 of the reasons for judgment, my lord, you set out the common law rule. And you note that:

> "Declarations made by deceased persons of competent knowledge, ante, A-N-T-E, litem motam, are admissible in proof of ancient rights of a public or general nature."

And I will be concentrating on that point ante litem motam, my lord. And further down when your lordship continues with this excerpt from Phipson. Your lordship comments that:

> "The grounds of admission are (1) death; and (2) necessity."

I will be concentrating on that question of death as

1 well, my lord, as an essential requisite.
2
3 And in these reasons your lordship follows Mr.
4 Justice Blackburn in holding that:
5
6 "Declaration by deceased persons relating to
7 interest in land or boundaries or house
8 territories is a declaration about a public
9 right".
10
11 As was found by Mr. Justice Blackburn, on page 342
12 your lordship cites the Milirrpum case. And in the
13 third paragraph on that page 342 your lordship
14 concludes that reputations about interests and lands
15 and boundaries are admissible in this case, the case
16 at bar.
17
18 Another point I wish to draw your lordship's
19 attention to on page 342 of the reasons is the second
20 last paragraph which deals with the admissibility of
21 evidence questioning and casting doubt on the
22 reputation. That will be mentioned again in some
23 detail in the section on overlap evidence. And your
24 lordship dealt with that subject again in other
25 rulings on that topic. This is also relevant to the
26 point I will be making in this argument on reputation
27 about the conflicting claims that abound in the
28 evidence. There are many claims such as those -- such
29 as that to which your lordship refers in the case of
30 Mrs. Johnson. And that will go to the point about
31 consensus which I submit is another basic element of
32 reputation evidence admissibility.
33
34 Referring your lordship to page 343 of your
35 lordship's reasons, at the end of the first paragraph
36 on page 343 your lordship discusses community
37 reputation. And your lordship says:
38
39 "...it is important to remember that the
40 question is not, "What is the reputation in the
41 community?" as such a reputation may not be
42 based on grounds (declarations by deceased
43 persons) which alone make the evidence
44 admissible."
45
46 I would ask your lordship to make a note there because
47 that will be an important point to which I will refer

in my argument on reputation.
THE COURT: Where is this passage that you have just referred to?
MR. MACKENZIE: Page 343, my lord.
THE COURT: Yes.
MR. MACKENZIE: Of your lordship's reasons at the end of the first paragraph. Does your lordship have that reference?
THE COURT: The end of the first full paragraph?
MR. MACKENZIE: Yes, my lord.

> "But it is important to remember, my lord, that the question is not, "What is the reputation in the community?"

Does your lordship have that reference?
THE COURT: No. The end of the first full paragraph?
MR. MACKENZIE: My lord, it is the end of the first full paragraph at the top of the page.
THE COURT: Yes, I have it now.
MR. MACKENZIE: Sorry, my lord. My lord, I was asking your lordship to note that passage because I will refer to it as an important point in dealing with the territorial affidavits. I will be submitting, my lord, that the evidence does not show clearly that the declarations in the affidavits are the only evidence or the only information upon which the witnesses rely. What I am saying, my lord, is that in our submission there will be living persons as well who contribute to the information. And so the analogy will be exactly the same as your lordship's point about community evidence.

And finally, my lord, referring to the second full -- the first full paragraph on page 343. Your lordship finds that -- your lordship states that:

> "...I cannot find support for the admissibility of declarations made by living or deceased persons about specific use made of the territories claimed by the plaintiffs."

My lord, I now will refer to the addendum to section 5(b), page 1. And my lord, this is an argument on admissibility. And the references that I make in this argument are set out in the yellow binder, volume 10. At the pink tab called addendum which follows Roman

1 Iv, subparagraph 5(b), page 7-2. Does your lordship
2 have a pink tab saying addendum?
3 THE COURT: What tab number?
4 MR. MACKENZIE: 5(b) page 7-2, my lord. Do you have is that?
5 THE COURT: I only have tab 5. I don't have 5(b).
6 MR. MACKENZIE: Does your lordship have Roman IV?
7 THE COURT: Wait a minute. I think I have the addendum.
8 MR. MACKENZIE: Yes, my lord. It should be a pink tab addendum.
9 Does your lordship have that?
10 THE COURT: No.
11 MR. MACKENZIE: Does your lordship have Roman IV,5(b) page 7-2?
12 THE COURT: This print is so small I can barely read it. I have
13 5(a)-5.
14 MR. MACKENZIE: And then it should go on to 5(b), my lord.
15 THE COURT: My next tab is 5(a)-7.
16 MR. MACKENZIE: Then you carry on to the end of the 5(a) until
17 you get to the 5(b).
18 THE COURT: All right. 5(b) and what?
19 MR. MACKENZIE: Carry on in 5(b) until you get to page 7-2, my
20 lord.
21 THE COURT: All right. I'm getting close.
22 MR. MACKENZIE: And the next tab should be addendum, my lord.
23 THE COURT: I have got an addendum.
24 MR. MACKENZIE: That's right, my lord.
25 THE COURT: Now where do I go?
26 MR. MACKENZIE: Now, my lord, paragraph 1. It says 1 and 4.
27 Now, these tabs now relate to the addendum that we are
28 dealing with now, my lord.
29 THE COURT: But the first one after the addendum is --
30 MR. MACKENZIE: It should say paragraph 1 and 4, my lord.
31 THE COURT: 1 and 4?
32 MR. MACKENZIE: Yes, my lord.
33 THE COURT: In that tab?
34 MR. MACKENZIE: Yes, my lord.
35 THE COURT: All right.
36 MR. MACKENZIE: That starts the references now, my lord, on the
37 addendum. And I will be referring your lordship to
38 those references.
39 THE COURT: All right.
40 MR. MACKENZIE: Does your lordship have the addendum entitled
41 reputation evidence, my lord, in your argument?
42 THE COURT: Yes.
43 MR. MACKENZIE: Thank you, my lord. I am going to deal with
44 that argument now, my lord. My lord, an example of
45 the hearsay evidence which is sought to be admitted by
46 the Plaintiffs is that contained in Walter
47 Blackwater's affidavit Exhibit 605, paragraphs 39, 40,

1 43 and 44. Those excerpts are at the tab to which I
2 have just referred your lordship. If your lordship
3 will go to page 2. If your lordship can see the page
4 numbers. They are at the bottom right-hand corner.
5 THE COURT: Yes.
6 MR. MACKENZIE: Paragraph 38 starts off Mr. Blackwater's
7 testimony about the Slamgeesh area. Paragraph 39, my
8 lord, Mr. Blackwater indicates deceased informants.
9 He names them starting with Dawamuxw, Moses Stevens.
10 Does your lordship see that?
11 THE COURT: Yes.
12 MR. MACKENZIE: And I will be referring to Moses Stevens again
13 in some detail. And then carrying on, my lord, the
14 next one is Asgii, A-S-G-I-I, that's Ester Stevens.
15 Does your lordship have that?
16 THE COURT: Yes.
17 MR. MACKENZIE: And the next one is Mary Blackwater. And then
18 Charles Stevens. And, finally, Jimmy Blackwater. And
19 I will refer to all of those people, my lord. Now,
20 the final sentence in that paragraph, my lord, is:
21
22 "They told me this territory belongs to Gwinin
23 Nitxw."
24
25 Does your lordship see that reference?
26 THE COURT: Yes.
27 MR. MACKENZIE: Now, my lord, that is a classic reputation
28 statement such as the kind discussed in the Milirrpum
29 case by Mr. Justice Blackburn.
30 THE COURT: I would have thought that was not a reputation
31 statement.
32 MR. MACKENZIE: Well, my lord --
33 THE COURT: You say it is?
34 MR. MACKENZIE: Yes, my lord. I say that that is alleged to be.
35 I say that that's produced as a reputation statement.
36 But it is not because it does not meet the criteria.
37
38 And paragraph 40, my lord, there is a detailed
39 description of the boundary, precise territorial
40 boundaries. And I say again, my lord, that in my
41 submission the Plaintiffs adduced that as
42 representation evidence. And it is boundaries and
43 rights of way and rights of common in the classic
44 English common law cases that are often the subject of
45 reputation evidence. And we submit that that evidence
46 is not admissible as reputation evidence.
47 THE COURT: Well, surely that is only evidence -- that's only an

1 identification of the subject matter of his affidavit.
2 MR. MACKENZIE: Yes, my lord. That is one interpretation of
3 the -- of that paragraph. Mr. Blackwater there
4 describes the territory in some precise detail and
5 then later says: That's the territory of this house.
6 THE COURT: But do you question that that in the context of this
7 affidavit flows from what these deceased persons told
8 him --
9 MR. MACKENZIE: My lord -- sorry.
10 THE COURT: -- as the subject matter of the subject that they
11 were discussing?
12 MR. MACKENZIE: Well, my lord, in my submission the Plaintiffs
13 would argue that. And as we see in the later
14 paragraphs, Mr. Blackwater says: That's the territory
15 they told me was used by the house. That's the
16 territory that belongs to the house from time
17 immemorial.
18 THE COURT: But when --
19 MR. MACKENZIE: So in that case -- sorry.
20 THE COURT: But when you've got a classic old English conveying
21 problem based upon reputation, the evidence could be
22 given of reputation. But before you get to reputation
23 you've got to know what you are talking about. And
24 surely if a person says: The old people in the
25 village now deceased told me that it has always been
26 believed and understood in the village that Black Acre
27 belongs to the common. Now, what do you understand as
28 Black Acre? The answer is: It is surrounded by x, y,
29 z and a, b, c river. Surely in order to give
30 reputation evidence you have to identify the subject
31 matter of the reputation evidence first.
32 MR. MACKENZIE: That's correct, my lord.
33 THE COURT: If you can't give evidence of the identification or
34 the boundaries, you can't have a reputation. So what
35 is it -- what is your submission on paragraph 40?
36 MR. MACKENZIE: Well, our submission on paragraph 40, my lord,
37 is that -- our understanding of the Plaintiffs' case
38 is that these boundaries are part of the reputation.
39 Because that's the area precisely which the Plaintiffs
40 allege -- which Walter Blackwater alleges is the
41 subject of the reputation. And that becomes clear in
42 my submission later on --
43 THE COURT: Yes.
44 MR. MACKENZIE: In paragraph 43, my lord.
45 THE COURT: Yes.
46 MR. MACKENZIE: If I can refer your attention directly to
47 paragraph 43.

THE COURT: Well, at the moment you're saying that paragraph 40 isn't just an identification of the close, as they would have called it, for which the reputation is proven, you say it is itself part of the reputation?
MR. MACKENZIE: It is alleged to be part of the reputation, my lord, in my submission.
THE COURT: All right. Away you go from there.
MR. MACKENZIE: Paragraph 43, my lord, which is over the page at page 5. If you look in the lower right-hand corner, paragraph 43, Walter Blackwater swears:

> "The boundary of the ... territory described above has remained the same through my lifetime and the persons mentioned in paragraph 39 told me that it has remained the same since long before the arrival of European people here."

Now, that deals with boundary.

> "They told me that the members of the house had owned, harvested and looked after the territory from generation to generation."

My lord, in my submission that is attempted reputation evidence. Because, my lord, in my submission Mr. Blackwater says these deceased persons told him this. And in my submission that's what the Plaintiffs are trying to adduce as reputation.

Paragraph 44 in our submission is slightly different. And it says:

> "I have heard the ... territory described in the Gitksan feast as being owned by the House".

THE COURT: What do you say that is?
MR. MACKENZIE: Sorry, my lord?
THE COURT: What do you say that is?
MR. MACKENZIE: I am saying that is pure hearsay evidence, not alleged to be reputation evidence and inadmissible.

Now, my lord, paragraph 41 which is at page 3 at this tab deals with neighbouring territories. Does your lordship have that?
THE COURT: Yes.
MR. MACKENZIE: And paragraph 42 deals with geographical features. Now, it is not clear, my lord, whether that

is alleged to be reputation evidence. If it is, we submit -- if it is alleged to be reputation evidence, I say no one -- in the affidavit it doesn't say the old people told me this. But if this is alleged to be reputation evidence, we say it is inadmissible.

THE COURT: Well, I would take 42 to be based on personal knowledge.

MR. MACKENZIE: Yes, my lord. I would agree with that if it is not adduced as reputation evidence then it clearly appears to be personal knowledge.

THE COURT: It is just saying in this area there are these features.

MR. MACKENZIE: And if I can say this, my lord, the features and the names, the Gitksan names of the features are a fundamental element of the Plaintiffs' claim for ownership and jurisdiction. They say that's fundamental evidence of their ownership. And that is the affiant's knowledge. And if that is the argument that is being made, then that argument does not carry on beyond the lifetime, back before the lifetime of the present affiant on your lordship's interpretation. But that is the consequence of regarding that as personal knowledge and not reputation evidence.

THE COURT: Yes.

MR. GRANT: My lord, I am just not clear on that point. My friend maybe could clarify so I can deal with this, if necessary, in reply. But I am not sure why he says that if that is personal knowledge then there is no -- then that means that it is -- there is no evidence of it beforehand. I am not sure. He makes a quantum leap, and I am not sure what follows. I would like him to explain that if he could.

MR. MACKENZIE: Yes. My lord, as the cases -- as the cases on reputation say, the reason for reputation evidence is the lack of personal knowledge of the witness of ancient rights and ancient matters. That's the only reason that reputation or hearsay evidence is admitted.

Now, if paragraph 42 is regarded as purely personal knowledge and not as reputation evidence, then that restricts this to the knowledge at the present time or during Walter Blackwater's lifetime. It is not hearsay evidence. It is not reputation evidence. Therefore --

THE COURT: It isn't based upon information -- it doesn't purport to be based on information belief.

1 MR. MACKENZIE: That's correct, my lord.
2 THE COURT: It purports to be knowledge of -- it purports to be
3 a declaration of his present state of mind. For
4 example, if I say: "That's Grouse Mountain," I am
5 stating that I know that is Grouse Mountain. But one
6 knows that I have to have obtained that information
7 from some other source unless I happen to have named
8 it myself, which I didn't. One couldn't get the
9 information any other way unless one was the explorer
10 or the person who named these locations. But it does
11 not -- I think your point, Mr. Mackenzie, is it does
12 not travel with the alleged information, the alleged
13 reputation, from time immemorial.
14 MR. MACKENZIE: That's my submission, my lord.
15 THE COURT: Yes.
16 MR. MACKENZIE: That's why, in my submission, it is important to
17 differentiate as your lordship is doing and identify
18 specifically in this affidavit what is the alleged
19 reputation evidence and what is the personal
20 knowledge. And then we concentrate on the reputation
21 evidence.
22 THE COURT: Yes. You agree that paragraph 40 could be read in
23 two different ways, do you?
24 MR. MACKENZIE: Yes, my lord. I agree it can be read in two
25 different ways, my lord. But I permit that paragraph
26 43 is persuasive for my interpretation of it as
27 purported reputation evidence. And, my lord, the
28 reason that I go into this in detail is because this
29 is the format of all the territorial affidavits.
30 THE COURT: And you would agree that the source of reputation in
31 40, if any, would be those deceased persons mentioned
32 in 39?
33 MR. MACKENZIE: Yes, my lord, according to paragraph 43. If
34 that is regarded as reputation evidence then the
35 allegation has to be that that boundary evidence came
36 from the deceased witnesses. If it is regarded as
37 personal knowledge then there is no evidence as to the
38 source of that information.
39
40 Now, that deals with paragraphs 1 to 6 of my
41 addendum, my lord. I do make the point that this is
42 an argument that deals with all the territorial
43 affidavits. Now, does your lordship --
44 THE COURT: Yes.
45 MR. MACKENZIE: So I am on page 2 of my addendum, my lord, and
46 paragraph 7.
47 THE COURT: All right.

1 MR. MACKENZIE: My lord, this evidence is not admissible, the
2 reputation evidence which we have identified, does not
3 meet the threshold criteria for admissibility of
4 reputation evidence. As I have indicated, my lord,
5 this submission deals only with admissibility.
6 Questions of weight will be addressed later. And I
7 will go into that in some detail depending on the time
8 available. As I have indicated, your lordship has
9 reviewed this issue in earlier reasons for judgment.
10 Your lordship invited further submissions in
11 connection with further questions. And in our
12 submission, there is now in the record trial basis for
13 these submissions.
14 THE COURT: What did I say in that regard?
15 MR. MACKENZIE: My lord, I will read to your lordship -- this is
16 at -- it is not in the excerpt I have handed up to
17 your lordship. It is at page 355 of that case.
18 THE COURT: Yes.
19 MR. MACKENZIE: Your lordship says:
20
21 "Everything I have said is of course very
22 general and counsel must be free to advance
23 such submissions as they may be advised in
24 connection with any specific questions of
25 evidence which may arise."
26
27 THE COURT: All right.
28 MR. MACKENZIE: Now, this was not argument again after that, my
29 lord. There was a subsequent argument on
30 historical -- condition of historical evidence.
31 THE COURT: But it could be argued now.
32 MR. MACKENZIE: I submit it can be argued now, my lord.
33 THE COURT: Yes. I have said before, we common law judges don't
34 like to cross bridges even when we come to them.
35 MR. MACKENZIE: Well, my lord, now I deal with the threshold
36 tests. My lord, if your lordship looks in the yellow
37 binder at tab 9 just following what we are dealing
38 with. Does your lordship see that, tab 9?
39 THE COURT: Yes.
40 MR. MACKENZIE: Your lordship will see the reference of your
41 lordship's comment at page 2 of tab 9. Does your
42 lordship see that reference at the last paragraph?
43 THE COURT: Yes.
44 MR. MACKENZIE: I just mention that, my lord.
45
46 My lord, dealing with the question of
47 admissibility, three of the threshold tests for

1 admissibility of reputation are on page 3 of my
2 submissions, my lord.
3 THE COURT: Yes.
4 MR. MACKENZIE: This is significant point, my lord, in these
5 submissions. The declaration (not the reputation)
6 must have been made before the controversy in question
7 arose (not only before the commencement of
8 litigation). And all the authorities are set out at
9 tab 10 in the yellow binder. And I will be coming
10 back to the Phipson passage in more detail, my lord.
11 So I won't go through those in more detail now. Did
12 your lordship find tab 10 in the yellow binder?
13 THE COURT: Yes.
14 MR. MACKENZIE: And the second point, my lord, subparagraph (b),
15 the reputation which is the subject of the declaration
16 must be undisputed, that is, a settled public
17 consensus, after the sifting of claim and
18 counterclaim. And that is a reference to Wigmore.
19 That is also set out at tab 10. And that is page 21
20 at tab 10. And page 22, 23 and 24. Did your lordship
21 finds those?
22 THE COURT: Yes.
23 MR. MACKENZIE: I am not going to go into those in detail
24 because I will deal with them later.
25 THE COURT: Yes.
26 MR. MACKENZIE: The third paragraph (c), the persons whose
27 statements are reported must be shown to be deceased.
28 I think that must be common ground, my lord. Your
29 lordship pointed that out in your lordship's reasons
30 for judgment.
31 THE COURT: Yes.
32 MR. MACKENZIE: Carrying on, it is submited that these three
33 tests have not been met at the case at bar.
34
35 And my lord, paragraph 12, Mr. Justice Blackburn
36 in Milirrpum did not have to decide these issues. He
37 made it clear, though, that neither the novelty of the
38 substantive issues, nor the unusual difficulties
39 associated with proof of matters of aboriginal law and
40 custom was any ground for deaparting from the rules of
41 the law of evidence.
42
43 And I am not going to read from the case, my lord,
44 but that reference is set out at tab 12 of the yellow
45 binder. His lordship referred to the law on
46 admissibility of reputation evidence as described by
47 Phipson, 11th edition and Wigmore. And Phipson, 11th

1 edition is at page 3 of tab 10 in the yellow binder.
2 Does your lordship have that note just to refer your
3 lordship to that, page 3?
4 THE COURT: Yes.
5 MR. MACKENZIE: Yes. And it is at paragraph 972, my lord. Does
6 your lordship have that reference?
7 THE COURT: Is that the top of the page?
8 MR. MACKENZIE: 972 on page 4, my lord, paragraph 972. The
9 paragraphs are in there. Do you have Phipson, my
10 lord?
11 THE COURT: I don't see paragraph --
12 MR. MACKENZIE: Sorry, my lord, if you are looking at the bottom
13 right-hand corner of the page, you will see that Roman
14 IV-12, page 3 is the cover page for Phipson, 11th
15 edition.
16 THE COURT: Yes.
17 MR. MACKENZIE: And page 4 is the reference. Does your lordship
18 have that?
19 THE COURT: No. Page IV-10?
20 MR. MACKENZIE: No, tab 12, my lord. If your lordship goes into
21 tab 12. Sorry, my lord. I may have misspoken, my
22 lord.
23 THE COURT: I have it now.
24 MR. MACKENZIE: And the reference is in the yellow binder.
25 THE COURT: 972?
26 MR. MACKENZIE: Yes, my lord.
27 THE COURT: Yes.
28 MR. MACKENZIE: My lord, Mr. Justice Blackburn cited that
29 paragraph in the Milirrpum case, but he left out the
30 reference to ante litem motam in his citation in the
31 Milirrpum case. And I say that -- I am saying that in
32 paragraph 12 of my submission, my lord, his lordship
33 omitted the reference to ante litem motam in his
34 citation from Phipson, 11th edition. And it would
35 appear, therefore, that this issue was not argued in
36 Milirrpum. It was no doubt unnecessary.
37 THE COURT: Why was it unnecessary?
38 MR. MACKENZIE: Because the issue of whether the deponents were
39 deceased or not -- sorry, the issue of whether there
40 was a controversy or whether declarations were made
41 after the beginning of the controversy did not arise
42 in that case, my lord.
43
44 Ante litem motam which I deal with in some detail,
45 my lord, deals with whether the declaration or the
46 statement was made after the beginning of the
47 controversy. Ante litem motam meaning before the --

1 THE COURT: Death before litigation, isn't it?
2 MR. MACKENZIE: Yes. Before the issue in question, my lord. It
3 doesn't mean before the litigation.
4 THE COURT: Before the controversy.
5 MR. MACKENZIE: Before the controversy arose.
6 THE COURT: But it is a remarkable submission that Mr. Justice
7 Blackburn would leave out of a quotation the
8 qualification as you suggest.
9 MR. MACKENZIE: Yes, my lord. Well, if I could refer your
10 lordship to that. It is at tab 12 where your lordship
11 is already in tab 12 in the yellow binder at page 2.
12 Does your lordship have that?
13 THE COURT: Yes.
14 MR. MACKENZIE: It is a reference from Milirrpum page 154.
15 THE COURT: Yes.
16 MR. MACKENZIE: Is your lordship's copy marked?
17 THE COURT: Yes.
18 MR. MACKENZIE: If your lordship will go down to the bottom of
19 154, you will see where the marking starts Mr. Justice
20 Blackburn saying:
21
22 "A well-known exception had of course to be
23 considered..."
24
25 Does your lordship have that?
26 THE COURT: Yes.
27 MR. MACKENZIE:
28
29 "It is described by Phipson, Law of Evidence,
30 11th ed. (1970), par. 972, in these words:
31 'Declarations made by deceased persons of
32 competent knowledge . . ."
33
34 THE COURT: Oh, I see. I rather thought you suggested he
35 misquoted it. But he put in three dots?
36 MR. MACKENZIE: Yes, he omitted it, my lord.
37 THE COURT: Well, my faith in Mr. Justice Blackburn has been
38 restored.
39 MR. MACKENZIE: I wasn't saying that he wasn't aware of this
40 problem.
41 THE COURT: All right.
42 MR. MACKENZIE: Your lordship can see the basis of my submission
43 that it probably didn't arise in that case because he
44 chose to omit it from that reference.
45 MR. GRANT: Well, is there some reference where he does say that
46 it is not an issue in that case, or is it just the
47 three dots that my friend is using as the assumption?

MR. MACKENZIE: Well, my lord, it is not mentioned in the reasons for judgment. And it is omitted in this citation from Phipson. And that's the basis --
THE COURT: Of course the evidence may have been such that there was nothing to suggest otherwise.
MR. MACKENZIE: That's our submission, my lord.
THE COURT: All right.
MR. GRANT: Well, that's where I have the difficulty, my lord, because certainly my reading of Milirrpum is that the claim there and the controversy there was probably, you know, arose from -- in the same time depth as your lordship has to deal with --
THE COURT: Well, I wonder, Mr. Grant, whether in that case the controversy didn't arise when the mining leases were granted.
MR. GRANT: Well, I will review that.
THE COURT: I am just speculating now. Because it may have been that no one ever questioned those aboriginal -- those aborigine rights, I don't know. But they didn't have a controversy going back to the middle of the last century I don't think in Milirrpum like we have here.
MR. GRANT: Well, I will review it and consider that reply, my lord.
THE COURT: Yes. Just read the Milirrpum case over the lunch hour, Mr. Grant, and see if you can get something out of it.
MR. MACKENZIE: Your lordship has a point that is made here. And your lordship also clearly referring to the controversy in the case at bar really foreshadows the argument that is going to be made in this submission.

And, my lord, at paragraph 14 I set out, in my submission, the correct principle which your lordship referred to Phipson, 13th edition which is at tab 13 of the yellow binder. I have set it out in my submissions, my lord, at page 5. I am reading from page 5 of my submissions, my lord.
THE COURT: Yes.
MR. MACKENZIE:

> "The declarations, must, in order to prevent bias, have been made ante litem motam, that is before the commencement of any controversy, and not merely before the commencement of any suit, involving the same subject-matter."

And following on, my lord:

1
2 "Declarations made after a dispute has arisen
3 are inadmissible, although the dispute was
4 unknown to the declarant, for that is a
5 collateral issue which it might be impossible
6 to prove."
7
8 And The Berkeley Peerage case is given as the
9 principle authority, my lord. And I will go into that
10 case in some detail. But in summary, in The Berkeley
11 Peerage case, as I say in paragraph 15, the judges
12 discussed this principle with respect to the pedigree
13 problem for them. But also in general they dealt with
14 the question of the admissibility of reputation
15 evidence in the classic cases dealing with rights of
16 way and prescription. And the Court's concern is with
17 the trustworthiness of the evidence if the declaration
18 is made after the origin of the controversy.
19
20 Now, my lord, I say the safeguard against the
21 unconscious shaping of evidence according to the
22 interest of the witness is cross-examination. And
23 declarations of a deceased person must have been made
24 "...when his mind stood in an even position...."
25 And that reference is to Baron Wood's judgment at tab
26 15 of the yellow binder. I will just perhaps refer
27 your lordship to that. Does your lordship have tab
28 15?
29 THE COURT: Yes.
30 MR. MACKENZIE: In the yellow binder. There is several judges
31 of the House of Lords who gave judgment in this case,
32 my lord. And as I say, they dealt with this question
33 of the admissibility and reputation evidence
34 generally. And Baron Wood is at the bottom of the
35 page there, my lord. About three quarters of the way
36 down he starts his reasons. Does your lordship have
37 that?
38 THE COURT: Yes. Perhaps we will consider what Baron Wood said
39 at 2 o'clock, Mr. Mackenzie.
40 MR. MACKENZIE: Yes.
41
42
43
44
45
46
47

THE REGISTRAR: Order in court. Court stands adjourned.

(PROCEEDINGS ADJOURNED AT 12:30)

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

_____

Lisa Franko,
Official Reporter,
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RECOMMENCED AFTER LUNCHEON RECESS)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Mackenzie.
5 MR. MACKENZIE: Thank you, my lord. My lord, I would like to
6 turn to page 4 of my summary of the addendum. I
7 missed a paragraph I wanted to deal with. Paragraph
8 13.
9 THE COURT: Yes.
10 MR. MACKENZIE: And I ask your lordship in the yellow binder to
11 turn to tab 13. Just before page 4.
12 THE COURT: Yes.
13 MR. MACKENZIE: Your lordship have that? This deals with the
14 plaintiffs' submissions on this point, my lord.
15 I am just reading at paragraph 13 of the summary.
16 The plaintiffs' submission on this point are set out
17 at that reference, and then it is submitted that
18 counsel for the plaintiffs incorrectly interpreted
19 Wigmore when counsel said that the reputation as
20 opposed to the statement of the reputation must have
21 arisen before the commencement of the litigation. And
22 that's the passage in the yellow binder, tab 13, page
23 4, starting at line 35. Referring your lordship --
24 Does your lordship see that?
25 THE COURT: Yes.
26 MR. MACKENZIE: Now, my lord, on the last of the principles
27 Wigmore, in dealing with the principle ante litem
28 motam, said this:
29
30 "The limitation, already noticed as obtaining in
31 .."
32
33 And that should be "other", my Lord.
34
35 "... other hearsay exception, that the
36 reputation to be admissible must have arisen
37 ante litem motam ..."
38
39 And then Mr. Rush then says:
40
41 "And that's to be distinguished as from the
42 statement of the reputation."
43
44 Now, my lord, without taking your lordship to the
45 actual passage in Wigmore, I propose to tell your
46 lordship where that passage is in our materials, and
47 then explain to your lordship what Wigmore was saying

1 there. The passage in Wigmore is found at tab 10 of
2 this addendum section, page 6. So it's just two tabs
3 earlier.
4 THE COURT: Yes.
5 MR. MACKENZIE: And it is set out at the top of the page, my
6 lord, but Mr. Rush has read with the correction that I
7 have made. I just point out to your lordship that
8 Wigmore refers to the Berkeley Peerage case as the
9 authority for that statement. And, my lord, I am
10 pointing this out to your lordship just to explain
11 that there is no inconsistency between Phipson and
12 Wigmore in this case. What Wigmore means by ante
13 litem motam is just what the cases say; that is,
14 before the controversy has arisen. And I say that in
15 his submissions Mr. Rush didn't note that. So that's
16 the --
17 THE COURT: Where was Mr. Rush's statement again?
18 MR. MACKENZIE: It was at --
19 THE COURT: I have it. Yes. Thank you.
20 MR. MACKENZIE: It was at tab 13, page 4.
21 THE COURT: Well, he says the reputation to be admissible must
22 have arisen before the controversy. What's different
23 from that from what Wigmore says?
24 MR. MACKENZIE: Mr. Rush says ante litem motam.
25 THE COURT: Yes.
26 MR. MACKENZIE: And then Mr. Rush says:
27
28 "And that's to be distinguished as from the
29 statement of the reputation."
30
31 So Mr. Rush is interpreting that as the reputation
32 must have arisen ante litem motam. And then if you go
33 to the next page, my lord, page 5, you will see that
34 Mr. Rush interprets that to mean before the litigation
35 commenced. It's at the line 33 to 36.
36 MR. GRANT: Which page?
37 MR. MACKENZIE: Tab 12, page 5.
38 THE COURT: Is your distinction between the litigation and the
39 controversy?
40 MR. MACKENZIE: Yes, my lord.
41 THE COURT: All right. Yes.
42 MR. MACKENZIE: And it's also between the reputation and the
43 statement, my lord.
44 THE COURT: Do they both have to be made before the litigation
45 arises?
46 MR. MACKENZIE: I say, my lord, the reputation has to be made,
47 that is the statement of the reputation has to be made

1 before the controversy arises.
2 THE COURT: Well, what you're saying, then, is that the
3 declaration --
4 MR. MACKENZIE: Declaration has to be before the controversy
5 arises.
6 MR. GRANT: I am a bit lost, my lord. Where is my friend
7 referring to in Wigmore for that proposition that the
8 statement has to be before the controversy? I see the
9 statement he's referred to that says the reputation as
10 Mr. Rush quoted, but I want to be sure I understand
11 you.
12 MR. MACKENZIE: I am saying, my lord, that Wigmore means the
13 same thing as Phipson. That is, when he says the
14 reputation to be admissible must have arisen ante
15 litem motam, I say that Wigmore's relying there on the
16 Berkeley Peerage case, which is the principle
17 authority for Phipson.
18 THE COURT: But this statement from Wigmore on page 5 and 6 of
19 your tab 11 doesn't say that the declaration must be
20 made before the controversy arises, does it?
21 MR. MACKENZIE: Wigmore says the reputation to be admissible
22 must have arisen ante litem motam.
23 THE COURT: Yes. That doesn't say the declaration --
24 MR. MACKENZIE: No. I am suggesting, my lord, that that really
25 means the same as Phipson, because it's -- he is
26 relying, Wigmore is relying on the same case that
27 Phipson relied on.
28 THE COURT: All right. Where is the -- I have just looked at
29 the statement from Wigmore, and it doesn't mention the
30 declaration.
31 MR. MACKENZIE: Yes, my lord.
32 THE COURT: Where is Phipson again?
33 MR. MACKENZIE: Phipson is -- the actual reference is at tab 12,
34 page 6.
35 THE COURT: All right.
36 MR. MACKENZIE: Does your lordship have that?
37 THE COURT: Yes.
38 MR. MACKENZIE: Does your lordship see that? Paragraph 24.
39
40 "declarations made by deceased persons ante
41 litem motam."
42
43 MR. GRANT: This is Phipson?
44 MR. MACKENZIE: Yes.
45 THE COURT: All right.
46 MR. MACKENZIE: My lord, it's my submission that passage from
47 Phipson is the statement of a common law.

1 THE COURT: You say that's extracted from the Peerage case?
2 MR. MACKENZIE: Yes, My Lord.
3 THE COURT: Let's go to it. And do what you were going to do
4 when you were so rudely interrupted for lunch.
5 MR. MACKENZIE: I can assist your lordship by doing that,
6 because I have set out the passage from the Peerage
7 case.
8 THE COURT: Well, that's all right. Where did you set out the
9 passage?
10 MR. MACKENZIE: I have set out the passage from the Peerage case
11 on -- at paragraphs 27 and 29 of my submissions.
12 THE COURT: Paragraphs what?
13 MR. MACKENZIE: Paragraphs 27 and 29.
14 THE COURT: All right. Barron Wood at page 130 says:
15
16 "But declarations to be receivable in evidence
17 ... must have been the natural effusions of the
18 mind of the party making them, and must have
19 been made on an occasion when his mind stood in
20 an even position, without any temptation to
21 exceed or fall short of the truth. Upon this
22 principle it has been the general rule, as far
23 back as my experience and knowledge go, to
24 reject hearsay evidence of the declarations of
25 deceased persons, not only relative to matters
26 in actual suit, but in dispute and controversy
27 prior to the commencement of judicial
28 proceedings."
29
30 And then paragraph 2, my lord, Chief Justice
31 Mansfield sets this out again:
32
33 "General rights are naturally talked of in the
34 neighborhood ... therefore, what is thus
35 dropped in conversation upon such subjects, may
36 be presumed to be true. But after a dispute
37 has arisen, the presumption in favour of
38 declarations fails; and to admit them, would
39 lead to the most dangerous consequences.
40 Accordingly, I know of no rule better
41 established in practise than this, that such
42 declaration shall be excluded ...."
43
44 That is the declarations after the commencement of
45 the controversy. And Chief Justice Mansfield carries
46 on:
47

1 "I have now only to notice the observation, that
2 to exclude declarations you must show that the
3 lis mota was known to the person who made them.
4 There is no such rule. The line of distinction
5 is - the origin of the controversy, and not the
6 commencement of the suit. After the
7 controversy has originated, all declarations
8 are to be excluded, whether it was or was not
9 known to the witness."
10
11 That's the common law, in my submission, my lord.
12 And my submission is that is different from what
13 counsel for the plaintiffs were saying when he
14 interpreted Wigmore at the passage that I referred to
15 in paragraph 13 of my submissions.
16 THE COURT: All right. Then what did Chief Justice Dickson have
17 in mind in Simon when he spoke on this question saying
18 that history has to be admissible in these cases or
19 could not otherwise be proven? Are you saying that
20 that statement of his should be read in light of this
21 limitation?
22 MR. MACKENZIE: Yes, My Lord. In my submission we are not
23 talking about history here. We are talking about
24 history, but we are talking about reputation evidence
25 really. We are talking about evidence as to
26 territorial matters which is adduced as reputation
27 evidence, but in this case we have a controversy. The
28 controversy has arisen, and as your lordship pointed
29 out, that distinguishes it certainly from --
30 apparently distinguishes it from Milirrpum. In this
31 case if it can be shown, and in any case under the
32 common law, if it can be shown that a controversy has
33 arisen relating to the subject matter in the lawsuit,
34 then the statements are subject to the -- or presumed
35 to be subject to the influence of that controversy,
36 and can't be regarded as natural effusions of the
37 witnesses, that is the deceased declarant's mind.
38 THE COURT: Well, then, reading that together with Chief Justice
39 Dickson's dictum, would mean that the history of which
40 the Chief Justice spoke could not be proven as to
41 historical matters, as to declarations of historical
42 matters made beyond the lifetime of a living person.
43 MR. MACKENZIE: Well, my lord, if there was a controversy that
44 had arisen --
45 THE COURT: Before the lifetime of the witness?
46 MR. MACKENZIE: Yes, that's right.
47 THE COURT: Before the birth of the witness --

1 MR. MACKENZIE: That's right.
2 THE COURT: -- could be proven.
3 MR. MACKENZIE: If it could be shown that the deceased
4 declarants were influenced or presumed to be
5 influenced by the controversy.
6 THE COURT: I would have to look at Simon again to see what his
7 facts were, and what declarations were being relied
8 upon there. Will you be covering that in your
9 submission?
10 MR. MACKENZIE: No, my lord, but I will certainly deal with
11 that.
12 THE COURT: Yes, I think you better, because it seems to me that
13 the authorities that you are citing would severely
14 limit what Chief Justice Dickson seemed to suggest was
15 admissible under the heading of necessity.
16 MR. MACKENZIE: Simon has been dealt with to some extent, as I
17 understand, my lord, in the argument, the defendants'
18 argument, Roman II, section 3, page 9 at paragraphs 22
19 to 27.
20 THE COURT: What's the --
21 MR. MACKENZIE: Roman II.
22 THE COURT: Yes.
23 MR. MACKENZIE: Part 3, page 9. That passage distinguishes
24 Simon as being a treaty case.
25 THE COURT: Yes.
26 MR. MACKENZIE: As I understand criminal prosecution, where the
27 accused raises a treaty right in his defence, as Mr.
28 Plant noted --
29 THE COURT: All he is really talking about is history there.
30 MR. MACKENZIE: Yes.
31 THE COURT: Not talking about title.
32 MR. MACKENZIE: Doesn't deal with title. As I understand, it's
33 not an ownership and jurisdiction case. This case is
34 different from all the cases, as your lordship has
35 been told many times, in that we are dealing in the
36 case at bar with ownership and jurisdiction and the
37 title to land. So that's a distinguishing factor,
38 which in our submission affects the use by which --
39 for which reputation evidence can be adduced. One
40 must -- one is going to rely on reputation evidence,
41 it should meet the tests that is set out for
42 trustworthiness in the Berkley Peerage case and since
43 then.
44 MR. GRANT: With respect, my lord, this was a right of hunting.
45 THE COURT: No, but the --
46 MR. GRANT: But it was the reputation, a reputation as to
47 geneaology, and that was necessary to establish that

1 Simon had that right. So certainly the controversy --
2 THE COURT: No, but he based his right on the fact he was
3 registered. So that's nothing.
4 MR. GRANT: He based it on the presumption of genealogy.
5 THE COURT: Yes. By registration.
6 MR. GRANT: As he being the present occupant -- presumably the
7 descendant of the previous occupants.
8 THE COURT: I don't read the case on a very cursory reading as
9 suggesting that it depends upon the admissibility in
10 any way of declarations of deceased persons. I don't
11 think it does. I'll read it again, but it seems to me
12 what he was saying was as the historical fact I accept
13 there is a treaty in 1756, and I accept the fact that
14 he is registered as a member of a band of Indians
15 having the same name as the signatory to that 1756
16 treaty. That's good enough for me. Is that all he is
17 saying in Simon?
18 MR. GRANT: Well, I think so. I think he is also making a
19 presumption of geneaology, which of course geneaology
20 is generally established through reputation, and if my
21 friend is right, that could never be done in a case,
22 because of course the controversy would have arisen
23 from the time at least of the first reputation of the
24 hunting --
25 MR. MACKENZIE: In my submission, my lord, the question didn't
26 arise in Simon.
27 THE COURT: Until he shot the moose. If it was a moose.
28 MR. MACKENZIE: But the point should be made, in my submission,
29 my lord, that the plaintiffs are relying upon the
30 common law reputation, and its been my respectful
31 submission misstated or misinterpreted inadvertently
32 in the plaintiffs' argument. It's my submission the
33 Berkeley Peerage case, which is the leading case in
34 this area, sets out the law very clearly; and this
35 question of one statement has to be made is very
36 important in the judgments in that case, and they all
37 talked about it as being the practice and the law on
38 the basis of principle, as well as what had actually
39 been done in the courts in England.
40 I'll go into that in some detail, my lord. I am
41 going to analyze that in some detail with a specific
42 declaration.
43 THE COURT: Yes. All right.
44 MR. MACKENZIE: And so --
45 MR. GRANT: Can I ask my friend, when he does analyze it
46 specifically, I would like to be very clear as to when
47 my friend submits, if he says the statement must be

1 made before the "controversy arose", when he says the
2 controversy arose before the statement was made. He
3 may deal with that in the context.
4 THE COURT: I'm sure he will.
5 MR. GRANT: I would like to have that very clear.
6 MR. MACKENZIE: My lord, just carrying on with the submissions
7 on page 6 of the submissions, paragraph 16, starting
8 to deal with the declarations in this case.
9 All the declarations sought to be introduced in
10 the case at bar were made during the lifetime of the
11 affiants. I am talking about the territorial
12 affidavit, and virtually all cases after 1900. I am
13 saying, my lord, that in this case virtually all the
14 statements relied on are after 1900.
15 The plaintiffs' witnesses, both lay and experts,
16 have portrayed the land question in terms of we
17 against them, with the province identified as them.
18 It is submitted that the plaintiffs' claim of
19 ownership of lands in the claim area has been in issue
20 and the subject of controversy in the claim area from
21 the 1880's. Declarations then and later have been
22 made by persons whose interests lay in preserving the
23 title claim. As such they are unlikely to have been
24 free of conscious or unconscious bias or uninfluenced
25 by the dispute. The plaintiffs' counsel acknowledge
26 furthermore that some reputation statements were made
27 after October 1984, the commencement of this
28 litigation.
29 And an example of that is David Gunanoot's
30 statements in Neil Sterritt's affidavit. That's an
31 example of statements made after the commencement of
32 this litigation, which is a much stronger case, but
33 equally as valid.
34 So then I now go into a specific deceased
35 informant, my lord, and that title should read Moses
36 Stevens' statement post litem motam. Our submission
37 that his statement was made after the controversy
38 arose, post litem motam. So if your lordship would
39 change that heading to post litem motam.
40 Paragraph 18. According to Exhibit 605, paragraph
41 39, which your lordship has reviewed, Moses Stevens
42 told Walter Blackwater that the Slamgeesh territory
43 belongs to Gwinin Nitxw. The dates of that
44 declaration is not in evidence.
45 Moses Stevens was born in 1861, and he died in
46 1971. Walter Blackwater was born in 1923. Moses
47 Stevens' statements, therefore, must have been made

between, say, 1928, when Walter Blackwater was 5 years old, and 1971 when Moses Stevens died.

The circumstances of the declaration are not in evidence. Assuming that Moses Stevens made this statement, there is nothing in the evidence about the reason why he made such a statement. I note there is much evidence which suggests that he probably did not make that statement, my lord. But assuming that he did make that statement, it cannot be tested by cross-examination. The plaintiffs rely upon it to prove ownership of the Slamgeesh territories against the Crown. It is not known from the evidence whether Moses Stevens made the statement for this purpose. It is not known from the evidence whether Moses Stevens meant this statement to apply only as among the Gitksan chiefs and not as against the Crown. He may have accepted the Crown's ownership of the territory, but have wished to clarify the allocation of responsibilities in the Gitksan context.

It appears to be a statement against Moses Stevens, Dawamuxw's interest, but it cannot be determined whether it is a statement against his interest in relation to the Crown or in relation to Gwinin Nitxw or neither of those.

It is relied upon by the plaintiffs as a statement in the interest of Gwinin Nitxw as against the Crown. It is a statement made during a time when, according to the plaintiffs, the Gitksan had not ceased to assert their territorial claim as against the Crown. And that's the statement of claim, paragraph 72. It was made after the origin in the 1880's of the controversy about Indian ownership of the claim area. Moses Stevens lived during the years of Gitksan protest from 1884 to 1927 analyzed in the evidence of Robert Galois. According to Galois the Gitksan continued during these years to assert their title to the claim area as against the Crown. Reference is made particularly to the Kispiox petition of 1924 signed by the chiefs of the village.

My lord, that petition is set out at tab -- is at tab 25. Does your lordship have that?

THE COURT: Yes.

MR. MACKENZIE: And that is a petition signed by many of the chiefs or all the chiefs of the village of Kispiox. And in the first paragraph, this is 1924, the chief says:

1 "In view of the fact that our forefathers were
2 the occupants and possessors of the lands of
3 this country in the days before the coming of
4 the white people and in view of the fact that
5 for that reason we are now the proper
6 inheritors of this land ..."
7
8 And so on. And then they deal with the Indian
9 land question and the unsatisfactory resolution.
10 Now, these chiefs, my lord, it is assumed from
11 the -- on the plaintiffs' case, represented the people
12 at Kispiox, and some of these are deceased declarants.
13 For example, deceased informants -- for example, Moses
14 Morrison, who is the fifth chief on the list, is the
15 declarant Gitludahl. He told -- he is one of the
16 people upon whom Peter Muldoe relied for the ownership
17 of the Gitludahl territory. So -- and some of the
18 other chiefs who signed there may also be actual
19 informants, deceased informants upon whom the
20 territorial affiants rely.
21 Now, it's not known from the evidence whether
22 Moses Stevens knew about this, but this is an example
23 of the concerns that were being expressed in the
24 controversy that was in the claim area and in the --
25 and in the area where Moses Stevens passed his life or
26 lived his life.
27 THE COURT: This is what exhibit?
28 MR. MACKENZIE: This is Exhibit 995-12. It was put in by Mr. --
29 came in during the evidence of Mr. Brody.
30 There are many other examples of this, my lord, but
31 this is just an example of -- it may show the
32 controversy in the area around this -- around Moses
33 Stevens' place of -- where he lived over these years.
34 THE COURT: I don't understand your submission relating to the
35 question against whom the declaration is intended to
36 be made. Does it really matter?
37 MR. MACKENZIE: It does, in the sense that -- the point is that
38 one can't cross-examine Moses Stevens.
39 THE COURT: If he made it with a specific purpose in mind, would
40 it not still be admissible for all purposes?
41 MR. MACKENZIE: No. It would not be admissible -- I mean, if
42 its introduced the controversy and arises after the
43 controversy --
44 THE COURT: I appreciate that. But apart from the time when it
45 was made, I am not sure that I understand the
46 distinction you draw between declaration made against
47 other Indians or against the Crown.

1 MR. MACKENZIE: Well, my lord --
2 THE COURT: I am not sure that it makes any difference.
3 MR. MACKENZIE: But it may not make any difference, my lord, but
4 in our submission it's significant, because it's being
5 relied upon as expressing the interests of the Gitksan
6 against the Crown. If it wasn't used for that purpose
7 at all, then it would be of no evidentiary value to be
8 used in the case as against the Crown. If Moses
9 Stevens was saying 'I am only concerned with the
10 chiefs' ownership of the land in this area' -- for
11 example, in 1945, as Ms. Sigurdson pointed out, Thomas
12 George wrote to the Indian Agent and said, 'I have a
13 dispute with Matthew Sam.' When Thomas George was
14 talking about his dispute with Matthew Sam, he wasn't
15 talking about title as against the Crown.
16 THE COURT: Well, that depends on a construction of what the
17 statement is or what the declaration contains, and
18 that will always be if a person said "I heard 'x' now
19 deceased now say that Black Acre is common way in the
20 village of Epping", a favorite English town, and then
21 the village sells it to that person, and then there is
22 an argument about whether that person is entitled,
23 surely the declaration as part of the chain of title
24 would be admissible for all purposes, wouldn't it?
25 MR. MACKENZIE: Well, my lord, I think if you can show by
26 cross-examination, because there is --
27 THE COURT: You can't prove the -- you can't show by
28 cross-examination the deceased -- what he had in mind.
29 I am just questioning whether it makes any difference
30 what his purpose is. It seems to me the relevant
31 thing is what did he say? What did he declare?
32 MR. MACKENZIE: In my submission it does make a difference. All
33 the judges in the Perrage case point out that it makes
34 a difference, because once the controversy arises, you
35 don't know -- because he may be influenced by the
36 controversy in this case.
37 THE COURT: I am conceding for the purposes of argument that it
38 makes a difference about whether the controversy arose
39 or not. I am focusing now on whether it makes any
40 difference for what purpose the declarations made.
41 MR. MACKENZIE: In my submission in this case it does, my lord,
42 because you are talking about a different interest.
43 If the interest as against the other chiefs, that's
44 among the chiefs themselves. That has nothing to do
45 with the matter at issue in this case.
46 THE COURT: But if there was a dispute between the chiefs, and
47 somebody made a declaration that this property belongs

1 to chief A, assuming there is no controversy at that
2 time -- well, no, I'm sorry. Let's assume there is no
3 controversy and a deceased person now deceased
4 declares that belongs to Chief A. Surely that
5 declaration could be used for any purpose -- that
6 could be used on A's behalf in any dispute that
7 arose -- what difference would it make if he was only
8 thinking of it as between which chief it belonged to,
9 assuming there was no controversy? If there was a
10 controversy, then it wouldn't be admissible anyway.
11 MR. MACKENZIE: Well, my lord, the submission has to be made
12 that -- we are making the submission that it's really
13 a public versus private right distinction, although
14 that was -- that was determined by Mr. Justice
15 Blackburn and your lordship that reputation generally
16 was admissible to prove house territories. But we are
17 talking about a private matter between the chiefs as
18 opposed to a public matter as against the Crown, and
19 if there is any question about that, then its -- then
20 that is going to cause a problem with determining how
21 the evidence is to be used and can be used in our
22 submission.
23 THE COURT: Are you challenging my tentative finding that the --
24 that this is a sufficient general right to qualify as
25 admissible declarations and ownership of title?
26 MR. MACKENZIE: My lord, Mr. Justice Blackburn certainly -- to
27 answer your question, my lord, in these submissions we
28 have not challenged that, but the argument, as I
29 understand, was not made in detail before your
30 lordship on that occasion about public and private
31 rights. It's not being made here.
32 THE COURT: All right. Thank you.
33 MR. MACKENZIE: Except, as I have already noted, your lord, this
34 is a slight distinction from what Mr. Justice
35 Blackburn was speaking about, and is the whole point
36 of the problem in this particular case, is it's public
37 in the sense as against the Crown and private as
38 against the other chiefs. That doesn't deal with your
39 lordship's point and Mr. Justice Blackburn's point
40 about the number of people involved.
41 THE COURT: Yes.
42 MR. MACKENZIE: But it's a different aspect of the argument
43 using the terms public and private, my lord.
44 So, my lord, I think we dealt with paragraph 26
45 and paragraph 27, and I point out, as the judges in
46 the Berkley Peerage case pointed out, that it's a
47 problem of conscious or unconscious bias. And in our

1 submission in this case it cannot be said that Moses
2 Stevens' statements was the natural effusion of his
3 mind or that a statement was made on occasion when his
4 mind stood in an even position, because the
5 controversy was raging.
6 And Chief Justice Mansfield points out, as we
7 already read at paragraph 29, that because of the
8 problem determining whether the person -- the problem
9 of determining whether the person knew or not, the
10 line of distinction is the origin of the controversy,
11 and one doesn't have to show that the controversy was
12 known to the person.
13 And, my lord, these arguments, moving onto
14 paragraph 31, apply to all the statements of deceased
15 informants in the territorial affidavits.
16 Some of them, even more strongly of course,
17 because the statements were made after the
18 commencement of the litigation, after 1984. And, my
19 lord, a paragraph I think we dealt with in the
20 Berkeley Peerage case, several of the judges referred
21 to the hardships that might result from their
22 decision.
23 And moving on to the second threshold test,
24 dealing with consensus. I am not aware that the
25 plaintiffs differ from us on this question, that the
26 reputation really is a consensus, must be a single and
27 definite consensus after conflicting claims had been
28 sifted and settled down into reputation.
29 Paragraph 35 we point out that in the case at bar
30 there is much evidence of inconsistent claims to the
31 territories which are the subject matter of the
32 declarations.
33 THE COURT: What is the source of that quotation?
34 MR. MACKENZIE: Wigmore, my lord, and it's at --
35 THE COURT: The top of page 12?
36 MR. MACKENZIE: Yes, my lord. Wigmore describes the general
37 law.
38 THE COURT: Yes, all right.
39 MR. MACKENZIE: I set it out there at paragraph 33, and also
40 found at -- the passage is found at tab 33 in the
41 yellow binder.
42 THE COURT: Yes. All right.
43 MR. MACKENZIE: Going to paragraph 35 on this point of
44 consensus. In our submission the conflicting claims
45 are contemporaneous with the declarations of the
46 reputation. Because in our submissions these claims
47 have been made throughout the times -- throughout the

1 period that -- after, as far as we can tell, after
2 1900. The conflicting claims in some cases are
3 reflected in declarations to Neil Sterritt by the
4 deceased named informants, such as Arthur Kusick.
5 Arthur Kusick told Neil Sterritt something different
6 about the Slamgeesh territory, it conflicted with
7 Walter Blackwater's affidavit, and the statements that
8 Walter Blackwater got from Moses Stevens. And I point
9 out that's dealt with in detail later in the argument.
10 Henry Wright made statements to Neil Sterritt,
11 which conflicted with reputation evidence in James
12 Morrison's affidavit.
13 There are conflicting claims also in prior
14 inconsistent statements to Sterritt by major affiants
15 such as Walter Blackwater and Steven Robinson. That
16 is the actual affiants made statements that conflict
17 with the reputation evidence.
18 In other cases the inconsistent claims are those
19 of long standing advanced by neighbouring Indian
20 groups, such as the Nishga and the Tahltan in feasts
21 and at meetings attended by the plaintiffs. Mr.
22 Willms will deal with those. We have set out the
23 references in this argument.
24 Paragraph 36. In addition, there is evidence of
25 long-standing inconsistent and overlapping claims by
26 the Kitwancool, whom the plaintiffs acknowledge as
27 members of their community in which the alleged
28 reputation exists. The Kitwancool overlap is
29 discussed in detail at the reference I indicate.
30 On this point about consensus I added after paragraph
31 36 that the evidence shows that there was little or no
32 discussion of these boundaries at feasts --
33 THE COURT: Well, do you say that any allegation amounting to a
34 conflicting claim destroys the consensus for
35 reputation that might otherwise be established?
36 MR. MACKENZIE: My lord, it shows that there is no consensus, if
37 the -- if there are conflicting claims and disputes.
38 THE COURT: Well, consensus doesn't mean unanimity, consensus
39 means a weighted agreeing opinion.
40 MR. MACKENZIE: Yes, that's right.
41 THE COURT: Well, if four deceased declarants said that Black
42 Acre belongs to "x" -- says there is a reputation that
43 Black Acre belongs to "x", and there is one reputable
44 deceased declarant who said there is doubt in the
45 community about whether it belongs to 'x' or 'y', do
46 you say that there is no consensus, or do you say that
47 it then becomes a matter of weight, or what do you say

1 is the result of that?
2 MR. MACKENZIE: Well, my lord, if there is evidence of
3 considerable dispute, that means that there is no
4 consensus and no reputation.
5 THE COURT: Right. So it would be a matter of weight for the
6 kindly trial judge to say before declarations here to
7 qualify as reputation evidence. And I got one that
8 says there is a dispute about it, but I can accept
9 that there was a sufficient consensus on reputation to
10 make the declaration.
11 MR. MACKENZIE: Well, my lord, that is -- as your lordship has
12 articulated, that is a weight problem. You have to
13 pass the threshold of determining there was a
14 consensus, and then there may be other people who
15 dispute it, but the argument here on admissibility is
16 that we don't reach the threshold state of consensus.
17 THE COURT: I understand that. All right.
18 MR. MACKENZIE: But your lordship -- I agree with your lordship
19 that once you pass the consensus point, then it's a
20 question of weight as to whether --
21 THE COURT: I'm sorry, you say once you pass the consensus
22 state --
23 MR. MACKENZIE: Once you have reached the threshold test, that
24 there is a consensus.
25 THE COURT: All right. Then you're saying that any adverse
26 claim wouldn't destroy the reputation?
27 MR. MACKENZIE: That's right, my lord. Because reputation is
28 assumed to be consensus. If that becomes disputed --
29 THE COURT: Surely you have to weigh the evidence before you
30 decide whether there is a consensus or not.
31 MR. MACKENZIE: Well, my lord, once you get the disputes rising
32 to a level where you have no consensus, you have no
33 reputation.
34 THE COURT: Surely you have to wait before you can say that it's
35 at that stage, don't you?
36 MR. MACKENZIE: Well, I think, my lord, as we pointed out, the
37 definition of reputation is that the consensus has
38 been sifted or at least the claims and counter-claims
39 have been sifted in the community, and the reputation
40 is settled into a consensus. So if there is evidence
41 that that hasn't occurred, that's a threshold test in
42 our submission.
43 THE COURT: Well, then, you're saying that any inconsistent
44 evidence to the reputation would destroy consensus?
45 MR. MACKENZIE: I am saying substantial evidence of disputes
46 would show that it hadn't been sifted and hadn't
47 settled into a -- and hadn't developed into a settled

1 reputation.
2 THE COURT: But you are not saying it must be -- not saying
3 there must be unanimity?
4 MR. MACKENZIE: No, my lord.
5 THE COURT: All right. Thank you.
6 MR. MACKENZIE: And carrying on with this question of consensus,
7 my lord, or sifted consensus. But being Wet'suwet'en
8 are members of the plaintiffs' community as well, but
9 there is no evidence that they agree with this
10 reputation. In fact there is evidence that there was
11 traditionally no boundary there along the eastern
12 border between -- on the eastern areas as between the
13 plaintiffs and the Babine territories.
14 In our submission, my lord, it can't be said that
15 there was a consensus or a settled reputation in the
16 plaintiffs' community, even if the plaintiffs
17 restricted definition of community were accepted.
18 The plaintiffs, as we have indicated, have undertaken
19 to prove detailed precise boundaries to support their
20 claims, unlike the general claims in Milirrpum.
21 This is another point on reputation, my lord, and
22 in paragraph 40 we point out that Neil Sterritt
23 testified that boundaries are not static, therefore
24 unchangeable boundaries since time immemorial could
25 not be regarded as reputation of fact, because
26 boundaries shift. Territorial affiants purport to
27 give reputation evidence that the boundaries have
28 remained the same since time immemorial.
29 In our submission this evidence of the boundaries
30 shifting directly contradicts the evidentiary
31 requirement that reputation is a distillation of
32 opinion, which approaches a degree of certainty.
33 These declarations therefore about boundaries since
34 time immemorial should be regarded as statements about
35 a belief, and these beliefs are subject to substantial
36 change, therefore despite their appearance, these
37 affidavits and the reputation evidence about -- I am
38 in paragraph 41, my lord.
39 THE COURT: Yes.
40 MR. MACKENZIE: Despite their appearance, these affidavits do
41 not support the plaintiffs' claim as to community
42 consensus.
43 And the third threshold test --
44 MR. GRANT: My lord, I just ask, with respect to the comments on
45 paragraph 40, that you make a note to look at what Mr.
46 Sterritt actually said. Of course he was talking
47 about the Tsiix, and giving of territory for helping

1 in a burial. Those are the two situations that he is
2 referring to there. My friend doesn't make that clear
3 in his argument.
4 MR. MACKENZIE: Well, my lord, I disagree with my friend's point
5 in relation to that evidence. I'll leave it for your
6 lordship.
7 THE COURT: All right.
8 MR. MACKENZIE: The third threshold test on page 15, My Lord,
9 deals with -- and plaintiffs' counsel at paragraph 44,
10 my lord, dealt with this in the following way:
11
12 "The deponents to the affidavits testified that
13 the persons who were the sources of information
14 are deceased. This was not under mind in
15 cross-examination, nor, in many cases, was it
16 challenged at all."
17
18 My lord, in argument, as set out at paragraph 45,
19 we reviewed the evidence to support the proposition
20 that the plaintiffs have not shown that the alleged
21 reputation came solely from named deceased informants.
22 In summary, in cross-examination Mr. Sterritt agreed
23 that the chiefs may have had living informants, and
24 may have discussed their boundary information with
25 living informants as well as the deceased informants.
26 And then the conclusions follow from these
27 submissions, my lord. The declarations made after the
28 origin of the controversy relating to the subject
29 matter of the declarations are unlikely to be free
30 from bias, and do not meet the test of
31 trustworthiness.
32 Declarations about matters in dispute at the time
33 of the declarations are not evidence admissible as a
34 settled reputation or consensus.
35 Paragraph 48. Declarations which assert the
36 static nature of a boundary since time immemorial are
37 contradicted. The basis for consensus is lacking.
38 Paragraph 49. Reputation which is not based
39 solely upon declarations by deceased persons is not
40 admissible.
41 The reputation evidence, as we have analyzed it in
42 Mr. Blackwater's affidavit and in all the other
43 affidavits, does not comply with the reputation
44 exception to the hearsay rule.
45 MR. GRANT: Just to be clear on that paragraph 49 of my friends.
46 I want to understand. Is he saying that a
47 reputation -- for reputation evidence to stand, it

1 cannot be discussed by people who are presently alive,
2 but only by those who are deceased? I just don't
3 understand the proposition he is making there.
4 MR. MACKENZIE: Paragraph 43, My Lord, I refer to your
5 lordship's reasons, and I say by analogy that that
6 applies here. What your lordship said in paragraph
7 43:
8
9 "... the question is not, 'What is the
10 reputation in the community?' as such a
11 reputation may not be based on grounds
12 (declarations by deceased persons) which alone
13 make the evidence admissible."
14
15 So if there is evidence that the information comes
16 from probably -- information comes from probably
17 deceased and living informants, and that's unclear as
18 to what comes from living informants and what comes
19 from deceased informants, then you have the same
20 situation. You do not have a situation where it is
21 declarations by deceased persons only.
22 THE COURT: Well, if it comes from living persons, then it's
23 inadmissible. But why would that poison admissible
24 evidence?
25 MR. MACKENZIE: Well, because my lordship can't tell which came
26 from deceased declarants and which came from the
27 living informants.
28 THE COURT: All right. Well, then, if a witness said my great
29 uncle told me that there was a reputation in the
30 community that his property belonged to "x", that's an
31 admissible declaration?
32 MR. MACKENZIE: Yes, my lord.
33 THE COURT: Then in cross-examination that witness could be
34 asked:
35
36 'Q That statement was made to you a long time ago
37 before your great uncle died?
38 A Yes.
39 Q Since that time have you discussed this
40 question with anybody else?
41 A Yes.
42 Q Who else?
43 A A, B, C and D.
44 Q Did they tell you the same thing?
45 A Yes, they did.'
46
47 You say that poisons the otherwise admissible

1 declaration?
2 MR. MACKENZIE: No, my lord. If I may, my lord, what poisons
3 the otherwise admissible declaration is one, did you
4 get your information -- sorry, one, have you changed
5 your views after the death of that informant?
6 THE COURT: If he says no.
7 MR. MACKENZIE: Well, if he has changed his views, as is the
8 case with several informants, after the death when
9 this case -- Walter Blackwater and Steven Robinson
10 changed their views after the death of their
11 informants, clearly got the information from --
12 THE COURT: If it changed their view, then they are not relying
13 on the informants.
14 MR. MACKENZIE: That's true, but in the affidavits they purport
15 to rely on the informants for different evidence. And
16 then in the case that your lordship pointed out, there
17 is another case here where -- in cross-examination the
18 affiant says 'No, I didn't get that information from
19 that deceased declarant. He never told me that.'
20 That's what happened in the case of Richard Benson and
21 Peter Muldoe.
22 THE COURT: It seems to me that if they got anything from
23 somebody after the death of the informant, even if
24 they subjectively said 'I believe that rather than
25 what my great uncle told me', that you would -- their
26 belief, it seems to me, would be irrelevant. It
27 doesn't matter what they believe. The Court has to
28 disregard the inadmissible, and it seems to me that
29 leaves the admissible. Maybe a matter of weight to
30 show that the community view had changed.
31 MR. MACKENZIE: My lord, in my submission we may have to look at
32 this a bit more carefully, but it's inextricably
33 intertwined. Which came from the living informants
34 and which came from the deceased informants, in our
35 submission, cannot be determined from the affidavits.
36 THE COURT: But if they change your mind, you know that it came
37 from the living ones, and therefore it's inadmissible.
38 MR. MACKENZIE: Except where the -- except where the information
39 alleged to come from the deceased informant is
40 different. That's alleged to be the reputation
41 evidence.
42 THE COURT: Yes. That's all the Court has to go on. It seems
43 to me what you are raising now is a different
44 question. It's the question of what is the
45 reputation? Or is there a consensus, because its been
46 challenged by other opinions, although they are
47 inadmissible, and maybe they should just be deleted

1 from one's consideration of the question.
2 MR. MACKENZIE: I should deal with that in a specific example,
3 my lord. For example, David Blackwater or Walter
4 Blackwater in his affidavit says the -- says 'Moses
5 Stevens told me this area belongs to Gwinin Nitxw'.
6 There is evidence that he made -- that Walter
7 Blackwater made conflicting statements after to Neil
8 Sterritt after the death of Moses Stevens. So it's
9 unclear where the information came from. And then
10 Neil Sterritt says, 'Well they may have got this
11 information from other people.' I'll look at that
12 evidence in more detail to give your lordship specific
13 examples.
14 THE COURT: All right.
15 MR. MACKENZIE: I think my friends would not disagree on the law
16 it must be shown that the information relied upon came
17 from the deceased, solely from the deceased persons.
18 THE COURT: I'm not sure, because I don't know if it matters
19 what the witness relies upon. It's the question, what
20 is the evidence of the witness, and if the evidence of
21 the witness establishes a reputation based upon
22 declaration of a deceased person or otherwise
23 qualifies, that evidence, it seems to me, stands there
24 separate and apart from what happened later, unless
25 you can say that it goes to the question of whether
26 there is a consensus, which it seems to me is a
27 different question.
28 MR. MACKENZIE: Well, my lord --
29 THE COURT: It's not one of admissibility, a question of whether
30 a threshold test has been made.
31 MR. MACKENZIE: Well, my lord, in my submission the
32 cross-examination establishes a basic problem, in that
33 there are other informants besides the deceased
34 informants who gave the information.
35 THE COURT: Well, I seem to recall that cross-examination. It
36 was Mr. Goldie cross-examining Neil Sterritt, wasn't
37 it?
38 MR. MACKENZIE: Yes, my lord.
39 THE COURT: It seems to me that the sum total of that is that I
40 would have to disregard what Mr. Sterritt said or
41 what -- disregard his evidence insofar as it was a
42 repetition that had not been received from living
43 informants.
44 MR. MACKENZIE: That's true if you can determine what had been
45 received from living informants. But if you can't
46 determine, then you have the evidence, and it comes
47 from --

1 THE COURT: What I thought it really went to is the credibility
2 of the informant. We are saying on one hand that it
3 was received from a deceased informant, and on the
4 other hand from a living informant, and really what
5 Mr. Goldie was establishing, I thought, was that this
6 information at first blush seems to have come from a
7 deceased informant, and could have been admissible and
8 in fact came from a living one and could not be
9 admissible.
10 MR. MACKENZIE: That's correct, my lord. Yes. That's correct.
11 But there were general statements made that this
12 information may all have come or much of this
13 information may have come from living informants, this
14 alleged reputation information.
15 THE COURT: I think that's a matter of weight, but I'll try and
16 sort it out.
17 MR. MACKENZIE: Well, my lord, I agree to some extent that it's
18 a matter of weight. These submissions deal with the
19 question of admissibility, and if your lordship can
20 find as a general finding on the basis of Mr.
21 Sterritt's cross-examination that generally speaking
22 the reputation, the territorial affidavits are
23 comprised of information from living and deceased
24 informants, if your lordship finds that your lordship
25 cannot determine from the affidavits whether the
26 information came from deceased persons or living
27 persons, then, my lord, in my submission that's
28 admissible. That's a question of admissibility.
29 THE COURT: Yes.
30 MR. MACKENZIE: Did your lordship wish to take the --
31 THE COURT: I thought we would go to about 3:15, if that's all
32 right. Madam Reporter would like to stay a little
33 longer.
34 MR. MACKENZIE: Well, my lord, that completes the addendum and
35 the argument on admissibility of this reputation
36 evidence. And if your lordship could turn past the
37 end of the addendum to the continuation of section --
38 I'll just move over to section 5b, page 3. Does your
39 lordship have that? I want to complete this in a
40 summary matter. These submissions deal with weight in
41 a very summary matter; that is, if the evidence is
42 admissible, in our submission the boundary, and
43 relying at paragraph 5 now, my lord, if this evidence
44 is admissible, the plaintiffs' boundary evidence is
45 unreliable and entitled to more weight. And as will
46 be apparent, much of the boundary evidence is found
47 at -- well, as I indicated, in the territorial

1 affidavits. Some of these affidavits contain false
2 statements, and some of this affidavit evidence is
3 contradicted by others sworn evidence.
4 Paragraph 6. Neil Sterritt and Marvin George and
5 Richard Overstall devised a common format and prepared
6 most of the territorial affidavits. In our submission
7 their evidence revealed serious shortcomings in their
8 methodology, and it supports the proposition that the
9 resultant affidavits are unreliable.
10 My lord, I am going to deal with this in more
11 detail in the next section.
12 Paragraph 7 dealt with that diluted by evidence of
13 conflicting claims.
14 Paragraph 8 dealt with that -- I have dealt with
15 that generally, my lord. This all deals with
16 admissibility, and the territorial affidavits dealing
17 with paragraph 8 allege that the boundaries have
18 remained unchanged from time immemorial, but there is
19 evidence again going to weight that the occupation in
20 this area is relatively recent.
21 Paragraph 9 deals with the fur trapping areas
22 established in the 18th and 19th century. Paragraph 9
23 continuing. This deals primarily with recency; that
24 is, the house boundaries appear to coincide with the
25 boundaries of registered traplines which were based on
26 the old trapping grounds.
27 And paragraph 10 deals with overlaps, and Mr.
28 Willms will deal with that, neighbouring Indian
29 groups.
30 Paragraph 11, the plaintiffs' assert they are a
31 community within the reputation exception. This is a
32 different argument from the argument I just made on
33 admissibility, my lord. The argument on the overlaps
34 is the proper aboriginal community must include
35 neighbouring peoples, and in paragraph 11 people on
36 both sides of the boundary constitute a community, and
37 therefore the plaintiffs assertions as to territory
38 are not community assertions and not evidence of
39 reputation. That will be dealt with in the overlap
40 section.
41 Skip over now, my lord, to refer your lordship to
42 section 5c, going past 5b, page 10, over to section
43 5c. That's the territorial evidence chronology. I am
44 not going to deal with that in detail, my lord, but
45 that's a chronology there. I will be handing up an
46 erratum sheet, which will correct some of the
47 references in that chronology.

1 And continue over to section 5d, which is the
2 territorial affidavits, my lord.
3 And this section I deal in general with the
4 problems in the territorial affidavits, and I think
5 it -- generally speaking these could be said to be
6 generally weight questions -- questions of weight and
7 problems with the evidence and the format in the
8 territorial affidavits.
9 MR. GRANT: Maybe I can interject now, my lord. 5b, paragraph
10 6, my friend referred to the proposition that Richard
11 Overstall, Marvin George and Neil Sterritt develop the
12 affidavit format. But when you look at the evidence
13 upon which he relies, and which is in the tab, and
14 which I have recalled, it was those three as well as
15 the lawyers develop the affidavit format. And my
16 friend doesn't refer to the fact that the lawyers were
17 involved in the preparation of that format.
18 THE COURT: Pleading guilty, are you, Mr. Grant?
19 MR. MACKENZIE: I'm pleading guilty. I will wait to hear the
20 rest of the argument before I speak to sentence on it.
21 MR. MACKENZIE: I don't disagree with Mr. Grant's comment.
22 THE COURT: I would like to see the indictment.
23 MR. GRANT: That's right.
24 MR. MACKENZIE: So, my lord, dealing with territorial
25 affidavits. These are the most important part of the
26 plaintiffs' boundary evidence, as the plaintiffs' case
27 developed after June, 1987. And the plaintiffs
28 assert, Marvin George asserted again and again that
29 map 9A and 9B are based on the territorial affidavits.
30 That's an addition to paragraph 1 of my
31 introduction.
32 Carry on to paragraph 2.
33 MR. GRANT: My friend mislead -- left out, I should say, that
34 not only the southern Antigulilbix territory and the
35 Hanamuxw territory were not sworn to by territory, but
36 the Gisdaywa territory as well. And Mr. George relied
37 on the oral evidence in all three of those cases as
38 well as cross-examinations.
39 MR. MACKENZIE: Yes, Gisdaywa should be added to that list.
40 THE COURT: All right.
41 MR. MACKENZIE: And again I don't disagree with Mr. Grant's
42 comments. With respect to all the other territories,
43 I think -- in my submission Mr. George asserted that
44 the territorial affidavits were the principle basis of
45 his drawing the map 9A and 9B in cross-examinations.
46 Paragraph 2, my lord, the territorial affidavits
47 as we have seen contain detailed precise descriptions

for the boundaries, and also house names and geographical features.

Paragraph 3 I refer to your lordship's comments on ownership in the territorial affidavits, and your lordship noted that your lordship would interpret that as meaning claimed.

Paragraph 4 your lordship raised the question whether there can be a reputation for ownership, and your lordship concluded that without argument -- without extensive argument there, that ownership was a multi-meaning name, and probably there could not be a reputation of ownership.

And paragraph --

THE COURT: I'm sorry, I don't remember this passage quoted at the bottom of --

MR. MACKENZIE: Paragraph 3, my lord.

THE COURT: Yes. Did I have territory affidavits before me at that time?

MR. MACKENZIE: Yes, my lord. That was the first -- that was after the first three affidavits had been filed.

THE COURT: I see. All right. We weren't taking evidence then.

MR. GRANT: It was in Chambers, my lord.

MR. MACKENZIE: In Chambers, yes, my lord.

THE COURT: I had forgotten this. So I had -- what counsel understand is that where the affidavits say owned, that that --

MR. MACKENZIE: Well, your lordship commented on that -- this is at Tab Roman IV, 5d-3. I'll read your lordship's comments, just as I have indicated there, my lord. Your lordship says:

> "I don't think I want to strike anything out of these affidavits. I think 'owned' means 'claimed' where it's a matter of identification of a property."

THE COURT: I said "I don't think I want to strike anything out of these ..."

MR. MACKENZIE: "... affidavits". The submission being made by the defendant of that case, my lord, was that references to ownership could not be included in the territorial affidavits.

THE COURT: Yes.

MR. MACKENZIE: Because your lordship had given an order permitting the plaintiffs to file affidavits relating to boundaries and geographical features on the territories.

1 THE COURT: Yes. All right.
2 MR. GRANT: I don't -- I think my friend mis-characterized it,
3 and I have a note, Mr. Rush and I were checking this,
4 as to -- and I don't have the full transcript, my
5 lord, but neither Mr. Rush nor myself understood that
6 your lordship -- I was on a conference call, I believe
7 in your own Chambers, and other counsel were present.
8 No ruling was made, but directions more or less as to
9 how to proceed with the affidavit process. And I
10 think that the -- in that extract that my friend has
11 put in, the comments of Mr. Rush at the end of that
12 page, line 28, demonstrates what the plaintiffs' saw
13 as a difficulty, and that we saw were within the
14 context of your ruling of your earlier ruling. I
15 don't believe there was a ruling at that time.
16 THE COURT: All right.
17 MR. MACKENZIE: Well, in my submission that was a ruling, my
18 lord, because that affected the entire
19 cross-examination after that point. As your lordship
20 points out, that's the reason why you are giving
21 directions in that Chambers occasion.
22 THE COURT: Look and see --
23 MR. MACKENZIE: Yes, my lord, Tab Roman IV, 5d-3.
24 THE COURT: IV 5d, are we?
25 MR. MACKENZIE: Yes, my lord, page 3.
26 THE COURT: And which tab number?
27 MR. MACKENZIE: Page 3 of tab 3, my lord. It's tab 3, my lord,
28 Roman IV, tab 3, page 1.
29 THE COURT: Oh, tab 3. Page 1?
30 MR. MACKENZIE: Yes, my lord. The only one page at that tab, my
31 lord. It's Roman IV, 5d-3.
32 THE COURT: What are we talking about here? "I have to tell you
33 here that I don't think it is admissible."
34 MR. MACKENZIE: The question of ownership, my lord. I interpret
35 that to refer to what your lordship just discussed,
36 which was the subject of the defendants' submissions
37 there, that is ownership and allegations of ownership
38 should not be included in the territorial affidavits.
39 THE COURT: Well, it seems to me that I clearly did not make a
40 ruling there. I said:
41
42 "I'm saying that without the benefit of argument
43 or research by counsel or myself and with the
44 benefit of never having thought of it before."
45
46 What troubles me greatly is the fact that I doubt
47 if a declaration made by a deceased person that

1 someone owned a piece of property would be admissible.
2 And it's not -- that's not -- that's not evidence of
3 the reputation of ownership. It's a statement of
4 fact. I think that's what I was saying in that
5 passage. But I have to say that I haven't thought of
6 it since, but it seemed to me that I said there I
7 don't think it's admissible. I said I didn't want to
8 strike it out. I suggested that "owned" maybe means
9 "claimed" --
10 MR. GRANT: You see, Mr. Rush explained our position on that in
11 that same page, my lord, which is that even if its
12 said that my mother told me this was Kweese's
13 territory, rather than this territory was owned by
14 Kweese, the reputation is whose territory was it.
15 That's why I say there wasn't a final ruling on that.
16 THE COURT: Yes.
17 MR. MACKENZIE: If I may, my lord, I regard that as a procedural
18 decision, that your lordship would determine ownership
19 as a result of the evidence before your lordship.
20 THE COURT: Uh-huh.
21 MR. MACKENZIE: And that the territorial affidavits would have
22 reputation evidence as to people claiming certain
23 areas, and your lordship would determine as a matter
24 of law whether that was ownership or not, and
25 therefore that qualified the term "ownership" as found
26 in the affidavits for the purposes of conducting the
27 proceedings. That's the submission as to the
28 interpretation of your lordship's reasons.
29 THE COURT: Well, you see, what I think I had in mind, and I
30 have come across this problem in many other similar
31 situations, and that is that we have some rules of
32 evidence which are very difficult to apply, and
33 reputation evidence is one of them, where you say that
34 a person is allowed to give as reputation evidence
35 what a person's reputation is in the community for
36 honesty and integrity. But witnesses don't think in
37 those terms, and they immediately launch into saying
38 'Well, he's a good person, and he goes to church
39 regularly, and he contributes to various charities,
40 and coaches the baseball teams', all of which is
41 inadmissible. And we judges have generally tended to
42 overlook that, as to say well, witnesses can't be put
43 into straight-jackets and say they have to say things
44 in certain ways. And we short-cut the process by
45 saying well, they've told us specific acts, but we
46 treat that to be as statement of reputation. And I
47 think what I was saying at the top of this page was

that -- and if an elder now deceased had said to a witness this is owned by Delgamuukw, the witness giving evidence of the declaration shouldn't be stopped from repeating the exact words that were used and were treated as a statement of reputation.

I think that's what I had in mind at the top of page 14 there. But I also said later on that without the benefit of argument I had some doubt about whether it was admissible to say that somebody owned something. As I said, I have some difficulty whether it can be reputation of ownership, but I don't have -- I don't have any doubt about that, that it would not be admissible as evidence of reputation to say that somebody owns something, yet I wouldn't stop somebody from saying 'Well, that's what he told me'.

Now, I don't know how much good that is to you, but I don't think you should treat that, Mr. Mackenzie, as a considered ruling. I expressly said it was not.

MR. MACKENZIE: My lord, I certainly agree with that. That was the -- I think it reflects what your lordship has just said. That was the basis on which the cross-examinations were conducted.

THE COURT: I confess that I was somewhat troubled when I saw these affidavits all coming in with these statements of ownership, and I had forgotten about this discussion here, and I assumed that this would all be straightened out at some time, as we are doing now.

I think I'll go and consider this shortly. No, I'm going to leave it to counsel to consider what this all means, and take a short adjournment.

THE REGISTRAR: Order in court. Court stands adjourned.

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

_____
LORI OXLEY
OFFICIAL REPORTER
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RECONVENED AT 3:30 P.M.)

THE REGISTRAR: Order in court.
THE COURT: Well, I hope you are not as confused as I am, Mr. Mackenzie.
MR. MACKENZIE: I don't know how to respond to that, my lord, except to say --
THE COURT: Perhaps it would be helpful if I try to restate again what I think the present position is; and that is, simply, that while I was not prepared to disallow or rule inadmissible these affidavits because they stated that someone said that a territory was owned by a particular person, I was raising the question of a general admissibility as evidence of reputation. I wasn't prepared to rule it out because there was going to be other evidence. In fact, there already had been other evidence. And what I was saying was that I'm not going to rule the affidavit inadmissible because it's phrased in language which does not strictly comply with the requirements of reputation evidence. I wasn't passing in any way upon the effect of that kind of a statement in that kind of an affidavit. I think that's what I was attempting to convey to counsel, and I think, subject to being persuaded otherwise, that's what I think is the present situation.

I must add that I did expect that I would hear further from counsel about this before now, but here it is.

MR. MACKENZIE: Well, my lord, in my submission, that your lordship stated -- stated the law in this case in your tentative -- your lordship's tentative conclusions that ownership is a multi-meaning word and really a question of law. And in my submission, your lordship -- although your lordship did not have the benefit of extended argument at that time, was stating what the common-law is, that the reputation is not -- is not of a legal matter or a question of law, it's a matter of custom or right in the community that something a normal witness could give if he were a -- if he were a witness to it. And witnesses can't give evidence about ownership as a matter of law. I would deal with it -- I interpret your lordship's comments that way.
THE COURT: All right.
MR. MACKENZIE: My lord, in view of the time, would it be possible in your lordship's schedule to sit 'til 5:30

1 today?
2 THE COURT: I don't know about Mr. Grant, whether he wants to
3 sit longer today. How are you feeling, Mr. Grant?
4 MR. GRANT: If your lordship can handle my coughing and hacking
5 I would. I had asked my friend at two o'clock and he
6 said that he would go 'til 4:30, but I understand if
7 he wishes to continue.
8 THE COURT: We'll go to 5:30.
9 MR. GRANT: Far be it for me to slow down the progress of the
10 case, my lord.
11 THE COURT: We'll take a break at 4:30 and go on after a very
12 short break and go on to 5:30.
13 MR. MACKENZIE: Thank you, my lord. I understand the reporters
14 are prepared and have made their arrangements.
15 THE COURT: Thank you. They are always very obliging.
16 MR. GRANT: My lord, we will speak on this point further. I
17 want to look at the whole transcript of those
18 proceedings.
19 THE COURT: Yes.
20 MR. GRANT: And we'll make clear our position as to this issue.
21 THE COURT: Thank you.
22 MR. GRANT: In due course.
23 MR. MACKENZIE: So my lord, it follows from my submissions on
24 ownership, that the affidavit evidence, if it's a
25 question of weighing the evidence, there is only one
26 factor in your lordship's determination of whether
27 there is actual ownership as a matter of law, or
28 whether these are the actual boundaries as a matter of
29 law.
30 And your lordship, as I indicated in paragraph 5,
31 has stated that it's your lordship's role to determine
32 whether the evidence amounts to reputation, and that
33 case -- and that particular passage is at tab 5, there
34 was a -- is your lordship at tab 5?
35 THE COURT: Yes.
36 MR. MACKENZIE: Your lordship was dealing with the question of
37 whether Mr. Sterritt could give evidence of reputation
38 as an expert. And your lordship pointed out at line
39 34 -- 33:
40
41 THE COURT: The most an expert can say was that
42 ten people say that that's a boundary.
43 Well, that's usurping the function of the
44 court. That's my responsibility to
45 decide whether that amounts to a
46 reputation or not.
47

1 And your lordship was dealing with a slightly
2 different subject there, but in my submission, that
3 applies to your lordship's reception and consideration
4 of the territorial affidavits as well.
5 In weighing the evidence, assuming that there is
6 admissibility, your lordship will determine whether
7 that evidence does amount to a reputation.
8 And moving over to paragraph 7, my lord, we dealt
9 with the point of the maps being based primarily on
10 the territorial affidavits and we dealt with the rest
11 of paragraph 7.
12 Moving to paragraph 8.
13 THE COURT: Well, the maps take it no further than the
14 affidavits.
15 MR. MACKENZIE: That's correct, my lord.
16 THE COURT: Yes.
17 MR. MACKENZIE: As your lordship said, the maps are based on the
18 affidavits and if nothing else is shown, then we will
19 assume that it is evidence of the material of the
20 boundaries on the map.
21 THE COURT: Yes.
22 MR. MACKENZIE: That is -- I say that in paragraph 9, my lord.
23 Your lordship has pointed out:
24
25 ...that depictions on the maps accord with the
26 territorial descriptions in the affidavits then
27 I think in the absence of anything else the map
28 would then be evidence which was admissible for
29 the truth of those facts.
30
31 And as a note there, my lord, "anything else" are
32 these submissions and the evidence that the affidavits
33 are either inadmissible or of little weight, which is
34 dealt with in these submissions.
35 THE COURT: Yes.
36 MR. MACKENZIE: Now, I summarize in paragraph 10 the problems
37 with the affidavits, and I go into detail later in
38 these submissions on these points. I'll just run
39 through them in summary:
40 (a) The affidavits do not name all the sources
41 of information upon which the deponent
42 relies.
43 (b) Some of the information has probably been
44 obtained from living informants.
45 (c) Mr. Sterritt and Mr. George drafted the
46 affidavits based upon their and other
47 research with various informants and from

other sources, including archival materials, prior to 1987.

(d) The affidavits have a common format, and I set out the different phrases in that.

The common format itself, in our submission, leads to problems of weight and credibility when the common format is shown not to apply to the particular circumstances of the affiant, despite the fact that the common format has been followed.

(e) The affiants all purport to describe the claim area boundaries, as I say, in a detailed description, the use of which conveys misleading impression, in our submission, of the way in which this information is actually known.

(f) Many of the affidavits contain evidence which conflicts with earlier statements by the affiants or other apparently knowledgeable persons about the house claim area.

And as an example here I point out, as a note, Walter Blackwater made statements in 1983 -- this is a note to be made just as an example of (f), my lord.

THE COURT: Is that the note there at page 138?

MR. MACKENZIE: At transcript 138 is an example of this situation, and -- and I'll just check that, my lord.

THE COURT: No, I was wondering if that was Walter Blackwater's example but it isn't, is it?

MR. MACKENZIE: Yes -- well, I'll just have to check that, my lord. It's Neil Sterritt but it may be dealing with --

THE COURT: All right.

MR. MACKENZIE: Yes, it's transcript 138, page 8667, lines 22 to 27. It's at tab 10 in the yellow binder, page 11, and it deals with Walter Blackwater. And Neil Sterritt agreed that Walter Blackwater made statements in 1983 which conflicted with his territorial affidavit of 1988. Now, does your lordship have that reference? Does your lordship --

THE COURT: I don't think so.

MR. MACKENZIE: It's tab 10, my lord.

THE COURT: Tab 10?

MR. MACKENZIE: Because this is -- we are dealing with paragraph 10 here. It's Roman four, 5(d), tab 10.

THE COURT: Yes.

MR. MACKENZIE: And if your lordship then goes to page 11. It's Roman four --

THE COURT: Yes. I'm just trying to find the page number.
MR. MACKENZIE: It's page 11, my lord, at the lower right -- if you look at the lower right-hand corner of the page --
THE COURT: Yes. I'm just wondering why -- yes, all right.
MR. MACKENZIE: Does your lordship see that? That -- if your lordship looks at that, your lordship will see that that is transcript 138, page 8667.
THE COURT: Yes, and it's?
MR. MACKENZIE: The passage should be marked in your lordship's copy at lines 22 to 27.
THE COURT: Yes, it is.
MR. MACKENZIE: And at any rate, my lord, that's the example I was given there.
THE COURT: All right.
MR. MACKENZIE: And that's the way that the yellow binder continues to work, in general, just giving examples. I won't go into examples now because I deal with them, my lord.

(g) Many of the affidavits are not sworn by hereditary chiefs or members of the house which claims the territory.

And there are many examples of that. Elizabeth Jack swore the affidavit, she is a Cheslatta person who swore the affidavit for the Tahtsa Lake territory. I think I've already dealt with that, my lord.

THE COURT: Yes.
MR. GRANT: Which paragraph is that?
MR. MACKENZIE: Paragraph (g) -- subparagraph (g).
MR. GRANT: Thank you.
MR. MACKENZIE: (h) The affidavits, while purporting to provide reputation evidence as to the boundaries, do not contain evidence supporting the characterization of the boundary evidence as reputation.

Well, that's a reference to the point that your lordship just pointed out, that they do not say that this was given by -- arguably say this was given by deceased persons. And in addition, there is no evidence of consensus or public discussion.

(i) Every affiant purports to have received the boundary information from deceased persons.

And at first sight that doesn't look like a problem, my lord, but the point is that the arrangements have been that every single affiant has apparently selected deceased persons to receive the information relating to the boundaries, and that in itself, we submit, is a cause for concern about

1 credibility and we'll deal with that in the section.
2 THE COURT: But, of course, if they -- if they had done that you
3 would have said it was inadmissible in any event.
4 MR. GRANT: That's correct, my lord. We could have put many
5 more affidavits in, my lord, I'm sure, of people who
6 relied on living witnesses, but my friends would
7 certainly have taken objection to that.
8 MR. MACKENZIE: Yes. Well, my friend is probably right in that.
9 The point here is that the submission will be made
10 that it appears that living informants have been
11 deleted or removed or left out of the affidavits.
12 That is, the actual sources of the information, that's
13 the submission.
14 (j) The information was obtained for land
15 claims negotiations or litigation purposes.
16 This is related to some extent to the ante
17 litem motam point, my lord. Mr. Sterritt's
18 information, which was the basis of the
19 first drafts of the affidavits, was obtained
20 after 1975, generally speaking, when the
21 land claims were a political concern. And
22 also, I'll point out all the informants to
23 whom Alfred Joseph spoke were aware of the
24 fact that he was obtaining information for
25 the purposes of the lawsuit.
26 MR. GRANT: I just wondered if my friend -- he may be coming
27 back to this, because he says he is coming back to
28 some categories. But (h) -- subcategory (h), my lord,
29 appeared to me to contradict what my friend earlier
30 has argued, when he went to paragraph 43 of the
31 Blackwater affidavit, and he said that ties back to
32 the boundaries. And I just wonder if he is saying
33 what -- what he means by "not containing evidence
34 supporting the characterization of the boundary
35 evidence as reputation"? That appears to conflict
36 with what I understood he earlier argued.
37 MR. MACKENZIE: Well, my lord, the point there, as I mentioned,
38 was that there is no evidence of consensus, in our
39 submission, or public knowledge or public
40 acknowledgement.
41 THE COURT: Yes. All right.
42 MR. MACKENZIE: My lord, paragraph 11, I think in my submission,
43 is self-evident. The plaintiffs have tried to produce
44 evidence to comply with the reputation exception to
45 the hearsay rule, and in our submission, if it can be
46 shown that that evidence was probably obtained from
47 living witnesses, your lordship's comments apply. And

1 this is what -- your lordship brought this up in Mr.
2 Joseph's cross-examination -- Mr. Joseph's
3 examination. I think that follows from the arguments
4 we've already made that the source must be deceased
5 persons.
6 So if we can show a probability of the
7 information having been obtained from living
8 witnesses, in our submission, that evidence is
9 inadmissible.
10 Paragraph 12, the plaintiffs had initially
11 intended to have Mr. Sterritt testify as to the
12 boundaries, based upon information he obtained from
13 various informants. And when the court ruled that it
14 had no discretion to admit that hearsay evidence, the
15 plaintiffs proposed to adduce the boundary evidence by
16 affidavits in place of Mr. Sterritt's testimony.
17 Now, my lord, there is a correction to the
18 reference there. It should be tab 137 -- sorry,
19 transcript 137, page 8567, line 29, to page 8568, line
20 47. And that's set out at tab 12 in the yellow
21 binder. I'm not going to go into it.
22 Mr. Sterritt said that this was a way -- a
23 digression and note related to paragraph 12: Mr.
24 Sterritt said that the affidavits were an attempt to
25 resolve the hearsay problem, but of course the
26 affidavits contained hearsay evidence. The only
27 difference is they purport to be reputation evidence
28 and purport to rely only upon deceased informants.
29 That's the way --
30 THE COURT: Is that quotation at the bottom of page 8 included
31 in your chronology?
32 MR. MACKENZIE: Yes. It's at tab 11, my lord, in the yellow
33 binder.
34 THE COURT: No, sorry. Is it in the chronology that you skipped
35 over?
36 MR. MACKENZIE: Oh, the chronology doesn't deal with events
37 during the trial, my lord, it deals primarily with the
38 collection of evidence leading up to the trial.
39 THE COURT: All right. Thank you.
40 MR. MACKENZIE: And I think it also refers to the -- my friend
41 is correct, it also refers to the date that the
42 affidavits -- the commencement of preparation of
43 territorial affidavits.
44 THE COURT: Where is that chronology again, please?
45 MR. MACKENZIE: It's at 5(c), my lord. And my friend is --
46 has -- is referring to 5(c) page 4, I take it, at the
47 bottom, where there is a reference to the commencement

of the territorial affidavit project in 1987.
THE COURT: Yes.
MR. MACKENZIE: Should be June 1987. Yes, my lord.
Is your lordship at paragraph 12?
THE COURT: Yes.
MR. MACKENZIE: I'm just pointing out, my lord, that the territorial affidavits are designed to replace Mr. Sterritt's testimony on the boundaries -- hearsay evidence on the boundaries.
Paragraph 13. After June 1987, Mr. Sterritt started preparing the affidavits, and all his interviews after that date related to the affidavits. And Marvin George carried out the same responsibilities with respect to the -- with respect to the Wet'suwet'en witnesses.
Paragraph 14, this deals with the preparation of the affidavits. Mr. Sterritt and Mr. George prepared drafts and then they brought the drafts to the affiants. Mr. George already had maps which he had prepared based on other information, and he brought those to the affiants. In -- carrying onto page 10. Mr. Sterritt balanced the need for Mr. George's requirements with respect to mapping information and the need to explain the affidavit to the chief. Mr. Sterritt explained to the chief what the words in the affidavit meant.
And the reference there, my lord, should be changed to transcript 137, page 8572 lines 5 to 15. I'll be handing up an errata, my lord, for these sorts of changes.
THE COURT: Fine. Thank you.
MR. MACKENZIE: The point of these paragraphs, of 15 and 16, is that Mr. Sterritt was, in our submission, suggesting this information to the chiefs for the chiefs' response. And Mr. Sterritt indicated he would say the name of the feature and the chief would say, "Yes". Paragraph 16.
Paragraph 17. This relates to all the other sources of Mr. Sterritt's information. He spoke to many informants living and later deceased at the time of the trial. And he obtained information from archival and historical documents, the Barbeau-Beynon papers, and I might add there, my lord, paragraph 17, the D.I.A. files, adding to paragraph 17, and Polly Sergeant also was one of his informants.
And carrying onto paragraph 18, I think this is the mapping procedure. Mr. Sterritt collected

geographical and ownership information and, in our submission, often conflicting, about the claim areas from many informants. For example -- this is an example to be noted in paragraph 18 -- for the Slamgeesh area, some people said it belonged to Dawamuxw, some people said it belongs to Niist and eventually some people said it belonged to Gwinin Nitxw.

THE COURT: What's the third one?

MR. MACKENZIE: Gwinin Nitxw, G-W-I-N-I-N, new word, N-I-T-X-W.

THE COURT: Yes.

MR. GRANT: I'm sorry, my lord. In paragraph 15 my friend makes a reference to -- and he has it in his tab, page 8674, line 23 to 42. What's germane there is, in our submission, is immediately before that, where Mr. Sterritt explained an answer that the chief -- hereditary chief changed the boundary according to his knowledge of where the boundary was, and that same proposition applies -- that same principle applies with respect to paragraph 16. In other words, I say that you should look at the evidence surrounding those two transcript excerpts, because my friend, I say, has truncated the answer to such a large extent that it's misleading.

THE COURT: Judges never look at what counsel refers to, we always look at the question before and the question after.

MR. GRANT: I assumed that, my lord, but I wanted to be sure of that. In this case, it's quite important.

THE COURT: Yes. It's instinctive. Often the page before and the page after.

MR. MACKENZIE: My lord, I appreciate my friend's comment. I can anticipate his reply now, he has given great assistance; he has given it.

Tab 15 -- perhaps just to respond to my friend's comment, at tab 15 in the yellow binder, I haven't -- is your lordship at tab 15?

THE COURT: Yes.

MR. MACKENZIE: At lines 23 to 32, Mr. Goldie's question is:

> Q So the source of his information with respect to the wording in the affidavit was you?
>
> MR. RUSH: The first draft of the affidavit?
>
> MR. GOLDIE:
>
> Q Yes, the first draft affidavit?
>
> A The first draft.

1 Q Yes. That's correct, is it not?
2 A Well, I want to be clear.
3 Q Yes. Well, first draft your answer is
4 yes?
5 A Yes.
6
7 And that was the basis for the paragraph 16 in my
8 submissions, my lord.
9 I was at paragraph 18, my lord. The information
10 was recorded on data sheets and working maps.
11 Paragraph 19. The data was given to Mr. George
12 and he used it to prepare composite maps. And these
13 composite maps and this data was used as a basis for
14 drawing all the maps, all the plaintiffs' maps in the
15 Exhibit 646 series, including the various versions of
16 Schedule "B" to the Statement of Claim. Mr. George
17 also prepared individual house claim area maps which
18 became the interrogatories maps.
19 Paragraph 20. Every one of the maps in the 646
20 series -- that should be corrected, my lord, 646 --
21 including Mr. Sterritt's 1977 map, that was the first
22 declaration -- is inconsistent with the Exhibit 646-9A
23 and 646-9B boundaries.
24 THE COURT: Do you mean anything more than that they are
25 different?
26 MR. MACKENZIE: They are all different, that's correct, my lord.
27 THE COURT: All right.
28 MR. MACKENZIE: And they all have differences, to some degree or
29 another, of ownership attribution.
30 MR. GRANT: Well, I take it my friend is only talking about the
31 ones on the 646 series that have been referenced to
32 internal territories, if he is saying that there is
33 differences there.
34 MR. MACKENZIE: Yes, my lord.
35 THE COURT: Because most of them don't have that.
36 MR. MACKENZIE: The early maps did not have internal boundaries
37 until, as my friend noted, June or May of -- June
38 1987, when Exhibit 5 was produced. That was the first
39 time we saw the internal boundaries. Although there
40 is another map of internal boundaries which is Exhibit
41 102 and Exhibit 101, those were produced in 1985.
42 Exhibit 102 was produced in 1985 and Exhibit 101 was
43 produced for 1986, April 1986.
44 MR. GRANT: And the defendants had them before trial.
45 MR. MACKENZIE: Mr. George asserted that all the prior
46 information had come from the hereditary chiefs,
47 through the researchers' data sheets and working maps.

And the reference there should be transcript 218 page 1584.
THE COURT: 218?
MR. MACKENZIE: Yes, my lord. Page 1584.
THE COURT: 1584?
MR. MACKENZIE: Yes, my lord. 15854, I beg your pardon.
THE COURT: Yes.
MR. MACKENZIE: I dealt with paragraph 21, my lord. The territorial affidavits were drafted on the basis of this accumulated information.

Paragraph 22. Mr. Sterritt and Mr. George followed similar procedures during the affiant interviews, and I think we dealt with that.

And paragraph 23, we dealt with that. It is asserted that the claim area maps were based on the territorial affidavits. And in our submission though, the maps originated from the working maps, the data sheets and the composite maps. And it is submitted that Mr. Sterritt and Mr. George reconciled conflicting information, discarding that which did not coincide with their view of the claim area. I've already mentioned in the case of the Slamgeesh area, Mr. Sterritt received several conflicting statements.

And then I give some examples of information that Mr. Sterritt had but did not pass on to be incorporated. For example, Mr. Sterritt had information given to Chris Harris -- that should be changed -- given to Chris Harris by Arthur Sampson that Miluulak owned part of the Ingenika River. That's well to the east of Bear Lake and outside of the claim area.
MR. GRANT: Given to Chris Harris?
MR. MACKENZIE: Yes. And that the transcript reference there is transcript 141, page 8947, line 14. There was information from Moses Brown that Wiigyet owned land in the Nass River Valley. It did not find its way into Sterritt's working maps or Mr. George's Schedule "B" maps. And the reference is given there and it's in the yellow binders.
MR. GRANT: My recollection is that's outside the area of claim.
MR. MACKENZIE: Yes, that's correct. My friend is correct.
MR. GRANT: So there would be no need, of course, to put it on any map of the area claimed.
MR. MACKENZIE: Thank you. My friend is making the point that I was making as well.

Paragraph 25, it's the -- paragraph 25, the note to add is it is the reconciliation of these conflicts

that is the significance here. There are conflicts between Mr. Sterritt's and other researchers' notes and the territorial affidavits. They are analyzed in detail, for example, in Section 5(g). There are conflicts between maps 9A, 9B, and all previous plaintiffs' maps. There are conflicts between non-chiefly affiants and notes of interviews with hereditary chiefs relating to the chiefs' claim areas.

THE COURT: What non-chiefly affiants are there? I didn't think there were any.

MR. MACKENZIE: Well, for example, my lord -- sorry, non-chiefly affiants would be Elizabeth Jack, for example, and Thomas Moore. Mrs. Elizabeth Jack was Cheslatta -- was a Cheslatta person who sworn the affidavit for that Tahtsa Lake area which is down in the south-western corner of the land claims area.

THE COURT: Yes.

MR. MACKENZIE: And many of the chiefs are also not the head chiefs of the house. And as I've already indicated, there are in some cases chiefs of other houses and there are conflicts between their affidavits and the actual chiefs who claim the territory.

Several of the informants, in our submission, were not produced for cross-examination. Several of the informants referred to in the researchers' data sheets, for example, David Blackwater, Andrew George and Nancy Superneault. Leonard George, one of the principal researchers, was not produced, and Alfred Joseph's research materials, including all of his data sheets -- that's an addition to that paragraph -- were not produced prior to his cross-examination. It's our submission that the information which forms the foundation of the entire mapping, research and affidavit process is untested, conflicting and totally unreliable.

And paragraph 27 I've already dealt with, my lord, but the plaintiffs have a fundamental obstacle: the creation of a vast interlocking mosaic of individual claim areas based upon second and third-hand hearsay information.

Paragraph 28, we deal with Walter Blackwater's affidavit, and we've already referred to that to some extent. And the evidence confirmed -- this is paragraph 28 -- that Walter Blackwater had deposed to matters in his affidavit which contradicted earlier statements which he had made to Mr. Sterritt in a 1983 interview.

1 And then I give examples of that in paragraph 29.
2 I won't go into details in the examples except to say
3 one. Mr. Sterritt -- sorry, Mr. Blackwater swore that
4 the Slamgeesh area was claimed or owned by Gwinin
5 Nitxw, and in the interview in 1983, Mr. Blackwater
6 said several times that it was owned by Dawamuxw. And
7 there are other areas of conflict dealing with that
8 Slamgeesh territory which I will deal with in further
9 submissions.
10 Paragraph 30 deals with other conflicts between
11 Mr. Blackwater's 1983 interview and the 1988
12 affidavit. I won't go into those.
13 Paragraph 31, I get into this question now, my
14 lord, of the deceased informants. Paragraph 31: The
15 only sources of information given for Mr. Blackwater's
16 knowledge about this territory were Jack Tait, Thomas
17 Sampson and Mary Blackwater. And these informants had
18 all died prior to 1983.
19 But Mr. Blackwater changed his mind -- changed
20 his views as to ownership of that territory between
21 1983 and 1988. In our submission, paragraph 32, those
22 changes could not be attributed to the people whom he
23 listed as informants of his affidavit.
24 And that's the same with respect to the Slamgeesh
25 area. All the informants were deceased by 1974 and
26 yet Mr. Blackwater continued to change his -- he gave
27 different evidence. Paragraph 33, that's dealing with
28 that.
29 Paragraph 34, Mr. Sterritt explained that the
30 territorial affidavits were put forward to avoid the
31 problem of hearsay. That was the reason why the
32 informants had to be dead at the time the affidavit
33 was sworn. And I'm going to refer to this, my lord,
34 at tab 34, this section in the yellow binder. And
35 this is paragraph 34, this is lines 15 to 29, my lord:
36
37 Q The territorial affidavit was put forward
38 to escape what you understood to be a
39 problem with hearsay evidence?
40 A I don't know why you use the word escape.
41 I understood from the discussion partly
42 from, I guess, you and from the judge on
43 the bench and the discussions from our
44 lawyers over the issue of hearsay that if
45 a person was living, that they -- then it
46 could only be hearsay. It had to be from
47 dead persons, and that I could not -- I

1 myself could not come forward with
2 information if those people were living,
3 and they should.
4 Q Yes.
5 A And as I understand it, that's the
6 situation.
7 Q Yes.
8
9 Then at the bottom, lines 42 to 46:
10
11 Q Well, I am asking you to confirm that for
12 every territorial affidavit the
13 informants that the deponent relied upon
14 had to be deceased at the time the
15 affidavit was sworn.
16 A That's my understanding, yes.
17
18 And continuing over the page, my lord, to page 2
19 in that tab, the yellow binder, at lines 9 to 26:
20
21 Q Well, do you agree or disagree with my
22 suggestion to you that the territorial
23 affidavits are defective?
24 A Well, define the sense.
25 Q In not naming the source of information
26 upon which the deponent relied.
27 THE COURT: Not naming all sources?
28 MR. GOLDIE:
29 Q Not defining all sources of information.
30 That's correct. Thank you, My Lord.
31 A Yes, but our understanding was that
32 because of hearsay that they couldn't.
33 That was my understanding.
34 Q Well, that may be your understanding, Mr.
35 Sterritt, but is that the reason why
36 certain sources of information were left
37 out?
38 A Out of the affidavits, yes, because if
39 the people are living, then it's hearsay.
40 Q All right. So you --
41 A That's right.
42
43 And that -- I deal with that in paragraph 34 in
44 my submissions, my lord.
45 THE COURT: Why is Mr. Goldie saying the affidavits are
46 defective? Because they don't disclose all the
47 sources of information?

1 MR. MACKENZIE: Well, my lord, I interpret him to be saying that
2 affiants, people who swear affidavits, should rely on
3 the sources of information from which they get the --
4 the source from which they get the information used in
5 the affidavits.
6 THE COURT: Surely that's only required where secondhand
7 information is admissible as in applications in
8 chambers. Those affidavits are full of, "I'm informed
9 by such-and-such and verily believe," but that
10 wouldn't have been admissible here.
11 MR. MACKENZIE: That's correct, my lord. But the analogy is --
12 and in these reputation affidavits, the only evidence
13 that's admissible is from deceased people. And so I
14 suppose what Mr. Goldie is saying -- well, it's sort
15 of a reverse meaning of defective. They would be even
16 more defective if these other informants, the living
17 informants were included.
18 I think what Mr. Goldie is also saying is that
19 reputation evidence affidavits have to -- in our
20 submission, have to be solely the information received
21 from deceased informants. And if there is any
22 question that there are other informants, then the
23 affidavits are defective. It doesn't deal
24 specifically with the point your lordship was making.
25 THE COURT: All right.
26 MR. GRANT: My lord, I think on that point you can see that Mr.
27 Rush objected and your lordship intervened at that
28 point and Mr. Goldie -- on the very concept of
29 defective, where you said:
30
31 THE COURT: I think the word defective, Mr.
32 Goldie, does imply the application of
33 legal and evidentiary principles to facts
34 which are now pretty clear.
35
36 In this exchange, the -- I think the question of
37 what was defective is a very open issue. That's not
38 even clear now, having heard my friend's argument, not
39 clear to me.
40 MR. MACKENZIE: Well, my lord, I am not relying on the question
41 of defective, I am relying on the point here that
42 sources of information were left out and that --
43 certain sources of information were left out, and I
44 submit that this cross-examination is intended to show
45 that sources relied -- sources which were the source
46 of the information were left out in order to produce a
47 document that appeared to be complying with the

1 reputation exception, that the information came solely
2 from deceased informants.
3 MR. GRANT: Well, I think that's answered after that exchange
4 then by the last part of that page and onto the next
5 page of the transcript it goes back to another topic
6 of Mr. Blackwater's own affidavit. But Mr. Sterritt
7 does say he couldn't agree with that source of
8 information being left out.
9 THE COURT: Yes. I think the problem is well stated in the
10 penultimate answer on that page.
11 MR. MACKENZIE: Yes. I deal with that in paragraph 35, my lord.
12 THE COURT: All right.
13 MR. MACKENZIE: Mr. Sterritt did not know to what extent Mr.
14 Blackwater might have talked to other people. He
15 stated that "it's a process that all of the hereditary
16 chiefs" -- I'm referring to paragraph 35. Mr.
17 Sterritt stated that "it's a process that all of the
18 hereditary chiefs like to engage in, to go to other
19 people and confirm and verify what they know or what
20 they understand..." And that's -- that reference is
21 set out at tab 35 in the yellow binder.
22 The question has to be asked, in our submission,
23 my lord, in addition to confirming and verifying,
24 there is also correction in the times of provision of
25 newer information relied upon in the affidavits. This
26 is paragraph 35.
27 Now, I carry on with this point, my lord, in
28 paragraph 36. Reference was made to Mr. Stanley
29 Williams who was a person to whom Mr. Sterritt spoke
30 frequently and who referred in his affidavit to the
31 greatest number of territories. Mr. Williams swore
32 two affidavits: the first in 1987, the second in 1988.
33 With respect to Mr. Herbert Burke's claim area, Mr.
34 Williams' informants, Charles Smith and Mathias Wright
35 had died prior to January 1987. However, Mr.
36 Williams' evidence as to the location of a tributary
37 of Insect Creek changed between 1978 and 1988. In his
38 1987 affidavit, he located the creek in Herbert
39 Burke's territory whereas in his 1988 affidavit, it
40 was located in Arthur Matthews' territory.
41 Paragraph 37, the cross-examination on this
42 question continues:
43
44 Q Does that not suggest that Mr. Williams
45 received information about the ownership
46 of a feature within the property after
47 the 25th of January, 1987?

1 A He may have.
2
3 My lord, I submit that that's an important point to
4 note.
5
6 Q And that could come only from somebody
7 other than the informants that he names
8 in his affidavit, Charles Smith, Mathias
9 Wright?
10 A Yes. That's possible.
11
12 THE COURT: Well, it seems to me the plaintiffs are in an
13 impossible position: If they put in other live
14 sources of information that's inadmissible, and if
15 they leave it out it's possibly misleading if it
16 contributed to the understanding of the chief.
17 MR. MACKENZIE: Well, I agree, my lord, except to the extent
18 that the argument here is that information did not
19 come from the deceased sources. It probably did not
20 come solely from the deceased sources because --
21 THE COURT: I was saying if it didn't come solely from a
22 deceased informant, then it seems to me that that
23 doesn't make the evidence which came from the deceased
24 source inadmissible, but it affects the quality of the
25 affiant's knowledge because it's impossible to know
26 what -- how much did you learn from legitimate or
27 admissible sources and how much did you learn from
28 inadmissible sources.
29 MR. MACKENZIE: Yes, my lord. That's the argument that's being
30 made.
31 THE COURT: Yes, all right.
32 MR. GRANT: On this point, my lord, my recollection is that
33 these questions, although of course my friends had
34 both affidavits of Mr. Williams before their
35 cross-examination of him, this point was not raised
36 with him as to why that change and what source --
37 living source, if any, he got it from.
38 MR. MACKENZIE: And moving to paragraph 39, my lord, we already
39 made the point in my first sentence. Some other
40 examples I give there, Peter Muldoe and Richard Benson
41 stated that they did not discuss the claim area or
42 travel in the claim area with certain of the alleged
43 deceased informants referred to in their respective
44 affidavits.
45 Now, as a note, I say that is an example of a
46 case where the affiants mentioned deceased affidavits
47 in their affidavit -- or deceased -- sorry. Deceased

informants were included in the affidavit but in fact they were not the source of the information.

And my lord, paragraph 40 follows from this: The receipt of such information from living informants disqualifies the affidavit evidence as reputation evidence. In our submission, the failure to identify the sources of the information not mentioned in the affidavits makes it impossible to determine which information was received from living informants and which from named deceased informants. It was therefore impossible to determine whether the territorial affidavit boundary evidence complies with the requirements for admissibility as reputation evidence. And your lordship has already pointed that question out.

Paragraph 41 gives another example of this. Steven Robinson -- I won't go into it in detail -- but it's a similar example where there seems to be a change in evidence and more information apparently obtained after the death of the deceased informants.

Paragraph 43, dealing with these changes in evidence after the death. The premise of the plaintiffs' case is that information has been known (and has remained unchanged) within the community of the plaintiffs since time immemorial. The significance of short-term changes in boundaries, particularly as substantial as those in the case of that Spookw territory -- that's Mr. Robinson's territory -- is apparent. The new information may have been manufactured by Mr. Sterritt or by someone else or it may be a process of giving substance to that which is ordinarily understood in terms of the highest degree of generality and uncertainty.

THE COURT: Shall we take a short adjournment, Mr. Mackenzie?

MR. MACKENZIE: Yes, my lord.

THE REGISTRAR: Order in court. Court stands adjourned.

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

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

Toni Kerekes, O.R.,
UNITED REPORTING SERVICE LTD.

1 (PROCEEDINGS RESUMED PURSUANT TO ADJOURNMENT)
2
3 THE REGISTRAR: Order in court.
4 THE COURT: Mr. Mackenzie.
5 THE REGISTRAR: My lord, I received this letter.
6 THE COURT: Ms. Thompson brought to my attention a letter that I
7 received from Mr. -- well, I'm sorry, that the
8 registrar in Smithers has received from Mr. James
9 Sterritt which I will pass down to counsel. I have
10 received various communications from Mr. Sterritt from
11 time to time. And I am not sure that I have shared
12 every one of them with counsel. There was one quite
13 long one about a month ago. And I am not sure that I
14 gave it to counsel.
15
16 I would be grateful if counsel would tell me what
17 they think I should do about that letter, that is what
18 response I should cause the registrar to make to it,
19 if any. They seem to want to file some kind of
20 intervention. I am rather disposed to tell the
21 registrar to have them send in whatever he wants in
22 writing at any time. Counsel can talk about it and
23 let me know. There is no rush.
24 MR. GRANT: We probably won't be far removed from what your
25 general comments are, but I would like to discuss this
26 with Mr. Rush.
27 THE COURT: Yes, certainly. You may take that with you, Mr.
28 Grant, as long as we see that we get it back some
29 time.
30 MR. GRANT: Yes.
31 MR. MACKENZIE: Maybe we could get a copy also, my lord.
32 THE COURT: Yes.
33 MR. GRANT: I'll take it and make a copy for myself.
34 THE COURT: Perhaps Ms. Thompson can go do that right now. Make
35 three copies, thank you.
36 MR. MACKENZIE: My lord, as I say, I am not going to deal with
37 paragraph 41. But I did hand up some material which
38 was put at your lordship's tab 41 in the yellow
39 binder. And I am not going to deal with it except to
40 explain to your lordship what it is at tab 41 in the
41 yellow binder deals with Mr. Steven Robinson. And I
42 have handed up an excerpt from his territorial
43 affidavit, Exhibit 592.
44 THE COURT: And that's in the yellow binder?
45 MR. MACKENZIE: In the yellow binder in tab 41.
46 THE COURT: Yes.
47 MR. MACKENZIE: And I handed up a copy of Exhibit 807 which is

one of Mr. Sterritt's topographic survey data sheets in which there is apparently a statement made that contradicts Mr. Robinson's territorial affidavit. And that was the subject of the cross-examination. And that's already at tab 41.

THE COURT: Yes, all right.

MR. MACKENZIE: Thank you, my lord. Carrying on to paragraph 46, my lord, in my submissions. And this submission deals with this question of consensus and public discussion, paragraph 46. In most cases, the evidence relates to one territory for which boundary information is known only to a small number of people, that is the territorial evidence. Mr. Alfred Joseph stated:

> "They are very reluctant to talk to other Wet'suwet'en about their territory. That's -- each clan have their own territories."

Mr. Arthur Matthews stated that it is hard to follow a chief's boundary descriptions because "they have a language unique of their own". This is another example at paragraph 46, Thomas K. Morris testified that he had never heard the boundaries of his -- of the land described in his affidavit discussed at feasts. That's Exhibit 671A, page 17, line 36.

THE COURT: 671A is an exhibit?

MR. MACKENZIE: Yes. It's a cross-examination on territorial affidavit.

MR. GRANT: Who?

MR. MACKENZIE: Thomas K. Morris. Ms. Sigurdson dealt with this at some length in her argument, my lord. And the submission at paragraph 47 is that the Plaintiffs did not call evidence of community, real community reputation. There is no -- this is an addition to paragraph 47. There is no evidence of reputation from non-native people or non-plaintiffs. In our submission, the real community reputation is that the land in the claim area is Crown land. And that evidence was called from lay witnesses called by the Provincial defendant. The community -- this is an addition to paragraph 47. The community includes non-natives and non-plaintiffs.

Paragraph 48, my lord, deals with this question of ante litem motam. I think we have pretty well dealt with that. The land claims have been the subject of

concern.

Paragraph 49 deals with the collection of evidence by Mr. Sterritt during the years that land claims were contemplated as to be negotiated or litigated.

And I will pass on to paragraph 50. And I would also say here, my lord, that just following paragraph 49, Mr. Sterritt testified that his informants were aware that he was collecting information in preparation for the land claim. And that's transcript 131, page 8097, line 37.

MR. GRANT: Can you say that again?

MR. MACKENZIE: Transcript 131, page 8097, line 37. Yes, that's found in the yellow book at tab 49A, pages 1 and 2. Yes.

Pressing on to paragraph 50, my lord. I have made this point, my lord, that due to the conflicting evidence and the conflicting information the boundary evidence should be accorded little or no weight.

Now, the question of the interrogatories at 51. Many of the Plaintiffs swore affidavits verifying answers to the Interrogatories prior to trial. Attached to many of the Interrogatories were maps alleged to show the boundaries of territories claimed by the House of that Plaintiff. These Interrogatories answers and maps conflicted generally with the territorial affidavits and maps 9A and 9B. And that general statement is Mr. Sterritt's evidence at that reference given in paragraph 51. Mr. Sterritt testified that in 1987 he believed the interrogatories maps accurately depicted the territorial boundaries. And that's set out in the evidence at -- in the yellow binder. At the trial he agreed that the territorial affidavits were to be preferred over the interrogatories responses where the two differ. And there is a correction to the transcript reference there. It should be transcript 134, my lord. It is submitted, however, that the significant conflicts between these two sets of sworn boundary and ownership evidence make both unreliable.

During Mr. Marvin George's cross-examination it was pointed out that Mr. George's interview notes with hereditary chiefs relating to the Hagwilnegh-Burns

Lake territory contradicted boundary evidence in the territorial affidavits sworn by Mr. Simms and Mr. Austin. The transcript reference there should be lines 23 to 35. The reference there was to interview notes with Salina, S-A-L-I-N-A, John relating to that Burns Lake territory. Her information in those notes differed from the territorial affidavits. Even where Mr. George's interview with hereditary chiefs about their territories conflicted with affidavits by other persons about those same territories, Mr. George asserted "the affidavit is right".

And that is set out at tab 52 in the yellow binder, page 2. I will just refer to that passage, my lord. It is tab 52, page 2 at lines 31 to 36:

"Q But you will agree with me this far, won't you, that when you have an interview note with a hereditary chief about his territory and that interview note conflicts with an affidavit, the interview note is probably right?
A No, the affidavit is right."

And, my lord, dealing with paragraph 53, I have referred to the methodology. In our submission, viewed objectively, the process followed amounts to this: Mr. Sterritt and Mr. George pulled fragmentary pieces of information together, eliminated the inconsistencies and through extrapolation, conjecture and selection, presented a ready-made product for the affiants to approve.

And carrying on paragraphs 54 and 55, my lord, I referred to this question of individual circumstances differing from the general format. And that's the case with Mr. Benson. I have referred to Mr. Benson. He testified that certain informants mentioned in his affidavit had not in fact advised him of that information. And the reference there should be line 16 to 42 at that page.

THE COURT: I'm sorry?

MR. MACKENZIE: The reference at paragraph 54, if you could add line 16 to 42 to that transcript reference, please.

THE COURT: Thank you.

MR. MACKENZIE: That's a cross-examination transcript.

MR. GRANT: Well, that was one only, wasn't it? That was only the case of Phillip Brown. You say "certain of the

1 informants." One of the informants is the way the
2 evidence is, as I understand it.
3 MR. MACKENZIE: Yes. This case I have given an example of
4 Phillip Brown.
5 MR. GRANT: And that was the only one that he said had not, in
6 fact, advised him of information of the territory.
7 MR. MACKENZIE: I will advise my friend on that. I am not clear
8 on that at this point, my lord.
9 MR. GRANT: That's my understanding of the evidence.
10 MR. MACKENZIE: As far as this transcript reference is
11 concerned, paragraph 54 should say "one of the
12 informants named in the affidavit had not advised him
13 of the information."
14
15 And so, my lord, I would submit at the end of
16 paragraph 55 that in conclusion it could hardly be
17 suggested that the word of the affidavit in Mr.
18 Benson's case were those of the affiant. And I refer
19 also to a similar situation of Mr. Muldoe.
20
21 And the conclusions, my lord, the Plaintiffs
22 assert that the territorial affidavits are the basis
23 for maps 9A and 9B. And the actual basis, in our
24 submission, is all the conflicting hearsay information
25 obtained over the years.
26
27 A note to be added to paragraph 57, if the
28 Plaintiffs' assertion is accepted, that is that the
29 map 9A and 9B are based on the affidavits, the
30 affidavits simply are an attempt to avoid hearsay
31 evidence. They do not avoid the problem, in our
32 submission, they exacerbate the problem because they
33 purport to be sworn evidence in conflict with a mass
34 of other sworn and unsworn evidence about the
35 territories by the chiefs. I refer to the flaws of
36 the content in the methodology.
37
38 In our submission, my lord, this last paragraph 59
39 deals with admissibility. I have already argued
40 admissibility. Certain of the reputation evidence in
41 the affidavits is, in our submission, not admissible.
42 But if admissible should be given little, if any,
43 weight.
44 THE COURT: Well, is there a problem here. Did I not give leave
45 to the plaintiff to file these affidavits?
46 MR. GRANT: Yes.
47 MR. MACKENZIE: Yes, my lord.

THE COURT: So it can't be said that they weren't admissible, can it?
MR. MACKENZIE: Well, my lord, I can respond to that point. There is a general objection. Mr. Goldie made a general objection to hearsay evidence during the evidence of Mr. Alfred Joseph.
THE COURT: Yes.
MR. MACKENZIE: And your lordship permitted -- excuse me, my lord. Your lordship permitted the Plaintiffs to file these affidavits:

> "To be at liberty to file evidence of facts or documents relating to the location of boundaries and geographic landmarks of the territories claimed by the Plaintiffs in their houses."

And that's in your lordship's order of October 23, 1987. And your lordship continues:

> "The Plaintiffs are not to be precluded from arguing from such facts or based upon such facts that an inference of ownership be drawn."

In my submission, my lord --
THE COURT: What was the liberty that was given to file affidavits?
MR. MACKENZIE: The liberty was given to adduce by affidavit --
THE COURT: To adduce, yes.
MR. MACKENZIE:

> "Evidence of facts or documents relating to the location, boundaries and geographic landmarks of the territories claimed by the Plaintiffs and their houses."

And I noted the qualification:

> "But that the Plaintiffs not be precluded from arguing from such facts or based upon such facts that an inference of ownership be drawn."

THE COURT: Yes. All right.
MR. MACKENZIE: And so, my lord, if I may say, that was the basis for the Provincial defendant's submissions in that chambers application.
THE COURT: Can you give me the reference to that? It is a

1 transcript of the proceedings on October 23, 1987?
2 MR. MACKENZIE: It is an order, my lord. And I will provide a
3 copy of that to your lordship first thing.
4 THE COURT: Yes. I would like to have a copy of that.
5 MR. MACKENZIE: It was entered November 23, 1987 after being
6 settled by your lordship on those chambers proceedings
7 in 1987.
8 THE COURT: Yes.
9 MR. GRANT: That was other chambers than my friend has referred
10 to because that was another matter that came up.
11 THE COURT: Well, in liberty to adduce evidence by affidavit
12 doesn't mean that everything that is put in and filed
13 is conclusive. It still has to -- it would still be
14 open, I should think, to the defendants to say that
15 the affidavits do not amount to proof of these facts
16 because of the various rules of evidence which should
17 be applied to them.
18 MR. MACKENZIE: That's my submission, my lord.
19 THE COURT: Well, I would be surprised if your friends think
20 otherwise.
21 MR. MACKENZIE: My lord, I have completed my submissions on that
22 section. And I will hand up now the next yellow
23 binder, Volume 11. My lord, in the interests of
24 conserving time, I am handing up to your lordship an
25 outline of the argument. These are detailed
26 submissions in this section. I have handed up an
27 outline of the argument so it will enable me to
28 summarize. If your lordship could place that at the
29 beginning of this new section.
30 THE COURT: Yes.
31 MR. MACKENZIE: My lord, this section deals with traplines and
32 territorial boundaries. And I start, my lord, with
33 the introduction at paragraph one. It is submitted
34 that the boundaries shown on maps 9A and B coincide to
35 a large measure with the boundaries of registered
36 traplines as shown on Exhibit 24A. That was the
37 province's trapline map, my lord, in the alienations
38 project. That was identified by Mr. Steventon.
39
40 The Plaintiffs' evidence also disclosed the
41 general fact that in many of the Plaintiffs' minds
42 trapping grounds or traplines were synonymous with the
43 alleged House territories upon which the claim is
44 based.
45
46 It is submitted that these territories are
47 vestiges of trapping grounds originally developed in

response to the European fur trade. I say, parenthetically, Mr. Willms has dealt in some detail on this in his argument.

The recency of these boundaries, in our submissions, belies the Plaintiffs' allegations of their present location since time immemorial. The fact of their relationship to trapping accounts, in our submission, for the vagueness of informants' knowledge of their location, that is the boundaries location. After fur trapping virtually disappeared as a source of income in the claim area after the 1940's, and Ms. Sigurdson went into that in quite a bit of detail in her argument, the question of trapping declining after the 1940's.

In his book The Gitksan Potlatch, Professor John Adams independently arrived at conclusions which are supported by the evidence in this case. I set out Professor Adams' comments that the Indians in -- I'm sorry:

> "...the Gitksan claim approximately the area registered with the Game Warden, together with whatever land within that general area still registered to White trappers."

Mr. -- Professor Adams says:

> "As sources of revenue today the lines are almost worthless, but the land-values they symbolize, especially timber and mineral rights, are considerable."

THE COURT: When was Adams writing?
MR. MACKENZIE: My lord, that was in 19 -- researched in the 1960's and published in 1973.
MR. GRANT: He doesn't give any sources for that proposition, my lord. And as I recall, it is just in his preface as introductory remarks.
MR. MACKENZIE: It is set out at -- it is contained at the tab 5 of the yellow binder, my lord.
THE COURT: Tab 5?
MR. MACKENZIE: Yes. I think your lordship has that, has the reference handy. That's correct.
THE COURT: Oh, yes, tab 5.
MR. MACKENZIE: And my lord --

MR. GRANT: I believe it is in his introduction.
MR. MACKENZIE: Yes, that's correct. And, my lord, just following my outline of argument. Dealing with the point, the traplines were allocated in the early 19th century, I am handing to your lordship a copy of Exhibit 88A which I would ask be inserted at the end of tab 5 which your lordship has open. Yes, just following Professor Adams.

Now, my lord, Ms. Sigurdson referred to this matter. In my submission this is a significant exhibit. And I propose to refer your lordship to certain portions of it. This letter is to the Indian agent, Mr. McMallinson, as Ms. Sigurdson pointed out. And it relates to trapping places as indicated in the title on page 1 of the letter, Exhibit 88A on September 7, 1945. In summary, this deals with the trapping place dispute as Mr. George -- this is a letter from Thomas George:

> "...trapping place dispute",

as he says in the first sentence,

> "...between I and Matthew Sam."

And the second paragraph, Mr. George says:

> "Mr. Matthew Sam does not know how that trapping place stands from olden times nor how it became ours."

And then Mr. George refers to hearing in Telkwa apparently with respect to the dispute. Carrying over to page 2 of the letter:

> "Remember at the meeting at Telkwa when the older people who knew better swore to prove that the lower lake was given to our ancestors according to Indian rights years and years ago and lately was known as my uncle Joseph's trapping ground. Our uncle Joseph now is the fifth generation from the time this trapping place was given to our ancestors."

My lord, on the basis of that, on the basis of that passage and also other evidence which came out during

the cross-examination of Dr. Antonia Mills, that takes us back about 125 years, 120 years before 1945.
THE COURT: That's 25 years to the generations?
MR. MACKENZIE: Yes, my lord. And I understand Mr. Willms read from that passage as well.
THE COURT: Do we know what lake he is talking about here?
MR. MACKENZIE: He is talking about a lake in the western part of the Gisdaywa territory, my lord. And I don't know exactly which lake it is right now. It was known apparently then as Muscrat Lake. There is a lake shown in the Gisdaywa territory in the western portion there, my lord.
THE COURT: Is this the same Matthew Sam that Mr. Shelford talked about?
MR. MACKENZIE: This is the Topply Matthew Sam, my lord. This is Woos.
THE COURT: All right.
MR. MACKENZIE: And also this Matthew Sam had the trapping territory around McBride Lake. And apparently, according to this letter, he overlapped to some extent on Thomas George's, Gisdaywa's area.
THE COURT: All right.
MR. MACKENZIE: The Matthew Sam that Mr. Shelford referred to lived at Francois Lake.
THE COURT: Yes, that would be a different one.
MR. MACKENZIE: At the Tatler Reserve.
THE COURT: All right. McBride Lake, as I recall, is just north and east of Morice Lake.
MR. MACKENZIE: Which lake, my lord?
THE COURT: Morice Lake?
MR. MACKENZIE: McBride Lake is --
THE COURT: Yes.
MR. MACKENZIE: Right, my lord. Just slightly to the east of Morice Lake.
THE COURT: Yes. All right.
MR. MACKENZIE: I might also say that at that time Matthew Sam from Francois Lake was trapping near Tahtsa Lake. There was quite a bit of evidence on that.
THE COURT: All right.
MR. MACKENZIE: Now, this letter is significant also because the constant -- several references to this area's trapping place, and as trapping grounds. And so the submission is that what Mr. George, Thomas George is talking about here is trapping grounds. And that area, on page 3, Mr. George says was then registered as a trapline. And that's about halfway down page 3. "We have decided," does your lordship have that paragraph?

THE COURT: Yes.
MR. MACKENZIE:

> "We have decided among our own family that part of the said grounds be registered under my name and the other part be registered under my brother Joseph George's name. (I mean the ground that was registered under our uncle Joseph's name be turned over to him) By doing this we will be able to hold the entire grounds that was rightfully belonged to our family."

So, my lord, the submission as indicated in my outline of argument and as indicated also in paragraph 63 of my submissions, is that the emergence of trapping ground boundaries in the claim area is relatively recent, about five generations or 150 years before 1940.

MR. GRANT: What page?
MR. MACKENZIE: Page 21, paragraph 63.

And Mr. Willms, of course, discussed this. But this point is corroborated by Professor Steward's research at Stuart Lake, S-T-U-A-R-T. This is in paragraph 63, page 21.

THE COURT: I'm sorry, where are you putting this note?
MR. MACKENZIE: My lord, this note can be put just at paragraph 2 of my outline of argument. You see, my lord, in paragraph 2 my outline of argument refers to page 21, para 63?
THE COURT: Yes.
MR. MACKENZIE: And there is a reference there to Thomas George's letter.
THE COURT: Yes.
MR. MACKENZIE: Which is Exhibit 88A. And Professor Steward's research at Stuart Lake. And that's found in Exhibit 955-13. That was Professor Steward's letter to Dr. Jenness.

Now, my lord, referring to my outline of argument, paragraph 3, after the 1920s the trapping grounds were registered as traplines. Mr. George referred to that, and Ms. Sigurdson referred to that in some detail in her argument. And the Plaintiffs' witnesses as I indicated on page 10, paragraph 29 of my submissions, the Plaintiffs' witnesses testified that they registered their traplines to prevent the loss of their areas. Mrs. Mackenzie said:

"We had to have our traplines registered or else we lose them."

So it is my submission there is exstensive evidence on that point. And on this point also, Ms. Sigurdson referred to Mr. Boys' evidence. This is continuing on the outline of argument at paragraph 3. Mr. Boys evidence on the registration of traplines during his time as Indian agent at Hazelton. And that's set out at page 22, paragraph 64 to 66 in my submissions.

Paragraph 4 in the outline of argument, in the 1950s fur trapping declined considerably. That was also dealt with in Ms. Sigurdson's argument. And I refer to it at page 22, paragraph 65 of my submissions. I am just carrying through the outline of argument, my lord.

THE COURT: Yes.

MR. MACKENZIE: And referring to the paragraphs in the detailed submissions.

My lord, carrying on with paragraph 5 of my outline of argument, to many Plaintiffs the registered traplines were synonymous with the territories. And there are several references in the detailed submissions to that point, my lord. I wish to refer to one particular reference which is the reference at paragraphs 30 to 40 dealing with the Chief's Resolution, the Gitksan chief's resolution in 1975. And now I am going to refer your lordship to that resolution which is at tab 30 in my yellow binder.

THE COURT: Which tab?

MR. MACKENZIE: Tab 30 in the yellow binder, my lord.

THE COURT: Yes.

MR. MACKENZIE: Does your lordship have that reference?

THE COURT: Yes.

MR. MACKENZIE: Now, my lord, this is a document entitled "Resolution Presented to the Special General Assembly of the Union of B.C. Indian Chiefs by the Hereditary Gitksan Chiefs of the Kispiox and Skeena Valleys." It is dated April 3, 1975. And the evidence is that Mr. Sterritt drafted this resolution. And in that resolution at the second paragraph it states:

"Whereas the Nishga tribes are claiming certain tribes which are rightfully the lands of the

1 Gitksan,"
2
3 and certainly we will refer to that in the overlap
4 argument,
5
6 "be it hereby resolved that we direct our
7 elected representatives on the Gitksan-Carrier
8 tribal council to make land claims a priority
9 issue, and ensure that the Gitksan's hereditary
10 lands as defined by all their registered
11 traplines be made known to the B.C. Land Claims
12 Co-ordinator."
13
14 Now, my lord, the point of referring to this
15 Exhibit 116 is the identification between the
16 hereditary lands and the registered traplines. And,
17 my lord, I have many other references in these
18 detailed submissions as set out in my outline of
19 argument indicating this identification in the
20 Plaintiffs' minds between the registered trapline
21 areas and these territories.
22
23 Now, carrying on to paragraph 6 of my outline of
24 argument, my lord. In order to prepare a map of the
25 territories, Neil Sterritt Jr. relied on maps of
26 registered traplines. If you recall, my lord, he
27 obtained these maps from the Department of Indian
28 Affairs' files. In connection with that paragraph 6
29 in my outline of argument, my lord, I am going to
30 refer your lordship to Exhibit 22 which is a map. I
31 have copies here for your lordship. I am just about
32 to hand that up. And my discussion of Exhibit 22
33 starts at paragraph 12 on page 4. I am handing up to
34 your lordship the map binder. My lord, Exhibit 22 is
35 the second map in that binder.
36 THE COURT: Do you want to look at this?
37 MR. MACKENZIE: Yes, my lord. Now, my lord, the reason I am
38 referring to this exhibit is for the point in my
39 outline of argument that Mr. Sterritt relied on maps
40 of registered traplines in preparing a map of the
41 territories. This is the first map that Mr. Sterritt
42 saw. He received it from Chris Harris. And then Mr.
43 Sterritt made additions to it. And that is at
44 paragraph 11 on page 4 of my submissions.
45
46 I am going to be referring to this map and my
47 submissions at the same time, my lord. But looking at

the area up around Bowser Lake, my lord, your lordship will see a dotted line west, southwest and south of Bowser Lake marked David Gunanoot. Does your lordship see that?

THE COURT: No. I haven't found Bowser Lake yet.

MR. MACKENZIE: It is in the top left-hand corner, my lord.

THE COURT: Bowser is north of Meziadin?

MR. MACKENZIE: Yes, my lord. Top left-hand corner.

THE COURT: Yes. I found it.

MR. MACKENZIE: Does your lordship see the dotted line, the boundary line?

THE COURT: The dotted line, yes.

MR. MACKENZIE: Mr. Sterritt said that he drew that line. And your lordship can see that Mr. Sterritt has noted there:

> "This boundary is drawn from the outline of the Gunanoot and Skawil traplines."

THE COURT: Yes.

MR. MACKENZIE: Does your lordship see that note?

THE COURT: Yes.

MR. MACKENZIE: Mr. Sterritt said that he put that note on there, and he also put the dotted lines on there. And your lordship can see that the boundary is noted as following the external boundaries of the traplines in those areas. Does your lordship see that reference? Just talking about the Bowser Lake area, my lord, west and south of Bowser Lake?

THE COURT: You mean this note:

> "This boundary drawn from outline of Gunanoot and Skawill traplines?"

MR. MACKENZIE: Yes, my lord.

THE COURT: Yes, I see that.

MR. MACKENZIE: And, my lord, Mr. Sterritt also drew the boundary, the dotted line that goes across the northern part of the map. Does your lordship see the dotted line going north?

THE COURT: Yes.

MR. MACKENZIE: North across past the Niist territory?

THE COURT: Yes.

MR. MACKENZIE: That's paragraph 14 of my submissions. Now, my lord, those dotted lines that your lordship has just looked at appear to coincide generally with the boundaries as depicted in all the subsequent

Plaintiffs' maps until there was a change in the northern boundary after discussions with the Tahltan in 1987.

THE COURT: But it includes the Kitwancool territory, does it not?

MR. MACKENZIE: No, it doesn't, my lord. If you look south of Bowser Lake, my lord.

THE COURT: Is Meziadin Lake all within the claim territory?

MR. MACKENZIE: Yes, my lord.

THE COURT: I didn't think it was.

MR. MACKENZIE: Meziadin Lake is Kitwancool territory.

THE COURT: Yes.

MR. MACKENZIE: I'm sorry, my lord, Mr. Sterritt has noted the Kitwancool, Nishga boundary going down the western --

THE COURT: Yes. Well, I said this map seems to include the Kitwancool territory.

MR. MACKENZIE: Yes, my lord.

MR. GRANT: He reflected the Kitwancool Nishga territory on this one.

THE COURT: Yes.

MR. MACKENZIE: So your lordship is correct. And my submission is related to the relationship of the Plaintiffs claim area boundaries to the trapline boundaries.

THE COURT: Yes.

MR. MACKENZIE: That apparently originated in this map by Mr. Sterritt which he noted when he was drawing as a result of information from the trapline files. And I am suggesting, submitting to your lordship that the boundaries are just the same, they are trapline boundaries. And that's in paragraph 15 of my submissions. And then I point out that in paragraph 16 of my submissions that in the legend Mr. Sterritt characterizes the dotted line -- sorry, my lord, paragraph 16.

THE COURT: Yes.

MR. MACKENZIE: Characterizes the dotted line as a territorial boundary. So in my submission, my lord, Mr. Sterritt, up in that Bowser Lake area that we've been looking at, equated the trapline boundaries with territorial boundaries.

THE COURT: Yes.

MR. MACKENZIE: That's the point, my lord.

THE COURT: All right.

MR. MACKENZIE: I have added that submission to paragraph 16.

THE COURT: Now, is this Exhibit 22 at the trial?

MR. MACKENZIE: Yes, my lord. We are looking at Exhibit 22. And my friend has a question.

MR. GRANT: I take it that this is as of the time drawn by Mr. Sterritt where he drew these dotted lines was in 1976; is that right? I'm going from memory on that.
MR. MACKENZIE: My lord, my friend is referring to the date.
THE COURT: It says '76 in the legend.
MR. GRANT: I am just wondering is he saying the dotted lines were drawn in 1976 at the time, or subsequent to that, that is Mr. Sterritt's lines?
MR. MACKENZIE: My lord, in my submission that doesn't appear clear in the evidence. The evidence is clearly that the additions are Mr. Sterritt's, not Mr. Harris'. And this continues to the north and northeastern boundary of this map as well. And so I can't answer my friend, except to say that that is the date given for the drawings or additions by Mr. Sterritt.
THE COURT: All right.
MR. MACKENZIE: And I would say, my lord, that Mr. Sterritt's evidence is that after the 1975 Resolution, Exhibit 116 to which we have just referred, that is the resolution.
THE COURT: Yes.
MR. MACKENZIE: Mr. Sterritt began to review the trapline files.
THE COURT: Yes.
MR. MACKENZIE: Because the chiefs had directed him to do so because they were the same as the hereditary territories.
THE COURT: All right. Shall we continue this tomorrow?
MR. MACKENZIE: Yes, my lord.
THE COURT: Tomorrow we will start at 9:30. And what is your pleasure, 5:30 and then back at 7:00?
MR. MACKENZIE: My lord, we would request the option of an evening sitting. And we would request to be able to inform your lordship halfway through the morning or just before noon how the schedule is going.
MR. GRANT: Well, is my friend assuming that we will go to 5:30? That will help me.
MR. MACKENZIE: Yes, normally.
MR. GRANT: We would go to 5:30, in any event?
MR. MACKENZIE: Yes, my lord.
THE COURT: And possibly not come back?
MR. MACKENZIE: Possibly.
THE COURT: All right. Thank you.

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

(PROCEEDINGS ADJOURNED TO MAY 24, 1990)

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

_____
Lisa Franko, Official Reporter,
UNITED REPORTING SERVICE LTD.