VANCOUVER, B.C.
May 24, 1990

THE REGISTRAR: Order in court. In the Supreme Court of British Columbia, this 24th day of May, 1990. Delgamuukw versus Her Majesty The Queen, at bar, my lord.
THE COURT: I just want to mention a couple of scheduling matters. I don't think that I can start on Saturday until 9:30. I hoped maybe 9:00, but I have another problem laid on me that I have to deal with, and it will have to be in the morning, so we won't get started until 9:30 on Saturday morning, and we'll make it into a regular morning hours from 9:30 to 12:30. Secondly, if counsel have any plans for next week, I have to say that I am not going to be able to sit on Tuesday evening or Thursday evening, so we can work around that, if you're of the mind.
MR. WILLMS: My lord, just on scheduling today, we mentioned last week and earlier this week evening sitting tonight, and what we propose is that we have an evening sitting from 7:00 to 9:00 tonight, but that we only sit until 5:00.
THE COURT: All right.
MR. WILLMS: Instead of 5:30 to give a bit more of a break before the evening sitting.
THE COURT: If that's convenient to your friends.
MR. GRANT: We understood that.
THE COURT: All right. Mr. Mackenzie.
MR. MACKENZIE: Thank you, my lord.
THE COURT: I still have this map of Mr. Sterritt's out here.
MR. MACKENZIE: Thank you, my lord, we'll be carrying on with that. I have a couple of preliminary matters arising out of yesterday, my lord, and the first deals with Section 5(d) page 26.
THE COURT: 5(d) on page 26.
MR. MACKENZIE: Yes, page 26, my lord.
THE COURT: Oh, all right, thank you.
MR. MACKENZIE: That's paragraph 54. And in the last sentence of that paragraph Mr. Grant suggested that an amendment be made changing the word "certain" to "one".
THE COURT: Yes.
MR. MACKENZIE: My lord, that original wording should remain as "certain of the informants" because there was more than one informant who had not advised Mr. Benson of the information of the affidavit, and that is referred to in Section 5 (g), page 6, paragraph 17. So that's

further on in the summary, a discussion is made with the other and transcript references are given.

THE COURT: Yes.

MR. MACKENZIE: Now, your lordship also asked about the area of land that was in question in Milirrpum, and in the Milirrpum case Mr. Justice Blackburn commented that the area in question has an area of something of the order of 200 square miles and is commonly called the Gove Peninsula, that's at page 146 of the Milirrpum case. That may be found at tab M-2 of the Province authority binder.

THE COURT: Is the area in question, the 200 square miles, the area covered by the leases that were impuned in that case?

MR. MACKENZIE: My lord, I'm not certain as to whether the leases cover every acre or every square mile, but that is the area in which the leases are located.

THE COURT: Does the report show any contest on the identification of the area that is discussed in the judgment?

MR. MACKENZIE: I'm not clear on the --

THE COURT: Was there a contest about the dimensions or the boundaries of the disputed area?

MR. MACKENZIE: My lord, my understanding of the decision was that there was no dispute about the fact that the peninsula was involved.

THE COURT: Yes.

MR. MACKENZIE: And I understand that the Solicitor-General in that case challenged some of the evidence as to clan identification with certain parts of the territory.

THE COURT: All right. So there was some boundaries disputed in the case then.

MR. MACKENZIE: Yes, my lord.

THE COURT: All right.

MR. MACKENZIE: But the point I made yesterday, and it follows from the Milirrpum case, and in that case the boundaries discussed were very vague and were not precise in detailed nature, which are at issue in this case.

THE COURT: While you're tidying things up, I took the liberty of digging out my judgment in the "Itchy Trousers" case dealing with the survey question or the census, I guess, but it's only an insignificant little commercial case, but counsel may be amused by its presumption. It mentions some of the authorities that deal with this sort of thing. I don't think you'll find the rest of the judgment particularly

enlightening or useful in the context of this case.
MR. MACKENZIE: Thank you, my lord. In answer to your lordship's last comment on the Milirrpum case, I think it would be fair to say that in Mr. Justice Blackburn's judgment there was no major issue discussed with respect to boundaries.
THE COURT: All right.
MR. MACKENZIE: And I just also remind your lordship that I handed up the Berkeley Peerage case to your lordship, and that is marked as tab B-2A, and that should be inserted in the Province's grey binder of authorities in volume 2 at your lordship's convenience. It may be the tab in front of your lordship.
THE REGISTRAR: Did you say volume 2?
MR. MACKENZIE: Volume 2 of the grey binders, the Province's case authorities. So the authorities should be put in volume 1 following the other tabs in order there, that's the Berkeley Peerage case.

Now, my lord, if I could return to the subject we were discussing yesterday at the break, your lordship will recall that we were discussing the section on traplines and territorial boundaries, and I had handed up an outline of argument to your lordship which your lordship, as I understand, placed at the beginning of that section (e).
THE COURT: But you had proceeded beyond that.
MR. MACKENZIE: Yes, my lord. As I indicated to your lordship, I was following the various points in that outline of argument, and I had dealt with points 1 to 5 and was in the midst of dealing with point 6.
THE COURT: Yes.
MR. MACKENZIE: And at that point at the outline of argument point 6 was: In order to prepare a map of territories Neil Sterritt Jr. relied on maps of registered traplines. And in relation to that point, we were in the detailed submissions at page 5 paragraph 16. We were examining Exhibit 22. And the points that I had made on Exhibit 22, as appeared from the paragraphs just before this point, were that Mr. Sterritt had noted several trapline boundaries on Exhibit 22 and that they were equated with territorial boundaries. We had directed our attention to the northwest part of the area around Bowser Lake, and now just to complete the reference to this map, my lord, and carrying on on paragraph 17 of my submissions I note that, my lord, in the upper right-hand corner of Exhibit 22 there are several more notations, up in the Thutade Lake area,

although that lake is not marked on Exhibit 22, more notations, as your lordship can see, the top one is "Boundary per Billy Moat" trapline, and that dotted line which Mr. Sterritt drew continues apparently following the boundaries of the traplines in the northeastern portion of Exhibit 22. Does your lordship have that reference?

THE COURT: Yes.

MR. MACKENZIE: It's my submission, my lord, that the boundary of the claim area on map 9A and map 9B follows that line that Mr. Sterritt drew on Exhibit 22, and this was the basis of that line following the boundaries of the trapline, registered traplines in that area. And paragraph 18 I note Mr. Sterritt's evidence that he transferred the information as closely as he could from the trapline file in an effort to determine the location of Billy Moat's territory. In the middle of paragraph 18, my lord.

THE COURT: Yes.

MR. MACKENZIE: And Mr. Sterritt performed a similar exercise down the east side of Exhibit 22. He transferred the boundary from trapline maps kept in the Department of Indian Affairs. And I referred your lordship generally to other such notations on Exhibit 22.

And paragraph 20 I make the point that I've just made, that that boundary in the northeastern section follows the boundaries on map 9A, as will be seen from an examination of registered trapline -- registered trapline boundaries and the 9A, which I'm going to direct your lordship to. On Exhibit 22, Mr. Sterritt's trapline boundaries carry on down towards the -- along the eastern boundary, northeastern boundary, and in my submission they exclude areas covered by Carrier-Sekani trapline -- registered traplines, and that becomes a significant point in my submission when the overlaps come to be considered.

THE COURT: Well, in paragraph 20 you say:

> "The trapline boundaries in the Thutade and Bear Lake areas on Exhibit 22 exclude much of the area presently included in the claim area."

Do you mean by that that the claim area is much -- is greater than the area outlined on Exhibit 22?

MR. MACKENZIE: Yes, my lord, in that northeast section of the Bear Lake-Thutade area, and that's the point I just made, my lord.

THE COURT: So that this dotted line which goes by Arthur Samson's and then follows the Sustut River -- the Sustut River rises in Bear Lake?
MR. MACKENZIE: No, my lord. The Bear River rises in Bear Lake and flows into the Sustut River. The Sustut River rises in Sustut Lake east of the land claim area.
THE COURT: All right. So it follows the Sustut River and until its confluence with the Skeena, and then the line seems to run southeasterly past the Henry Wright trapline.
MR. MACKENZIE: Yes, my lord.
THE COURT: And the area -- the present area on map 9A would be to the east of that line.
MR. MACKENZIE: It would be to the northeast of that line.
THE COURT: Yes.
MR. MACKENZIE: And in some cases to the east of that line.
THE COURT: Yes, all right. I have it, thank you.
MR. MACKENZIE: That concludes my reference to Exhibit 22, my lord.
THE COURT: Thank you. I suppose it came out of this pocket, it should go back in, should it. I don't think it's going to. Yes, it is, thank you.
MR. MACKENZIE: Now, just carrying on on this point, my lord, this is point -- moving onto point 7 in my outline of argument at the beginning of this section, point 7: The territorial boundaries on the plaintiffs' maps coincide generally with registered traplines. And in my submission, my lord, this follows logically from Mr. Sterritt's initial research and the drawings which he made the additions which he made to Exhibit 22, and just as an example of this, I'm going to refer your lordship to the Judge's series and ask your lordship to put the trapline boundaries map and the house areas map onto the Judge's series.
THE COURT: Is that Mr. Macaulay's famous map?
MR. MACKENZIE: Yes, my lord. Perhaps your lordship already has that overlay on --
THE COURT: I'm not sure what I have here. I've got a number with the trapline 9A and 9B.
MR. MACKENZIE: That's correct, my lord, that will --
THE COURT: Is that all right?
MR. MACKENZIE: Yes. Your lordship will be able to follow the references.
THE COURT: All right, yes, all right. Which one is which, traplines are black -- traplines are red?
MR. MACKENZIE: Yes, traplines are in orange.
THE COURT: Orange, all right.

MR. MACKENZIE: It should be overlay number 32, my lord. On the part of the map referring to the northern boundary, my lord, the base of the map shows the original northern boundary of the claim area, and in my submission, my lord, that northern boundary, the original northern boundary follows the northern boundaries of the traplines in that area. And I refer to this in my detailed submissions at page 16 paragraph 52. So, my lord, some of the traplines included within those original boundaries, this is paragraph 52 on page 16, I'm following along this point now, my lord.
THE COURT: Yes. Where are you in your outline?
MR. MACKENZIE: I'm just dealing with point 7 on my outline, my lord, and the detailed submissions are at page 16, paragraph 52.
THE COURT: I'm sorry, at --
MR. MACKENZIE: At page 16, paragraph 52.
THE COURT: What's all this material in between?
MR. MACKENZIE: Well, those are detailed submissions relating to the other points I've dealt with, my lord.
THE COURT: All right.
MR. MACKENZIE: And references are all contained in the outline of argument that I've been following.
THE COURT: All right, yes.
MR. MACKENZIE: And in paragraph 52 I make this point that I'm about to direct your lordship to. As I have submitted, the northern boundary, which was drawn by Mr. Sterritt, follows the northern boundaries of the Gitksan traplines, and at the present time, with the northern boundary having been moved south, several of the Gitksan traplines extend to the north of the present boundary. Mr. Willms will be dealing with the overlap significance of that in his submissions.

In paragraph 53, my lord, I'm not going to go through this in detail, but I do refer to the numbers of those northern traplines to show to whom those -- the northern traplines were registered to follow along the northern boundary of the original land claim area. Does your lordship have paragraph 53?
THE COURT: Yes.
MR. MACKENZIE: Yes, my lord. In that paragraph I refer to a trapline map that was prepared by Marvin George, and I'm not going to deal with that in detail, but the same point can be made from the reference to the Judge's series which we have just completed. And the point simply there is that those boundaries are virtually coterminous with the boundaries of the

traplines in those areas.
THE COURT: When you say: "The boundaries of the plaintiffs' ancestors' registered traplines form part of boundary shown on Exhibit 765"; What is 765?
MR. MACKENZIE: 765 was a trapline map prepared by Marvin George, which was on the boundaries of Exhibit 102, but I would ask your lordship that your lordship put in there "to form part of the boundary as shown on Exhibit 765 and Exhibit 648", which was the first Schedule B to the Statement of Claim; the point being that the original claim followed those registered trapline boundaries.
THE COURT: And is that the most northern one or the present one?
MR. MACKENZIE: Most northern one, my lord.
THE COURT: Yes, all right.
MR. MACKENZIE: To complete this point, my lord, I wish to refer to page 20, paragraph 62. I'm at page 20 of my detailed submissions, paragraph 62, my lord.
THE COURT: Yes.
MR. MACKENZIE: And in my submission, my lord, the general coincidence at the northern section of the land claim, it may be seen in generally reviewing the boundaries throughout the land claim, including many of the house boundaries. And now I've listed some house territories which coincide generally with the trapline boundaries, and the first one that I give for your lordship's consideration is the Namox-Goosely Lake territory, which as your lordship will recall is down south of Houston just in the Wet'suwet'en territory. Does your lordship see that Namox territory?
THE COURT: Not yet, but I'm sure it's here somewhere. Yes, I have it, yes.
MR. MACKENZIE: As your lordship may recall, in the cross-examination of Dan Michelle and Alfred Mitchell, the close resemblance between the house territory and the registered trapline area was discussed in that cross-examination, and with some minor exceptions, that is the boundary that the house territory follows, as your lordship can see from that overlay.
THE COURT: Yes.
MR. MACKENZIE: And if your lordship remains down in the Namox area, your lordship will just go slightly to the west to Gisdaywa territory. I refer your lordship to the point that emerged from Thomas George's letter, Exhibit 88A, trapping grounds in that case -- the trapping grounds in the Gisdaywa territory really were

registered as traplines and became the Gisdaywa house territory which we see today.

THE COURT: But not in the southeast and southwest corners.

MR. MACKENZIE: There are some differences, my lord. And your Lordship, by the way, can see the lakes that Thomas George was referring to in his letter of Exhibit 88A.

THE COURT: Yes.

MR. MACKENZIE: The southwestern -- the lower lake I presume is the one to the south, most southwestern lake.

THE COURT: Yes.

MR. MACKENZIE: It's one of those two lakes shown in the lower western -- southwestern corner of Gisdaywa. And, my lord, in my submission, there are several examples throughout the land claims area -- of the claim area, and this is not a -- this is not a surprising submission, my lord, because Mary McKenzie, for example, said that her trapping grounds were registered as traplines, and that her trapping grounds are in the house territory of Gyolugyet, so the point is that the resemblance continues today on an examination of the trapline overlay with the house territories. I list some other examples there, my lord.

THE COURT: Yes.

MR. MACKENZIE: So that completes my point number 7, my lord. And now just referring to the conclusions on page 23 of my detailed submission, I simply refer to paragraph 67. Now, my lord, to conclude this section -- that's paragraph 23 -- -- sorry, page 23, my lord.

THE COURT: Yes. I have it.

MR. MACKENZIE: The recency of the trapline boundaries and the alleged house territorial boundaries based upon the trapline areas is significant because this contradicts the territorial affidavit of assertions that the boundaries have been in place and have remained unchanged since time immemorial.

THE COURT: Well, is it a question of which came first, the trapline boundary or the house boundary?

MR. MACKENZIE: No, my lord. If your lordship will recall, this whole argument was based on the allocation in the nineteenth century of these trapping grounds. Your lordship will recall we examined Exhibit 88A, in which Thomas George pointed out that his -- the trapping grounds were allocated about five generations before 1945. So the point that is made in this section, my lord, is that is the date that these boundaries originated.

THE COURT: Well, does your five generations depend on that one letter of Thomas George?
MR. MACKENZIE: No, my lord. This came out also -- Mr. Willms dealt with this in some detail.
THE COURT: Yes.
MR. MACKENZIE: But there's another reference on that point in these submissions, and that is Professor Steward's letter to Dr. Jenness reporting on his research at Stuart Lake, and that letter is found at tab 63 of this section, and it's Exhibit 955-13, and Professor Steward found that he had come to the same conclusion, that the territories were distributed about that time in Stuart Lake.
THE COURT: What was -- what paragraph is Thomas George's letter referred to.
MR. MACKENZIE: It's referred to in paragraph 63, my lord, and also referred to right at the beginning of the submission. And your lordship filed the letter Exhibit 88A at tab 5 just after Professor Adams' comment, so it appears at two places, my lord.
THE COURT: Yes, all right, thank you.
MR. MACKENZIE: Now, my lord, that completes my submissions on the traplines, and Mr. Willms --
MR. GRANT: Just one point. On the Steward letter, my friend of course is not suggesting that Steward was referring to the Wet'suwet'en, he was clearly referring to the Stuart Lake Carrier, my lord. It was very clear in his letter he wasn't making any reference to the Wet'suwet'en.
THE COURT: How far is it from Stuart Lake to Burns Lake?
MR. GRANT: I think it's 7,500 miles.
MR. MACKENZIE: My lord, if I may, I don't disagree with my friend there, but I point out that this was discussed in the cross-examination of Dr. Antonia Mills, and Dr. Mills had -- had referred to research with the Stuart Lake Carrier as support for several of her propositions dealing with the Wet'suwet'en, and if I may now just read for your lordship what Professor Steward said in his letter at Exhibit 955-13, he said:

> "Five generations ago the Stuart Lake hunting lands were distributed in two solid blocks, one belonging to each fraterie."

That letter was written in June 1940.
THE COURT: That's at tab 63?
MR. MACKENZIE: Yes, my lord, it's at tab 63, page 5. The

letter is pages 5 and 6, the citation passage I just read is at page 6.

THE COURT: All right, thank you. There's one other matter, my lord, and I'm handing up a copy of your lordship's order in chambers that we referred to yesterday. This is the order dated October 23, 1987, and I would ask your lordship to file that letter.

THE COURT: Apart from the Hall of Fame, where does it belong?

MR. MACKENZIE: If your lordship could file that letter just following the last page of Section (d) dealing with the territorial affidavits.

THE COURT: 5(d)?

MR. MACKENZIE: 5(d), my lord.

MR. GRANT: In the argument?

MR. MACKENZIE: Yes, in the argument.

THE COURT: At the end of 5(d).

MR. MACKENZIE: Yes, my lord. That would be 5(d), page 27, just following that, as your lordship made notes discussing that letter, just following the discussion on page 27.

THE COURT: Mr. Willms.

MR. WILLMS: My lord, I will be dealing with Section 5(f), which is entitled "Overlapping Claims", and there are two parts to the section, my lord. The first part of the section goes to page 23, and that's the part that I will be dealing with. The appendix provides the detailed support for the propositions that are made in the first part, and I won't be reviewing those -- the detailed support for the propositions, my lord.

THE COURT: All right.

MR. WILLMS: But starting at paragraph 1, I say that there is extensive evidence about claims by neighbouring Indian groups overlapping the claim area. Mr. John Magwood, a Provincial witness, prepared a map depicting the overlapping claims described in documents identified during the Marvin George cross-examination. And of course Canada filed the comprehensive claims of neighbouring groups as Exhibit 1238 and 1238A.

Now, my lord, just following along in the yellow book, the first tab relating to this section --

THE COURT: Not the map book?

MR. WILLMS: No, not the map book, my lord, the yellow book, volume 11. And the first tab of the map section -- or the overlap section is 5f-1.

THE COURT: Yes.

MR. WILLMS: And the first page should be the first page of a letter from Mr. Magwood addressed to me.

THE COURT: 5f --

MR. WILLMS: 5f-1.
THE COURT: Yes.
MR. WILLMS: All right. Now, this, my lord, is the opinion of Mr. Magwood, and I just want to ask your lordship to turn to the last page of that, which is page 1n of the tab, it's page 14 of the letter and page 1n in the lower right-hand corner.
THE COURT: Yes.
MR. WILLMS: And you will see his opinion is at the bottom:

> "In my opinion, the boundary lines that I have drawn onto a copy of Exhibit 646 and the half size copies of Exhibit 646, subject to the assumptions contained in parts II and III of my report, fairly represent and depict the boundaries of the territories set out and described in --"

And then he lists the exhibits, my lord that he has mapped onto his exhibit, and that's the map -- the large map on the easel, my lord, is the map prepared by Mr. Magwood. And what I've done is I've overlaid 9A and 9B over top of -- transparency of 9A and 9B over top of Mr. Magwood's exhibit. And now, I'll just --
THE COURT: I'm -- where is 9B? 9A is outlined heavily in black.
MR. WILLMS: Yeah, my lord. All of the black on this one, it's the two are put together, it's just that it's a heavier line for 9A. 9B just carries on.
THE COURT: Yes, all right.
MR. WILLMS: Now, if you turn along, my lord, in the tab 1 to page 6, the first overlap that Mr. Magwood mapped was the Kaska-Dene overlap, and this is taken from a report prepared by Miss Albright, one of the plaintiffs' witnesses. Of course, she wasn't the plaintiffs' witness at the time. And so this document sets out within it a metes and bounds discription, and Mr. Magwood plotted the Kaska-Dene metes and bounds in red in the upper right-hand portion of the Magwood map. And your lordship can see that the essential overlap there is excluding the territory of Nii Kyap.
THE COURT: Is it just the territory of Nii Kyap?
MR. WILLMS: For the -- for Kaska-Dene, yes, my lord, here, because the boundary in the upper right-hand corner of 646-9A follows the height of land between the drainages, the Peace River drainage and the Nass and

the Stikine drainages.
THE COURT: So it is not -- yes, it's all of -- it's at least all of what is in yellow in this.
MR. WILLMS: Yes. And, my lord, you might recall that the Nii Kyap is the in again, out again, in again territory in that area. One map according to the plaintiffs it was in, another map it was out, and then it came back in again. The next -- so that's that one. If you turn, my lord, to page 16 of the yellow book, you will see in this tab there are -- there is a metes and bounds description of the Tsimshian claim, and what Mr. Magwood has done is mapped that one in the lower left-hand corner in blue, and that overlap extends into a number of the territories on the lower Skeena River. For example, it comes into Hagwilnegh and then up through Sakxum higookx, Miluulak, Haaxw, and through over towards Kitsumkalum Lake.
THE COURT: Where does the line go after it proceeds west of Haaxw's?
MR. WILLMS: It comes down, my lord, and this is in green, Mr. Magwood has mapped, and this is also at the same section there's a metes and bounds, and then there's a map. This map, Kitsumkalum claim, in green.
THE COURT: This is green?
MR. WILLMS: Green. Kitsumkalum is green, and Tsimshian is blue, and there's a mutual -- appears to be a mutual boundary in blue and green between Kitsenkalum and Tsimshian.
THE COURT: Is that an overlap between them?
MR. WILLMS: No. That boundary appears to come down the same line, that's the way Mr. Magwood has mapped it.
THE COURT: I see. So to the west is Kitsumkalum and to the east is Tsimshian.
MR. WILLMS: Is Tsimshian. And then the Kitsumkalum claim comes up into the territory of Tenimgyet.
THE COURT: Yes, takes in most of it.
MR. WILLMS: Most of Tenimgyet.
THE COURT: Yes.
MR. WILLMS: And, my lord, for -- as I said, at this particular section of page 16 and on the Kitsumkalum claim is described in a metes and bounds description, and it's also --
THE COURT: Sorry, page 16.
MR. WILLMS: Well, page 16 -- if you go to page 19, you will see the metes and bounds of the Kitselas Band.
THE COURT: Yes.
MR. WILLMS: And then over to page 22, a metes and bounds of

Kitsumkalum.
THE COURT: Yes.
MR. WILLMS: But what Mr. Magwood mapped for Kitsumkalum was the map which is at page 24. At page 24 there's a foldout and there's a map of the Kitsumkalum Tribe territory, and you'll see Mr. Sterritt's notes in the upper -- his initials in the upper right-hand corner, "NJS", that's Neil Sterritt. And what he's done in green is he's mapped this onto his map. The next one that was marked, my lord, if you turn to page 26 of this tab, what follows at page 27, 28 and 29 is a metes and bounds description from Tahltan oral histories, my lord, according to Teit, a metes and bounds description of the Tahltan traditional territory, and Mr. Magwood has mapped the -- a Tahltan from the north in blue, and it comes down the height of land between the two drainages and abuts the Kaska-Dene claim, but it takes out the territories of Nii Kyap, Miluulak, part of Miluulak across part of Wii Gaak, Geel, Wii Minosik, and it comes all the way down to, as Teit said, latitude 56 degrees. And then at 56 degrees Mr. Magwood then went over to the Cascade Range along 56 degrees, but you'll see, my lord, that that, according to the Tahltan oral histories, if you map that down it takes out a large chunk of the northern section of the claim area.

The next that Mr. Magwood mapped is at page 31, my lord. This is the Nishga Tribal Council claim. The map that was given to Mr. Sterritt, and your lordship may recall the evidence of the feasts between the Nishga and the Gitksan and in an attempt to resolve this one, and what Mr. Magwood has done on his map with the Nishga claim, my lord, and it's fairly faint, but it's in yellow, and the Nishga claim generally follows the watershed boundaries of the Nass, but you can see it coming in from the north through Kliiyem lax haa, taking out Wii Minosik and then following the Tahltan claim down through Luus, Niist, Wii Goobl, and then carrying on down through Delgamuukw, the boundary of Delgamuukw, it takes out Delgamuukw and Gyolugyet, following roughly between Antgulilbix and Delgamuukw on the far left side.

THE COURT: Overlapping with the Tahltan?
MR. WILLMS: Overlapping with the Tahltan. The next overlap, my lord, that -- and there are two -- there were two representations of Kitwancool, my lord. The first Kitwancool is a metes and bounds description, which is

found at page 36 tab 1, and so what -- in paragraph 10 there is a metes and bounds description and then there is also -- there were two descriptions, and then there was also the description, which is at page 45, which is from the -- from Exhibit 383, which is the -- I think it's the Laws and Territories of the Kitwancool, by Duff. So what Mr. Magwood did there, my lord, was he mapped the metes and bounds territory with long dashes in red and he mapped with short dashes the map, so when you look -- okay. Here you can see the long dashes are the attempt to follow the metes and bounds description, except that the metes and bounds description at one point appears to have headed 70 miles across the land claim area, and you may recall Mr. Magwood then couldn't figure out from the metes and bounds how to get back --

THE COURT: Yes.

MR. WILLMS: -- over, but he mapped so much of it as he could. The short dashes are the map from the Laws, Territories, et cetera, of the Kitwancool, and they come up and take out Djogaslee, part of Gyolugyet, Delgamuukw, Antgulilbix, Geel, more Geel, Wii Minosik, Wii Goobl, Yal.

THE COURT: Yes.

MR. WILLMS: But -- so that that, my lord, is what Mr. Magwood did. I really want to go now from paragraph 1 of my argument through to paragraph --

MR. GRANT: If my friend is finished with the map, I just think it's important to recall on the Magwood evidence that he used dashes and dots for a significance, to show wherever he was uncertain, and solid lines where he could properly map, so it wasn't just for legend purposes.

MR. WILLMS: It's just from one legend.

THE COURT: That goes in the legend, doesn't it.

MR. WILLMS: Yes. What Mr. Magwood said with respect to the Kitwancool, as to both descriptions he had some uncertainties and he had to make some assumptions, and you may recall, my lord, his primary assumption was to follow the height of land. If there was -- what he called a "call", a mapping call to be made, his call would be to follow the height of land, and your lordship may recall that many of the territories that are claimed in this case follow the height of land as being the boundary.

THE COURT: Was there a separate claim advanced by the Kitwanga -- sorry, the Kitwanga.

MR. WILLMS: I'll get to that, my lord. Mr. Magwood didn't map that, but I'll get to that in the argument here. And there was also a second claim advanced by the Carrier-Sekani, and this is the map that Marvin George prepared, Exhibit 101, where he shows the Carrier-Sekani overlap. And you'll see from Mr. George's map that the Carrier-Sekani overlap basically takes out almost all or most of the southern Wet'suwet'en territories and a great deal of the eastern claimed territories.

THE COURT: That's the one that was pinned on the wall.

MR. WILLMS: At the feast -- there were two feasts, the Moricetown feast and the Burns Lake feast, and I think this was the one at Moricetown.

THE COURT: Yes.

MR. WILLMS: Now, I'm not going to -- what I have done in the argument, my lord, at paragraphs 2 through 10, is just summarized the various rulings that have been made in -- by your lordship in this case about challenging the reputation evidence that the plaintiffs have brought to bear. And the plaintiffs alleged, for example, that we couldn't cross-examine their witnesses on whether they knew of somebody else changing the territory, and your lordship said that we could, that that would go to reputation. So I don't intend to go through that, that's just a bit of history, but I would ask your lordship to go to paragraph 11 on page 5, and I say this: That a boundary by definition must involve an agreement between the alleged landholders on either side of the boundary or a decision by an authoritative decision-maker to which these claimants defer. The plaintiffs argue that the alleged declarations of house members about house boundaries constitute evidence of reputation of the boundaries. The plaintiffs, however, have called no evidence as to the reputation concerning such boundaries in the larger community of native and non-native groups in northwestern British Columbia. There is, and I'm going to deal with this in a bit more detail later, my lord, no evidence of reputation in what I say is the real community as to these boundaries. In other words, the real community necessary for proferring reputation evidence to boundaries. My friends haven't called any evidence.

Now, I say in paragraph 12 that the evidence of overlapping claims, both in chief and in

cross-examination, seriously dilutes the evidence, if it's admissible as reputation, the plaintiffs' evidence, contained in all the territorial affidavits. And there there is a further significance to the overlapping claims, my lord, and we used these for two purposes. In the Baker Lake case Mr. Justice Mahoney excluded from the land claim areas subject to overlapping and successive occupation by other native groups. And, my lord, could you turn to tab 13, it's f-13 in the yellow book. And this is an extract from the Baker Lake case, but you'll see in the middle of the page on the left-hand side "The nature, extent or degree".

THE COURT: Mm-hmm.

MR. WILLMS:

> "of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings are capable of surviving on barren lands, the Inuit were there: to the extent the barrens lent themselves to human occupation, the Inuit occupied them.
>
> The occupation of the territory must have been to the exclusion of the other organized societies. In the Santa Fe case at page 345 Mr. Justice Douglas, giving the opinion of the U.S. Supreme Court held:
>
> > 'Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Indian title' which unless extinguished survived the railroad grant of 1866.'.

Now, my lord, here of course the plaintiffs put their case on an even higher plain, because they say that not only have they had possession since time immemorial, except for the northern -- some northern

territories which they say they acquired through peace feasts, not only do they say that they had possession since time immemorial, they claim to have possession to today. So I say that there are two ways that the overlapping claim evidence can be used in measuring the allegations of the plaintiffs here.

Now, I say in paragraph 14, my lord, that as well the extent of the overlapping claims is -- oh, my colleague just pointed out to me, my lord, or -- I had two replacement pages to hand up, and one of them I'm just reading from. This replaces page 6. The difference is, my lord, there was a bit of the paragraph at the top of the page that was missed. The other page comes later on, my lord.

THE COURT: Sorry, the other page doesn't come there?

MR. WILLMS: No. There's another page number at the top, I think it's a page in the appendix.

THE COURT: All right, thank you. So take out page 69, the appendix.

MR. WILLMS: Yes, and replace it with the new page.

THE COURT: My book is getting very close to being full.

MR. WILLMS: I won't add anything more, my lord.

THE COURT: All right.

MR. WILLMS: Now, I was on page 6.

THE COURT: Yes.

MR. WILLMS: And I just want to make a comment here, because I've noted in paragraph 14 that some overlaps have been depicted by Neil Sterritt, and I list the exhibits there, and also by Marvin George, and that's Exhibit 101, and of course the Magwood map is the map I've just referred your Lordship to. In paragraph 15 I say that there is evidence of claims based on aboriginal rights and on prior use and occupation in the claim area by the following native groups who live or lived in or near the claim area. There is the Tsimshian-Kitselas and the Tsimshian-Kitsumkalum, the Nishga, Kitwancool, Tahltan-Stikine, the Tsetsaut, which is sometimes included in the Tahltan-Stikine, the Kaska-Dene, the Carrier-Sekani, and the Cheslatta, sometimes included in the Carrier-Sekani. And I do want to pause here, my lord, to answer a point. I don't know whether my friends are continuing to advance this point, but earlier on Mr. Rush made the comment that the Nishga weren't an organized society, and he made that comment in relation to the argument about reputation evidence and whether or not it could be put to a witness in cross-examination that the

Nishga were claiming the territory. And one of the points that Mr. Rush made at the time, and I don't know whether that's still being maintained, but he said that the Nishga weren't an organized society and therefore the reputation evidence was different.

THE COURT: I think what he said was, as I recall it, was there was no evidence that they were.

MR. WILLMS: Oh, all right. Well, I can deal with that too, my lord. The evidence that the Nishga -- the evidence led by the plaintiffs that the Nishga are an organized society are the fact that they feasted with the Nishga in accordance with their traditional system, and my friend, Mr. Grant, went through in detail the Nishga -- described the Nishga feasting. It's also covered, my lord, in my friend's suggestion of international relations. The people that they're suggesting that they can have international relations with are the people that my friend says there's no evidence that they're an organized society. Well, I say that the feasting alone on the plaintiffs' case is evidence that the Nishga are organized. The Kitwancool -- of course, from the Statement of Claim, the Kitwancool are, because the Kitwancool are Gitksan. The Tahltan-Stikine, my friends rely on the fact for some territories that they obtained territories in feasts, and they can't obtain territories in feasts, on their own theory, unless they're obtaining them from an organized society, and so they need the Tahltan-Stikine-Tsetsaut people to be organized in order to get those territories. There are also references, of course, in the oral histories that my friend would make as to feasting with the Tahltans feasting with the Tsetsaut. With the Kaska-Dene, I'll deal with that a little later, my lord, but Miss Albright gave evidence about the Kaska-Dene. And of course the Carrier-Sekani, my lord. There were two feasts, overlap feasts with the Carrier-Sekani, and it is my submission, my lord, that there is ample evidence that it was held by the plaintiffs here on their own theory that surrounding peoples are organized societies. Now, turning to page 7 --

THE COURT: Mr. Magwood didn't map the alleged overlapping claim with the Tsetsaut, did he?

MR. WILLMS: No, my lord. The Tsetsaut is once again in the Suttles map, which shows the linguistic boundary at the time of contact. Now, that one, if you drew a

line from Kuldo over to Bear Lake, basically what you would do -- which is where, according to the Suttles map, the Tsetsaut were at the time of contact, if you drew a line across there it would knock off most of the top part of the Gitksan territories.

THE COURT: From where -- from --

MR. WILLMS: If you draw a line roughly from Kuldo across to Bear Lake, and then south -- now, the neat thing about all of this, my lord, of course, is that it fits so well with what Dr. Rigsby said, with what Dr. McDonald said, with what Dr. Robinson said about the Gitksan moving up in the protohistoric period and early historic period in response to the fur trade into an area that they were not before that time.

THE COURT: And of course that would overlap with the Tahltan.

MR. WILLMS: Yes. Well, the Tahltan, now, you may recall the evidence that it was a combination of warfare, the Tsetsaut was small pox and warfare with both the Tahltan and the Nishga, and I think the Tlingit as well.

THE COURT: Yes, all right.

MR. WILLMS: Now, I say in paragraph on page 7, paragraph B1 I note that there is an overlap of the House of Tenimgyet and that Art Matthews Jr. and Neil Sterritt testified that they were aware of these claims. Over to page 8, I note the Kitselas -- the territories that the Kitselas claim overlaps, my lord, and then I note in paragraph 3 that both Vernon Smith and Neil Sterritt were aware of Kitselas claims to territories within the claim area. In paragraph 4 I -- actually if you -- I've been through 4 and 5 already, my lord, except to note that the Nishga map was received by the plaintiffs in 1983, before the lawsuit was commenced, but in paragraph 6 the claim overlaps, and I set out the territories that are overlapped, and I say in paragraph 7 that Mr. Sterritt was aware of the Nishga claims as early as 1975. And I would, on this particular point, my lord, ask you to turn -- the numbering system changes to B in the yellow book now, and it's tab B-7.

THE COURT: Capital B?

MR. WILLMS: Capital B-7.

THE COURT: Yes.

MR. WILLMS: And I'll read the quote. This is the resolution of April 3rd, 1975, and you will see the chiefs who made this resolution down the left-hand side.

THE COURT: Sorry, I'm not at the right place. Down the

right-hand side?
MR. WILLMS: Left, down at the bottom. The top of the document --
THE COURT: Oh, I'm sorry, I'm at B-17, you want B-7.
MR. WILLMS: B-7.
THE COURT: Yes, thank you.
MR. WILLMS: All right. This is a resolution presented to the Special General Assembly of Union of B.C. Indian Chiefs By The Hereditary Gitksan Chiefs Of The Kispiox and Skeena Valleys, April 3rd, 1975:

> "Whereas the hereditary Gitksan Chiefs from the Kispiox and Skeena Valleys are aware that land claims and aboriginal rights are becoming a major issue amongst the Indian people of B.C. and;
> Whereas the Nishga tribes are claiming certain lands which are rightfully the lands of the Gitksan, be it hereby resolved that we direct our elected representatives on the Gitksan-Carrier Tribal Council to make land claims a priority issue, and ensure that the Gitksan's hereditary lands as defined by all their registered traplines are made known to the B.C. Land Claims Co-ordinator, Mr. Phillip Paul, and to the Nishga people."

And you will see some familiar chiefs names in the left, my lord, and it was as a result of this really that you will see on the next page, from the cross-examination of Mr. Sterritt, that section is put to him and he was asked:

> "Q Now, was that the terms of the resolution that you described a few minutes ago?
> A This was the resolution that I was referring to and it was in the nature of what I've just described a few moments ago, that the hereditary chiefs understood that the traplines would represent their traditional lands, a situation which turned out not necessarily to be true."

And I note, my lord, that from the outset the prime map-maker in this area, the person who prepared the draft maps, was aware all along of the very extensive Nishga overlap.

THE COURT: Wasn't there a letter or a memorandum about the Gitksan recognizing the Nishga claim for the purpose of the Calder case?
MR. WILLMS: That was the Kitwancool, I believe the Kitwancool people for the purposes of the Calder case did that.
THE COURT: All right, it wasn't the Gitksan.
MR. WILLMS: Well, there are Gitksan, but they're not the plaintiffs in this action.
THE COURT: All right.
MR. WILLMS: I don't know what the position of the plaintiffs in this action is, as to whether the Nishga claim in Calder was good or not. I don't think they've said so.
THE COURT: It doesn't matter, because it was an agreed statement.
MR. WILLMS: It was an agreed statement, my lord, and I don't know whether they agree that that claim should have succeeded and therefore perhaps overlap with their claim today, I don't know, I don't think they've dealt with that. But turning to paragraph 8 on page 9, I say that other witnesses who were well aware of Nishga claims to territories within the claim area included Mary McKenzie, Dora Wilson-Kenni, Arthur Matthews Jr., James Morrison, Vernon Smith, Solomon Marsden, and Marvin George. Now -- and the next item, my lord, is Kitwancool on page -- the bottom of page 9. I've already pointed out the two lines, and where that came from, I note in paragraph 10 that the map was identified as showing the Kitwancool boundaries by James Morrison and Solomon Marsden, both Kitwancool chiefs, and Vernon Smith, chief councillor of the Kitwancool band. I note in paragraph 11, as I pointed out roughly, my lord, the house territories that are overlapped by the Kitwancool claim.
THE COURT: Does Exhibit 383 --
MR. WILLMS: 383 is from the Laws, Territories -- the History Of The Territories and Laws of Kitwancool, and 383 is the one that sort of -- the line.
THE COURT: Yes.
MR. WILLMS: In paragraph 12 I note that Peter Muldoe was aware of the Kitwancool claims to the territory. Now, I note one point here, my lord. Although the Nangeese River Valley in paragraph 13 is outside the claim area, that Fred Wale had testified at one point that the House of Gwoimt claims the Nangeese Valley, but that's not advanced here.
I say in paragraph 14 that the territory of the

House of Yal in the Kiteen River area extended into the lands claimed by the Nishga and the Kitwancool, and that the territory was removed from the plaintiffs' claim in a subsequent amendment.

And finally, I note another map which hasn't been marked, my lord, but another map which overlaps a map verified by Solomon Marsden, having another claim extending into the Upper Kiteen River within the claim area.

Now, on this point, this is the Kitwanga band Council, my lord, there was an earlier land claim by the Kitwanga, and at page 12 I note that Vernon Smith testified that in 1978 the Kitwanga Band Council decided to advance its land claim independent of Gitksan-Carrier Tribal Council, and the boundaries -- if we can go back to B -- if your lordship can go to B-17 now, where -- in the yellow book, you'll see a metes and bounds of the Kitwanga claim, which commences at:

> "Andimaul Train Station, eight miles east of Kitwanaga Indian Reserve 1, and extends to a mutual location between the Kitsegukla Band and us."

And I don't want to read any further, my lord, but except to make two comments. The first comment is that, first of all, the Kitwanga Band Council advanced its own claim. And your lordship will recall the argument that we've already made about villages rather than houses or territories -- sorry, houses, but it's a village claim. Secondly, your lordship will note the boundary between the Kitsegukla and Kitwanga being mentioned here, and that was mentioned in the O'Reilly documents that I directed your lordship to when I went through that section, the dispute between the Kitwanga band and the Kitsegukla band, where the Kitwanga people want the strangers from Kitsegukla removed from their reserve.

Now, I would like to go back, my lord, to the argument now and go to paragraph 19, where I set out, as I've already described, the Tahltan boundary and the house territories that are overlapped there by the Tahltan boundary.

Over to the top of page 13, and I note in paragraph 20 that several witnesses testified about the Stikine claims in historic times to areas within

the claim area, including Sterritt -- that should be Neil Sterritt Jr. -- Solomon Marsden, Martha Brown, David Gunanoot, Fred Johnson, Jessie Sterritt, Thomas Wright, and Walter Blackwater.

The Stikine claims were said to extend as far south as Kuldo according to Martha Brown and included the Bowser Lake, Meziadin Lake, Ninth Cabin, Upper Nass River, Upper Bell-Irving River and Upper Skeena River areas.

Now, in 1986, as a result of discussions with the Stikine or Tahltans, and I note, my lord, not a feast but discussions, although there were feasts, according to Neil Sterritt the northern boundary was established at a location farther south than on the earlier maps. And this -- and this is Mr. Sterritt's Tahltan -- if I can call it this, put it this way -- Tahltan accommodation, but certainly not in accordance with any historic method of resolving territories, no feast to set this -- fix this boundary.

THE COURT: Meech Lake, was it?

MR. WILLMS: It was Meech Lake, my lord.

THE COURT: Is it fair to use Stikine and Tahltan as interchangable too?

MR. WILLMS: Well, my lord, the problem with that is Stikine sometimes includes Tsetsaut, because when you look into the historic documents, the Stikine people were alternately either Tsetsaut or Tahltan, but of course at the beginning of the nineteenth century, after the early part of the nineteenth century, there were no more Tsetsaut, so that when there was a reference to Stikine in the earlier documents, when there was a reference to Stikine in the earlier documents, it could have been Tahltan or Tsetsaut.

THE COURT: Yes, thank you.

MR. WILLMS: Now, and that's why I -- at the bottom of paragraph -- page 13, paragraph 23 I say that the Tsetsaut claim area is not depicted on the map prepared by Magwood, and they are sometimes included in the term "Stikine" by the plaintiffs' witnesses. And Stanley Williams equated the two groups. Thomas Wright stated that the two were different groups, and I point out the Suttles were linguistic maps depicting the Tsetsaut as occupying most of the land in -- north of a line from Kuldo to Bear Lake.

I've already referred to the Kaska-Dene claim and the effect of that territory on Nii Kyap. And of course the Carrier-Sekani, that claim, my lord, was

used as a reference by the Wet'suwet'en hereditary chiefs during a feast at Moricetown in April 6th, 1986. And Alfred Joseph testified that the overlap, as depicted on Exhibit 101, was based upon the Carrier-Sekani comprehensive claim filed with the federal government. James Morrison, Robert Jackson Sr., Dora Wilson-Kenni, Alfred Joseph and Hugh Brody testified about Carrier-Sekani claims in the claim area.

And as depicted on Exhibit 101, the western boundary of the Carrier-Sekani claim cuts across the claim area from a point west of Thutade Lake south to the confluence of the Skeena and Mosque Rivers, south across the Skeena River west of its confluence with the Sustut, south along the height of land to cross the Babine River just east of Kisgegas, and then south of the Babine, turning southeast to the French Peak area. And I describe there in the balance of the paragraph, my lord, the house territories which we say are overlapped by the Carrier-Sekani claim. And then in the Wet'suwet'en area, as I said before, it overlaps most of the southern claim area.

I note in paragraph 31 that Alfred Joseph, Dora Wilson-Kenni, Marvin George, and Neil Sterritt were all well aware of the Carrier-Sekani overlapping claims.

One of the earlier maps, Exhibit 113, excluded several of the southern territories in the claim area, and I list those territories which were excluded from that earlier map and note that those maps and some of the Schedule B maps extended east to Chapman Lake, an area which was removed from the claim area in 1987.

In paragraph 34, my lord, I note that the location of the territories occupied by the Cheslatta people isn't depicted on 1177-2, but the Cheslatta bands are included in the Carrier-Sekani Tribal Council.

Now, the Suttles linguistic map, my lord, does depict -- there is a smaller boundary that is depicted in the Suttles map, which he has depicted as Babine. And that boundary cuts across the Bulkley River, it's partway down Babine Lake, and then over towards the north end of Takla Lake, and you'll note that between Francois Lake and Ootsa Lake the Cheslatta people are named on the Suttles map as a linguistic group at the time of contact. And the point here, again, my lord, is that when you look at the evidence, for example, the work of Mr. -- of Dr. Jenness, about the move

south and also the discussion even when Trader Brown got there, you can see that there are the Hotset people on Bulkley River and the relationship with Babine Lake and the speakers, as Dr. Kari said, the Babine-Wet'suwet'en, which in my submission is what the Babine represent, a much smaller area than what is now being claimed.

Now, I'm not going to -- my lord, from pages 18 through to 23, what I have set out there is just some conclusions about the general external boundaries, and I'm not going read that, but I would like to explain, if your lordship could turn to page -- the page immediately after page 23, and this is an appendix, the detailed review of the evidence. And so the propositions that I've made as I've gone through the first part, my lord, are supported and it's broken down A through I with references to the evidence in the appendix which follows and which stretches for some nine pages. And I'm not going to go through that, but I say that there is support in the evidence for all of the propositions that I've made in the previous pages in that end, and I say, my lord, really in conclusion on this section, and this is departing from any part of the argument, my lord, but I say that this evidence, the overlapping claim evidence goes to two points, it meets two points in the plaintiffs' case: The first point is that it corroborates the earlier evidence that your lordship has heard about and corroborates the earlier arguments that were made that the plaintiffs were not where they say they were at the time of contact or in the protohistoric period. And in particular, there, my lord, Teit's notes were from Tahltan oral tradition. The same evidence that the -- well, I mean the plaintiffs don't advance Tahltan oral tradition, they advance Tsimshian oral tradition, including some reference to people that are now called Gitksan. But you have oral tradition advanced which has a claim coming down to 56 degrees, and --

MR. GRANT: Well, my lord, is my friend going to be sure to caution you about the note of Teit, that -- and I think that you may recall that Teit made a note at the end of the reference which he has there, which is a note, it's at tab 1, where Teit's notes are --

THE COURT: Tab 1 of --

MR. GRANT: IV/5f-1, the oral tradition given by Teit.

THE COURT: Yes.

MR. GRANT: He makes a note that it was difficult to determine the southern most boundary, and he --
THE COURT: What page are you on?
MR. GRANT: I will give you the page now, my lord. It's on page 5 -- Section IV/5f-1, page 29, and he says:

> "I found it rather hard to get a full understanding of the approximate boundaries of the Tahltan, as some persons had a knowledge of some but not of others. There may have been some changing or extension of boundaries within the last 100 years in certain places owing to trade and some changing of headquarters."

THE COURT: I haven't found that, Mr. Grant, where is it again?
MR. GRANT: In the first tab of my friend's --
THE COURT: Page 29?
MR. GRANT: 5f-1 is the tab number, page 29.
THE COURT: Yes, all right.
MR. GRANT: At the very bottom.
THE COURT: Yes, all right.
MR. GRANT: And going over to the top of the next page, page 30:

> "Boundaries are less well defined than those of tribes further south because the Tahltan were? more nomadic and had no real permanent villages formerly. Also certain families through intermarriage with neighbours, especially in the east and west, appear to have ranged over and used territory of both tribes."

I think that's a telling comment on Teit of what can be made of that.
MR. WILLMS: Certainly, my lord, if I was alleging -- if I was trying to prove Tahltan tribal boundaries, my friend has a good point, but what I'm saying is when you read this evidence it shows that my friends have not proved theirs, and those comments I say apply A fortiori to their own evidence.
Now, if you turn to page 46, my lord, of tab 1 in the yellow book, what you will have is some evidence in this case from Miss Albright about the Tahltan and the Tsetsaut. She says at line 4:

> "Q In your Tahltan ethnoarchaeology, did you

become aware during your research there or your research in preparing for your ethnoarchaeological evidence here, aware that Tsetsaut?

A Yes.

Q And at one point the Tsetsaut were located as a group somewhere between the Tahltans, who you investigated, and the Gitksan?

A Yes.

Q Now, you're earlier work on Tahltan ethnoarchaeology indicated a review of the ethnography of the Tahltans?

A Yes.

Q And I'm showing you -- it's the cover page of publication, and one page of it. Did you -- if you turn the page, did your review of the Tahltan ethnoarchaeology indicate, as is set out in figure 2, the clan territories and the Tahltan tribal boundaries that you indicated there?

A Yes.

Q All right. And you've shown the Nas Koten at the headwaters of the Nass, and another group, the T-L-E-P-A-N-O-T-E-N at the headwaters of the Skeena River?

A Yes.

Q And that was the ethnography that you reviewed in doing your Tahltan ethnoarchaeology?

A Yes. Based on Teit's, James Teit's previous work in that area.

Q Yes. And you -- and I think you mentioned in your evidence -- or maybe I better mark that."

And, my lord, that's Exhibit 849-20, and when you look at that, I marked the figure that Miss Albright did, and it's very close to what Mr. Magwood drew on the map, although it's a much smaller scale. Miss Albright, in Tahltan ethnoarchaeology noted these boundaries coming down, and these two groups that she's named, Nas Koten and Tlepanoten, and she notes where they come down. I haven't included that, my lord, I'm sticking with what was mapped here, but if you look at Exhibit 849-20 and the extract from Tahltan ethnoarchaeology, you will see that Miss Albright, who isn't a map-maker, came pretty much bang

on in drawing her map to what Mr. Magwood came to. And she also has a description from Teit's notes as well.

I might just continue here, my lord, with Miss Albright, because she deals with another group:

> "Q I think you said earlier in your evidence in chief that at one point in the past you had done a review of the Kaska dena land claim submission?
> A Yes.
> Q And when you reviewed that Kaska dena land claim submission, did you review -- or do an ethnoarchaeological review? Did you review the ethnography?
> A I reviewed the ethnography, yes.
> Q And you recall the map that Marvin George showed you before you plotted the archaeological sites on the maps that have been marked? Do you recall Marvin George's map?
> A Yes.
> Q And did you recall from your review of the Kaska dena land claims submission, that part of that claim submission overlapped the Marvin George map that you looked at?
> A I don't recall."

And the Kaska-Dene work that Miss Albright's referring to there is what was mapped by Mr. Magwood. And my friend makes a very good point there, my lord, about boundaries changing, because once the Tsetsaut were no longer there, and they're on the Suttles map but they're not around anymore, I have no doubt that not only did the Gitksan move up the river at the same time the Tahltans moved down further, I don't have any doubt of that at all, but I'm not here proving Tahltan territory, my lord, I'm just saying that when you look at the evidence, the evidence is inconsistent with my friend's theory that since time immemorial this has all been Gitksan territory; and more than that, Gitksan house territory. The second point, my lord, and this -- and I have an extract from the submissions in this case, and -- and if I can just complete this, my lord, and then if we can adjourn I'll be finished, this is an extract from transcript 328, and the

submissions by Miss Mandell, and you will see in particular, just pick up at line 7, Miss Mandell says:

> "MS. MANDELL: But the collective jurisdiction in its fullest form is exercised by all the chiefs of the houses representing all of the houses at feasts where territory is passed or affirmed, which is headstone or pole raising feasts."
> THE COURT: So name or territory passing is all Gitksan chiefs?
> MISS MANDELL: Or Wet'suwet'en, yes.
> THE COURT: Name or territory?
> MISS MANDELL: Yes. Well, high chief's name where territory passes.
> THE COURT: All right.
> MR. WILLMS: Is that Gitksan and Wet'suwet'en or just Gitksan and just Wet'suwet'en?
> THE COURT: All Gitksan chiefs for Gitksan lands and names and all Wet'suwet'en chiefs, I understand.
> MR. WILLMS: What about the boundary of territories? Does that apply to the boundary too? I just don't know.
> THE COURT: I don't know either.
> MR. WILLMS: Between the Gitksan and Wet'suwet'en.
> THE COURT: Where there is a common boundary
> MR. WILLMS: Where there is a common boundary, what happens there?
> MISS MANDELL: We can explain it more. Mr. Grant's going to be dealing with that when he deals with Gitksan and Wet'suwet'en relations."

Well, we waited, my lord, and we didn't hear about that. The point that your lordship may want to note there, and this is from the evidence of Neil Sterritt, my lord, at transcript 131 page 8060, and the question starts at line 32 on page 8060 and it carries over to page 8061, the answer to 8061, line 27, but I just want to read a part of that where Mr. Sterritt says -- he's talking about the Gitksan-Wet'suwet'en boundary here, and I'm reading starting at -- on line 12 of page 8061, and he -- well, a little higher he says:

> "A And at that area there is a boundary at a

> creek Sta Gapsit, and that Ax Weegasxw also went as far as another creek called Xsu Gwi Tsiik, and that in reviewing the genealogical information, the House of Djogaslee, is Lax Seel, and Frog, the House of Wah Tek Teht, as I understand it, is Gilhseyu, which is also Frog, and that it's an old zone of interaction between the Wet'suwet'en and the Gitksan, and they will have to discuss that, but there were very close relationships and at this time the boundary is at Porphry Creek. I don't, as a result of those discussions, I can't predict whether they will define the boundary is at Boulder Creek or Porphry Creek, but the hereditary chief, Djogaslee, has said that subject to further discussions the boundary is at Porphry Creek, and so have the persons from Moricetown, in terms of their statements."

Now, he doesn't refer to a feast. And what I say, my lord, here, is that the plaintiffs can't have it both ways, I mean either boundaries, either the common sifting of boundaries takes place at a feast, where all of the relevant people are there, and that means for Gitksan internal boundaries, as they argue, all the Gitksan chiefs, Wet'suwet'en internal boundaries, as they argue, all the Wet'suwet'en Chiefs. If they're having a feast to discuss Gitksan and Wet'suwet'en boundaries on the plaintiffs' theory, in my submission, you should have both, and that has been put into practise, my lord, because there were two feasts between the Carrier-Sekani, and the Wet'suwet'en, they had a feast at Moricetown and a feast at Burns Lake to try to resolve the boundary, so what I -- and they had feasts with the Nishgas, and there is other evidence of feasting. My friends say that they take territories in the north because of peace feasts, and what I suggest, my lord, is on the plaintiffs' own evidence the community that is relevant to boundaries is the people on both sides of the boundary, and on their own evidence they've acknowledged that, on their own evidence they've acknowledged that there has been no sifting on these external boundaries. In fact, there is still disagreement on the external boundaries. And so when

your lordship looks back at the test that my friend set out earlier, or my colleague set out early from Wigmore, from Phippson and from Milirrpum, that my friends have not led any evidence that can be called a community sifting of reputation, because they picked the wrong community, they just picked themselves. They didn't even include the Kitwancool chiefs, they didn't even include the Babine chiefs in the sifting process, even though those are part of the same group in my submission. Those are my submissions on overlapping claims.

THE COURT: Where do you suggest I file this?

MR. WILLMS: My lord, that can go immediately before "Overlapping Claims".

THE COURT: Yes, all right. Right after page 23. All right, thank you. We'll take the morning adjournment now.

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

(MORNING RECESS TAKEN AT 11:10)

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

Graham D. Parker
Official Reporter
United Reporting Service Ltd.

(PROCEEDINGS RECONVENED AT 11:30 A.M.)

THE REGISTRAR: Order in court.
THE COURT: All right. Volume 2. Are we on schedule, Mr. Willms?
MR. WILLMS: My lord, by the end of Saturday or by the finish of argument on Saturday we'll be back on schedule.
THE COURT: All right.
MR. WILLMS: We anticipate that we will be.
THE COURT: All right. Mr. Mackenzie.
MR. MACKENZIE: My lord, my submissions now will relate to section (g).
THE COURT: Am I finished with this yellow book?
MR. MACKENZIE: We're dealing now with the yellow book Volume 12. Does your lordship have Volume 12?
THE COURT: No, not yet.
MR. MACKENZIE: Okay.
THE COURT: Thank you.
MR. MACKENZIE: Does your lordship have the first page in your Volume 12, section (g) called "Addendum"? I'm sorry. Yes, addendum entitled "Summary."
THE COURT: Yes.
MR. MACKENZIE: Madam registrar just put it before your lordship. And I've also handed up to your lordship an addendum which goes after page 23 in this section, just to confirm that, my lord. Madam registrar --
THE COURT: After page 23?
MR. MACKENZIE: Yes, my lord. Madam Registrar inserted that. Does your lordship have that?
THE COURT: After page 23 there's an unnumbered page called --
MR. MACKENZIE: Entitled --
THE COURT: -- Gwinin Nitxw-Slamgeesh Lake.
MR. MACKENZIE: Yes, outline of argument.
THE COURT: Yes.
MR. MACKENZIE: Yes, my lord.
THE COURT: All right.
MR. MACKENZIE: My lord, as the heading of this section indicates, this section contains a detailed analysis of certain territories. I'm going to be making some general comments at the beginning of this section and then going into consideration of one of these territories, the Slamgeesh territory, at page 24. I'd like to start off, my lord, by saying, referring to the summary which I've given your lordship, I have summarized here, my lord, all the detailed evidence which is contained in this section. Now, my lord, if your lordship could make this note just on that

summary: in our submission, the same exercise could be done for every house territory.

This type of analysis requires a massive amount of research, and so we have given five examples, and I'm going to deal with those now, my lord.

Now, referring to the summary, my lord, the first detailed analysis is of the Gyolugyet territory. I'm going to now point your lordship to the location of these territories on Map 9A and Map 9B. Now, the Gyolugyet territory, my lord, is a massive territory north-east of Kuldo which extends in three blocks north-west up across the Nass River to the head of the Taylor River.

THE COURT: Yes.

MR. MACKENZIE: And Mary McKenzie, Chief Gyolugyet, spoke about that territory, and Richard Benson swore a territorial affidavit relating to that territory.

THE COURT: That must be nearly a hundred miles from north to south, is it?

MR. MACKENZIE: That's one of the largest of the territories, my lord.

THE COURT: Maybe not a hundred.

MR. MACKENZIE: The next territory, my lord, that's dealt with is Antgulilbix South at Date Creek. That's just -- that's down near Kispiox, and I'm pointing it out to your lordship. It's noted as Antgulilbix.

THE COURT: Yes.

MR. MACKENZIE: And it's in the area of Date Creek just west of Kispiox.

THE COURT: Is it all west of the Kispiox River?

MR. MACKENZIE: Yes, my lord.

THE COURT: Yes.

MR. MACKENZIE: And if your lordship can see, this Antgulilbix territory proceeds over to the Kitwancool territorial boundary.

THE COURT: Yes.

MR. MACKENZIE: The Gwinin Nitxw territory, that is, the third territory which is analysed and which I'll be going through in detail, is in the north central area of the land claim area just west of the Skeena River confluence with the Sustut.

THE COURT: Yes.

MR. MACKENZIE: Does your lordship have that?

THE COURT: Yes.

MR. MACKENZIE: And your lordship will recall that we landed there on the view of Slamgeesh Lake.

THE COURT: Yes.

MR. MACKENZIE: The other territory that I've analysed in this section, my lord, is the Samooh-Tahtsa Lake territory, and it's down in the south-west corner of the land claim area.
THE COURT: Yes.
MR. MACKENZIE: Does your lordship have that?
THE COURT: Yes.
MR. MACKENZIE: And it's featured in around Tahtsa Lake, as the name clearly indicates.
THE COURT: It's the one with two parts separated by an intrusion from Woos' territory, W-o-o-s --
MR. MACKENZIE: No, my lord.
THE COURT: -- is it not? Oh, I'm sorry. You're right. I'm looking at Goohlaht. Samooh is to the south of that.
MR. MACKENZIE: Yes, my lord. That's correct. And the final territory that's discussed, my lord, is Madeek (Kanoots), which is Buck Creek, and it's just south of Houston in the Wet'suwet'en, central part of the Wet'suwet'en land claim area. Does your lordship see that? It's just west of Namox, Goosly Lake. It's entitled Madeek.
THE COURT: Yes.
MR. MACKENZIE: And that is generally east, said to be east of the Morice River and south of Houston.
THE COURT: Between Gisdaywa and Namox?
MR. MACKENZIE: Yes, that's correct, my lord.
THE COURT: Yes. There are two Madeek territories there.
MR. MACKENZIE: Yes, my lord.
THE COURT: Are you considering both of them or just the southern one?
MR. MACKENZIE: Just the southerly one at Buck Creek --
THE COURT: Yes.
MR. MACKENZIE: -- that flows through this territory into the Bulkley River.
THE COURT: Yes.
MR. MACKENZIE: And so in following the summary now, my lord, I am going to summarize the contents of the other territories which I'm not analyzing in detail. The first territory is Gyolugyet, and in my submission the analysis contained here shows that Map 9A conflicts with the Benson -- Richard Benson's territorial affidavit and with other maps identified by Mary McKenzie, who is Chief Gyolugyet, as showing the correct boundaries. The territorial affidavit, in our submission, on the basis of the cross-examination evidence contains false statements and also conflicts with the affiant, Mr. Benson's evidence on cross-

examination. And for quick reference, reference can be made to the conclusions noted on my summary sheet.

Proceeding on to the next territory, my lord, Antgulilbix South, which is Date Creek, and a brief summary of the detailed analysis in that section is that Map 9A, the boundaries, conflict with other maps identified by Mary Johnson, Chief Antgulilbix, as showing the correct boundaries of that territory. And in our submission there is no evidentiary basis for much, if not all, of the boundaries of that territory as shown on Map 9A. And I refer again to the conclusions for a quick reference.

Passing over the Slamgeesh territory, my lord, which I'll return to, I go to Samooh-Tahtsa Lake, which is in the Wet'suwet'en claim area. In our submission, there is much evidence that this is the -- this is a Cheslatta territory which should not be included in the claim area.

And finally the Buck Creek-Madeek (Kanoots) territory. In our submission, on cross-examination, as the analysis shows -- this is Lucy Bazil -- the affiant on the territorial affidavit testified that the territorial boundary description was false. There is no basis, in our submission, in the evidence for the western boundary which is shown on Map 9B for that territory. And I refer to the conclusions set out there.

Now I return, my lord, to the Slamgeesh territory, and this will be an example of the treatment by the plaintiffs of these -- this territorial evidence and the cross-examination that took place during the trial. I have referred to this -- I'm still on the summary, my lord, making comment on this territory. I've referred to this territory several times through my argument. This was the Walter Blackwater territory, and this was the territory for which one of the deceased declarants was Moses Stephens, Dawamuxw. The summary of my submissions, my lord, Map 9A of the the territory conflicts with several other maps in evidence. There is considerable evidence that until 1988 most of the territory was attributed to Dawamuxw or possibly Niist, the House of Niist, as opposed to Gwinin Nitxw, which is a Wolf House from Kisgegas.

THE COURT: Niist and Dawamuxw, were they also Wolf Houses?

MR. MACKENZIE: No, my lord. Well, I'll qualify that. Dawamuxw was a Fireweed House and Niist is in the Wolf Clan, but the territory was said to be attributed to

Gaiyemlaxha, G-a-i-y-e-m-l-a-x-h-a, a chief in the House of Niist. I deal with that in my submissions.

THE COURT: All right.

MR. MACKENZIE: Now proceeding to discuss that territory, my lord, I move to page 23, just following page 23, the outline of argument which has been inserted following page 23 in your lordship's binder. And I'm going to be referring to the yellow binder, my lord, Volume 12, if your lordship would have it handy. Now, as I state in my outline of argument, I'm going to deal first with the introduction, but if your lordship will turn over to the table of contents for this section -- it's just after the outline of argument I have handed up for lordship. You should have two pages of the argument, then on page 24 the table of contents for this section.

THE COURT: Yes.

MR. MACKENZIE: Yes. That sets out the organization of the detailed evidence in this section. I am now going to move to the introduction at page 25.

Now, my lord, as I have indicated, I'm starting at paragraph 1 in the introduction on page 25. The Slamgeesh area is in the north central Gitksan claim area about 28 miles north of Kuldo. Mr. Marvin George obtained the information to draw the Slamgeesh boundaries, according to his evidence, from the affidavit of Mr. Walter Blackwater which was sworn in May 1988. And, my lord, during the argument on reputation we've dealt with this affidavit and its relationship -- it's Exhibit 605, Exhibit 605 -- relating to the Slamgeesh territory.

Carrying on to the summary of the evidence on this point, in our submission the Blackwater -- Mr. Blackwater's evidence as to boundaries and claims to the Slamgeesh territory is inadmissible, and, my lord, we've made that submission on reputation, and, alternatively, it's unreliable and should be accorded no weight.

It is submitted, my lord, there is much evidence contradicting Mr. Blackwater's territorial affidavit, and in our submission much of the evidence was probably obtained from living informants in addition to, or more probably, in our submission, instead of the deceased informants. And continuing on at that paragraph, my lord, we've made those submissions under the reputation argument.

Paragraph 5, my lord. The Blackwater -- Mr.

Blackwater's affidavit and Map 9A show the Slamgeesh territory as being claimed by Gwinin Nitxw. However, there is considerable evidence that until 1988 much of the territory was attributed to Dawamuxw or possibly Niist.

I start off, my lord, by referring your lordship to the yellow binder at page -- it's tab 6, page 13. Does your lordship have that reference?

THE COURT: 13?

MR. MACKENZIE: 13, yes, my lord.

MR. GRANT: C6?

MR. MACKENZIE: Yes, C6. And you'll see the page number -- it may be on the top right hand. It's a map that folds out.

THE COURT: Yes.

MR. MACKENZIE: If your lordship could perhaps take that map out and have it handy. That is an enlargement of the Gwinin Nitxw territory as shown on Map 9A, and this is the territory that we'll be discussing in detail in this analysis.

MR. GRANT: This is from 9A?

MR. MACKENZIE: Yes. Just referring to this excerpt from Exhibit 9A, my lord, your lordship will see Slamgeesh Lake in the north central part of that territory.

THE COURT: Yes.

MR. MACKENZIE: And north of that is Damshilgwit Lake.

THE COURT: Yes.

MR. MACKENZIE: And flowing out of those two lakes and down into the Skeena River is the Slamgeesh River. Does your lordship have that?

THE COURT: Yes. Where do you say we stopped for lunch?

MR. MACKENZIE: Well, my lord, I say we stopped just south-west of Slamgeesh Lake, probably near Shilahou Creek. Probably just south of Shilahou Creek because, as your lordship will recall, we were on a flat spot in that case -- in that area.

THE COURT: Yes.

MR. MACKENZIE: And just to the north of us was a swampy area. In fact, we walked through the swampy area.

THE COURT: Yes.

MR. GRANT: Well, is this -- I'm just confused. Is this a lateral -- the north is at the top, so this is a reproduction of 9A, not from one of the other maps?

MR. MACKENZIE: Yes, this is directly from 9A, my lord.

MR. GRANT: Okay.

MR. MACKENZIE: The reason I'm referring to these locations, my lord, is they appear in all of the evidence that will

be discussed. And flowing into Slamgeesh Lake from the west, my lord, is the Shilahou Creek.
THE COURT: Yes.
MR. MACKENZIE: And I note down in the southern part of the territory just north of the Skeena River is a hill called Babiche Hill.
THE COURT: Yes.
MR. MACKENZIE: And just to the east of Babiche Hill is Kitangas Creek flowing into the Skeena River.
THE COURT: That's hard to read. That's K-i-t --
MR. MACKENZIE: -- a-n-g-u-s.
THE COURT: Yes.
MR. MACKENZIE: Your lordship will recall we flew over along the Skeena River past these areas.
THE COURT: And that's the area that's thought to be the site of the Wild Rice Village?
MR. MACKENZIE: In that general area around the vicinity of -- just -- probably just a little east of Kitangas Creek. I understand that is the general area.
MR. GRANT: Where it empties into the Skeena.
THE COURT: We flew over it, and there's a cleared area there somewhere.
MR. GRANT: Yes.
MR. MACKENZIE: Yes.
THE COURT: Appearing to be somewhat similar, from the air at least, to Kuldo. All right. Thank you.
MR. MACKENZIE: Yes, my lord. Two more geographical features to which I wish to refer in the northern part of the territory. The Slamgeesh River flows out of the north-eastern part of the territory into Slamgeesh Lake. Do you see that, my lord?
THE COURT: Yes.
MR. MACKENZIE: And the Damshilgwit Creek flows from the north outside the boundaries of the territory down into Damshilgwit Lake. Does your lordship have that? Just flowing into Damshilgwit Lake, my lord.
THE COURT: Yes.
MR. MACKENZIE: Yes. And I just note here, my lord, that that creek is shown to be outside the territory on this 9A, and there's a small lake --
MR. GRANT: Part of it's inside.
MR. MACKENZIE: Yes, that's right. There's a small lake between -- or just north of Damshilgwit Lake. There's two lakes there, and that will also be relevant. That is the territory that we're discussing, my lord.
Now, keeping that map, my lord, in hand, I continue on at paragraph 6 with my summary of the

evidence. And I refer your lordship to the yellow binder at tab 6, page 1.
THE COURT: Yes.
MR. MACKENZIE: Yes, my lord. That is Exhibit 774, dated November 18, 1982, and there is a sketch. This is an interview note by Neil Sterritt with Mr. Solomon Jack. There is a sketch there indicating that Moses Stephens is located on --
THE COURT: I'm sorry, I'm not with you.
MR. MACKENZIE: I'm sorry. It's tab 6, page 1, my lord.
THE COURT: Well --
MR. MACKENZIE: It should be -- it should be a data sheet, topographic survey data sheet. It's the same tab that the map we're looking at came out of, my lord.
THE COURT: Yes. All right. I've got it.
MR. MACKENZIE: Just pointing out, my lord, this is -- there's a sketch in the upper right-hand corner showing Moses Stephens located on part of this sketch area and Gwinanitx located on another part of the sketch area. Does your lordship see that?
THE COURT: Yes.
MR. MACKENZIE: In my submission, my lord, Moses Stephens' name is beside what appears from the evidence to represent the Slamgeesh River and Gwinanitx is beside what appears from the evidence to be Kitangas Creek. And the body of the note indicates that Dawamuxw, who is Moses Stephens, has the territory on the western side of the -- of that territory. And continuing on, my lord, to --
THE COURT: You say that that line left of Gwinanitx is the --
MR. MACKENZIE: Kitangas Creek.
THE COURT: Kitangas Creek you think it is?
MR. MACKENZIE: I'm saying that on the basis of the evidence. I'll be referring to that in more detail.
THE COURT: Yes. All right. All right. Yes. Thank you.
MR. MACKENZIE: And I'm suggesting that that dotted line is the boundary between the two --
THE COURT: Yes.
MR. MACKENZIE: -- areas there. And carrying on to the next --
THE COURT: What was Moses Stephens' House?
MR. MACKENZIE: He was Dawamuxw, Chief Dawamuxw, Fireweed House. The thrust of all this evidence, my lord, is to show that the overwhelming majority of witnesses and the documentary evidence attributes this territory to Dawamuxw and then all of a sudden, in our submission, it changes in about 1988.
THE COURT: Yes. All right.

MR. MACKENZIE: And I'm just going to go through these maps quickly because they graphically show this documentary evidence. Moving to tab 6, page 3, this is a -- this is a sketch. Does your lordship have page 3?
THE COURT: Yes.
MR. MACKENZIE: This is a sketch on the left-hand margin of Exhibit 725. 725 was one of Neil Sterritt's working maps, and Neil Sterritt identified this sketch as his handwriting in his testimony. And at this -- on this sketch Neil Sterritt --
MR. GRANT: Sorry, what tab?
MR. MACKENZIE: It's tab 6, page 3. On this sketch Neil Sterritt has written: "Dec. 15, '82 at Sam Hope Feast. Walter Blackwater says Dawamuk comes up creek to main Branch & Gwinanitx on other side." And so if your lordship looks at that sketch, your lordship will see Slamgeesh identified as that creek flowing -- creek flowing into the Skeena and Dawamukw noted just where the creek turns there, then to the east Gwinanitx noted, and then further east Gitangas Creek identified. Does your lordship have those references?
THE COURT: No, I don't see any of those.
MR. MACKENZIE: My lord --
THE COURT: Are we looking at the north or south of Foster Creek?
MR. MACKENZIE: Excuse me, my lord, we're looking at a sketch on the margin --
THE COURT: Yes.
MR. MACKENZIE: -- of an exhibit at tab 6, page 3.
THE COURT: Yes, I've got that. I've got the margin where it says December 15th Sam Hope -- oh, you're talking about the sketch, you're not talking about the map.
MR. MACKENZIE: That's correct, my lord.
THE COURT: Oh, all right. Yes, I see. I'm sorry, I was looking at the map.
MR. MACKENZIE: Sorry, my lord.
THE COURT: Yes, I see that.
MR. MACKENZIE: Just -- my lord, this is a -- this shows Dawamuxw in that area and the division --
THE COURT: Yes.
MR. MACKENZIE: -- at that time, according to -- apparently, according to Mr. Sterritt's note, December 15, 1982.
THE COURT: That would be the Slamgeesh River, would it?
MR. MACKENZIE: Yes, my lord.
THE COURT: Or creek. Yes.
MR. MACKENZIE: Yes. And, my lord, that's Exhibit 725. That's on Exhibit 725.

THE COURT: Yes.
MR. MACKENZIE: And then, my lord, carrying on to tab 6, page 5 and page 5A. Page 5, my lord, is a black and white copy of a section of this same map, Exhibit 725, and page 5A is a colour reproduction of that area enlarged, and I wish to refer that to your lordship -- your lordship to that.
MR. GRANT: Which one?
MR. MACKENZIE: This is page 5A. This is Exhibit 725. If your lordship could open up the coloured map, the north direction will be towards the rings on your lordship's binder. I wish to direct your lordship to this map. My lord, this is one of Neil Sterritt's working maps on which he recorded information he obtained from the various informants to whom he spoke, and this area that has been enlarged is the Slamgeesh area. Mr. Sterritt, if your lordship can note here, has coloured a boundary in purple on this area, which he used as a code to denote the Fireweed Clan territory.
THE COURT: And the colouring ends on the Slamgeesh Creek, does it?
MR. MACKENZIE: No, my lord, the colouring goes over to Gitangas Creek.
THE COURT: Oh.
MR. MACKENZIE: And Mr. Sterritt has coloured the various creeks within the territory as well as the boundaries around the territory. Does your lordship see that?
THE COURT: I suppose the blue does extend over east of Gitangas Creek although --
MR. MACKENZIE: No, Gitangas Creek is the boundary here, my lord, on this map, Exhibit 725. Can your lordship see that the purple colour goes down Gitangas Creek to the Skeena and along the Skeena to the west over to the margin? Does your lordship see that?
THE COURT: Well, are you saying the whole thing is coloured blue or purple?
MR. MACKENZIE: Purple. That's correct, my lord. I'm saying the purple boundary goes down Gitangas Creek and follows along the Skeena to the west.
THE COURT: I can't follow what you're saying.
MR. MACKENZIE: Sorry, my lord. When I said Gitangas Creek, I'm sorry, I meant -- I was wrong. I misspoke. The boundary here is east --
THE COURT: I can't -- the colours are so vague and uncertain that I can't follow you.
MR. MACKENZIE: Yes, my lord. Referring to Exhibit 725, your lordship will see that the boundary is coloured in

purple?
THE COURT: Yes. All right.
MR. MACKENZIE: I'm referring now to the north-east boundary of this territory.
THE COURT: Yes.
MR. MACKENZIE: And the boundary continues south along a creek which is east of Gitangas Creek to the Skeena River.
THE COURT: Yes. All right.
MR. MACKENZIE: And then the purple boundary continues along the Skeena River west to the margin of the map, which is Exhibit 725.
THE COURT: Yes.
MR. MACKENZIE: And at that margin is noted in Mr. Sterritt's handwriting "Dawamuk."
THE COURT: Yes.
MR. MACKENZIE: Which refers to the boundary marked in purple.
THE COURT: Yes.
MR. MACKENZIE: That boundary then continues over on to the next map, which adjoins this map and is Exhibit 726. It's simply -- and I'll refer that to your lordship. It will be --
THE COURT: In here?
MR. MACKENZIE: Yes, my lord. It's the next map, which is tab 6, page 7A. And this is an enlargement of Exhibit 726 and a continuation of the purple boundary and the rest of this territory as indicated on Mr. Sterritt's working map. And your lordship can see, for example, Shaslomal Creek, which, as your lordship will see, flows into the -- flows into the Slamgeesh Creek in the centre of the territory. In addition it's noted on this map Dawamuk, showing that Dawamuxw is attributed to this territory. And what we're looking at now on Exhibit 726 is simply the western portion of this Slamgeesh territory as it appeared on Mr. Sterritt's working maps.
THE COURT: Yes. All right. Thank you.
MR. MACKENZIE: The point that is being made, my lord, in each of these comments is that this is attributed to Dawamuxw-Fireweed Clan, this area.
MR. GRANT: I think it's important, my lord, when you look at 725 that the blue -- that that cross-hatching of boundary not only goes where my friend says along the Skeena but also goes up Slamgeesh River and goes up other tributaries to Slamgeesh River. And if you can see on 725 a number of cross-hatched blue, indicative, and I believe Mr. Sterritt testified to this, that this was a working map and that these were different

attempts of him just trying to work out the boundaries.
THE COURT: Yes.
MR. GRANT: So that it's not as simple as my friend says on this, that there's one place marked. He's drawing -- he's cross-hatching at different places trying to work out what he's been told.
MR. MACKENZIE: My lord, I disagree with that characterization of the evidence.
THE COURT: All right.
MR. MACKENZIE: But I do agree with my friend that the purple cross-hatching on the various watercourse does indicate that this is Fireweed Clan and it's all Dawamuxw territory.
THE COURT: Yes.
MR. MACKENZIE: Now, my lord, I date this Exhibit 725 --
THE COURT: Which one?
MR. MACKENZIE: I date this Exhibit 725 at about May 1983. Yes, this is -- I'll deal with this in the evidence, but I said -- it's in my summary of evidence at paragraph 6(c), and I'll summarize. The reason I say that is because the information on this map reflects the information which Mr. Sterritt received from Walter Blackwater during an interview in May 1983.
THE COURT: Yes.
MR. MACKENZIE: Then I continue over, my lord, to -- and still in the same tab and still summarizing the documentary evidence of the maps, I continue over to page 9 of tab 6. Does your lordship have that page?
THE COURT: Yes.
MR. MACKENZIE: My lord, this is an enlarged excerpt from Exhibit 102, and I date that October 17, 1985. Does your lordship have that point? And -- yes. Now, the territory shown on this map, my lord, is 3.F.25. Does your lordship have that? And in this case north would be to the top of your lordship's binder and 3.F.25 is in the centre of the excerpt.
THE COURT: 3.F.25 is a trapline number, is it?
MR. MACKENZIE: No, my lord, 3.F.25, as will appear from the following page, is a code reference that's set out on page 10. And it's significant that the code on page 10 is -- 3 is Giskaast or Fireweed. I'm referring to page 10 just following that map, my lord. "F" is Kispayaks, for the village.
THE COURT: Yes.
MR. MACKENZIE: And 25 is Dawamux. Your lordship will recall that I --

THE COURT: Yes.
MR. MACKENZIE: -- mentioned Kispiox when I was discussing Mr. Stephens' declaration and the reputation evidence. I mentioned events that were occurring in the Kispiox area. Now, page 9 and 10, as I have indicated, my lord, are enlargements from Exhibit 102. And, my lord, in summary, this continues the attribution to Dawamuxw-Fireweed Clan and it also --
THE COURT: I haven't placed this.
MR. MACKENZIE: Does your lordship see 3.F.25?
THE COURT: Yes.
MR. MACKENZIE: If your lordship will look just at that number, your lordship will see the Gitksan terms Xsi, X-s-i, Galaanhl, G-a-l-a-a-n-h-l, Giist, G-i-i-s-t, which is the Slamgeesh Creek. Does your lordship have that reference?
THE COURT: Yes.
MR. MACKENZIE: Yes.
THE COURT: All right. Thank you.
MR. MACKENZIE: And your lordship will also see that the boundary on this -- on this map is now west of Xsaan Gas Creek. It goes along Slamgeesh Creek and then heads north-east. Does your lordship see that?
THE COURT: Yes. This is the Skeena running across the bottom, is it?
MR. MACKENZIE: Yes, my lord, that's correct. Does your lordship see -- Xsaan Gas Creek is the Kitangas Creek there, X-s-a-a-n G-a-s, flowing down into the Skeena River just -- just near the Slamgeesh River there.
THE COURT: Xsaan Gas is Kitangas?
MR. MACKENZIE: It's my submission, my lord.
THE COURT: Well, I'm having some trouble in deciding whether that area between -- well, the area east of Slamgeesh Creek and north of the Skeena is within this 3.F.25 or outside it.
MR. MACKENZIE: It's within it, my lord. The 3.F.25 is the Slamgeesh area, and the watershed of the Slamgeesh River, with some exception, generally speaking is included in this particular territorial depiction.
THE COURT: What is this dark line that runs more or less east and west across the territory starting at about the letter "G" from Giist?
MR. MACKENZIE: That's the boundary, my lord.
THE COURT: That is the boundary?
MR. MACKENZIE: Yes. The boundary is depicted on this map. Sorry.
MR. GRANT: As depicted on this map, my lord, that -- where

Gitangas Creek is, Xsaan Gas, that would be attributed to 1.E.4, which is Gwinin Nitxw.

THE COURT: Yes.

MR. GRANT: That boundary -- that part south of that dark line is attributed to Gwinin Nitxw.

THE COURT: Yes. All right.

MR. MACKENZIE: Yes, my lord. I misunderstood your lordship's question. 1.E.4 is the Gwinin Nitxw territory, and it extends up past the -- north of the Skeena.

THE COURT: Yes. All right.

MR. MACKENZIE: So, my lord, this is continuing the point that this area is attributed to Dawamuxw-Fireweed Clan, and the boundaries are -- the location of the boundaries change in these various depictions.

Now, I have another point about this Exhibit 102, my lord. The Gitksan place-names mentioned on this map were put on here by Marvin George, who drew the map, and he got that information from Mr. Sterritt's data sheets. Mr. Sterritt in turn got the information from his informants, including Walter Blackwater in the interview of May 1983. So, again, all these geographical points are here included in the Dawamuxw-Fireweed area.

Now, the next map, my lord, is -- the next map to which I wish to refer is Exhibit 420, which is in the map binder.

THE COURT: Can you tell me, this legend from page 10 --

MR. MACKENZIE: Yes, my lord.

THE COURT: -- is from where?

MR. MACKENZIE: It's Exhibit 102, my lord, the map. That's the map legend.

THE COURT: Of Mr. Sterritt's working map?

MR. MACKENZIE: No, my lord. This is the -- Exhibit 102 is the map that was prepared in October 1985 by Marvin George, and the evidence is that it was obtained -- the information was obtained from Mr. Sterritt's working maps and data sheets. It's also -- there's a depiction of that in the 646 series.

THE COURT: All right. Now you want to go to --

MR. MACKENZIE: Now I'm going to refer to Exhibit 420, my lord, which is in the map binder. These -- the map binder is Volume 13, and Exhibit 420 -- these maps are in order of exhibit number, but 420 is about halfway through the pile.

THE COURT: Yes, I've got it.

MR. MACKENZIE: This is Solomon Jack's interrogatories map.

THE COURT: What did you say this was again?

MR. MACKENZIE: This is Solomon Jack's interrogatories map. Mr. Jack --
THE COURT: Just a moment, please.
MR. MACKENZIE: Yes, my lord.
THE COURT: Yes.
MR. MACKENZIE: Now, my lord, I'll have to orient your lordship on this map. Your lordship can see the north direction on the left-hand side of the map. I'm sorry, the right-hand side, my lord.
THE COURT: Yes.
MR. MACKENZIE: So the narrow point is heading -- is the northern direction.
THE COURT: Yes.
MR. MACKENZIE: And right through the centre of the map, my lord, runs the Skeena River, called Xsan, X-s-a-n. It's the large -- it's the large river running through the centre of the map from west to east.
THE COURT: Yes.
MR. MACKENZIE: Actually, of course, it runs the other way. What we have here, my lord, is a depiction of Solomon Jack territory, and you can see, my lord, it extends north of the Skeena River.
THE COURT: I'm not sure I've found the Skeena River yet.
MR. MACKENZIE: Well, it's the main river flowing through the centre of the map, my lord.
MR. GRANT: For the north you can see Gitangas marked on it, my lord.
THE COURT: Yes, I see it. Yes.
MR. MACKENZIE: All these features that we've been looking at on the other maps are marked on this one, my lord. And on this map, if your lordship can see, the boundary goes along the Slamgeesh River.
THE COURT: Which boundary?
MR. MACKENZIE: Just north of the Skeena, my lord.
THE COURT: Yes.
MR. MACKENZIE: The boundary comes along the Skeena and then it heads north.
THE COURT: Well, I'm sorry.
MR. MACKENZIE: Perhaps I could assist your lordship.
THE COURT: I'm absolutely lost.
MR. MACKENZIE: Yes. These are just -- referring your lordship to Exhibit 420, which is Solomon Jack's interrogatories map, I'm pointing out the Skeena River, which runs across the centre of the map, and Gitangas, which is located about the centre of the map on the Skeena River, and now I'm pointing your lordship to the Slamgeesh River, which flows into the

Skeena River at the centre of this map. And that is the Slamgeesh River that -- it flows down from Slamgeesh Lake, as we've indicated in the other maps. And the point on this interrogatories map is the --

THE COURT: Boundary along the Slamgeesh River.

MR. MACKENZIE: The boundary along the Slamgeesh River and extending north. And so the Gwinin Nitxw territory is shown on this map to be in this area east of the Slamgeesh River, and on this map is indicated west of the Slamgeesh River the name of Dawamuxw.

THE COURT: Yes. All right. Yes. Should I put it away?

MR. MACKENZIE: Yes, my lord. And so --

THE COURT: Why did Mr. Solomon Jack swear this affidavit?

MR. MACKENZIE: Mr. Solomon Jack swore the affidavit, and it answered interrogatories.

THE COURT: On behalf of which House?

MR. MACKENZIE: On behalf of the House of Gwinin Nitxw.

THE COURT: Yes.

MR. MACKENZIE: And he is Chief Gwinin Nitxw.

THE COURT: Yes.

MR. GRANT: The affidavit referred to the approximate boundaries, my lord. You're familiar with that --

THE COURT: Yes.

MR. GRANT: -- in the affidavits.

THE COURT: Yes.

MR. MACKENZIE: My lord, we're still continuing through the summary of the documentary evidence at page 27 of my submissions in the summary. I have dealt with Exhibit 420, Solomon Jack's interrogatories map, which is August 1986. Now, my lord, the next map I'm not going to pull out because it's another interrogatories map. Exhibit 605A-2 is the correct reference to that map, and that's a map of August 7, 1986.

THE COURT: Whose interrogatories?

MR. MACKENZIE: And that's Robert Stephens, who is Chief Wii Minosik, W-i-i knew word M-i-n-o-s-i-k.

THE COURT: Yes.

MR. MACKENZIE: His territory is just to the north. If your lordship still has the enlargement of 9A, Wii Minosik's territory is not shown on this enlargement, but your lordship can see Wii Minosik Lake just to the north of the area.

THE COURT: Yes.

MR. MACKENZIE: That's the -- the Damdochax Lake-Blackwater area. And in my submission that map shows much the same thing that -- the name Dawamuxw appears in the Slamgeesh area on that map.

THE COURT: Same as 420?
MR. MACKENZIE: Yes, my lord. And then next referring to Exhibit 5, which is at tab 6, page 12. Tab 6, page 12, my lord.
THE COURT: Yes.
MR. MACKENZIE: This is an enlargement of the area as shown on Exhibit 5, May 20, 1987.
THE COURT: Enlargement of what?
MR. MACKENZIE: Of Exhibit 5, my lord.
THE COURT: Yes.
MR. MACKENZIE: And this is the map that was put into evidence on May 20, 1987.
THE COURT: Yes.
MR. MACKENZIE: Now, on this map the territory is attributed to Niist, Chief Gaiyamlaxha, spelt here G-a-i-y-a-m-l-a-x-h-a. And I point out that the boundaries -- the eastern boundary has changed here, is different from the earlier boundaries which we've been looking at on these other maps. But I won't analyse that in detail except to make that submission and say that that's based on an analysis of Exhibit 5, comparing it with the previous maps.
THE COURT: What is this word? I guess it ends with the h-a, does it?
MR. MACKENZIE: Yes, my lord.
THE COURT: What's beyond is blurred, but that's not part of it?
MR. MACKENZIE: No, it's not, my lord.
THE COURT: And Gaiyamlaxha is?
MR. MACKENZIE: That's Charles -- Charles Stephens. And Charles Stephens was Moses Stephens' son.
THE COURT: And he's a chief in the House of Niist, is he?
MR. MACKENZIE: Yes, he is. And the reason for that is that Moses Stephens --
MR. GRANT: He was.
MR. MACKENZIE: I'm sorry. Moses Stephens was married to Esther Stephens, who was in the House of Niist, and, of course, his -- their sons are in Niist as well.
So those are all the maps, my lord, that show the difference in attribution of ownership and the varying boundaries which have appeared in the evidence.
THE COURT: What do you say this eastern boundary is on this map?
MR. MACKENZIE: Well, this eastern boundary on this map is well to the east of Gitangas Creek, in my submission.
MR. GRANT: I think it's the same as on 9A, my lord.
THE COURT: All right. Thank you.
MR. MACKENZIE: Well, my lord, now having just summarized --

gone quickly through the maps we won't have to deal with them again. I'll return to my outline of argument, which is at the beginning of this section, the outline of argument for this Slamgeesh Lake area. I'm going to now go through that. I completed paragraph 2, the summary of evidence. Now, point 3 deals with Walter Blackwater's territorial affidavit and cross-examination.

THE COURT: What page would that be at in your text?

MR. MACKENZIE: It just follows page 23, my lord, in the summary insert that your lordship put in. It's the outline of argument. You could call it 23A, my lord.

THE COURT: Yes. Thank you.

MR. MACKENZIE: I'm going to summarize the evidence now, my lord. I'm going to paragraph 3 in that outline of argument, and this deals with Walter Blackwater's territorial affidavit and cross-examination. And I'm going to summarize that, my lord, by saying that in Walter Blackwater's territorial affidavit he stated that he had been told by deceased informants that this area was owned by Gwinin Nitxw, and we dealt with that territorial affidavit on the reputation argument.

THE COURT: Yes.

MR. MACKENZIE: In his cross-examination on the territorial affidavit Mr. Blackwater maintained his position that this was Gwinin Nitxw. He denied that it was claimed or had been owned by Dawamuxw. So as I say, my lord, the territorial affidavit is the basis of 9A.

Now, moving to paragraph 4 of my outline, until 1988 the Slamgeesh territory was generally believed to belong to Dawamuxw.

MR. GRANT: Could my friend clarify when he says generally believed is he saying believed by all the Gitksan or by Mr. Sterritt or something in between?

MR. MACKENZIE: Well, my lord, my submission is generally believed by Mr. Sterritt and all the informants.

THE COURT: Who led him to that belief.

MR. MACKENZIE: Who led him to that belief.

THE COURT: Whoever they were.

MR. MACKENZIE: Well, I've listed the informants, my lord, and in my detailed notes I actually analyse the comments of each of these informants.

And so I say the Slamgeesh territory was generally believed to belong to Dawamuxw. The first heading I have there, my lord, is Mr. Sterritt's working map and data sheets, and without going into those in detail, in my analysis I actually pull out the data sheets and

indicate that several of these geographical points that appear in the Gwinin Nitxw territory today are indicated on Mr. Sterritt's working map and data sheets as being owned by Dawamuxw-Fireweed Clan.

THE COURT: You say that subparagraphs (a) to (e) are Mr. Sterritt's informants, do you?

MR. MACKENZIE: Yes, my lord. And I set out the specific -- the references in the detailed analysis. Now, subparagraph (b), my lord, was the subject of considerable cross-examination at this trial. I refer to Walter Blackwater's 1983 interview. Your lordship will recall a tape was finally obtained of that interview and a transcript was prepared, and Mr. Sterritt was cross-examined on that transcript, and he identified it as being correct and representing what Mr. Blackwater said to him in 1983. In summary, my lord, in 1983 Mr. Blackwater told Mr. Sterritt that this was Dawamuxw territory. Mr. Blackwater said that Dawamuxw owned Slamgeesh Creek and this entire area.

MR. GRANT: Is the transcript of the tape in the yellow book?

MR. MACKENZIE: There are excerpts from the transcription contained in the yellow book, but the entire transcript is not in the yellow binder.

MR. GRANT: What exhibit number is it?

MR. MACKENZIE: The Exhibit number is Exhibit 745. Now, my lord, I have just stated the main difference between Mr. Blackwater's statement in 1983 and his territorial affidavit, but I submit, and the evidence is clear on this, that there were many other things that Mr. Blackwater said in 1983 which were completely different from his territorial affidavit.

THE COURT: And the tape was 1983?

MR. MACKENZIE: Yes, my lord, May 1983.

THE COURT: Is it convenient to continue this after lunch?

MR. MACKENZIE: Yes, my lord.

THE COURT: Thank you.

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

(PROCEEDINGS ADJOURNED AT 12:30 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.

_____

Leanna Smith
Official Reporter
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RESUMED AT 2:00 O'CLOCK P.M.)

THE COURT: C-2 of part 4? I have got an addition here, where do you want me to insert it?
MR. MACKENZIE: This is Mr. Goldie's.
THE COURT: We will wait. We won't speak any more until we are spoken to.
Mr. Mackenzie?
MR. MACKENZIE: My lord, I was in the midst of a discussion of the Slamgeesh Lake territory, and I am following the outline of argument which is in the -- inserted in the summary after page 23, section G, 5(g), and I have just dealt with the subparagraph 4(b) in the outline.
I was advising your lordship that in 1983 Walter Blackwater had that interview with Mr. Sterritt, and in that 1983 interview Mr. Blackwater advised Mr. Sterritt that Dawamuxw owned the Slamgeesh area. And that, as I pointed out to your lordship, differs or conflicts with Mr. Blackwater's 1988 territorial affidavit, saying this is Gwinin Nitxw's territory.
I might say, my lord, again by way of explanation, that in this outline of argument I have indicated the paragraphs in the summary where this material is dealt with in detail.
Now, just another point under this, on this 1983 interview, my lord, by 1974, all the --
THE COURT: '74?
MR. MACKENZIE: By 1974 all the informants had been -- had died, the deceased informants as set forth in Mr. Blackwater's territorial affidavit relating to this territory.
THE COURT: That's 605, is it?
MR. MACKENZIE: Exhibit 605, paragraph 39.
Then Mr. Sterritt, another point to be made in relation to that 1983 interview, Mr. Sterritt testified that sometime in 1987 or 1988 Walter Blackwater came to him changing his view that this was Dawamuxw's territory. That's set out in paragraph 40 in my submissions. So all of a sudden, in my submission, the evidence changed: now it's Gwinin Nitxw's territory, according to Walter Blackwater and Neil Sterritt in early 1988.
Going to -- carrying on in this outline to Mr. Sterritt's informants, all these informants advised Mr. Sterritt that this was Dawamuxw territory and it's significant who these informants are. The first is Arthur Kusick, he was the Chief Gwinin Nitxw, the

former Chief Gwinin Nitxw. And it was his -- and this information was given in 1982. And Mr. Sterritt indicated that Mr. Kusick was speaking about the Slamgeesh Lake territory and said the House of Gwinin Nitxw had lost it because someone else had used it so long that they kept it. So that was Mr. Kusick's advice to Mr. Sterritt in 1982. In 1983, Peter Muldoe and Albert Tait said that part of this territory was owned by Dawamuxw, that's the Shilalou Creek.

THE COURT: Who is that, Peter Muldoe and Albert Tait?

MR. MACKENZIE: Yes, my lord, in 1983.

They said that part of this territory was owned by Dawamuxw. And going to the next subparagraph, in 1979 --

THE COURT: I am sorry, Peter Muldoe and Albert Tait told him it belonged to who?

MR. MACKENZIE: Dawamuxw. That's the point of the argument, my lord, that all this information is that it belongs to Dawamuxw, Kispiox/Fireweed, which differs from the present situation or present allegation.

And continuing to the third informant or pair of informants, my lord, in 1979 David Blackwater was one of two people who advised -- actually Mike Morrell, that this was Dawamuxw territory, and Mr. Morrell's notes appear in Mr. Sterritt's materials. David Blackwater was, of course, Chief Niist, Walter Blackwater's brother.

THE COURT: David is Niist or Walter is Niist?

MR. MACKENZIE: David is Niist. David Blackwater is Niist. David Blackwater accompanied us on our trip.

THE COURT: Yes.

MR. MACKENZIE: David Blackwater told Mr. Morrell in 1979 that he had lived at Slamgeesh Lake with Moses Stevens, who is Chief Dawamuxw. As I indicate in paragraph 88 of my submissions, David Blackwater lived there with Moses Stevens and Mrs. Stevens until they moved to Kispiox in 1943. And there are several other field notes mentioned at the paragraphs indicated showing that David Blackwater and Bobby Stevens advised that this was the Dawamuxw area in 1979.

But David Blackwater as Chief Niist, in my submission, is a very significant comment, or very significant evidence that he is the person that lived there with Moses Stevens, Dawamuxw, and he asserted that this was Dawamuxw territory.

Carrying on to Solomon Jack, my lord, Solomon Jack became Chief Gwinin Nitxw and is now Chief Gwinin

Nitxw. And the date Solomon Jack had an interview with Neil Sterritt in 1982. And Solomon Jack swore interrogatories or answers to interrogatories in 1986. The 1982 interview was taped and the tape was played in court. And in 1982 Solomon Jack told Neil Sterritt that Dawamuxw traps and is on the west side of Slamgeesh and Gwinin Nitxw is on the east side of Slamgeesh.

THE COURT: There are two tapes, are there?

MR. MACKENZIE: There is a tape of Walter Blackwater's interview with Mr. Sterritt in 1983, which is Exhibit 745 of the transcript, and there is a tape of Solomon Jack's interview with Mr. Sterritt in 1982. And I discuss that evidence in some detail in my submissions as noted in the outline.

In 1986, Solomon Jack answered an interrogatory and said that "we lost part of our territory" allowing someone else to use it because the territory was so large. That's set out at paragraph 104 in my submissions and the documentary basis for that is at tab 104 in the yellow binder.

So in my submission, my lord, all these informants provided evidence to Mr. Sterritt which conflicts with the Walter Blackwater territorial affidavit and the boundaries and ownership as set out on Map 9A.

I have already referred your lordship to Exhibit 102, that's a 1985 map which reflected the information which Mr. Sterritt received from these informants. And going on to paragraph 5 of my outline of argument, my lord, Mr. Sterritt was also informed that the Slamgeesh territory belonged to Gaiyemlaxha, a chief in the House of Niist. That's Charles Stevens, Moses Stevens' son. This information was passed to Mr. Sterritt in 1986 and 1988 by Nancy Supernault, Charles Stevens' daughter. So, my lord, that advice conflicts with the previous advice from Dawamuxw and with the current attribution to Gwinin Nitxw.

Paragraph 6 of my outline, my lord, I point out in my submission there are different versions of the boundary location at the Martin's Flats area north of Slamgeesh Lake. I am not going to go into that in detail, my lord, but it involves a comparison of Map 9A and previous maps, which I do in that section of my detailed submission, paragraphs 96 to 97.

And paragraph 7, my lord, there were several explanations given for the change in attribution from Dawamuxw to Gwinin Nitxw. You recall, my lord, the

point that was made here is that sometime in late 1987 or 1988, Walter Blackwater came and said "this is Gwinin Nitxw." There was a change. And one explanation given was this Dawamuxw or Moses Stevens was there through marriage rights, that is, his wife, Esther Stevens.

THE COURT: That is Dawamuxw was there?

MR. MACKENZIE: Dawamuxw, yes, my lord. That was an explanation given for his presence on the territory.

And I point out here, my lord, that Esther Stevens, Moses' wife, was a member of the House of Niist, not the House of Gwinin Nitxw, which now claims the territory.

THE COURT: So Dawamuxw was married to who?

MR. MACKENZIE: Esther Stevens.

THE COURT: She was in the House of Niist?

MR. MACKENZIE: Yes, my lord.

Carrying on to page 2 of the outline of argument, in 1985, Walter Blackwater told Mr. Sterritt that Moses Stevens received the territory by peace settlement. That was before he changed his mind about the territory. And I deal with that in paragraph 82.

THE COURT: Who do you say got it by peace settlement?

MR. MACKENZIE: Moses Stevens, Dawamuxw. Walter Blackwater told Neil Sterritt this.

THE COURT: But told him that who got it? Moses Stevens gave that up years ago?

MR. MACKENZIE: Sorry, my lord, Moses Stevens is Chief Dawamuxw and he was the main actor in this hold drama. He is the person whom everyone agrees, seems to agree, was on the territory and up until 1988 agreed that that was his territory, in my submission, on the evidence.

And another explanation given is that, in subparagraph (c) in my outline of argument, Walter Blackwater on his cross-examination in August, 1988, said that Esther Stevens and Gwinin Nitxw were like sisters, and that's why they were -- Esther and her husband were permitted to stay on the territory. I deal with that in paragraph 93. And then finally, the final explanation is in his cross-examination in 1988, Solomon Jack said, Moses Stevens' father was a member in Gwinin Nitxw and was permitted to be on the territory for that reason. So there are several explanations given for Dawamuxw being there, but in my submission everyone believed that Dawamuxw owned that territory up until there was some change --

THE COURT: Again, Moses Stevens is Dawamuxw?

MR. MACKENZIE: Yes, my lord. And I have already gone through the maps, my lord, with your lordship, and in my submission, reviewing the maps one can see the ownership attribution being changed. Exhibit 102 was the 1985 map which had Dawamuxw as the owner. Exhibit 5 was the 1987 map which had Niist as the owner, that is, Chief Gaiyemlaxha of the House of Niist. And today, Exhibit 646, 9-A, has Chief Gwinin Nitxw, in another house completely, as the owner of that territory.

But now I move to my conclusions, my lord, on page 57 of my summary. I have dealt with some of these points, my lord. In paragraph 111, Walter Blackwater's territorial affidavit evidence as to the ownership of the Slamgeesh territory and as to the location of boundaries are contradicted by his earlier statements to Neil Sterritt in 1982 and 1983. And also by information provided by David Blackwater, Niist, and Robert Stevens, Wii minosik, to Mike Morrell in April, 1979. The Blackwater information is contradicted also by Solomon Jack's affidavit in 1986, to which were attached answers and interrogatories stating that Gwinin Nitxw had lost part of the Slamgeesh territory. The answers in that interrogatory referred to an attached map of Gwinin Nitxw territory showing part of the Slamgeesh area owned by Gwinin Nitxw and the remainder owned by Dawamuxw. Mr. Jack's interview with Mr. Sterritt on November 18, 1982 conflicts with Mr. Blackwater's evidence. And Albert Tait, who is chief Delgamuukw, gave information conflicting with Mr. Blackwater's affidavit evidence.

All the maps to which we have referred in our submission conflict with Mr. Walter Blackwater's affidavit and the Map 9A boundary evidence.

And, my lord, in paragraph 112 I refer to the significance of David Blackwater as Chief Niist and Albert Tait as Chief Delgamuukw, with chiefs high in the Gitksan hierarchy conflicting with Mr. Blackwater's evidence. And paragraph 113 I mention the point I have already made to your lordship about David Blackwater's opportunity for personal knowledge of this matter, having lived with Moses Stevens, who was Chief Dawamuxw.

Paragraph 114, I review the various explanations for change and I say that they are conflicting and confusing. Paragraph 115, I submit that the process

by which the affidavit was prepared is unreliable because Mr. Sterritt drafted the affidavit, in my submission, based on information he received from other sources, such as those I have just gone through, my lord, and brought the affidavit to Mr. Blackwater for review.

I make further submissions about the conduct of the 1983 interview and comment that the only informants referred to in Mr. Blackwater's affidavit are deceased informants, whereas there may be other living informants who may have provided this information to Mr. Sterritt and Mr. Blackwater. In my submission Mr. Sterritt's topographic maps and data sheets disclose that the boundary and other geographical information contained in Mr. Blackwater's 1988 affidavit, probably came from living informants other than Walter Blackwater and other than Walter Blackwater's deceased informants.

And in paragraph 116, I note that several high chiefs believed in 1979, 1982, 1983 and 1986 that Dawamuxw owned the Slamgeesh area. By 1982 -- actually, by 1974 but certainly by 1982, all informants to which Mr. Blackwater refers in his 1988 affidavit on the Slamgeesh territory had passed away. They could provide no further new information to him. Nevertheless, Mr. Blackwater changed his views as to the ownership of the Slamgeesh territory territory about 1988.

THE COURT: Which Blackwater participated in the field trip?

MR. MACKENZIE: The field trip was with David Blackwater and Walter Blackwater and Neil Sterritt. And just at the end of paragraph 116.

MR. GRANT: And Nancy Supernault.

MR. MACKENZIE: Yes, I mentioned Nancy Supernault in connection with other -- she gave information on this territory also to Mr. Sterritt. She told him it belonged to Niist, Chief Gaiyemlaxha, her father.

Mr. Sterritt testified also that many of the chiefs discussed their territories with other living persons, although he could not say whether Walter Blackwater actually had done this or to whom he might have spoken. In my submission, my lord, this detailed analysis and the other analyses, support the general submissions that were made in the earlier part of this argument on the territorial affidavits.

Paragraph 117, the Slamgeesh area information on this territorial affidavit as well as the remainder of

the affidavit in our submission is inadmissible and if admissible unreliable. In our submission there is no evidence upon which the Slamgeesh area ownership and boundary on map 9A could be based. As with the other territories, the Slamgeesh territory information becomes unreliable, it destroys, damages the credibility and the evidence as to the territorial boundaries of neighbouring territories. The entire pprocess by which the Blackwater affidavit was prepared renders unreliable all the evidence in the affidavit, in our submission, thereby eliminating a large part of the evidence for the territorial boundaries on the northwest part of the Claim Area. Mr. Blackwater spoke about several territories in that northern, northwestern Claim Area.

That completes my submissions on those detailed territorial analyses, my lord. Mr. Willms will complete this section.

THE COURT: Thank you.

MR. WILLMS: Yes, my lord. If you could turn to tab 6.

THE COURT: Roman VI?

MR. WILLMS: No, number 6.

THE COURT: Just a minute. Roman IV, section 6?

MR. WILLMS: Yes, the conclusion.

My lord, the plaintiffs set for themselves a monumental evidentiary task to prove that ownership and jurisdiction over every part of the Claim Area has been exercised since time immemorial by the plaintiffs and their ancestors. On a review of the evidence, it is clear that the plaintiffs have failed signally in that task. Not because of evidentiary problems which might render the task more difficult, but because at every stage the evidence either fails to support or refutes the allegations in the statement of claim, and I submit, the allegations made in final argument, my lord.

The plaintiffs allege that since time immemorial they or their ancestors lived within the Claim Area. The evidence shows that as late as the mid-19th Century other aboriginal peoples and not the plaintiffs lived within a large part of the Claim Area. Other aboriginal peoples continued to live in and exploit the resources of the Claim Area today.

THE COURT: Who do you have in mind there?

MR. WILLMS: Well, my lord, I have in mind the reserves that are up the Bulkley River, around Francois Lake, Burns Lake --

THE COURT: I am sorry, which reserves up the Bulkley River? You mean at Burns Lake?
MR. WILLMS: Yes, and Broman Lake and Driftwood River. I don't know all the reserves, my lord, but there are a number of reserves. In addition to that, of course, in the towns throughout that area there are people, including Cheslatta people, who gave evidence at this trial, who live within the Claim Area, and not necessarily on the reserve.
THE COURT: The Cheslatta reserves in the south were established in the '60s, were they not?
MR. GRANT: The '50s, my lord.
THE COURT: '50s?
MR. WILLMS: But, my lord, I remind your lordship of Dr. Jenness and the Cheslatta --
THE COURT: He said it was Cheslatta country before that.
MR. WILLMS: Yes, yes.
And he said that, my lord, before there was a reserve established there.
In paragraph 3, my lord, the plaintiffs allege that since time immemorial they or their ancestors harvested, managed and conserved the resources within the Claim Area. The evidence shows that except for salmon fishing, resource use in the Claim Area is completely different today than it was in late prehistoric times and prior to the end of the Little Ice Age in the 1850s. My lord, perhaps the best example of that is the moose and the deer that have come into the area and your -- my lord, you have heard much evidence about hunting moose and deer, not only from the plaintiffs but also from the lay witnesses that gave evidence on behalf of the province about hunting moose and deer in the area. Prior to 1860, there weren't moose and deer in the area. And I suggest that's a pretty big difference in resource use and resources in the area.
THE COURT: But how would that defeat an otherwise valid aboriginal claim?
MR. WILLMS: Well, my lord, in terms of whether it supports or defeats an aboriginal claim, my lord, I am saying that what my friends have put forward as this seamless web since time immemorial is contrary to the evidence. Now, what resources were there, my lord, and my submission on resource use was that on the evidence of Dr. Robinson and, of course, on the evidence of every other scholar, except for the plaintiffs' experts, the resource use fixes things like territoriality and

exclusivity. People determine their lives based on what they eat and where they go to eat it and where they bring it from. And it's a lot easier to throw a moose in the back of a pick-up truck than to the carry two beaver 90 miles in from a trapline.

Now, in paragraph 4, my lord, I say that the plaintiffs allege that since time immemorial they or their ancestors governed themselves according to their laws and governed the Claim Area according to their laws. The evidence shows that the principal methods of "governance" in the proto-historic and early historic period, and by evidence I include my friends' oral histories, within the last 100 or 150 years, were warfare, reciprocal killing and competitive potlatching, methods of governance which no longer exist. In addition, the evidence shows that the laws allege to govern the plaintiffs are so riddled with exceptions as to be devoid of normative effect. Exceptions are the rule, there are in fact there are no laws.

Finally, the evidence demonstrates, I say, the limited reach of the plaintiffs' alleged laws. They do not purport to apply to anyone other than some of the individuals that attend feasts. What the witnesses have referred to as law are not laws but rules of a voluntary organization.

I say in paragraph 5, my lord, that the plaintiffs allege that since time immemorial they or their ancestors have maintained their institutions and exercised their authority over the Claim Area through their institutions and expressed, confirmed and asserted their ownership of and jurisdiction over the Claim Area. The feast is said to lie at the heart of this authority. The evidence demonstrates the feast has radically changed over time in both form and function. In addition, the evidence demonstrates that neither the alleged ownership nor the alleged jurisdiction has been asserted against inhabitants of the Claim Area, other than some of those who may have attended feasts. I also say, my lord, and I point out my lord, my friends said in their argument that they don't assert these boundaries against neighbouring aboriginal peoples. Perhaps because they never did.

Now, I say in paragraph 6, my lord, the plaintiffs also allege that since time immemorial they or their ancestors protected and maintained the boundaries of the Claim Area. The evidence demonstrates that

European notions of territoriality did not arise until the proto-historic and historic period and then arose in relation to the creation of beaver traplines, the impetus for which was the fur trade. The evidence also demonstrates that the plaintiffs today are unable to remember, let alone agree, on the locations of boundaries in the Claim Area. And this, my lord, this goes to the sifting, whether you have a declarant who is dead who says that that's the reputation in the community, my friends' argument carries that to today, to there moment, the settled reputation on my friends' theory would be consistent with the settled reputation that is allegedly the subject of the deceased declarant's evidence, yet that's not the case at all. My colleague, Mr. Mackenzie, demonstrated that with Dawamuxw, the Dawamuxw territory.

I say finally, the evidence demonstrates that other aboriginal peoples disputed in the past and continued to dispute the alleged boundaries of the plaintiffs.

The plaintiffs allege that the Gitksan chiefs and the Wet'suwet'en chiefs, their ancestors or predecessors, since time immemorial have owned and exercised jurisdiction over the lands delineated by Exhibits 4469A and 6469B. The evidence demonstrates that although Gitksan and Wet'suwet'en chiefs may have owned and may own, the regalia, adaawk, kungax, songs, crests and totem poles, at no time have they owned and exercised jurisdiction over any part of the Claim Area in any sense congnizable in this court. Furthermore, their genealogical evidence, which forms the foundation of the link to the past, demonstrates only discontinuity and continuous re-definition of their identity through intermarriage. And I point out here, my lord, that Heather Harris, on the plaintiffs' theory, has the same aboriginal rights as Walter Blackwater does.

Paragraph 8. The evidence --

THE COURT: Your point being that she is married into the Gitksan clan?

MR. WILLMS: Yes, she has, according to the plaintiffs' theory, aboriginal title in Canada. And so would Mrs. Marsden, Ms. Marsden.

MR. GRANT: Ms. Marsden was not adopted by a plaintiff.

MR. WILLMS: Oh, no, sorry, she was adopted by the Kitwancool, who decided not to become plaintiffs in this action.

In paragraph 8, my lord, I say the evidence demonstrates, as plaintiffs' counsel so aptly put it

in his cross-examination of Mr. Hobenshield, that the plaintiffs have a "secret club". Proof of the rules of a secret club, which extends membership to non-aboriginal people, is not proof of aboriginal title and is not proof of the allegations in the statement of claim. And I say, my lord, that the plaintiffs have failed to prove their case on the facts.

THE COURT: Well, I am not sure that -- well, I am not -- I don't have cognizance of everything that's in here, but do I take it that you haven't made any submission with respect to a great many of the individual territories?

MR. WILLMS: Well, my lord, in terms of the individual territories, there have been submissions -- four territories were looked at in detail, that took up --

THE COURT: Five.

MR. WILLMS: Sorry, five territories in detail and that took up 94 pages. The work required to analyze every single territory in detail leading up -- would occupy volumes and volumes. But each one of these territories, of course, my lord, because it has surrounding territories, takes with it all the surrounding territories. And --

THE COURT: Takes away the common boundary.

MR. WILLMS: Well, no, my lord, in my submission, when you build your house of territories, you have built a house of cards, and once one card gets pulled out, the whole thing comes down. The whole thing depends on there being this seamless web. It does not allow for holes. The plaintiffs' theory of house ownership does not allow for holes in the house ownership, my lord. And so once one territory is gone, they are all gone. But, I -- to answer your lordship's question, this detailed analysis could be done for each and every house and each and every house territory.

THE COURT: I don't know what the result of that analysis would be.

MR. WILLMS: The result, in my submission, would be the same result of the five that were analyzed that were just chosen at random.

THE COURT: Well, tell me, looking at the map and assuming that you're right on Gutginuxw's territory and assuming that it collapses and the boundaries are Wii gaak, Wii minosik, Wiigyet, Wii minosik again, Luus, Niist, Baskyelaxha, Wiigyet, Waiget and Luus.

MR. GRANT: My lord it was only the northern of the Gwinin Nitxw

territory that was --
THE COURT: I am sorry, the northern one. So if those common boundaries left, why would that affect Gyolugyet's property over to the east without a common boundary?
MR. WILLMS: Well, my lord, it's because the plaintiffs' theory, as they put it in their argument, is that these house boundaries are defined at feasts, where everyone agrees that these are the house boundaries. And what my submission is, my lord, is that if there is no settled reputation in the community, no settled sifted reputation for one house boundary, then there can't be one for all the rest. In other words, it's a system that doesn't admit of mistakes, on the plaintiffs' case, my lord.

Now if your lordship was talking about how farm land was being divided up in the Fraser Valley, there may be a difference in dividing up farm land in the Fraser Valley. But that's because the farmers aren't coming in and saying, that when you add up all of our farms we own this whole territory. That's because a farmer says "this is my territory, I bought it, I have got a deed. This is mine." And if he can't prove that it's his, then it's not his. Whose it is, who knows? But on the plaintiffs' case it's an all or nothing case in every respect, my lord.

THE COURT: Well, I am having difficulty with that proposition. Assuming you are successful in Gwinin nitxw, why would that affect the plaintiffs' evidence on the territory of Tenimgyet?
MR. WILLMS: Well, my lord, the settled reputation in the community is based on a theory that each of these territorial affidavits is precise and each of the territorial affidavits that defines the boundaries of a particular territory also defines who is on the other side of the boundary. So that when one territorial affidavit is gone, then whatever corroboration or corroborative effect is obtained from that, takes the surrounding territories with it. But, my lord, if I can be -- if I can put it this way, that your lordship is quite right if we are talking about proving private boundaries. But we are not talking about private boundaries here. We are talking about community boundaries, we are talking about of the Gitksan community boundaries, that have been alleged to have been owned by these houses since time immemorial. And what I say, my lord is that on that theory, on the theory that every house territory's

have been fixed since time immemorial, and it's all been discussed and sifted in the feast hall, once one goes even, by way of example, without proof that the other ones are immediately adjacent to it, they all go.

This -- the plaintiffs' allegations, my lord, the plaintiffs' theory does not admit of a Swiss cheese theory of house ownership. It just doesn't fit in their theory of sifting, in their theory of sifting in their theory of house ownership, it just doesn't fit.

So it's not a matter of when you take one out, does the rest remain? On the plaintiffs' theory, they have to prove each and every one on their theory. Because that's the -- that's their case. And the foundation for it is the feast and the foundation for it is all of the Gitksan chiefs knowing where all of the boundaries are because they talk about it at the feast. And my submission is, my lord, once one is gone they failed to prove the whole case. But as I indicated, my lord, we could do a detailed analysis, which I say would come to the same effect of each and every one of these boundaries. Certainly we have done it in a somewhat larger scale with the overlap theory. The overlap theory --

THE COURT: Well, I am putting that aside for the moment. But I am having some trouble with your all or nothing submission. For example, Mr. Alfred Joseph, he walked me around the perimeter of his territory demonstrating, or at least establishing, in his evidence, a continuous boundary around his property. I have difficulty seeing how that evidence is compromised by the collapse of the plaintiffs' proof on some nearby but not adjacent property.

MR. WILLMS: Well, it is, because, my lord, it's the difference between the farmer in the Lower Mainland, and my friends' use of Milirrpum to elevate what really is proof of private boundaries and proof of community boundaries. And when they use Milirrpum, in my submission, and the sifted reputation of the communities, the whole thing rises and falls on the same thing. It's not like a farmer who walks around and shows you his fence and then the next day someone has taken the fence away or the next day someone comes up with a deed to say they really own the property. That doesn't affect who owns the property around it. But that's because the farmer doesn't come into court and advance a theory where his territory depends on

the territory of the other Gitksan chiefs. His territory, his land depends on the farmers around him. And a farmer in the Fraser Valley, his land doesn't depend on who owns the land around him. And that's why, my lord, you can pull his ownership out and that doesn't affect the fact that the farmers around him sometime own their land. But the plaintiffs' theory has all of the house ownerships depending on the Gitksan House ownerships. They all depend on each other, mutually interdependent ownership theory.

THE COURT: I am sorry, Mr. Willms, but I don't recall at the moment any evidence that goes that far. I thought the evidence was directed towards community recognition of each individual territory.

MR. WILLMS: In the feast, and I read that to your lordship earlier today, the part where Ms. Mandell said, for Gitksan territories, it's all the the Gitksan chiefs; for Wet'suwet'en territories, it's all the Wet'suwet'en chiefs. And that's why I say --

THE COURT: I thought she was talking there about the transfer of a name that carried a piece of property or territory with it?

MR. WILLMS: And boundaries of land.

THE COURT: That they had to agree.

MR. WILLMS: And land, my lord, that's the whole point of that. It's the name and the land and the whole theory, of course, of the plaintiffs, is that the name and the land, and once you know the name you know the land. In you know the land you know the name.

THE COURT: If all the Gitksan chiefs got together and decided to approve a new chief for a territory in what I call the Gitksan bulge or the Skeena, where the Skeena villages are, I did not understand her to be saying that not only did all the chiefs have to approve a transfer of the name in that territory but that that would all come apart if somebody way up in the Slamgeesh area had some trouble proving his title?

MR. WILLMS: Well, my lord, I -- the understanding of this, and it's difficult because we look on this as we would look on a farmland in the Fraser River, but that's not how the Gitksan look at it, in my submission, and it's the Gitksan case that's being put forward here. And it is my submission, my lord, that Ms. Mandell was quite right when she said that the Gitksan boundaries depend on all of the Gitksan chiefs at a feast agreeing on the boundaries.

THE COURT: That's what she said but I didn't think that was

necessarily the evidence.
MR. WILLMS: Well, my lord, if that's not the evidence, then there is no settled reputation. Because then you don't have the community. Then the community varies from location to location, and then you could prove private boundaries in the Fraser Valley by calling five farmers and they could say, well, we're the community of farmers in this area and --
THE COURT: When you have got an area nearly 300 miles north to south, it doesn't necessarily mean that the same community applies to every territory.
MR. WILLMS: In the plaintiffs' case it certainly does, my lord, and I didn't understand my friend at any time to say that two or three or four Gitksan chiefs could get together and have a mini feast and transfer their territory amongst themselves. My understanding of the plaintiffs' evidence, and my friends can correct me if I am wrong, but my understanding was that the Gitksan chiefs acting together dealt with important matters such as any territories and that you couldn't have sort of sub groups or mini groups or mini feasts. And that was what I thought the sum and substance of Ms. Mandell's submissions were. That's what I take from the plaintiffs' case, and if there is some theory of mini feasts, my lord, I hope my friends will let us know before we finish our argument, because we would like to deal with that. But we are trying to deal with the case the way they have argued it.
THE COURT: All right. Well, I have your submission. I have indicated to you that I have some difficulty with it and I will have to give it some more thought because these matters haven't been undergoing careful scrutiny until argument. And I heard Mr. Rush and Mr. Jackson go through their territories and I think they touched on every one. Not in the detail that is included in the province's argument with respect to these four or five territories, but it seems to me that either I ever to accept your theory of all or nothing or I have to do the detailed analysis for other properties that you have done four or five or something along that line, or I have to decide the case on the basis that you can succeed on your hearsay arguments or your overlap arguments or some of the general arguments or I have to say there is no specific submission with respect to a great many of these territories. And I may have left something out of there.
MR. WILLMS: Well, my lord, if I could -- the first point, my

lord, is the plaintiffs' own submissions. And I have -- these were the submissions made by Mr. Rush, I believe, on May 12th, on reputation evidence of house territories. And at page nine Mr. Rush said, I think it was Mr. Rush, but anyway the written argument said "the community" -- and that's in quotes -- is the Gitksan on the one hand and the Wet'suwet'en on the other. "The 'whole community' to use Wigmore's term, is the Gitksan community and the Wet'suwet'en community. Each of these communities represents the locality within which there exists the common reputation about the territory. Included within the community, to use Mr. Justice Blackburn's language, is the group consisting of all the people of all the clans who are plaintiffs as well as the Kitwancool/Gitksan. This then is the community of the reputation and it is the community in which the plaintiffs have demonstrated that their rights are enjoyed and which they have proved exist."

Now that is what we have been responding to, my lord, and that is why we haven't gone through, in each and every case, and dealt with each and every piece of boundary evidence. And the reason is that's not the way the plaintiffs have advanced their case. And that's why I say, my lord, on the plaintiffs' case, if one house goes in the Gitksan community, then based on my friends' submissions, all of them go.

THE COURT: What is that reference to that passage?

MR. WILLMS: It's at the top of page nine, my lord, in the argument. It's entitled "Reputation evidence of house territories." I don't know which volume of the plaintiffs' final argument it's in.

MR. GRANT: Volume nine.

MR. WILLMS: Volume nine, my friend says.

THE COURT: Page nine of volume nine.

MR. WILLMS: Page nine of volume nine.

THE COURT: All right. Well, I will give that every thought and every consideration.

MR. WILLMS: Those are the submissions on that aspect of the evidence, my lord.

THE COURT: Thank you. What time are we going to go to tonight, Mr. Willms?

MR. GOLDIE: 5 o'clock, my lord.

THE COURT: I think if that's so, we won't take the break until about 3:30, if that's convenient.

MR. GOLDIE: Your lordship will need volume two of the blue book.

THE COURT: Royal Proclamation?
MR. GOLDIE: Yes. And we will hand up volume 14 of the yellow binders.
THE COURT: I am sorry, before Mr. Mackenzie gets away, where did I get this from, Mr. Mackenzie?
MR. MACKENZIE: Yes, my lord, that goes in the yellow binder.
THE COURT: Volume 12?
MR. MACKENZIE: Volume 12.
THE COURT: I am sorry, it's got a page number on it.
MR. MACKENZIE: It's Roman IV, 5A, and tab 6, page 13.
THE COURT: 5A? You sure confuse me with your 5As.
MR. MACKENZIE: May I help your lordship?
THE COURT: Yes, you sure can.
MR. GOLDIE: My lord, I am also handing up a copy of the Royal Proclamation with letters on the margin. This was marked as exhibit, I think, 1160. And I refer in my argument to the letters for purposes of identifying the part of the Royal Proclamation I am speaking to.
THE COURT: You say this is 1160?
MR. GOLDIE: Yes, my lord.
THE COURT: I have been working from one that's called 1025.
MR. GOLDIE: Yes, that was filed, I think by Mr. Morrison, or in the course of his evidence. The text is the same. It is the -- it is the form that is taken from the Revised Statutes of Canada and contains, of course, the official translation.
THE COURT: Is this also the Brigham edition?
MR. GOLDIE: I think that's my friend's edition.
THE COURT: Is there any difference in the text?
MR. GOLDIE: None that I am aware of.
THE COURT: All right.
MR. GOLDIE: So far as the court is concerned, this is the official version of the Royal Proclamation. So far as historical versimlitude is concerned, Mr. Morrison's is closer in time to the actual document.

My lord, I am going to just comment on sections one, two and three under part Roman V in the blue book. The first section is simply a resume of the plaintiffs' case with respect to the Royal Proclamation. It was largely prepared from the pleadings and my friend's opening. The submissions that have been made since that time do not add any significant variations.

If your lordship would look at page 2, there is summarized there what we understand to be the principal submissions that the plaintiffs make with respect to the Royal Proclamation. They argue that

the proclamation entrenched mid-18th Century British practices with respect to Indians and bound the Crown by a number of rules. First, all land occupied by Indians is theirs and cannot be used by the Crown until the Indians surrender their rights to the Crown. Of course, the word occupied is given a very wide interpretation. And I will comment on that when I come to the creation of what has been termed the Indian reserve or the great reserve or the reserve between the Appalachian line and the Mississippi.

Two, Indian surrender must take place through formal treaties; and three, only the Crown may purchase Indian lands. The reference there is to my friend's opening.

In evidence of this entrenchment, the plaintiffs rely upon a number of treaties entered into by the British Crown, and in some cases by individuals, prior to the issuance of the Royal Proclamation. The plaintiffs argue that the continuation of this practice after the Royal Proclamation of 1763, and the instructions to British explorers and the governor of Vancouver Island to adopt this practice are the result of the directions contained in the Royal Proclamation. And they say this indicates the prospective nature of the proclamation. And again the references there are to my friend's opening.

THE COURT: When you say opening, you mean opening of the argument?

MR. GOLDIE: No, his opening at the trial, my lord.

And those references are found under the appropriate tab numbers in the yellow binder, which I am not going to read at this point.

The plaintiffs argue that the proclamation possessed an unique constitutional nature, which limited the authority of colonial governors, and subsequently provincial governments, to deal with lands which had not been surrendered by Indians through treaties. And accordingly, they submit that all colonial enactments affecting unsurrendered lands are void and ultra vires. And the reference there is again to their opening.

They, the plaintiffs submit, as we understand it, that the Province of British Columbia, and more particularly the Claim Area, fall within the reserve created by paragraph V of the Royal Proclamation. Now, my lord, I might just pause there and indicate to your lordship how I make reference to the

proclamation. The letters which we have placed in the margin of course run through from A to double A, and on the page number at the bottom of the page, 127. Opposite the letter V is -- are the words which have been referred to many times, of course, and I quote:

> "And we do further declare it to be our Royal Will and Pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and Dominion, for the use of the said Indians, all the Lands and Territories not included within the limits of our said three new governments or within the limits of the territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid."

Now without going to the evidence of the meaning to be attributed to the -- a number of those words and phrases at this point, it is that to which the plaintiffs point to justify the proposition that the Claim Area in northern British Columbia is within those words.

Now, they also point to paragraph S, which is the preamble at the top of that page, and I read that:

> "And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several nations or Tribes of Indians with whom We are connected, and who live under our protection, shall not be molested or disturbed in the possession of such parts of our Dominions and territories having been ceded to Us or purchased by us, are reserved to them..."

And they say with respect to that that their possession continues until surrendered to the Crown in accordance with the rules which they say are found in the proclamation. They say, if I understand them correctly, that the Royal Proclamation applies to British Columbia on its face. They also submit that British Columbia was an area over which the British Crown asserted sovereignty in 1763 by virtue of the

Virginia Charter, that is to say the Colony of Virginia, of 1609, the Hudson's Bay Charter of May 2nd, 1670, and they say that British Columbia was part of the lands acquired by Great Britain as part of Canada or New France, that is to say, that British Columbia in some way lies within the area ceded by New France by virtue of the Treaty of Paris of February, 1763.

Now, my lord, in section 2, I outline a summary of the province's position, and I will deal with these in the manner they are laid out.

The first proposition is that as a matter of law, the British Crown at no time had the power to exercise the Royal prerogative in relation to Indian lands and trade in British Columbia.

Obviously, my lord, the Royal Proclamation is an exercise of the Royal prerogative. And I will be saying that the exercise of the Royal prerogative in relation to Indian land and trade in British Columbia was unconstitutional, if it was attempted. Of course we say it wasn't attempted but I say if it was attempted it's unconstitutional. That's what I mean by as a matter of law.

Second, as a matter of fact, and on its own terms, the Royal Proclamation did not apply to present day British Columbia or to the Indians residing there.

Thirdly, even if the Royal Proclamation could be construed as applying to the province, the proclamation did not confer rights of ownership and jurisdiction as claimed by the plaintiffs in this case.

Turning to section three, the first point, the Royal Proclamation cannot in law apply to British Columbia. And the first part of that is limits on the Royal prerogative as such. I say the defendant province submits that as a matter of law the Royal Proclamation of 1763 has no application to British Columbia. This submission is based upon the limits of the Royal prerogative power. It is common ground that the Royal Proclamation was made pursuant to the King's power, the King's prerogative power. By law the power of a monarch to exercise his Royal prerogative on terms outside of Britain is dependent upon the manner in which the territory was acquired. For purposes of constitutional law, colonies fall within one of two classifications: They are either settled or they are conquered or ceded. The legal classification of

territory affects the powers of the Crown in relation to that territory.

My initial reference, my lord, is found in tab 3/3-2. Volume six of Hallbury's 4th edition, paragraph 1017, Modes of Acquisition of Colonies, and I am reading from that paragraph:

> "Colonies are treated for purposes of constitutional law of either, one, settled, or two, conquered or ceded, and the manner of acquisition affects the constitutional position of the colony knee, particularly the powers of the Crown. Every colony must be assigned to one or other of these two classes. The classification is one of law and once made by practice or judicial decision, will not be disturbed by historical research."

I am going to pause there and say, my lord, that the classification of the Colony of British Columbia was determined by the act constituting the colony.

And then I continue:

> "The basis of distinction is the stage of civilization considered to have existed in the territory at the time of acquisition. If there is no population or no form of government considered civilized and recognized in international law, possession is obtained by settlement. Where there is an organized society to which international personality is attributable, acquisition rests on cessions or conquest."

And when your lordship considers that, I ask you to keep in mind the preceding remark that the "classification is one of law and once made by practice or judicial decision, will not be disturbed by historical research."

And returning to my argument, I say in paragraph 3 settled colonies may be established in three ways: One, occupation of territory may be authorized by the Crown, possession taken in the name of the Crown and settlers introduced. Or, two, the Crown may recognize settlements made by British subjects without previous authority. And, three, uninhabited islands or areas

may be formally annexed.

And the reference to that, under the appropriate tab number, is to paragraph 1018 of Halsbury, and that simply repeats basically what I have set out in the argument. But I add the final sentence in that paragraph, and I quote: "A settled colony re-conquered or ceded back after conquest or cession does not lose its status as a settled colony."

As we will see, my lord, British Columbia, that is to say, the mainland colony, is a combination really of one and two. The Act of 1858 authorized settlement which was taking place at that time and it recognized that people had resorted to it without authority prior to that time.

Going to paragraph 4, in settled colonies -- and if I may pause for a minute, my lord, this is where we get to the question of its effect on the Royal Proclamation. In settled colonies the power of the Crown is limited to executive powers and includes the appointment of a governor, the establishment of courts of law and the summoning of a local representative assembly. Prior to 1887 the Crown had no power to make general laws with respect to a settled colony, that is to say, it had no power to exercise legislative powers.

THE COURT: What happened in 1887?

MR. GOLDIE: The passage of an Act that -- by the Imperial Parliament, referred to in the next paragraph, the balance of the paragraph, because it was found to be inconvenient to have the situation where there was a settled but unorganized territory. And that we will come to when we look at the Stikine Territory. And the reference there is again to Halsbury, and this is substantially what is paraphrased in my argument, but I will read it at this point:

> "The Crown's powers in settled colonies. In settled colonies the prerogatives of the Crown and the rights and immunities of British subjects are similar to those enjoyed in the United Kingdom. Thus settleers from the mother country carried with them such portions of the English common and statute laws as were applicable to their new situation. At common law, the Crown preserves the executive power and has authority to appoint a governor to establish courts of law but not ecclesiastical

> courts, and to provide for a summoning of the local representative legislature. Once such a legislature has been effectively provided for by the authority of the Crown, the Crown's power of legislation, whether ordinary or constituent by the prerogative is suspended during the existence of that legislature. But even before the establishment of a legislature, the Crown has no general power of ordinary legislation since it has no such general power in the United Kingdom."

Your lordship will see that the settled colony is assimilated to the situation that prevails in England itself, where the Crown's prerogative has been severely curtailed by the triumph of parliament over the Stewarts.

And then it goes on, the next reference to the Act of 1887:

> "The inconvenience of the common law rule led to the passing of the British Settlements Act, 1887, by which for any British settlement not under the jurisdiction of a legislature, other than a legislature constituted under that Act or under the Acts of repeal, the Queen and council may establish laws and institutions and constitute courts and provide for the administration of justice as may appear to be necessary for the peace, order and good government of Her Majesty's subjects and others within the settlement. These are continuing powers and in exercising them the Crown's authority to legislate generally for the territory by order-in-council is confirmed. The Queen may also delegate all or any of these powers to any person, persons or authority."

Your lordship will appreciate that where the -- where orders-in-council are made by the Imperial government, under that legislation they are made by virtue of an act of parliament and not by the residual Royal prerogative.

However, that's not a consideration that we have to concern ourselves with, since the matter was settled long before 1887 in British Columbia.

Turning to my argument in paragraph 5, I say the prerogative powers of the Crown in conquered or ceded colonies are much broader. Exerciseable by order-in-council, letters patent or proclamation, the Crown has the power to legislate for the conquered or ceded colony until a representative assembly has been granted to it.

And, again, Halsbury provides the necessary background. And I am -- I read paragraph 1029, under tab V/3-4. And I quote:

> "The Crown's competence in conquered or ceded colonies. In a conquered or ceded colony, the Crown by virtue of its prerogative, has full power to establish such executive, legislative and judicial arrangements as the Crown thinks fit and generally to act both executively and legislatively, provided the provisions made by the Crown do not contravene any act of parliament extending to the colony or to all British possessions. The Crown's legislative and constituent powers are exerciseable by order-in-council, letters patent or proclamation."

The principles to which I have referred have been stated in a number of cases. Your lordship has heard of the case of Campbell and Hall which was decided in 1774, in which an action was brought to recover a sum of money which was paid by the plaintiff as duty on sugars which were exported from the Island of Grenada. Grenada was one of the colonies which -- one of the territories which was ceded to Great Britain under the Treaty of Paris. Grenada was acquired, and I insert the words, by conquest and ceded, under the Treaty of Paris, 1763, and its government was established under item G of the Royal Proclamation.

I will just refer your lordship to that quickly. On the second page, down at the -- halfway down the page. What the King is doing is erecting separate colonies out of that which was ceded by France. Well, and also by Spain, Quebec being ceded by France, Grenada being ceded by France and East Florida and West Florida by Spain. And then after setting the bounds of Quebec and the two Floridas, and the Island of

> "The Government of Grenada, comprehending the Island of that name, together with the Grenadines, and the Islands of Dominico, St. Vincent's and Tobago."

And the issue that arose in that case, are the local letters -- I am sorry, letters patent which were issued pursuant to the King's preogative power before a representative assembly met in Grenada, purported to impose the duty. And the case turned on the validity of the letters patent. It was held that they were invalid because the King, by several instruments, had put it beyond the prerogative powers to issue them. The prerogative powers of the crown in a conquered colony are described at page 1048.

Now that, my lord, is an extract from the English report under the tab 3-6. And this is from the judgment of Lord Mansfield. And his lordship says, in the first paragraph, the sixth and last proposition that is if the King -- and when I say the King I always mean the King without the concurrence of parliament,

> "...the King...has a power to alter the old and to introduce new laws in a conquered country... This legislation being subordinate, that is, subordinate to his own authority in parliament. He cannot make any new change contrary to fundamental principles, et cetera."

And then the side lining about halfway down the page, I will begin the paragraph itself and I quote it:

> "It is left by the constitution to the King's authority to grant or refuse a capitulation. If he refuses and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has the power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace. He may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed and neither has it hitherto been

> controverted that the King might change part of the whole of the law or political form of government of a conquered dominion."

And on the next page -- well, it's under the next tab, the double side lining on the fourth paragraph:

> "It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before but that the King has a right to a legislative authority over a conquered country. It was never denied in Westminster Hall, it never was questioned in parliament."

The Campbell and Hall itself was -- is a case that has been much discussed and explained. One of the more recent cases in which the Campbell and Hall is noted is a judgment of the Judicial Committee of Sammut and Strickland, and an extract from that is found under the next tab. That related to the Island of Malta and the -- Malta was a particular case because it had been acquired by the Crown by virtue of voluntary cession by the inhabitants. And there was an argument as to whether its characterization was that of a settled colony, because it was the will of the inhabitants that led to the act of cession, or whether it still fell within the category of a conquered or ceded colony. And it was that characterization which would determine the extent of the Royal prerogative. I might add that the case was further complicated because the -- there was a reservation for the exercise of the prerogative in some of the orders-in-council.

But, at any rate, the Judicial Committee said that, beginning on page 701:

> "It may be said with truth that cases of voluntary cession, that is cessions otherwise than from a sovereign power, are rare, and it appears that the cases have been neglected by textbook writers and not noticed by the legislature."

Then they go on to consider the point. And they

say, midway down the paragraph the committee says:

> "The line of distinction here has always been based on the circumstance that English settlers, wherever they went, carried with them the principles of English law, and that English common law necessarily applied insofar as such laws were applicable to the conditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly, where there was an existing system of law, it has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession, if it was a case of that kind, to alter the existing system of law, although until such interference the laws remained as they were before the territory was acquired by the Crown."

Then there is a reference to Blackstone. I have set that out, my lord, in full on the top of page five of my argument.

Then in paragraph 10. More recently, Mr. Justice Mahoney of the Federal Court, recognized the distinction between settled and conquered or ceded territory in the Baker Lake case. And at page 532, he said, and I quote:

> "The Baker lake area lies within the former proprietory colony of Rupert's Land. The territory granted to the Hudson's Bay Company by Royal Charter of Charles II, May 2nd, 1670. It is common ground that Rupert's Land was a settled colony rather than a conquered or ceded colony."

That emphasis is, of course, my own.

> "It is to be noted that the particular legal consequences of settlement as distinct from conquest or cession in so far as the domestic laws of a colony were concerned, was not articulated in a reported case until 1693. The distinction developed in response to the needs of the English settlers and was not in its

> early development extended to the resolution of disputes involving the indigenous population. I am bound to hold that the Royal Proclamation of 1763 does not and never did apply to Rupert's Land."

That is the submission that we make with respect to British Columbia and in part for the exactly the same reason, that it was a settled colony and not a colony acquired by conquest or cession.

THE COURT: But the Royal Proclamation by its terms excluded Rupert's Land, did it not?

MR. GOLDIE: The argument was that it applied in part to it. My friends have made the same argument here.

THE COURT: So Mr. Justice Mahoney is just talking about the part that might not have been within Rupert's Land at the time of the Royal Proclamation?

MR. GOLDIE: Or to the argument that certain parts of the Royal Proclamation could apply.

THE COURT: All right. What is he talking about in 1693?

MR. GOLDIE: That, as I understand it, my lord, was the first case that discussed this question. Campbell and Hall, of course, was after the Treaty of Paris.

THE COURT: Yes. Just though, I think, 1774.

MR. GOLDIE: Yes. In the -- my friend has been good enough to refer me to the case in question. It's footnoted, it's a footnote on the Baker Lake, page 532. And it appears to be the case of Blankard and Galdy.

THE COURT: Yes.

MR. GOLDIE: The reason for the distinction is indicated by Mr. Justice Mahoney when he said:

> "The distinction developed in response to the needs of the English settlers."

And we will see what -- how Blackstone referred to that in a minute.

Now back to my submission on page six, I say, in summary, the Royal prerogative -- and I should add the words there "to legislate for a colony", because that's what we are talking about -- may be exercised only in territory acquired by Britain by one or both of conquest and cession. There is a very limited royal prerogative -- and I insert the word "power" and insert the words "to establish government institutions", exerciseable with respect to territory acquired by settlement. But that power does not

include the right to make laws concerning trade and land use.

Now, turning to the proclamation itself --

THE COURT: I think if you don't mind we will take the afternoon adjournment now.

MR. GOLDIE: All right.

(PROCEEDINGS ADJOURNED FOR SHORT RECESS)

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

Wilf Roy
Official Reporter

(PROCEEDINGS RESUMED AT 3:45 P.M.)

THE COURT: Mr. Goldie.
MR. GOLDIE: My lord, I was just about to deal with the section headed British Columbia was a Settled Colony, and I say that that is in respect --
THE COURT: I am sorry, when we adjourned you were at the middle of page six.
MR. GOLDIE: Oh. Oh. I am sorry. Yes. I was just about -- thank you, my lord. The section headed the Prerogative Power and the Royal Proclamation.
THE COURT: Yes.
MR. GOLDIE: The basis which the Royal Proclamation of 1763 was issued was conquest and cession. This is evident from the opening recital of the -- of the Proclamation itself which reads and I quote:

> "Whereas We have taken into Our Royal Consideration the extensive and valuable Acquisitions in America, secured to our Crown by the late Definitive Treaty of Peace,"

Etc. And then it goes on. If your lordship would just run your eye down to between C and D or just below C:

> "... we have, with the Advice of our Said Privy Council, granted our Letters Patent, under our Great Seal of Great Britain, to erect, within the Countries and Islands ceded and confirmed to Us by the said Treaty."

And the opening recital of the Quebec Act of 1774, which enlarged the boundaries of the original Quebec colony and revoked the application of the Royal Proclamation in it, begins with the words, and this is found under the tab 13, my lord. The preamble reads, and I quote:

> "Whereas His Majesty, by His Royal Proclamation, bearing Date the Seventh Day of October, in the Third Year of His Reign, thought fit to declare the Provisions which had been made in respect to certain Countries, Territories, and Islands in America, ceded to His Majesty by the definitive Treaty of Peace,"

And that, I say, is an accurate description of the process and of the territories that the Royal Proclamation purports to deal with and which in my submission the royal prerogative was limited to dealing with, namely conquered or ceded territories.

Then I now come to the section that underwhich I submit British Columbia's status is definitively established, and I say British Columbia was a settled colony and I -- my submission is that in respect of such a colony the prerogative did not extend on the enactment of the legislation. And of course, it is the submission of the plaintiffs that it is the legislation or the legislative aspects of the Indian provisions of the Royal Proclamation which govern in British Columbia.

Paragraph 15. The Royal Proclamation did not and cannot apply to British Columbia because the colony falls within the constitutional classification of a settled colony.

The process by which the colony of British Columbia was established is described in the preamble to Imperial Statute 21 & 22 Victoria, An Act to provide for the Government of British Columbia. That's the 1858 Act, my lord, and that's the way I will be referring to it in the future. The first page of that Act is found under tab 16, 3-16, and I draw your lordship's attention to the prepreamble. There are three aspects of it that I wish to emphasize. First:

> "Whereas Divers of Her Majesty's subjects and others have, by the licence and consent of Her Majesty, resorted to and settled on certain wild and unoccupied territories on the northwest coast of North America."

Your lordship will see that the preamble meets the description of English settlers with the licence and consent of Her Majesty resorting to. And now the next point -- resorted to and settled -- the verb settled emerges. The next point:

> "on certain wild and unoccupied territories on the northwest coast of North America."

Now, that establishes the fact that there is no organized government or recognized in international

law. It is not unoccupied in the sense of their being no people there. It is unoccupied in the sense of distinguishing it from a ceded or conquered colony. And then continuing:

> "commonly known by the Designation of New Caledonia, and from and after the passing of this Act to be named British Columbia, and the Islands adjacent, for Mining and other purposes."

And continuing, and this is the third point:

> "and it is desirable to make some temporary Provision for the Civil Government of such Territories, until permanent Settlements shall be thereupon established, and the Number of Colonists increased."

I will be coming back to that in terms of the -- of the relationship that has to the native peoples, but I simply say now that the preamble declares on the part of the Imperial parliament the essential characteristics of a settled colony. There is no issue here of cession or conquest, and in fact the plaintiffs say they haven't been conquered and they haven't been ceded. And that view is -- was the view of the Imperial parliament in 1858.

THE COURT: When was the goldrush?

MR. GOLDIE: The first discovery of gold was in December -- was 1857. By the time this Act was passed in August of 1858 it was a perfectly accurate statement to say that some of Her Majesty's subjects and others by the license and consent of Her Majesty resorted to and settled on, past tense. The goldrush had begun by the time this Act was passed.

THE COURT: Yes. When did you say the first discovery of gold was? What month did you say?

MR. GOLDIE: I think it was -- let me put it this way, my lord: Douglas issued a Proclamation in December of 1857 when he was Governor of Vancouver Island and it was warning all people who wanted to go on to the mainland that it wasn't open season.

THE COURT: Yes.

MR. GOLDIE: Now, in the next paragraph, my lord, I make reference to the Deadman's Island case, a judgment of the judicial committee. The issue was whether a

reserve had been created of Deadman's Island where the naval establishment now is, and the contest, as your lordship can see, was between British Columbia and Canada. And in the judicial committee Lord Dunedin made the observations which I have set out under paragraph 17, and I quote:

> "There have been produced in the case a very interesting set of letters, despatches, and maps, which although necessarily imperfect in detail, yet provide a clear picture of the early land history of the Colony. Matters had begun by the indiscriminate squatting of adventurous settlers in a wild country."

And in a very succinct way that sums it up. And he says:

> "The initiation of the reign of law may be taken to date from the advent of Governor Douglas in 1858."

And he refers to the 1858 Act. And continuing with my written submission. The "subjects and others" who had settled on the mainland were largely gold prospectors or miners, who were required by a Proclamation issued by Governor Douglas of Vancouver Island to obtain mining licences and permits from the Government of the Island. Now, that reference, my lord, is under tab 3-18 and it's not page eleven, it's page 33. And the rest of the wording can be crossed out. It's not an accurate.

THE COURT: Despatch number 23?

MR. GOLDIE: Yes. They can be crossed out, my lord. This is taken from the papers relating to British Columbia, which is Exhibit 1142, and it's under -- from tab one of that exhibit. And Douglas sent along to -- had sent along to London something which he had issued without authority as he later commented, but it is the 1857 Proclamation that I referred to a minute ago. And it reads:

> Whereas by law all mines of gold, and all gold in its natural place of deposit within the Districts of Fraser's River and of Thompson's River commonly known as the Quaatlan, Couteau, and Shuswap countries, whether on the lands of

> the Queen or any of Her Majesty's subjects, belong to the Crown.
>
> And whereas information has been received by the Government that gold exists upon and in the soil of the said Districts, and that certain persons have commenced or are about to commence searching and digging for the same for their own use, without leave or authority from Her Majesty.
>
> Now I, James Douglas,"

etc,

> "do hereby publicly notify and declare, that all persons who shall take from any lands within the said Districts any gold,"

etc, or shall disturb and so on,

> "without having been duly authorized in that behalf by Her Majesty's Colonial Government, will be prosecuted, both criminally and civilly, as the law allows."

Well, of course, the irony was that there was no law, but that didn't deter him, and as a matter of fact he caused this Proclamation to be advertised in Washington and Oregon.

THE COURT: What was the basis for the claim that this was -- that this gold belonged to the Crown?

MR. GOLDIE: The precious metals.

THE COURT: Precious metals belonged to the Crown in the realm of the Crown?

MR. GOLDIE: Yes.

THE COURT: What made this one of the realms of the Crown?

MR. GOLDIE: Well, it was -- it was part of the Dominions of Her Majesty in respect of -- in which there was no established government. If your lordship will go back to the Act under tab 16, the title of the Act is An Act to Provide for the Government of British Columbia, and it talks about Her Majesty's subjects. Oh, yes, paragraph one:

> British Columbia shall, for the purposes of this Act, be held to comprise all such Territories within the Dominions of Her Majesty."

THE COURT: I would have thought that that was the opening -- you say that this was Her Majesty -- His Majesty's Dominions before this?
MR. GOLDIE: Yes. Yes. I'll --
THE COURT: Dating back to Cook's time or --?
MR. GOLDIE: No. I will be submitting that the acts -- that the assertions of sovereignty, underlining the word assertion as opposed to completing the sovereignty in the international law sense, began on the coast with Cook and Vancouver, began in the interior with MacKenzie's voyage and Fraser's establishment of trading posts and was -- and then I will be submitting that a key element in the assertion of sovereignty was the Act of 1803, which was an Imperial Act providing for or enabling, I should say, enabling the appointment of magistrates within the Indian territories, which, and I will say that included British Columbia, the mainland, the Act of 1821 which did the same thing and finally the Oregon Boundary of 1846 which put the matter beyond doubt internationally.
THE COURT: All right.
MR. GOLDIE: Whatever -- whatever the validity of Douglas' Proclamation of 1857 was, the point I'm making here is that there never was any suggestion that British Columbia was acquired by conquest or that it was ceded by anybody to the Crown.
THE COURT: Did the Oregon Boundary Act cede or recognize the Crown's title north of the 49th Parallel?
MR. GOLDIE: Yes. What it did was resolve a state of affairs which had -- well, firstly, it moved from a state of affairs in which there was only the vaguest pretension to the situation that obtained after the Treaty of Gent, and I think it was in 1818 which extended the 49th Parallel to the Stony Mountains.
THE COURT: Yes.
MR. GOLDIE: And then there was a period of -- in which I call the standstill period in which the two countries agreed to a joint occupation without prejudice to their respective claims. And that was, I think, a period that extended for, oh, 20 some odd years perhaps. I may be wrong in that. But finally the Oregon boundary fixed the boundary at the 49th Parallel, the British losing out in their contention that the boundaries should have been the Columbia

River.
THE COURT: Not much doubt about that, is there?
MR. GOLDIE: Well, it all depends. The Hudson's Bay Company felt that the treaty was a disaster because they had been in that country for upwards of 50 years and they were squeezed out.

In paragraph 19 I say, and I quote, the corollary to the assertion that British Columbia was a settled colony is the denial that British Columbia was acquired by conquest or cession. The plaintiffs' suggestion that Britain acquired British Columbia in 1763 as part of "Canada" ceded by the French is without, in my submission, foundation and will be shown to be so in a later section of this summary.

Now, my lord, I submit that Mr. Justice Hall in Calder did not grasp the distinction between a settled colony and one conquered and ceded in his discussion of Milirrpum in the Supreme Court Report at pages 414 to 416. And I have put the -- put that discussion and I don't propose reading it, my lord, but it starts at the last paragraph in column one on page 414 and goes over to the end of the first paragraph on page 416. And in that -- in that discussion he -- he reaches the conclusion that Milirrpum was in error, and I say that in so doing he did not take into account the distinction that Mr. Blackburn was careful to analyse and take into account. He quotes from Milirrpum on page 415 beginning with the paragraph "Blackburn J." He says:

> "Blackburn J., after an extensive review of the facts and historical records involving some 50 pages, held as follows:
>
> > 'This question of fact has been for me by far the most difficult questions of fact in the case. I can, in the last resort, do no more than express that degree of conviction which all the evidence has left upon my mind, and it is this: that I am not persuade that the plaintiffs' contention is more probably correct than incorrect. In other words, I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim.'"

And Mr. Justice Hall goes on to say, and this was the key part of his finding:

> "That finding necessarily disposed of the claim being made."

And then he goes on to refer to Calder in the trial and Court of Appeal, and of course Milirrpum was decided before the Supreme Court of Canada judgment in Calder and after the Court of Appeal. And then he -- in the top paragraph he says:

> "The essence of his"

That's Mr. Justice Blackburn,

> "concurrence with the Court of Appeal judgment lies in his acceptance of the proposition that after conquest or discovery of the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer."

Now, with great respect, the issue that was being addressed by Mr. Justice Blackburn when he dealt with the nature of the colony, was not conquest or discovery in the sense of what rights does that give to the -- to the discoverer, but in his -- in the inquiry he addressed to himself, what flows from the fact that it's a settled colony as opposed to a conquered or ceded colony --

THE COURT: Well, why isn't this -- why isn't this a case that falls to be decided on a consideration of the rights flowing from discovery rather than from the assertion of jurisdiction in a settled colony?

MR. GOLDIE: Well --

THE COURT: Based in this case on Cook's discovery, if he discovered it.

MR. GOLDIE: My submission will be that the Royal Proclamation on its face has nothing to do with British Columbia. And it is only from the judgments of Mr. Justice Norris and Mr. Justice Hall which suggest an extension of the Proclamation westward that there is any suggestion that it does apply. And in my submission neither of those -- neither of those two learned judges considered that it would be unconstitutional to

apply the royal prerogative to a settled colony. But my basic assumption or my basic submission is going to be British Columbia was unknown in 1763. Cook was what, 15 years later. And indeed the issue to be decided by your lordship is what flowed from the discoveries that Cook and others -- because --

THE COURT: Well, I said a moment ago, why do we start with 1858? Why didn't we start with 1778.

MR. GOLDIE: Oh, it's because 1858 is an Act of parliament which put the question of what the colony was beyond doubt. We -- there are other cases dealing with other colonies where, because there is nothing like the Act of 1858, the court has to say well, what was it? Was it conquered or was it ceded or was it settled? The whole of the premise that your lordship is being asked to address at this point is the application of the Royal Proclamation.

THE COURT: Yes. Yes. I am just thinking of those passages in the judgments of Chief Justice Marshall, particularly Johnson and McIntosh, where he equates the beginnings of aboriginal rights with discovery. Or he --

MR. GOLDIE: Yes. If we can put the Royal Proclamation just to one side.

THE COURT: Yes.

MR. GOLDIE: Then we get to what I say are the -- is the nub of the whole question, is: what are the rights that were recognized by colonial law at the time -- I don't say -- well, one can -- one can go back to the time of discovery, but there was no established government at that time in British Columbia. And I will be endeavoring to take your lordship back before any possible act of discovery in putting some flesh on the phrase "colonial law." That's a phrase that I referred to in the Select Committee of New Zealand.

THE COURT: Yes.

MR. GOLDIE: But at the present time we're confronted with the proposition which the plaintiffs made is that the Royal Proclamation applies to British Columbia and it's part of the reserve.

THE COURT: Yes.

MR. GOLDIE: And that's what I have to dispose of. Now, I should say, to complete my comments on paragraph 20, that Mr. Justice Blackburn concluded that the area in New South Wales that he was dealing with was a settled colony. And I continue in paragraph 21. The plaintiffs have asserted that even where the prerogative powers of the Crown have been restricted

by the granting of government to a colony, a vestige of the prerogative remains and empowers the King to make grants of vacant lands and lands occupied by Indians. Accordingly, the plaintiffs say that the Indian land provisions of the Royal Proclamation were a valid exercise of the prerogative power and applied even to settled colonies. Apparent authority for this proposition may be found in Johnson and M'Intosh. And then I go on to look at that. And under tab 3-21 I have placed the extract of what I understand to be what my friends rely upon. Chief Justice Marshall suggests at page 596 of this case that the power to legislate with respect to vacant land is reserved to the Kings as a branch of the prerogative relating to political relations between Great Britain and foreign nations, even though he recognizes that the Indians were not in fact an independent nation. And I will come to that in a minute. He also distinguished Campbell and Hall on the basis that that case dealt with the imposition of a tax which powers he understood had never been remembered as part of the royal prerogative.

Now, to introduce this, he was -- he was refuting an argument of counsel for the claimant, and this is an interjection. It's not in my material, my lord. But I wanted to introduce my discussion of what he said with these words: He was refuting an argument of counsel for the claimant who claimed under an Indian title and I -- can I have the full report. I want to get the full report, my lord, not just the extract. I am referring to the full report which is Volume IX of the plaintiffs' authorities -- U.S. cases tab 22.

THE COURT: What volume number?

MR. GOLDIE: Volume IX, my lord, of the plaintiffs' U.S. cases.

THE COURT: Thank you.

MR. GOLDIE: And I want to --

THE COURT: What tab number?

MR. GOLDIE: It's tab 22.

THE COURT: I don't think I have the right -- Volume IX?

MR. GOLDIE: Volume IX. It's a green book, my lord.

THE COURT: There is a separate series for American?

MR. GOLDIE: Yes. That's correct. Oh, I see. Perhaps -- yes, that's right. We re-bound ours. Oh, Miss Sigurdson tells me it's Volume XII, tab 22 of the U.S. cases. It should fall open at that page.

THE COURT: That's it, yes. That's it.

MR. GOLDIE: I am going to refer to page 6 -- well, the page

number is a stamped page number in the upper right-hand corner, 276.

THE COURT: Yes.

MR. GOLDIE: The second column beginning with the --

THE COURT: Sue.

MR. GOLDIE: -- paragraph numbered three. This is the argument of the claimant. And he was claiming under an Indian title and he challenged the validity of the Proclamation of 1763, because in his eyes the lands in question lay within the limits of the colony of Virginia and he said the colony of Virginia was a settled colony and the Proclamation could have no effect with respect to it.

THE COURT: And that's on page 276?

MR. GOLDIE: Yes. If your lordship would look in the right-hand column.

THE COURT: Yes.

MR. GOLDIE: And the end of the first paragraph beginning with the word -- with the letter three.

THE COURT: Yes. This is the argument of counsel?

MR. GOLDIE: This is argument of counsel. And I -- I now come to the way Chief Justice Marshall dealt with that.

THE COURT: Yes.

MR. GOLDIE: And that begins -- it's at a page, the stamp number in the upper right-hand on my copy is just 28. It should be 284. It follows 283 and precedes 285.

THE COURT: Yes.

MR. GOLDIE: And I am going to refer your lordship to the left-hand column and four lines from the top and this is in the judgment of the Chief Justice. Your lordship sees the words, quote:

> "It has been contended that, in this proclamation, the king transcended his constitutional powers; and the case of Campbell v. Hall (reported by Cowper) is relied on to support this position."

And he's -- he's now going to deal with that proposition. And this is what he says:

> "It is supposed to be a principle of universal law that, if an uninhabitated country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverer,

> so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parceled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.
>
> If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.
>
> According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted."

If I may pause there. Your lordship will see that he is taking a line which is going to lead him to the conclusion that the Crown has a sort of a residual power arising out of the nature of the discovery. Continuing:

> "A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the

> governor in council, who was the deputy of the King, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.
>
> So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King, as was his right to grant that title. The lands, then, to which this proclamation referred -- "

That's the Proclamation of 1763,

> "-- were lands which the King had a right to grant, or to reserve for the Indians."

Now, your lordship will observe that he makes no reference to ceded or settled at this point. Then he goes on:

> "According to the theory of the British constitution, the royal prerogative is very extensive so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required that means should be adopted for the preservation of peace, and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown."

Now, in that passage he finds the power of the Crown to legislate not in the question of cession or conquest but on the basis that the Indian nations were to be treated as somehow entering into the field of foreign relations. And to that extent he foreshadows

the position that he took in Worcester and Georgia. Then he goes on to say:

> "In the case of Campbell against Hall, that part of the proclamation was determined to be illegal."

And he's now talking about the Proclamation which not of 1763 but of the Proclamation which imposed a tax, a separate Proclamation altogether. Continuing, quote:

> "that part of the proclamation was determined to be illegal which imposed a tax on a conquered province, after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted."

And then he says the power to tax is in parliament. With great respect to the Chief Justice, the government had not been bestowed upon it. It had only been promised, a representative legislature, but that was enough in the view of Lord Mansfield to take it out of the category of a ceded or conquered province. So I say, my lord, that the very local application that he gave to the Royal Proclamation enabled him to avoid the question of the constitutionality of its application which was raised in the claimant's argument by shifting its justification to the king's right to conduct the foreign affairs of the nation. Now, this does not help the plaintiffs in my submission, and I am now dealing with the proposition they make because it emphasizes the situation at the time, namely the power of the Indian nations in the war with France and their unhappiness with westward settlement.

THE COURT: Is it -- is it the view of Professor Hogg that the tax would have been lawful if imposed before the promise of a grant of an assembly?

MR. GOLDIE: Yes. That's my understanding.

THE COURT: Because I would have thought that with a conquered territory the Crown could legislate without limitation.

MR. GOLDIE: Yes. The -- and that's what Chief Justice Mansfield held.

THE COURT: Yes.

MR. GOLDIE: But he said what we have is the intervening fact of another Proclamation which promised a legislative form.
THE COURT: It was more than a promise, was it not?
MR. GOLDIE: Well, I don't think at the time the levy was made that the legislature had been called.
THE COURT: No, it hadn't been called.
MR. GOLDIE: No.
THE COURT: But perhaps you were speaking advisingly when you said another Proclamation intervened. I think there was a Proclamation setting up a legislative council, but --
MR. GOLDIE: Yes, that's correct. My emphasis was on the fact that there was no legislature had been --
THE COURT: It had not been convened.
MR. GOLDIE: Convened, yes.
THE COURT: I think that's right. I am not sure that the governor had even been appointed -- or yes.
MR. GOLDIE: No. He had been appointed.
THE COURT: Yes. Because he was the man who imposed the tax.
MR. GOLDIE: He was the man who imposed the tax.
THE COURT: That's right, yes.
MR. GOLDIE: Now, my lord, Johnson and McIntosh, then, as I say, really provides no assistance to my friend in suggesting that the Royal Proclamation had some application to lands in a settled colony. It was in the interest of the United States, of the Federal power in the United States at the time Chief Justice Marshall handed down this judgment to find authority in the central power which was transferred to the United States as opposed to the States. Whether the proposition put by counsel had any validity in terms of settled versus conquered or ceded we'll never know, because the Chief Justice very cleverly side-tracked that off into the question of foreign relations.

And I am returning now to my written argument in paragraph 23. I say this: that is to say, Chief Justice Marshall's characterization of the ratio decidendi of Campbell and Hall is inaccurate. To the contrary, the Court held in that case that the tax was invalid because the prior grant of an assembly to the colony in question had terminated the King's prerogative power to impose a tax. It is apparent from the suggestion that the existence of a prerogative power to tax (in conquered or ceded territory) was not disputed: the decision necessarily implies that the tax would have been valid had the

Proclamation imposing it been issued before the granting of an assembly. And your lordship has seen the reference to Hogg that I have in that section.

And then I go on to say Chief Justice Marshall's recognition of a residual power over lands is particularly ill-founded in relation to settled colonies with respect to which the King never had a prerogative power general legislation. In settled colonies, the settlers were deemed to have brought with them the laws of England, both statute and common law. And that is again the reference there is to Mr. Hogg or Professor Hogg under tab 24, and he says:

> "When an uninhabited territory was settled by British subjects, the rule of the common law was that the first settlers were deemed to have imported English law with them. In the absence of any competing legal system, English law followed British subjects and filled the territory. The importation was deemed to have occurred on the date of the settlement of the colony, but in practice settlement was a gradual process and the date of the first settlement was unknown or disputable."

I'm going to come back to that in a minute.

THE COURT: I'm sorry, I haven't found that.

MR. GOLDIE: I am sorry, my lord, I am reading from under tab V/3-24.

THE COURT: Page.

MR. GOLDIE: Page 23 of Hogg.

THE COURT: I am looking at Hogg, but I am under the wrong tab, I guess. Tab 23?

MR. GOLDIE: 24.

THE COURT: 24. All right.

MR. GOLDIE: He's under --

THE COURT: Yes, all right.

MR. GOLDIE: He's under two tabs there and I say that a reservation to the King of the right to grant land on a settled colony is inconsistent with the importation of English law to the colonies, and the powers granted to colonial governors.

Now, my lord, I am going to come back to this again, but I say all of the uncertainties to which Hogg, Professor Hogg refers to were resolved by the Act of 1858 and what was done under that Act by Governor Douglas. It wasn't a question of deeming

English law to follow settlers. We have a precise date for that.

Going to paragraph 25. Even if the law could be construed as reserving to the monarch a prerogative power to legislate with respect to vacant lands in a settled colony, it is incontrovertible law that the prerogative power may be diminished or abolished by a statute of the Imperial Parliament. And I add the words: and by the local legislature where authorized as Douglas was. And the reference that I make there is again to Hogg under the next tab, referring to the prerogative, and he starts off by saying:

> "The royal prerogative consists of the powers and privileges accorded by the common law to the Crown. Dicey described it as 'the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown.' The prerogative is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent.
>
> In the next chapter, we shall see that the Crown possessed certain prerogative legislative powers over British colonies. The King, acting without the concurrence of Parliament, had the power to create the office of Governor, executive council, legislative assembly and courts for a colony. In the case of a conquered colony (as opposed to a settled colony), the King possessed a general power of legislation - but only until such time as the colony was granted its own legislative assembly. These powers are of mainly historical interest for Canada today; but the Constitutions of today."

And so on. And then in the next paragraph:

> "Apart from the power over the colonies, the courts held that there was no prerogative power to legislate; only the Parliament could make new laws. The courts also held that there was no prerogative power to administer justice: only the courts could adjudicate disputes according to law."

And we will see that it was Douglas, authorized as he was under the Imperial Act, who created the courts.

Now, the other -- I wish to add as another reference there, my lord, and it should be under the same tab -- before I leave Hogg, I should go over to the next page. And to complete that I'll start on the page ten, the last two lines:

> "These decisions confined the prerogative to executive governmental powers. And within this area the prerogative was further limited by the doctrine that most executive action which infringed the liberty of the subject required the authority of a statute. Moreover, the prerogative could be abolished or limited by statute, and, once a statute had occupied the ground formerly occupied by the prerogative, the Crown had to comply with the terms of the statute. All of these rules, and especially the last (displacement by statute), have had the effect of shrinking the prerogative powers pf the Crown, down to a very narrow compass."

That's the end of that quotation. And now, I want to go on to the case of Attorney General and Cain, which was a judgment of the judicial committee from Canada, and the issue was whether the expulsion of an alien was beyond the legislative capability of the -- of parliament at a time when it did not possess extra territorial powers. But the reference to which I refer is page 546. And the first line, the first sentence --

THE COURT: I am sorry, where do I find it?

MR. GOLDIE: It's under tab 25, the same one as Hogg, but it's following. It's separated by a blue sheet.

THE COURT: Oh, yes, I have it.

MR. GOLDIE: And if your lordship would turn to page 546. The committee said, quote:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to peace, order and good government, or to its

> social or material interests. The Imperial Government might delegate those powers to the governor or Government of the one of the Colonies, either by royal proclamation which is has the force of a statute - Campbell v. Hall - or by a statute of the Imperial Parliament, or by a statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions."

Now, it's going to be my submission that Douglas enjoyed the complete delegation of Imperial authority at the relevant times and that that completely displaced any residual room for the application of the Royal Proclamation.

Now, my friend, in the course of his argument, suggested that his Douglas' instructions preclude interference with exercise of the prerogative. The instruction itself simply states, and perhaps I should quote it. It's at Exhibit 1142, tab one, page 6, and it's paragraph XVIII. I should say I won't quote it. I don't have it here. But it is not the exercise of the prerogative. It is the prerogative itself. In other words, his instructions said don't interfere with the prerogative as opposed to the exercise of the prerogative. Now, the Royal Proclamation is simply an exercise of the prerogative. And he was unincumbered when it came to that. He could not enact an ordinance that abolished the future exercise of the prerogative. But he could pass an ordinance which was inconsistent with an existing exercise of the prerogative in its -- in its application to the colony.

Now, I am back at paragraph 26 on page 12 of my written argument. Any prerogative power with respect to lands within what became the Colony of British Columbia was restricted within a few months of the establishment of the colony. And I emphasize any prerogative. The Imperial Parliament by the 1858 Act conferred upon Douglas' powers to make laws for the peace, order and good government of the colony. Now, the chain of that is one that we should follow

through, and I am going to refer firstly to tab 16 in the yellow binder. It should be -- it's tab 3-16.

THE COURT: Yes.

MR. GOLDIE: It's the 1858 Act.

THE COURT: Yes.

MR. GOLDIE: Under two, section two:

> "It shall be lawful for Her Majesty, by any Order or Orders to be by Her from Time to Time made, with the Advice of Her Privy Council, to make, ordain, and establish, and (subject to such Conditions or Restrictions as to Her shall seem meet) to the authorize and empower such Officer as She may from Time to Time appoint as Governor of British Columbia, to make Provision for the Administration of Justice therein, and generally to make, ordain and establish, all such Laws, Institutions, and Ordinances as may be necessary for the Peace, Order and good Government of Her Majesty's Subjects and others therein; provided that all such Orders in Council and all Laws and ordinances so to be made as aforesaid, shall be laid before both Houses of Parliament as soon as conveniently may be after the making and Enactment thereof respectively."

Now, so the parliament conferred upon the Queen and council the power to appoint the Governor and the power to enable him to make laws for peace, order and good government. And that was the chain. Not through the royal prerogative. It was through an Act of Parliament. And at tab 27, 3-27 -- well, I should note that under 3-26 is the Proclamation proclaiming the 1858 Act within the colony of British Columbia. But under --

THE COURT: It comes first?

MR. GOLDIE: Yes, it comes first, and then the Act itself comes next. And then finally under tab 27 we have a Proclamation issued under that Act and it was made in December of 1858 and the preamble traces the line of authority that I have referred to, "by virtue of an Act of Parliament ... the Queen by a Commission under the Great Seal of the United Kingdom ... in conformity therewith," that is to say with the Act, he has been "authorized by proclamation issued under the Public Seal of the ... Colony, to make Laws ... for the

peace, order and good government of the same. Now, therefore ... by virtue of the authority" he proclaims, ordains and enacts "that on and after the day of the date of this proclamation, it shall be lawful for the Governor, for the time being, by any instrument in print or in writing, or partly in print and partly in writing, under his hand and seal to grant to any person or persons any land belonging to the Crown in the said Colony." So the Governor, by virtue of the authority that comes to him from an Imperial Act of Parliament, becomes the sole person who can deal with land in the colony. And that excludes any residual aspect of the royal -- of the royal prerogative to deal with vacant lands.

THE COURT: You are ahead of me, I think. What is this Proclamation on the 2nd of December?

MR. GOLDIE: That is a Proclamation enabling him to grant lands in the colony. And it winds up with these words:

> "every such Instrument shall be valid as against Her Majesty, Her Heirs and Successors for all the estate and interest expressed to be conveyed by such instrument."

THE COURT: All right. And then you went to -- where is this?

MR. GOLDIE: Then I go to the -- well, that completes --

THE COURT: That completes it. All right.

MR. GOLDIE: -- my -- the line that I'm taking in terms of any residual power of the royal prerogative.

THE COURT: Where was the English law at?

MR. GOLDIE: That is --

THE COURT: Must have been the same time.

MR. GOLDIE: The same time, and it's -- I am going to come to it in a minute.

THE COURT: All right. When you get there.

MR. GOLDIE: All right. Now, is your lordship --

THE COURT: It is also made --

MR. GOLDIE: On the same date.

THE COURT: It was November 19, wasn't it?

MR. GOLDIE: I am sorry, yes. Your lordship is right. November 19.

THE COURT: I only remember because it's my sister's birthday.

MR. GOLDIE: Well, I have nothing to jog my recollection. Well, I say at the top of page 13 what I have said a few minutes ago. The prerogative power to make laws with respect to lands in British Columbia did not survive in any event beyond December 2, 1958 when it was

replaced by a power in Douglas granted by his Legislative Act which he was expressly empowered to do.

THE COURT: I am just having a little difficulty with understanding the reason for such a Proclamation.

MR. GOLDIE: It was on the advice, I believe, of Begbie that there should be a law in the colony which stated who could make a Crown grant. Now, I think I can get your -- the reference to that.

THE COURT: Well, I suppose this is a law that he's proclaiming, is it, pursuant to the English Law Act, or is he doing it in some other chain of authority?

MR. GOLDIE: He is doing it -- the chain of authority goes right straight back to the 1858 Act. It's found in the preamble. It starts this way: The 1858 Act says by an Order-in-Council the Queen can appoint a Governor and confer upon him such powers as she deems desirable. What was done by Order-in-Council was to appoint him with respect to his Commission and to give him instructions and he was the legislature, the legislative body as well as the executive until 1863.

THE COURT: But I have some difficulty in understanding if there is -- if the laws of England as of that date apply to the colony, why he would be issuing a Proclamation. I suppose he is -- I suppose that's -- that's a blanket statement and he is now bringing some practical application to it, is he?

MR. GOLDIE: I think the concern was that without it who was going to sign the Crown grant.

THE COURT: Well, is a Proclamation in this sense, is it legislation?

MR. GOLDIE: Yes, it will be, my lord. I am going to deal with that.

THE COURT: Yes. If a Proclamation is legislation, then I can understand it?

MR. GOLDIE: It was -- let me.

THE COURT: It says it's a Proclamation having a force of law.

MR. GOLDIE: Yes.

THE COURT: To convey Crown lands. All right. Well, I understand. I see it's not inconsistent with the English Law Act.

MR. GOLDIE: In another part of my submission I dwell upon the effect of --

THE COURT: Yes. All right.

MR. GOLDIE: -- what he had there. All I'm dealing with now is the proposition that the Royal Proclamation sort of sneaked in through the back door and had some

application in British Columbia. Now, I have already dealt with the submission that I make in paragraph 29.

MR. RUSH: Well, just before you move on, if you are not going to deal with it.

MR. GOLDIE: Well, I would be glad to.

MR. RUSH: Well, are you or aren't you?

MR. GOLDIE: I would be glad to right now, sure.

MR. RUSH: Well, go ahead.

MR. GOLDIE: As the defendant Province submits, and I add this word, if Chief Justice Marshall, and I insert these words, was making a general proposition, and I say he wasn't because he was talking about the foreign relations between the King and the particular Indian tribes at the time. I say he misunderstood the scope of prerogative power in settled colonies - add the word settled - with respect to which the King retained no legislative power. And I say in contradiction of their earlier assertion, the plaintiffs themselves agree, in another part of their written summary of argument, that the Crown could not alter the land provisions of the Royal Proclamation by exercise of the royal prerogative accept in conquered or ceded areas where a prerogative power of legislation is retained. And that reference is under tab 29.

MR. RUSH: And that's not a position advanced by the plaintiffs in the argument and my friend well knows that. That was a position that was put -- advanced in the summary and was not advanced in the final argument and it's not a position advanced by the plaintiffs and that does relate to my friend's reference at V/3-29.

MR. GOLDIE: Well, I was dealing here with what we understood to be the plaintiffs' position and it is from their summary dated March 1990 and the reference is at page 249 of the summary which we were supplied with and it reads, and I quote:

> "We submit that the rights held by Indians to unceded lands under the Proclamation of 1763 are indefeasible and could not be annulled or modified by the Crown or its officers under the prerogative power, except in conquered or ceded areas where a prerogative power of legislation is retained." I say that's a correct statement.

MR. RUSH: It is not the plaintiffs' position. It's not advanced by the plaintiffs in its argument.

THE COURT: Well, I am having trouble following it, because I

can't find this passage from the plaintiffs' argument summary.

MR. GOLDIE: Oh. It's under tab --

THE COURT: I don't see a tab 29.

MR. GOLDIE: Is it 3-29, my lord.

THE COURT: I am sorry. Oh, yes. I was look at 4-29. Well, is the difference between you gentlemen that you did not advance this in your argument, Mr. Rush?

MR. RUSH: That's right. That's --

MR. GOLDIE: I didn't understand my friend to say we retract that, it's not our position. However, I understand him now.

THE COURT: All right.

MR. GOLDIE: And my first position, then, is the one that applies, if my friend is saying that there is a residual power it does not apply in British Columbia, based upon any authority in Johnson and McIntosh, because the Chief Justice very skillfully transferred the justification for it to the field of foreign relations. I will -- there was no aspect of that in British Columbia.

Then going to paragraph 30. In summary, the defendant Province submits that the royal prerogative to legislate generally could not be exercised in any form in British Columbia because that colony was acquired by settlement and not by conquest or cession. Even if the Royal Proclamation was intended in 1763 to apply to what is now British Columbia, it was ultra vires to that extent at least, and so of no effect. That would be Campbell and hall. If the Proclamation is ambiguous with respect to the extent of its territorial application, it should be read down to avoid invalidity. Now, turning to the next submission --

THE COURT: You have got four minutes, Mr. Goldie. Do you want to start a new section or do you want --

MR. GOLDIE: Well, I would be glad to start promptly at 7 o'clock, my lord.

THE COURT: All right. Well, we will adjourn until that happy hour.

(PROCEEDINGS ADJOURNED PURSUANT TO DINNER RECESS)

27335 1

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

_____

Laara Yardley,
Official Reporter,
UNITED REPORTING SERVICE LTD.

(PROCEEDINGS RESUMED AT 7:00 p.m.)

THE REGISTRAR: Order in court.
THE COURT: Mr. Goldie.
MR. GOLDIE: My lord, part V, Section 4.
THE COURT: Yes.
MR. GOLDIE: The proposition that we advance here is that the Royal Proclamation has no application to British Columbia. And your lordship has heard me on the proposition that constitutionally it could not extend to British Columbia, here we submit that on two grounds or two categories that the Proclamation doesn't even purport to apply to British Columbia.

The first category I refer to in paragraph 1 is that the historical context of the Royal Proclamation and the arguments based on the British holdings in North America as they were in 1763, the contrasting status of British Columbia in that year as terra incognita, the views held by the framers of the Royal Proclamation, and the embodiment of those views in the Proclamation all point to one conclusion and one conclusion only, that it has no application to what is now British Columbia or what became the Colony of British Columbia in 1858.

The second category encompasses arguments based on the construction of the terms of the Proclamation itself, and how those terms define and limit the geographic reach of the Proclamation, your lordship bearing in mind that it is the plaintiffs' submission that the Proclamation reaches across to British Columbia.

Now, part 1, or the first section, The Historical Context of the Royal Proclamation. And I submit that the Proclamation must be interpreted in its historical context. And we submit that central to an understanding of the geographic reach of the Proclamation is a determination of the extent of British holdings in North America in 1763.

Now, it must be assumed, in our submission, that the King intended the Royal Proclamation to apply only to those territories over which he was recognized as, or at the very least claimed to be, sovereign. In the absence of an indication on the phase of the Royal Proclamation that it was intended to have a prospective effect or an extraterritorial application -- if I may pause there, my lord, extraterritorial in the sense of the King's dominions

at that time -- the defendant Province submits that its geographic scope is defined by the extent of British holdings in 1763.

And then we go on to determine what those are. An analysis of British territory within North America in 1763 necessarily begins with the Treaty of Paris entered into by Britain, France and Spain on February 10th of that year. The Treaty of Paris brought an official end to the Seven Years War. By its terms, Britain obtained from France the whole of "Canada", (including the Island of Cape Breton and other islands in the Gulf and River of St. Lawrence), everything lying to the east of a line drawn along the middle of the Mississippi River, the Island of Grenada, and release of all France's claims to Nova Scotia or Acadia. From Spain Britain acquired Florida, as well as all that Spain possessed on the continent of North America to the east or southeast of the Mississippi River.

And the reference there, my lord, is to -- is to the text of the Treaty of Paris itself. And that's under tab V/4-4 and the paragraph Roman IV:

> "His most Christian Majesty" --

That is to say the King of France:

> "renounces all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guaranties the whole of it, and with all its dependencies to the King of Great Britain."

Now, your lordship will note there's a change in the language. I'm now coming to Canada; "Moreover his most Christian Majesty cedes". That's a verb that doesn't appear in the first sentence:

> "And guaranties to his said Britannick Majesty, in full right, Canada, with all its dependencies, as well as the island of Cape Breton and all other islands and coasts in the gulph and river of St. Lawrence, and in general, everything that depends on the said countries."

Et cetera. And then in clause VII:

> "In order to re-establish peace on solid and durable foundations, and to remove forever all subject of dispute with regard to the limits of the British and French territories on the continent of America; it is agreed, that, for the future, the confines between the dominions of his Britannick Majesty and those of his Most Christian Majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the River Mississippi."

Et cetera. And at clause IX --

THE COURT: What's the River Iberville?

MR. GOLDIE: That's the river that flows into the Mississippi, and I forget its current name, if it's changed.

THE COURT: So the cession then runs right to the Gulf Coast.

MR. GOLDIE: Yes. It ran down from the Iberville to the -- if I may continue.

THE COURT: I'm sorry, it says "to the River Iberville and from thence".

MR. GOLDIE: "Thence", yes. And then it:

> "continues along the middle of this river, and the lakes Maurepas and Potchartrain" --

Which is right down by New Orleans:

> "And for this purpose the Most Christian King cedes in full right, and guaranties to his Britannick Majesty the river and port of the Mobile, and everything which he possesses or ought to possess on the left side of the river Mississippi, except the town of New Orleans and the island in which it is situated."

And then clause IX:

> "The most Christian King cedes and guaranties to his Britannick Majesty, in full right, the islands of Granada and the Grenadines."

Et cetera. Then clause XX:

> "In consequence of the restitution stipulated in the preceding article, His Catholick Majesty" --

That's the King of Spain:

> "-- cedes and guaranties, in full right, to his Britannick Majesty, Florida, with Fort St. Augustin, and the Bay of Pensacola, as well as all that Spain possesses on the continent of North America, to the east or to the southeast of the river Mississippi."

So with that that completed the cession to Great Britain of everything that was east of the Mississippi virtually -- well, from its mouth to a long way up the river, and that will become -- we'll go into that in more detail.

Paragraph 6. Following the ratification of the Treaty, the political situation of Britain in North America was substantially as follows: She continued to possess Labrador, Newfoundland, what became the 13 American Colonies, Nova Scotia, Acadia, and the territory granted to the Hudson's Bay Company. Britain possessed as new acquisitions Florida and the whole of the continent not already possessed by her that lay to the east of the Mississippi River from its source to the Gulf of Mexico, excepting the town and immediate environs of New Orleans.

Now, the submission that we say flows from that is that British Columbia was not part of Canada acquired from France under the Treaty of Paris.

The international boundary between French and British territory was drawn along the Mississippi River. However, the Treaty did not specify the western boundary for Canada, so the extent of British holdings north and west of the Mississippi must be determined by reference to other historical documents.

The western limits of the colony of New France or Canada were never defined with precision before their cession to Britain. In general terms they were described as extending into countries unknown.

Now, the reference there, my lord, under tab V/4-8, is to one of the documents that were prepared for the reference to the Judicial Committee over the arbitration determining the boundary between Ontario and Manitoba, and the particular reference here is to page 378, where a geographer, a French geographer of the year 1755 describes Le Canada:

> "Under the name of Canada, we comprehend, in our

> best and latest maps, that part of North America situate between the 40th and 55th degrees of north latitude and the 270th and 325th of longitude. This country is bounded, on the north, by Terre de Labrador and the countries of the Eskimaux and of the Christinaux; on the east, by the ocean, or North Sea, and New England; and on the south by Louisiana. Its limits on the west extend into countries unknown."

Your lordship will note that there is no reference there to Rupert's Land, and we'll come in a minute to the difference which existed between the French and the English growing out of the Treaty of Utrecht under which Rupert's Land was restored to Great Britain and with leaving the boundary to be determined.

Now, turning to my written argument again, paragraph 9. Something of the extent of -- and I put the words "French exploitation from Canada" in that line, so it will read something to the extent of French exploitation from Canada can be gleaned from the location of the French fur trading posts in the mid 18th century. The posts located farthest west were collectively known as "the posts of the Western Sea", that's a translation, and lay in the Manitoba Lakes area and on the Saskatchewan River. The transcript references, my lord, are to Dr. Greenwood's evidence, and both those references are under the single tab V/4-9. And then the last reference, Exhibit 1163-177(a), is to one of Dr. Greenwood's footnotes. I should say more accurately, to the authority referred to in one of Dr. Greenwood's footnotes. And this too is again to the papers prepared for the Ontario-Manitoba boundary dispute, and it again -- it's the last item on that page beginning with the words "Post of the Western Sea (La Mer De L'Ouest). And this again is from a French authority, and he is quite prepared to recognize the fact that the Hudson's Bay Company is there. He starts off by saying:

> "The post of the Western Sea is most advanced towards the north. It is situated amidst many Indian tribes with whom we trade, and who have intercourse also with the English towards Hudson's Bay. We have their seven forts built

> of stockades, trusted, generally to the care of one or two officers, seven or eight soldiers and eighty engages Canadian. We can push further the discoveries we have made in that country, and communicate even with California."

Now, my lord, I want to pause there and make a general observation, which I'll enlarge on a little later on, and that is that discovery, even in the sense that Chief Justice Marshall spoke of in Johnson and McIntosh, doesn't in itself constitute a colony or even a valid claim, it is discovery followed by possession which constitutes an assertion of sovereignty. We will find many instances where French fur traders or explorers talk about desiring to go further west. A desire doesn't constitute discovery, and of course it doesn't constitute possession.

Now, with that interjection, I go back to the exhibit. The forks that are found there are listed, and then over the page, the first complete paragraph:

> "The post of La Mer d'Ouest merits special attention for two reasons - the first, that it is nearest to the establishments of the English at Hudson's Bay, and from which their movements can be watched; the second, that from" --

And I emphasize the word "from":

> "-- this post the discovery of the Western Sea may" --

And I emphasize the word "may":

> "-- be accomplished; but to make this discovery it will be necessary that the travellers, (voyageurs) give up all views of personal interest."

The most westerly -- I'm now back at paragraph 10 on my --

THE COURT: Is there a date on this document? It says 1757 at the top of the --

MR. GOLDIE: Yes. This is Bougainville, my lord, and his summary is -- I believe that's the correct date. But he was regarded as a contemporary authority on the extent of the fur trade posts. The most westerly of

the posts of the Western Sea was Fort La Corne near the forks of the Saskatchewan, where the Saskatchewan I guess divides into the North and South Saskatchewan.

Paragraph 11. While an account left by a commandant of the western posts suggests that a temporary Fort La Jonquiere was established near the Rocky Mountains in 1751, the accepted view is that the existence of that fort west of Fort La Corne is doubtful. Again, the authorities refer to the evidence of Dr. Greenwood.

The first -- the plaintiffs, if I understand the argument correctly, submit that Canada, "with all its dependencies", included the posts of the Western Sea. And this forms the basis for the plaintiffs' assertion that the region north and west of the Great Lakes was ceded by France to Britain in 1763 and was therefore subject to the terms of the Royal Proclamation. That is to say -- again interjecting, that is to say they seek to establish the proposition that at least as far as the trading posts which were exploited from Canada are concerned, that those formed -- those were ceded because they were -- fell into the words -- or fell within the words "dependencies", and from there they say the Royal Proclamation got over the mountains, so to speak. The posts of the Western Sea were located in the territory granted to the Hudson's Bay Company by its charter of May 2nd, 1670 and over which Britain claimed sovereignty. Accordingly, it could not have been ceded to Britain by the Treaty of Paris. And I make reference there, my lord, to two exhibits, and -- does your lordship have a coloured --

THE COURT: No.

MR. GOLDIE: We had -- this is a page from the Historical Atlas of Canada, and in it it is coloured, but I think your lordship can discern in the lower left-hand corner the difference in the positions taken by France and Britain in the period leading up to and including the Seven Years War. And if you look over at the text on the left-hand page of the first exhibit, 1170, your lordship will see these words:

> "In 1713 the Treaty of Utrecht assigned Acadia, Newfoundland, and the land surrounding Hudson's Bay to Britain. The lower Great Lakes-Ohio area was to be a free trade zone. The Treaty did not specify definite boundaries and called for a commission to settle them. Although

views were exchanged in 1715 and the commission met from 1750 to 1754, the entirely different claims of France and Britain could not be reconciled. No settlement was reached until the Treaty of Paris in 1763."

Now, the depiction shows the very small area around Hudson's Bay which the French were prepared to recognize. Then there's a hatched or an area which is identified as disputed territory. Below that is a line that is almost straight drawn from the coast of Labrador to a point below and to the east of James Bay, and then it makes a fairly sharp western turn and it continues on as a straight line. That is the boundary of Rupert's Land as claimed by the British in the negotiations with the French after the Treaty of Utrecht.

Now, my lord, the British could not -- the French could not cede to the British what they already claimed. The outcome of the war simply meant that, so far as the British were concerned, the interlopers had ceased to be, so to speak.

MR. RUSH: Who are the interlopers?

MR. GOLDIE: The French.

THE COURT: Well, during that war the French captured some of the forts of the Hudson's Bay, did they not?

MR. GOLDIE: Oh, yes.

THE COURT: So they would be giving back what they had taken.

MR. GOLDIE: But your lord, the -- that was in the area which was ceded, restored to the British under the Treaty of Utrecht.

THE COURT: That's what I say. Isn't that what they were talking about at the Treaty of Utrecht, giving back?

MR. GOLDIE: Oh, yes, in the Treaty of Utrecht, yes, that's right.

THE COURT: Yes.

MR. GOLDIE: But so far as the Treaty of Paris is concerned, it's simply the result which I set out in paragraphs 13 and 14.

THE COURT: This line on the atlas is not the 49th parallel.

MR. GOLDIE: It's very close to it.

THE COURT: I thought most -- isn't most of Lake Superior in Canada?

MR. GOLDIE: Oh, yes. When I say it's very close to it, this is the assertion made by -- by the British in the negotiations after 1713.

THE COURT: Yes.

MR. GOLDIE: But it's not far off it.
MR. RUSH: My lord, I think it was the Hudson's Bay Company assertions, not the British.
MR. GOLDIE: Well, I think, with all respect, that the Hudson's Bay assertions were adopted by the British government. The Hudson's Bay people didn't negotiate with the French, I quite agree, but I think my friend will find that the Hudson's Bay Company's assertions were --
THE COURT: You think they had a friend in the negotiations.
MR. GOLDIE: They had a friend. In fact -- well, I come to that a little later. I just now wanted to refer to the 1857 map, which is Exhibit 1183, and that's -- my lord, Exhibit 1183 is the report of the Select Committee of 1875, which the Select Committee of the House of Commons. And there's an insert in that report, and it's the coloured map, which is identified by our number of A.G.B.C. 26A. It's an Arrowsmith Map of North America, and it's useful, my lord, because it indicates in colours, which I think can be discerned, what was recognized as Rupert's Land the year before the Colony of British Columbia was created, and what was called Canada East and Canada West. And I'll hand it up to your lordship, but I draw your attention to the inset on the left -- or underneath the title "Map of North America" these words on this map:

> "The territories claimed for the Hudson's Bay Company in virtue of the charter granted them by King Charles the II are coloured green, the other British territories pink, and those of Russia yellow."

THE COURT: The date of this map?
MR. GOLDIE: 1857, my lord.
THE COURT: Thank you.
THE COURT: Green is what again?
MR. GOLDIE: Beg your pardon, my lord?
THE COURT: Green is what again?
MR. GOLDIE: Green is Rupert's Land, Rupert's Land as granted by the Charter. That was the extent of Rupert's Land as acknowledged in 1857. Now, I say that if any part of that was regarded as ceded in 1763, it would not be Rupert's Land, it would be part of the British dominions.
THE COURT: Mm-hmm.
MR. GOLDIE: Now, if I may go back to paragraphs 13 and 14: Prior to the cessation of hostilities between France

and Britain in 1761, the French fur trade had penetrated into Rupert's Land. The French never admitted that the Hudson's Bay Company had acquired rights to the extent the company argued for, and the attempts to agree on the boundaries of Rupert's Land after the Treaty of Utrecht never came to fruition. Britain and France were rivals for the fur trade in this area.

However, this fur trade dispute in Rupert's Land was between British and French subjects, not as between the Hudson's Bay Company and Britain. When the Treaty of Paris was signed the British acquired nothing in Rupert's Land. For the British and the Hudson's Bay Company, the incursions into their territory by the French interlopers ceased. Rupert's Land did not become ceded or conquered territory by virtue of the Treaty of Paris. It remained what it was in 1670 - territory claimed by the British and granted by charter to a company of British subjects.

Now, if I can turn to -- excuse me, my lord, I just have another reference here that I want to pick up. Yes. Would your lordship turn to tab 4-14, and this is an extract from an article by Mr. Kent McNeil, who was relied upon as a treaties writer by the plaintiffs. The title is "Native Rights And The Boundaries of Rupert's Land And The North-Western Territory". And I have put in pages 16 through 19 and a couple of maps that he has included in his study. And I'm referring on page 16 to item B, The Treaty of Utrecht, 1713. And after quoting article 10 of the Treaty of Utrecht, which begins with these words:

> "The said most Christian King shall restore to the kingdom and Queen of Great Britain, to be possessed in full right forever, the Bay and Streights, of Hudson, together with all Lands, Sea, Sea-Coasts, Rivers, and places situate in the said Bay and Streights and which belong thereunto."

Now, that language is pretty well taken from the Charter of 1670. He goes on down to his own text:

> "Of particular significance is the use of the term "restore". On this point Professor Slattery observes:
>
> 'The term restore was employed at British

insistence, in place of the word 'cede' found in the original French proposal, and on this point the terminology differs from that used elsewhere in the Treaty regarding Acadia. Britain's aim was to secure recognition of its asserted original title to the Bay."

And then Mr. Rich, whose two-volume work on the Hudson's Bay Company is regarded as definitive, comments as follows:

> "In view of this assertion of discovery, first settlement, and trade the British decided that the French should not be allowed to make an act of cession. To do so would imply that the lands were French possessions, would therefore invalidate the Hudson's Bay Company's claims for damages, and would render the English trespassers on French soil up to the date of the Treaty. The Lords of Trade urged the rejection of an act of cession not only because a 'restoration' would implicitly acknowledge the company's title but because it would also put them 'into the immediate Enjoyment of their property without further trouble'."

Now, that was the object of the use of that word "restore". The object wasn't achieved because the disagreement over the boundary. And then Mr. McNeil goes on:

> "The use of the term 'restore' in this Treaty signed 16 years after the Treaty of Ryswick is therefore further evidence that England did not intend to relinquish title over the James Bay posts to France in the earlier Treaty.

That's the one that your lordship is talking about:

> "However, the term resulted in continuing disagreement over the location of the boundary between the French and English territories. Its use permitted France to contend that it need surrender only a strip of land around the Bay, since that was the only territory which Britain had previously held. Britain, on the

other hand, claimed everything north of a line running south-west from 58 and a half degrees north latitude at Cape Perdrix on the Atlantic coast through Lake Mistassini" --

Which is now in the Province of Quebec:

"-- to the 49th parallel and then due west (see Map 3).

Now, map 3 is what Mr. McNeil says the British asserted flowed from the restoration of Rupert's Land or the territory described by virtue of the Treaty of Utrecht. And your lordship will appreciate that the line that runs from Cape Perdrix down to the turn, which is east of Lake Abitibi, has some resemblance to the shape of the Colony of Quebec created in 1763. Then I go back to the text on page 19. There's a paragraph dealing with the -- well, completing that paragraph:

"The commissioners who were appointed under the Treaty to settle the boundary question failed to reach an agreement. The matter therefore remained unresolved when it ceased to be an international" --

And I underline that word "international":

"-- issue in 1763 on the cession of French Canada to Britain.
It has been argued that as a result of the Treaty of Ryswick, the Hudson's Bay Company lost any title which it may have had to the southern part of James Bay where its three posts were located and that, although the Treaty of Utrecht restored the territory to Britain, it did not revive the Company's title. Such a contention probably depends on the erroneous interpretation of Article 8 of the Treaty of Ryswick, which has already been discussed. Nonetheless, even if loss of possession could be said to have jeopardized the company's title, the intention of Britain at the time the Treaty of Utrecht was signed would appear to have been to 'restore' the former rights not only of the King but also of

> the Company. It is clear from E.E. Rich's article that Britain's insistence at Utrecht on recognition of sovereignty over the whole of Hudson Bay was due in large measure to pressure from the company. The whole purpose of the restoration was to re-establish the Company's monopoly over the Bay and to eliminate French competition in the fur trade."

And so on. And then the last sentence is the important one:

> "Competition with the French from that day shifted to the interior of the country."

And that's after 1713. The French competed with the -- for the fur trade in the interior, but at the Treaty of -- the Treaty of Paris made that competition between British subjects and not between British and French.

THE COURT: Excuse me a minute, Mr. Goldie, I think the reporters want to change places.

(CHANGE OF REPORTERS)

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

_____

Graham D. Parker
Official Reporter
United Reporting Service Ltd.

MR. GOLDIE: I'm at paragraph 15 at the top of page seven of my written summary, my lord. After 1763 British fur traders from Montreal, including those who had become British subjects after the Treaty of Paris, extended trade into Rupert's Land. This continued to be a problem for the Hudson's Bay Company but the difference was that the interlopers were British subjects and the problem had to be resolved internally. It was ultimately resolved with the merger of the North West Company and the Hudson's Bay Company.

My lord, under tab 15 I have placed an extract from Rich's book The Hudson's Bay Company 1670-1870 Volume I: 1670 to 1763. This was published by the Hudson's Bay Records Society and is a well-known text. Part of this was filed as an exhibit in the course of the trial. I am going to refer to pages 654 to 656 so as to illustrate the situation that was faced by the Hudson's Bay Company at the conclusion of the hostilities in Canada or in North America -- well, in the world, as between Britain on the one hand and France and Spain on the other. Beginning with the first complete paragraph:

> "So the company maintained its rights to the trade of the Eastmain, as it had maintained its Charter against the challenge of Arthur Dobbs."

That is a reference to problems the company had in England. Then this is the more relevant part:

> "But the transfer of sovereignty over Canada to the British Crown in 1763 at the Treaty of Paris completely changed the situation. Already the rights of settled colonists to trade with the Indians had been upheld against company rights."

That's not Hudson's Bay Company rights. That's incorporated companies, chartered companies.

> "In 1737 the settlers of South Carolina had maintained that despite the Act of the Government of Georgia, they had the right to trade with the Indians of their vicinity; their case was that the Crown alone could not grant an exclusive trade and that therefore only such

> charters as had been confirmed in Parliament were valid. For this argument the Royal African Company was put forward as a company whose privileges had been taken away because they had not been confirmed by Parliament, while the East India Company was vouched as a company fully justified because it had been confirmed by Parliament. The Hudson's Bay Company was in jeopardy."

I pause there. It was in jeopardy because it applied to have its charter approved by Parliament. There had been some difficulty and it had withdrawn the application. And at this time its charter stood in the same position or analogous to that of the Royal African Company rather than the East India Company. That's dealt with in previous sections of Mr. Rich's work. And continuing:

> "While the position of chartered companies as a constitutional anomaly was thus under discussion, the actual extent of the lands covered by the Charter was also open to dispute and was the cause of some anxiety."

And then there is a discussion of some of those challenges, particularly those in England. Then towards the bottom of the page beginning with the sentence:

> "Here the Company inevitably threw back to the discussions of 1719, in which it had tried to establish a southern boundary with the French in fulfilment of the terms granted by the Treaty of Utrecht. A memorial and a map were submitted on October 1750, the Company's case was included amongst the others discussed in Paris during the negotiations which followed the Treaty of Aix-la-Chapelle, and the boundaries were argued from 1750 to 1753. But with Governor Shirley of Massachusetts in a dominant position, interest was devoted to settling a boundary for Acadia and Nova Scotia, and enthusiasm gathered round the problem of the return of Louisberg to Franch rather than round a move to vindicate claims to unchartered areas in the north.

> These were years in which the Company was so far from securing its southern frontier that it could with justice inform the commissioners that though the French had 'never offered to navigate in the Bay, nor made any settlements of the coast, or carried on any trade there' since Utrecht, yet they had raised an opposition by means of 'Inland interloping settlements' and by wood-runners."

And then they talked about defensive posts of moose and so on and so forth. And down to the last complete paragraph, my lord, beginning with the words "as against the French."

> "As against the French, nothing was achieved in these years. But British rivals were held at bay, and the Company was left to carry out its own policy of opposition to the wood-runners - upheld even in its claims to Labrador."

And then there was a reference to its maintaining that the boundary was one that is described or pictured by Mr. McNeil. Then continuing:

> "The capture of Quebec and the other victories of 1759 did not bring to an end hostilities in Canada; it was not until Montreal had been taken in the following year that the Company's servants in their voyages to the interior began to find that the wood-runners were withdrawing, although Jean Baptiste Larlee had come into York as early as 1759."

Now, that refers to the effect of the -- of the outcome of the Seven Years' War. And then over at page 657--

THE COURT: The wood-runners are coureur de bois.

MR. GOLDIE: Coureur de bois, yes. Mr. Rich apparently doesn't believe in using the accepted French. And the second paragraph on that page midway down page 657, this is a discussion which -- this concludes a discussion of the negotiation of the peace terms and in the preceding page the Company had sought the assistance of Mr. Pitt who, however, was -- had his political problems at the time. And continuing:

> "If Canada was destined to remain in British hands, the boundary of the Hudson's Bay territories to the south would be a purely domestic problem, as between two British territories. It could therefore be settled at leisure - or perhaps not settled - and there is no need to wonder that the Company and its claims appear to have taken but little of the care of the statesmen who were negotiating the peace."

Now, my lord, the whole point of this is to refute the notion that there was any cession of any part of Rupert's Land, and I say in paragraph 16 of my summary: In short, evidence of French trading northwest of the head waters of the Mississippi prior to 1763 does not indicate that the region formed part of Canada. There is a great deal of evidence which suggests that the French themselves did not understand Canada to include the Posts of the Western Sea.

I now go into that. In 1754, an administrator in New France charged with producing a report to describe Canada wrote that Canada comprised the lands abutting on the St. Lawrence from its mouth to its source, and all the other tributaries that discharge into it. And I refer to what's under tab 17. First of which is one of Dr. Greenwood's sources and the French for what I have just read is found under item four. And then the other references are to Dr. Greenwood's evidence. Your lordship will bear in mind that in 1774, and I will come to this again, the boundaries of Quebec were extended from those stated by the Royal Proclamation to include lands east of the Mississippi. And what is found on the map on the board, the territorial evolution of Canada, your lordship will see there is a knuckle around Lake Superior which very closely approximates the description which is given in here.

And I say at paragraph 18, this would put the limit of Western Canada in the area of the head of the Great Lakes. And I will be submitting that that is what was consistently acted upon. Understandably, the knowledge of the British about the extent of Canada to the west was no more precise, although it was generally understood that Canada included the Great Lakes. And the reference there is under tab 19, my lord, and the first reference is to Dr. Greenwood's evidence, but he, in turn, is referring to two of the

items which follow. The first is from the material filed on the Ontario Manitoba boundary matter. The item in question is at the bottom of the page and this is entitled Unofficial descriptions of the Boundaries. This particular one is from a description of New France by Jefferys, in 1761:

> "Canada, according to the English accounts, is bounded on the North by the Highlands which separates it from the country about Hudson's Bay, Labrador or new Britain, and the country of the Eskimeaux, and the Christinaux; on the East, by the River St. Lawrence; and on the South by the Outawai River, the country of the Six Nations, and Louisianna; its limits towards the West, extending over countries and nations hitherto undiscovered."

And then the next one is General Gage in 1762 and he is reporting there on the -- to his Commander in Chief, General Amhurst and this, of course, is before the treaty but after, so to speak, the fighting has been concluded. And at page 72 about midway down the page he says:

> "As I cannot discover that the Limits betwixt Louisianna & Canada were distinctly described, so as to be Publickly known, I can only inform you, what were generally believed here, to have been the Boundaries of Canada & give you my own Opinion, which is drawn from the Trade that has been Constantly carried on, by the Canadians, under the Authority, and permission of their several Governors. From hence I judge, not only the Lakes, which are Indisputable, but the whole Course of the Mississippi from its Heads to its Junction to the Illinois, to have been comprehended by the French, in the Government of Canada."

Now, that -- there is one other reference there, my lord, that is a reference to a further footnote of Dr. Greenwood's, and the reference is right at the bottom of the page:

> "Before this report is closed it will not be improper to observe to Your Lordship how

impossible it is to ascertain exactly what part of North America, the French stiled Canada, no Chart or Map whatever having fallen into our hands or public record of any kind to shew what they understood by it."

Now, we will come to, of course the, Vaudreuil-Haldimand map which corrects, at least in part, that viewpoint.

Now, paragraph 20. A review of French and British maps of the day numbering well in excess of 100, disclose as very few in which are found an unambiguous indication that Canada or New France extended to the Pacific Ocean. Now, if your lordship would just delete that first reference. The authorities are both footnotes from Dr. Greenwood's sources and again they refer to the material in the Ontario Manitoba Boundary Arbitration and it will be seen later, my lord, that the printing of Canada or New France on those maps was very seldom west of the source of the Mississippi and never beyond the Rockies. And I say that an examination of the text of the 136 maps on the Ontario Manitoba boundary dispute are referred to in these exhibits supports that proposition. The references there are to maps, and your lordship may wish to make a note that the 1149 series and there is one reference there, 1149-18. The 1149 series are the maps on Dr. Farley's portfolio.

THE COURT: 1149. Oh, yes. 118?

MR. GOLDIE: Yes, and I think they run from, I think one to 24.

THE COURT: Yes. Are you able to direct my attention to any specific item on this tab 20? It looks like it's --

MR. GOLDIE: No, it is just --

THE COURT: -- a multi-paged document and there are 136 items here.

MR. GOLDIE: My lord, that -- my memory serves me correctly, Dr. Greenwood testified that those maps were examined by I think a Mr. Mills for the purpose of the arbitration and the text is his. The point that is made is that from that text, and there is no basis that I am going to suggest that warrants my examination of those before your lordship or that I can point to any particular one that says Canada extends to the Pacific Ocean. What we do say is that if you go through that, and Dr. Greenwood I believe did go through it, that the printing of Canada or New France on the maps was very seldom west of the source of the Mississippi

River.
MR. RUSH: Well, I just want to clarify one thing. The argument on page -- paragraph 20 refers to the maps and not to the texts in the exhibit. And it seems like there are -- my friend is now saying that his proposition is supported by the text in the exhibit and I am not clear which position he's advancing here.
MR. GOLDIE: Well, the text in the exhibit describes what is on the map.
MR. RUSH: But it says a review of the maps.
MR. GOLDIE: Yes.
MR. RUSH: I take it that that would be a visual review of the maps, would it not?
MR. GOLDIE: No.
MR. RUSH: I see.
MR. GOLDIE: The review of the maps, -- Dr. Greenwood reviewed a great many of them, but I'm not saying that he reviewed every one that is found in this exhibit. But what I am saying is that they were reviewed by the author of the statements.
THE COURT: And what is the exhibit number?
MR. GOLDIE: The exhibit number, my lord, is one --
THE COURT: Is that 1163-189?
MR. GOLDIE: Yes. That's correct, my lord.
MR. RUSH: Yes.
MR. GOLDIE: That's one of, as I say, Dr. Greenwood's footnote references and it is one that is part of the papers that were prepared.
THE COURT: All right.
MR. RUSH: For --
MR. GOLDIE: For the Ottawa -- --
THE COURT: Well, I'll have to look at the text to see what he said.
MR. GOLDIE: Yes. I am not suggesting to your lordship that you go through every one, but your lordship can get the sense of what he's doing.
THE COURT: Yes.
MR. GOLDIE: And the fronticepiece states that it was compiled by direction of the Government of Ontario with explanatory notes, and I believe the evidence is that the notes were prepared by Mr. Mills.
THE COURT: Yes. All right.
MR. GOLDIE: Now, the what is found under the references under tab 21 is illustrative of what we're talking about here. Exhibit 1164-193 was marked twice.
THE COURT: Yes.
MR. GOLDIE: And the other marking is 1154-23. And that is --

that is entitled a New and Accurate Map of North America Including the British Acquisition Gained by the Late War. And your lordship will see that the words New France or Canada New France starts just marginally west of Lake Superior and considerably east of Lake of the Woods. Canada, of course, itself is found between the St. Lawrence and the Great Lakes.

THE COURT: I can't find the --

MR. GOLDIE: The New France?

THE COURT: No. I can't -- well, I'm -- oh, I see, oh, yes. I see Lake Superior now.

MR. GOLDIE: Yes. And New France extends --

THE COURT: Well, presumably New France extends to the left-hand side of the map which takes it to the mouth of the -- to the source of the Mississippi.

MR. GOLDIE: To the left-hand side, yes, it extends -- it -- well, this is part of the -- part of the -- of the doubt.

THE COURT: I see the Mississippi here, though.

MR. GOLDIE: Yes.

THE COURT: And it seems to be the head waters of the Mississippi seem to be at the extreme edge of the map.

MR. GOLDIE: That's correct. The one that is the landmark that I say is most relevant is the Lake of the Woods.

THE COURT: Oh, yes.

MR. GOLDIE: Then if your lordship would go over to the next page, there should be a second copy which is coloured. In your lordship's books is there just the one, the black and white?

THE COURT: Yes.

MR. GOLDIE: Well, there is a second copy and I can hand that up and we'll get copies. This is a copy of the exhibit as it is. I'd ask my friend's indulgence, I'll hand this to him in a minute. The text identifies it:

> "This is a copy of the map facing page 64, and referred to on page 64 of the February 1763 issue of The London Magazine."

THE COURT: Yes.

MR. GOLDIE:

> "The colouring on this present reproduction (blue, yellow, red and green) accurately reflects the placement of these colours on the original in the National Archives of Canada. Edward Dahl 27 September 1989."

And your lordship will see that New France or Canada the words have much the same placement as they did in the previous map. The extent of New Canada goes right down to -- to the Gulf of of Mexico, follows the Mississippi but veers off to the right and then is -- follows around the shore of Lake Superior and then goes straight west along what is pretty close to the 49th Parallel, the bounds of the Hudson's Bay and it's stated in this map by the Treaty of Utrecht is traced and above it is a pinkish colouring. Your lordship will recall that the boundary claimed by the Hudson's Bay Company took a turn south before extending westward approximately the 49th Parallel.

THE COURT: I think if you don't mind we'll take a short adjournment.

(PROCEEDINGS ADJOURNED FOR A SHORT RECESS)

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

_____
Laara Yardley,
Official Reporter,
UNITED REPORTING SERVICE LTD.

THE COURT: Mr. Goldie.
MR. GOLDIE: I was just going to complete some comments on maps that, in our submission, support the proposition that the printing of "Canada" or "New France" is found very seldom west of the source of the Mississippi River and never beyond the Rockies.

I think I had started ---

THE COURT: My last note is at the bottom of page eight.
MR. GOLDIE: That's correct. And the map 1164-193 is Entick, and I think I had looked at that, my lord.
THE COURT: Yes, you did.
MR. GOLDIE: And the next one is 1149-18, which is Vaudreuil's map, and that's in Dr. Farley's folio, and I won't trouble your lordship with that right now.

Number eight is Delisle, 1149-8 is Delisle, and that's in Dr. Farley's folio and I submit supports the proposition that I have made.

1149-10, part 2 is, I believe, also 1162B, which is the so-called Bowen map. And I have that put up on the notice board. This, my lord, is the map which has been identified as the one that was consulted by the King and the words "New France" and "Canada" are found approximately at the same location, but in this time a little further west but still not west of the headwaters of the Mississippi.

1149-11 is another Bowen map and it, too -- one comes to the same conclusion. I am going to refer briefly to Exhibit 1163-192A, that is one of Dr. Greenwood's references. It is the so-called Palairet map --

THE COURT: P-A-L --
MR. GOLDIE: P-A-L-A-I-R-E-T, and I just have the one copy of the exhibit with me. It is interesting, in my submission, my lord, because not only are the placing of the words Canada, I don't see New France on it, it's just Canada, it is in French but it's published in London. It has outlined on a solid basis, the boundary of the Province of Quebec as created or as directed under the Royal Proclamation of 1763, and Canada, the word Canada starts just north of Lake Superior, and as far as one can tell, west of the headwaters of the St. Lawrence.
THE COURT: Mississippi?
MR. GOLDIE: Not the St. Lawrence, east of the headwaters of the Mississippi.
THE COURT: It has the Hudson's Bay boundary at the 49th parallel?

MR. GOLDIE: Yes.
THE COURT: My geography is getting sketchy, all these maps suggest that the north shore of Lake Superior is south of the 49th. I suppose the boundary dips when it -- at the 49th, it dips, does it, it runs through the lake down through Sault St. Marie?
MR. RUSH: That's where the border of Canada goes but not the 49th.
THE COURT: The border of Canada, yes.
MR. GOLDIE: Yes. But I made mention of a knuckle, and I think that is best demonstrated by the map of 1763, my lord, purports to show -- well, it does show the British colonies, Quebec, and then there is a dotted line which goes down like this and jumps up along Lake Nipigon and comes down. Your lordship will see that that's the knuckle that I referred to, comprising Lake Nipigon at the top of Lake Superior when Quebec was extended and then we find that continuation on through to the Peace. Then it dips down after Lake Nipigon to the 49th parallel.

The -- I just have one other comment to make about the Palairet map. It purports to show the demarcation line of the -- along the Appalachian, but it also purports to show the boundaries of the individual states extending to the Mississippi.

MR. RUSH: And beyond.
MR. GOLDIE: Well, not identified as such. It just says boundaries of the Charter.
THE COURT: Well, I am not sure it shows beyond, does it, Mr. Rush?
MR. GOLDIE: There are lines, if I may --
THE COURT: There are lines but is also calls Louisiana.
MR. RUSH: It falls into the same status, my lord, as the character of the line that purports to show the Hudson's Bay southern boundary west of Lake Superior.
MR. GOLDIE: With great respect, my lord, it does not. Those lines are the lines of -- extending based upon the Charter. And that -- those lines were given up at the Congress of Albany.
THE COURT: They were also given up at the Peace of Paris.
MR. GOLDIE: Yes. Any pretentions beyond the Mississippi were given up. The point I am making, my lord, is, at the risk of adding some confusion at this point, is that if your lordship will turn back to tab 21 and the last map in there, which is the new map of North America found in the London magazine, it purports to show a limitation on the colonies at the Appalachian line and

that the area west of that line to the Mississippi as being part of the New Canada.

Your lordship --

THE COURT: By colour?

MR. GOLDIE: By colour, yes.

Now going back to my summary, I say in paragraph 22, it is significant that the map annexed by the Board of Trade to the draft proclamation and forwarded to the king, the Bowen map, shows Canada stretching just west of Lake Superior. And that is the one that is on the board at the present time.

And then paragraph 23, although the Treaty of Paris itself does not delimit Canada, the boundaries of that colony, as they were understood by the British and French, can be gleaned from the peace negotiations which preceded the treaty. The French negotiator described Canada as stretching west up to and including Lake Superior.

And that, my lord, is found under tab 39. That is -- if I said exhibit -- yes, that's Exhibit 1164-197C, which is another reference of Dr. Greenwood's.

THE COURT: That should be at tab 23?

MR. GOLDIE: Tab 23, yes. I am sorry.

And the note I have for the translation of the French negotiator, which was the Duc de Choiseul, is relating to the boundary of Canada "by the eastern extremity of Lake Huron, proceed along height of land of Hudson's Bay towards Lake Abitibi, then the line continues from east to west to and in comprising Lake Superior." I believe that was the translation.

Paragraph 24, shortly after the capitulation of Montreal, Vaudreuil, the Governor of New France, in response to British inquiries about the extent of New Canada, described those boundaries to Colonel Frederick Haldimand. Haldimand sketched the boundary on to a map of North America, (the Vaudreuil-Haldimand map.) That map and Haldimand's account of Vaudreuil's instructions show Canada stretching as far west as Lac Rouge, which appears on the map to be the headwaters of the River Mississippi. 1165 is the map in question, and there should be -- no, there isn't.

THE COURT: Yes, it's here.

MR. GOLDIE: Under that tab 24, is a black and white --

THE COURT: Yes, it's here.

My lord, I have here a coloured copy, which I will hand up. And it gives your lordship a little better sense. The original is coloured and Dr. Greenwood

went through it.

The history of the -- of that map is of some considerable interest. The next document under -- following the map itself, under tab 24, is General Amherst to Colonel Haldimand of November 1st, 1762 in which he says, when I made -- General Amherst says, and I quote:

> "I have been 20 times at the point of writing to you on a subject which though of no consequence, I should be glad to know the exact transactions that passed. When I made a report of Canada to the Secretary of State I transmitted a copy of the part of the map where the limits between Canada and Louisiana were marked, which you delivered to me and which I acquainted the Secretary of State were done by Monsieur de Vaudreuil, whether by him or done in his presence by directions, comes to the same thing..."

And then he -- and the next page is Haldimand's reply, dated December 10th, 1762.

> "I received with pleasure the letter Your Excellency did me the honour to write, November 1, respecting what passed between Monsieur de Vaudreuil and myself on the subject of the boundary of Canada. Several times I considered anticipating you but decided I should await your orders which I shall obey as accurately as possible.
>
> About five or six days after I entered Montreal I asked M. de Vaudreuil if he had any plans, memoirs, or informative maps concerning Canada, begging him to be good enough to turn them over to me that I might put them in Your Excellency's hands. He replied that he had none, having lost them all at Quebec; and to avoid the ennumeration of his other losses, which he wished to make me, I contented myself for the time with his answer."

And then he goes on to describe what he later did. Now, there is a page that is -- that's a typescript of the letter that follows in the next section, and at page nine under that tab, is again an extract from the

collection by Pease, Anglo French Boundary Disputes In The West, and I will continue reading from the page over. It's page 404, under the word translation:

> "I went to his quarters at once, having Ensign Monin carry the map. Finding M. de Vaudreuil in his office, which opened on the street with some persons of his household I requested him without any preamble to be good enough to show me the boundaries of Canada."

And then he describes what actually happened. And he said in the last paragraph:

> "Upon that, taking a pencil from my pocket and resting on my elbows on the map with M. de Vaudreuil standing up beside me, I asked him, showing him the northern part of the Mississippi, if the line went thither. On his answering yes, I marked points from the source of the Illinois, ascending the Mississippi, and having again asked him if I was marking it correctly he - M. le Marquis de Vaudreuil, then having his eyes fixed on the map -- answered in these very words, 'take all the north, take all the north.'"

I won't bother reading the rest, the whole point of it is how he describes how he traced a line which was indicated to him by Vaudreuil at the very time.

Now that map was, as indicated in General Amherst's letter, sent to Pitt, and I think that's all a common ground. And in paragraph 26 I say the map was used by the British in negotiating the Treaty of Paris. Ultimately, the boundaries delimiting Canada on that map were accepted by the French.

Now, the first reference there, 1164-199, is from the History of Pitt, page 592 to 593. And I am going do read what is under Article 1 on 592:

> "Article 1. The King will not desert his claim to the entire and total cession of all Canada and its dependencies without any new limits or exceptions whatsoever. And likewise insists on the complete cession of the Island of Cape Breton and the other islands in the Gulf and River St. Lawrence. Canada, according to the

lines of its limits, traced by the Marquis de Vaudreuil himself when that governor surrendered the said province by capitulation to the British General Sir James Amherst, comprehends on one side the Lakes Huron, Michigan and Superior; and the said line drawn to the Red Lake takes in by a serpentine progress, the Ouabachi, as far as its junction with the Ohio, and from thence extends itself along the latter river as far inclusively as its influx into the Mississippi."

THE COURT: Who is speaking here?
MR. GOLDIE: This is -- this, my lord, I have a note of it here. This is the answer of the British minister to the ultimatum France delivered by Mr. de Bussy on the 16th of August, 1761. And in it, he was rejecting the proposition that Louisiana, which was to remain French, extended to the east of the Mississippi. And if I can go back to the documents in the yellow binder, which is part of this --
THE COURT: This is a position piece then during negotiations?
MR. GOLDIE: Exactly. And it is the rejection of the proposition by the French that Louisiana should include territory to the east of the Mississippi. And they, in part, base their position upon Vaudreuil's map, and our submission is that it was the Vaudreuil-Haldimand map which determined the western boundary of Canada.
THE COURT: He puts the boundary way east of the Mississippi.
MR. GOLDIE: I am sorry, the --
THE COURT: I am sorry, this Vaudreuil map does. If this broken red line is the map that is the line that the French officer Vaudreuil drew for General Haldimand, he has got this line way to the east of the Mississippi.
MR. GOLDIE: I am sorry, your lordship is correct. The -- I should have put it this way, ultimately that was rejected.
THE COURT: Yes.
MR. GOLDIE: That line out there. What we are saying at the present time is that Canada, according to Vaudreuil, did not extend beyond Lac Rouge.
THE COURT: Yes. Which is thought, which is suggested by this to be one of the headwaters of the Mississippi.
MR. GOLDIE: That's correct.
THE COURT: Although there is a river flowing into Lac Rouge from the west, I presume.

MR. GOLDIE: Yes, the one just above the word "Riviere"?
THE COURT: Yes, it may not be the headwaters of the Mississippi. There is a stub end on the west end of Lac Rouge.
MR. GOLDIE: I see what your lordship is referring to. I thought it was the lower one.
THE COURT: Yes.
MR. GOLDIE: Well, yes.
THE COURT: He stopped his line at Lac Rouge anyway.
MR. GOLDIE: Yes.
THE COURT: Red Lake is where? Mr. Rush told me one time but I have forgotten. Do you remember where Lac Rouge is?
MR. RUSH: It's northeast of the headwaters of the Mississippi and southwest of the point end of Lake Superior.
THE COURT: Southwest of the -- southwest of the westerly tip of Lake Superior?
MR. RUSH: Yes.
MR. GOLDIE: And that's what's depicted on this map.
THE COURT: Yes.
MR. GOLDIE: Now, the -- I come back to this, these negotiations, just turning to paragraph 27 for a minute. During the initial stages of the peace negotiations in 1761, the French intended to expand, at the expense of Canada, the limits of Louisiana which they were to retain. Even in those descriptions of French holdings, France did not extend Louisiana beyond Lake Superior.

And the authorities that are referred to there, again, this extract is from what I identified a few minutes ago, the reply of the French -- of the British minister of August 16th, 1761. I am sorry, this is not the reply of the minister, these are Pitt's instructions. These, as I understand it, are Pitt's words themselves. And beginning on page 607 --
THE COURT: 607 of Pitt's papers?
MR. GOLDIE: Yes, the fourth line from the top, "And lastly the claiming as Louisiana with..."
THE COURT: Just a minute, I haven't found that yet. What page number in your tab?
MR. GOLDIE: It's 27 and it's page 606 under the first item, and it's page 2 of the --
THE COURT: I have it. Thank you.
MR. GOLDIE: The fourth line down on the right hand side:

> "And lastly, the claiming as Louisiana with an effrontery unparalleled, vast regions which the Marquis de Vaudreuil has surrendered to General

> Amherst as Canada, and defined himself, with his own hand, as comprehended in the government of that province where he commanded. And, as far as concerns the whole course of the Ohio and the countries in that part, you will see by the enclosed memorial transmitted to you for the purpose, that the Duc de Mirepoix did solemnly declare here, in the name of his Court, that France had constantly regarded the said River Ohio as a dependance of Canada, and instead of making part of Louisiana as being essential to the communications of Canada with that first named province."

Now as I understand it, my lord, the British laid claim to that part of North America east of the Mississippi and as outlined by Vaudreuil as a dependance of Canada. But the claim of the French was to shift the line east of the Mississippi and that's -- that was what Pitt was talking about as effrontery.

And then the next reference is again to the document 1164-197A, another reference of Dr. Greenwood's, and the translation copy sent to Mr. de Bussy, July 15, 1761, is to Louisiana.

MR. RUSH: What page, please?

MR. GOLDIE: It's 321.

MR. RUSH: Thank you.

MR. GOLDIE: And it starts off with the words:

> "In the event that Canada is ceded to the English it is essential to settle the boundaries of Louisiana in such a way as to leave no pretext to the English to confuse them with those of Canada."

Now this is the French argument:

> "The government of Louisiana has its boundaries fixed and independent of Canada, even though it is subordinate to the governor-general of New France. This is so true that originally the Mississippi Company enjoyed its possessions independently of the governor-general of Canada.
>
> This principle established, it cannot be contested that the places to which the governor

> of Louisiana sends garrisons are under the government of that colony. Now, following the part of Louisiana which borders the English and running over the forts and garrisons established there by the French, you find, beginning with the south, the forts of Mobile and Tombigbee, which assure the government of Louisiana the entrance of the bay and river of Mobile ascending toward the Chickasay. Nearer Georgia, behind Florida, is the Alabama River..."
>
> And so on.

And then they -- the author proceeds to continue and then on page 323, the second paragraph from the bottom:

> "Finally, in the upper part between the Mississippi and Canada the two colonies have always been bounded by the lakes beginning with Nipigon, Lake Superior Lake Michigan with Green Bay, and the others whose waters flow into the St. Lawrence."

And the point that I am getting there is that the attempt by the French to push the boundary of Louisiana east of the Mississippi and to enlarge it in the north, was rejected. And Louisiana, which was the easternmost -- I am sorry, the westernmost colony, that is to say, the bulk of which was on the west side of the Mississippi, as from what I have just read, the French did not claim that Louisiana extended beyond Lake Superior.

My lord, the other reference, another reference is found in paragraph 28, Pownall, John Pownall, who was the man responsible for drafting what has become identified as the sketch which formed the basis of the June 8th report of the Board of Trade to the Secretary of State, understood Canada to stretch as far west as the Great Lakes. And I refer to 28.

The document number is 1159-52, and this is one of Dr. Greenwood's references and it's also been referred to by my friend. And this is the sketch, as I say, which gave rise eventually to the June 8th report to the Board of Trade. And at page 261, the first complete paragraph:

> "As to the extension of Canada on the north side of the River St. Lawrence, we think it should comprehend all the lands which lie upon any rivers that fall into the great River St. Lawrence from the north and northwest, extending from the River of St. John's, the coast to northeastward of which your Majesty has already put under the jurisdiction of the government of Newfoundland, along the said River St. Lawrence as far as the heads of those rivers which flow into the Ottawa River from the west and southwest."

Then he goes on:

> "Which we would humbly propose should be the utmost extent of the colony towards the Great Lakes on the north side of St. Lawrence's River, and that on the south side its western extent should be restrained by a line drawn from Lake Champlain in latitude 45 due west to the said river."

That outlines the boundary of what became the Province of Quebec until 1774. And then in the next paragraph:

> "It seems by a paper transmitted to us with the Earl of Egremont's letter to be the idea of some person that it might be advisable to establish two governments upon the River St. Lawrence and its dependent territories and although we conceive that such an establishment might in some particular cases be attended with local convenience, yet as the proposition is founded upon a supposed extension of settlement and jurisdiction as far as the Great Lakes..."

Now, in my submission, that was the extent of Canada as it was perceived by Mr. Pownall.

The plaintiffs, going to paragraph 29, the plaintiffs assert that Canada stretched even beyond the Posts of the Western Sea to the Pacific Ocean. They rely on evidence of a bare declaration of sovereignty made at Sault Ste. Marie in 1761, over lands undiscovered or unknown.

In the plaintiffs' submission, this declaration

combined with French knowledge that North America was a distinct continent with continuous western coastline, is evidenced by maps of the day, no matter how fanciful, suffice to establish French sovereignty over the whole continent.

Now, they -- I do not understand that there is any authority cited in support of this proposition, and certainly it is submitted that for extra-municipal purposes, that is to say, to establish something which could be recognized in international law as comprehended in a transfer of sovereignty, I say that none exists.

And I have already submitted to your lordship that if anything was ceded to great Britain by the Treaty of Paris, that went beyond the -- what I call the knuckle around Lake Nipigon, as indicated on the map, The Territorial Evolution of Canada, that would have been territory that would have accrued not to the Hudson's Bay Company, it would have accrued to Great Britain as part of its own dominions and would have been part of a ceded or conquered territory. But in fact, as I have indicated to your lordship, it has always been accepted and was accepted clearly by 1857, that it was comprehended within Rupert's Land.

Now, I also wish to comment on the proposition that discovery alone can be a basis for sovereignty, and I have referred to Johnson and M'Intosh, under tab 31, as an authority to which I refer your lordship. It's under tab 4-31, the page number is 573 in the -- in the reporter, and it starts on the page which has at the top left hand corner, 570. And in the second column, and this is a well-known citation, because it's his lordship's explanation of a doctrine which he said was respected by the European nations. And after talking about the principle of discovery as between the European nations, he says, and I am referring to the last five lines before the paragraph which begins with the words "the exclusion of all other Europeans." So I am reading the sentence preceding that and it reads as follows:

> "This principle..."

That is to say discovery,

> "....was that discovery gave title to the governments by whose subjects or by whose

> authority it was made against all other European governments which title might be consumated by possession."

So even Marshall, who wished to enlarge the European title for the purpose of establishing the primacy of a title gained by the United States, recognized that. Title of the discovery had to be consummated by possession, and in our submission there was no possession on the part of the French west of the Great Lakes. The trading posts were no more than that.

In paragraph 32, I say in mid-18th Century Europe, publicists of the Law of Nations were in agreement that title was dependent on actual possession in addition to discovery. I first correct that reference, 27 BCLR should be 27 Buffalo Law Review. And under tab 32 -- this is Mr. Berman's article, he is a writer that my friend has relied upon, and at page 652, he says at the top of the page:

> "By the early 19th Century, therefore, discovery alone was no longer valid as a distributional principle. Indeed, it is questionable whether it was ever totally accepted as a sufficient basis for dominion. As a distributional principle it was given limited recognition and various definitions by the European states. The early publicists of the Law of Nations were in basic agreement that title was dependent on actual possession in addition to discovery. It is not suprising then that John Marshall avoided a discussion of the Law of Nations in Johnson."

But even he, in my submission, recognized that the title had to be consumated by possession.

The De Vattell reference is following the blue divider, and if your lordship would turn to page 85, the first paragraph begins with the words, "But it is questioned..."

THE COURT: Yes.

MR. GOLDIE: About half way down that paragraph with the words:

> "Hence the Law of Nations will only recognize the ownership of a nation over unoccupied lands when the nation is in actual occupation of

them, when it forms a settlement upon them, or makes some actual use of them."

Then there follows a paragraph beginning with the words:

"There is another celebrated question which has arisen principally in connection with the discovery of the New World."

My lord, that part was quoted by the Indian Land Commissioners in their report of 1844, I think it was, cited by Chancellor Boyd in St. Catherines Milling I referred to some days ago.

And finally, I make reference in paragraph 33 to the judgment of Mr. Justice Taschereau in St. Catherines Milling, who, in my submission, not only accepted but asserted this proposition, and I quote, it's from page 643, and perhaps I will turn to the page it is, my lord, because he starts the sentence off:

"There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana in Breaux v. Johns, citing Fletcher v. Pecks, and Johnson v. McIntosh 'that on the discovery of the American continent the principle was asserted or acknowledged by all European nations that discovery followed by actual possession gave title to the soil to the government by whose subjects, or by whose authority, it was made, not only against other European governments but against the natives themselves.'"

I am citing it here for the proposition that it was taken that discovery had to be followed by possession. And I will be asking your lordship to bear that in mind when we look at some of the assertions of the French explorers to which my friend has made reference.

Then I come to the section, British Columbia was not part of Rupert's Land. And I can certainly deal with paragraph 34. The exact western limits of Rupert's Land were north defined and were unknown in the mid-18th Century. And I don't think that there is too much dispute over that. The reference is in

Martin, The Hudson's Bay Territories and Vancouver's Island, the printing date is 1849 and page 2, midway down the page:

> "No western or northern boundary having been expressed in the Royal Charter of 2nd May, 1670, it has been said that the Pacific and Northern Oceans constitute the limits in these directions."

And they -- but the company itself, seeking an opinion in 1814, were told by learned counsel Romilly, Holroyd, Cruise, Scarlett and John Bell, who stated that, quote:

> "'The grant of the soil contained in the Charter is good, and that it will include all the country the waters of which run into Hudson's Bay.'"

Would that be --

THE COURT: Yes, you're ahead of me there. I didn't get that last -- that's in tab --

MR. GOLDIE: Tab 34. And, the extract is from page 2 of Martin's treatise of 1849.

And clearly, as I say, by 1857 and before -- well, well before, it was acknowledged that the lands which were not drained by the rivers flowing into the Hudson's Bay, did not constitute a grant under their charter of 1670.

THE COURT: So this would limit the waters which run into Hudson's Bay, would include the Saskatchewan?

MR. GOLDIE: Does it flow into Hudson's Bay or --

THE COURT: I think so.

MR. GOLDIE: Yes, if it does, it would. If your lordship would --

THE COURT: But it wouldn't extend beyond the Rockies.

MR. GOLDIE: No. And if your lordship will look again at that map AGBC-26, which is the Arrowsmith 1857 map --

THE COURT: I am not sure which one that is. Is it this one?

MR. GOLDIE: The part that is coloured green by that time was determined what would fall into Hudson's Bay and James Bay.

THE COURT: Yes, I think that's probably right, because somewhere around Edmonton the water starts to flow north into the Mackenzie rather than east into Hudson's Bay. I am not sure exactly where the line is

that divides the Peace drainage system which runs into Hudson's Bay and the southern system which runs into the Saskatchewan.

MR. GOLDIE: No, that's true, but at least by the time you get into the Peace River area, there is no doubt about it.

THE COURT: You are running into the Mackenzie there.

MR. GOLDIE: Yes.

THE COURT: All right. I regret to say there has been a change in plans that I can't do anything about, if counsel want to sit an evening sitting next week I said this morning that I wouldn't be able to sit Tuesday, by matters beyond my control make it necessary to change that to Monday. I can't sit Monday but I could sit Tuesday.

MR. GOLDIE: In the evening?

THE COURT: Yes.

MR. GOLDIE: I am rather hopeful, my lord, that with the Saturday sitting we will be well within our timetable.

THE COURT: Well then, we will resume tomorrow at 9:30? Thank you.

(PROCEEDINGS ADJOURNED TO FRIDAY, MAY 25th, 1990 AT 9:30 A. M.)

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

Wilf Roy
Official Reporter